

# FREQUENTLY ASKED QUESTIONS ABOUT RULE 15a-6

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## Understanding Rule 15a-6

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### *What is Rule 15a-6?*

Rule 15a-6 defines permissible activities which foreign broker-dealers may undertake in the United States without becoming subject to the broker-dealer registration requirements of the Securities Exchange Act of 1934 (the “Exchange Act”). The permitted activities fall into four basic areas: (i) effecting unsolicited transactions, (ii) distributing research reports to certain institutional investors, (iii) soliciting transactions with certain institutional investors which are then effected in coordination with U.S. broker-dealers, and (iv) conducting unlimited business with certain categories of excluded customers, including U.S. broker-dealers and banks acting in a broker-dealer capacity and expatriates temporarily present in the United States.

### *Who is subject to the broker-dealer registration requirements of the Exchange Act?*

The Exchange Act defines “broker” as any person who engages in the business of effecting securities transactions for the account of others. “Dealer” is defined as any person who engages in the business of effecting securities transactions for their own account. The U.S. Securities Exchange Commission (the “SEC”) has interpreted “effecting securities transactions” as

involvement in any of the significant phases of a securities transaction, including solicitation, negotiation of the terms, and execution of the trade. In general, any broker or dealer who uses U.S. mails, wires, or other instrumentalities of interstate commerce is required to register as a broker-dealer with the SEC.

### *To what extent are the U.S. broker-dealer requirements applicable to non-U.S. broker-dealers?*

The SEC utilizes a territorial approach in determining if a broker-dealer must register under the Exchange Act. A foreign broker-dealer that has no offices in the United States and that conducts its broker-dealer business entirely outside the United States would not be subject to the Exchange Act registration requirements. However, any contacts with the United States could subject the foreign broker-dealer to an obligation to register under the Exchange Act unless such contacts are structured to comply with Rule 15a-6. Such prohibited contacts would include solicitation of investors in the United States by means of telephone, email, or other methods of communication, even if the foreign broker-dealer is situated outside the United States when undertaking such solicitation efforts.<sup>1</sup>

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<sup>1</sup> The SEC suggests that foreign broker-dealers who do not want to inadvertently run afoul of U.S. registration requirements include a legend on their websites stating that

*Is it easy to register as a broker-dealer under the Exchange Act?*

No. Broker-dealers must register with the SEC and become members of the Financial Industry Regulatory Authority (“FINRA”), a self-regulatory organization for the securities industry. In addition, they must register with certain states depending upon the scope and nature of their U.S. operations. The registration process can take six to nine months or longer. U.S. broker-dealers and their associated persons are also subject to comprehensive regulatory requirements and associated persons must pass qualifying examinations.

As a result, many foreign financial institutions elect not to form a U.S. broker-dealer subsidiary, or restrict their U.S. broker-dealer subsidiary to a limited scope of business, and utilize Rule 15a-6 for many of their direct dealings with U.S. institutional customers.

*What are the consequences of violating the broker-dealer registration requirements?*

In recent years, the SEC has shown renewed interest in pursuing claims against both large and small foreign broker-dealers that conducted business in the United States without complying with Rule 15a-6. In a recent case brought by the SEC against a large European bank that failed to comply with Rule 15a-6, the foreign bank paid approximately \$200 million in disgorgement, interest, and penalties to settle the charges.

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they will not open accounts or effect transactions for U.S. persons (except as permitted under Rule 15a-6.)

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**Transactions with Retail Customers Under Rule 15a-6**

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*Does Rule 15a-6 permit a foreign broker-dealer to engage in transactions with retail customers in the United States?*

Yes, but only under very limited circumstances. Under Rule 15a-6, a foreign broker-dealer may engage in unsolicited transactions with retail or institutional customers in the United States. In addition, a foreign broker-dealer may engage in transactions with certain expatriates who are present in the United States.

*Who is an unsolicited customer?*

An unsolicited customer is a U.S. investor who has sought out the foreign broker-dealer entirely of the investor’s own accord and not as a result of any solicitation by the foreign broker-dealer. The SEC interprets “solicitation” very broadly to include any affirmative efforts to induce a transaction or to establish a business relationship which could lead to transactions. Any kind of advertising or other marketing efforts directed at U.S. persons will almost certainly be deemed solicitation.<sup>2</sup>

*May a foreign broker-dealer maintain an account for a U.S. retail investor who has effected a transaction on an unsolicited basis?*

Yes, but in order to transact future business with such investor, care must be taken not to solicit any additional transactions. The foreign broker-dealer may send the unsolicited U.S. account holder confirmations, account statements, company announcements, and similar materials. It should not include any advertising inserts,

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<sup>2</sup> Distribution in the United States of a foreign broker-dealer’s quotes would not be deemed a solicitation if the quotes were distributed by a foreign exchange or by a private vendor.

research reports, or other materials which could reasonably be viewed as soliciting additional business. The SEC's Division of Trading and Markets (the "Staff") has expressed some skepticism about whether as a practical matter a foreign broker-dealer can have an ongoing relationship with a U.S. account holder where all transactions are unsolicited. However, if properly handled, this should be achievable.

***What are the requirements for doing business with expatriates in the United States?***

There are two basic requirements. First, the expatriate must be present in the United States on a "temporary basis." The Staff recently took the position that any expatriate in the United States who has not obtained a permanent residence card (green card) would be deemed present on a "temporary basis." Thus, even an executive present in the United States on a business visa for a five-year assignment would be deemed present on a "temporary basis." Secondly, the foreign broker-dealer must have a pre-existing relationship with the expatriate that was established when the expatriate resided outside the United States.

***Are there any limitations on the nature of broker-dealer business which may be conducted with expatriates?***

No. The foreign broker-dealer may actively solicit expatriates who fit the above requirements and is not required to engage a chaperoning or correspondent U.S. broker-dealer to engage in business with qualifying expatriates.

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**Transactions with Institutional Investors  
Under Rule 15a-6**

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***Does Rule 15a-6 permit a foreign broker-dealer to engage in transactions with institutional investors in the United States?***

Yes. Subject to certain conditions, Rule 15a-6 permits foreign broker-dealers to solicit U.S. institutional investors and major U.S. institutional investors to engage in securities transactions. In addition, foreign broker-dealers are permitted to furnish research reports to major U.S. institutional investors.

***What is a U.S. institutional investor?***

"U.S. institutional investors" is defined to include banks, insurance companies, investment companies registered with the SEC, small business investment companies, private business development companies, certain employee benefit plans as well as trusts and tax-exempt organizations with more than \$5 million in assets.

***What is a major U.S. institutional investor?***

A major U.S. institutional investor is a U.S. institutional investor or any other entity which owns or manages at least \$100 million in financial assets. "Financial assets" include securities of unaffiliated issuers, cash, money market instruments, futures, and other derivative instruments.

***May a foreign broker-dealer initiate transactions or solicit business with U.S. institutional investors or major U.S. institutional investors ("MIIs")?***

Yes. However, resulting transactions must be effected through a U.S. broker-dealer.

***What forms of solicitation are permitted?***

The foreign broker-dealer may solicit institutional investors by means of advertising, emails, phone calls, and other communications originating outside the United States. In addition, the foreign broker-dealer may visit U.S. institutional investors in the United States. In the case of U.S. institutional investors that do not qualify as MIIs, the foreign broker-dealer must be accompanied on such visits by a representative of a U.S. broker-dealer. A representative of a U.S. broker-dealer must also participate in telephone conversations with U.S. institutional investors that do not qualify as MIIs. In the case of MIIs, there is no chaperoning requirement for oral conversations or in-person visits if (i) each representative of the foreign broker-dealer conducts such in-person visits on not more than 30 days in any one-year period and (ii) no orders are accepted by the foreign broker-dealer during an unchaperoned visit.

***What are the responsibilities of a U.S. broker-dealer that agrees to execute transactions originated by a foreign broker-dealer under Rule 15a-6?***

The U.S. broker-dealer must take full responsibility for the executed trade. In that regard, the U.S. broker-dealer should treat the referred account in the same manner it would treat any other account, including obtaining all necessary information for “know your customer” purposes and obtaining all information or documentation required for the broker-dealer to discharge its suitability obligations. The U.S. broker-dealer is also responsible for ensuring that the customer receives confirmations and statements that comply with applicable requirements. The U.S. broker-dealer need not issue duplicate confirmations or statements if it determines that the foreign

broker-dealer has timely issued proper confirmations and statements. The confirmations and statements must clearly indicate that the account is established at the U.S. broker-dealer. The U.S. broker-dealer must maintain all required books and records relating to the customer’s account and, to the extent it is a clearing broker, it is generally responsible for receipt, delivery, and safeguarding of customer funds and securities. However, transactions in foreign securities or in U.S. Government securities may be settled directly between the foreign broker-dealer and the U.S. investor. In such situations, the foreign broker-dealer must agree to make available to the intermediating U.S. broker-dealer the clearance and settlement information.

Broker-dealers acting as correspondent or chaperoning brokers are not required to be clearing brokers; they may introduce such accounts to a licensed clearing broker.

Rule 15a-6 also imposes on the U.S. broker-dealer additional affirmative obligations. Such obligations include: (i) determining that the foreign broker-dealer and any of its associated persons involved in the trade are not subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act or any substantially equivalent foreign sanction, (ii) obtaining from the foreign broker-dealer the basic background information specified by Rule 17a-3(a)(12) under the Exchange Act with respect to each associated person of the foreign broker-dealer who is involved in the trade, (iii) obtaining from the foreign broker-dealer and each involved foreign associated person a written consent to service of process by the SEC or other securities regulators, and (iv) making the information obtained in items (ii) and (iii) available to the SEC.

*Is the U.S. broker-dealer liable for misrepresentations made by the foreign broker-dealer during unchaperoned visits or conversations with the customer?*

The U.S. broker-dealer may be liable for misrepresentations made by the foreign broker-dealer in soliciting the trade, even if the U.S. broker-dealer was not present when the misrepresentations were made. By taking responsibility for the trade, the U.S. broker-dealer assumes an obligation to implement reasonable steps to ensure that communications with the customer comply with applicable law and FINRA requirements.

*Should a U.S. broker-dealer that acts in a chaperoning or correspondent capacity enter into a written agreement with the foreign broker-dealer?*

In most cases, it will be advisable for the U.S. broker-dealer and the foreign broker-dealer to enter into a written agreement, even if the foreign and U.S. broker-dealers are affiliates. The agreement should delineate their respective responsibilities and should set forth protocols designed to ensure that both firms are able to comply with applicable regulatory requirements. In this regard, the U.S. broker-dealer must bear in mind that it is responsible for the account, notwithstanding the fact that the primary sales relationship with the customer may reside at the foreign broker-dealer.

*How may a foreign broker-dealer furnish research reports to MIIs?*

The foreign broker-dealer may furnish research reports directly to MIIs through email or other methods of communication. It may also furnish the reports indirectly through a U.S. correspondent broker-dealer. If the reports are furnished through a U.S. correspondent, that broker-dealer may treat the reports

as “third-party research” for purposes of FINRA Rules 2241 and 2242 and the U.S. broker-dealer is not required to take responsibility for the contents of the report. If it chooses to disseminate the report to persons in the United States who are not MIIs, then the U.S. broker-dealer is in effect republishing the report and it must take full responsibility for the report.

*What disclaimers and disclosures are required in research reports furnished to MIIs under Rule 15a-6?*

Research reports furnished to MIIs by foreign broker-dealers who have affiliated U.S. broker-dealers should include the following disclosures: a Regulation A-C certification by the analyst who prepared the report, a statement that any resulting transactions should be effected through a U.S. broker-dealer, and certain conflict of interest disclosures as required by FINRA Rules 2241(h)(4) and 2242(g)(3) for third-party research reports on equity and debt securities, respectively. Such conflict of interest disclosures include (i) for equity research, ownership of 1% or more of a company covered by the report, (ii) acting as a market maker for a covered company or, in the case of a report on debt securities, trading as a principal in such securities, (iii) provision of investment banking services or managing an offering for a covered company during the past 12 months, (iv) an expectation of providing investment banking services to the subject company in the next three months, or (v) any other actual, material conflicts of interest. A foreign broker-dealer may, for business reasons, decide to provide the full set of disclosures required by Rules 2241 or 2242.

If the report is “globally branded,” then it should include all of the Rule 2241 or 2242 disclosures and it

should identify the foreign research analysts who prepared the report and advise that they may not be subject to all of the requirements applicable to U.S.-based analysts. A research report would be deemed globally branded if it is published under a marketing name that encompasses both the foreign broker-dealer and any U.S. affiliated broker-dealer.

If the research reports are prepared by a foreign broker-dealer that is not affiliated with a U.S. broker-dealer, and the reports address only foreign securities and are disseminated in the United States solely to MIIs in accordance with Rule 15a-6, then such reports are exempt from Regulation A-C and Rules 2241 and 2242. They should still include a notice that any resulting transactions should be executed through a U.S. broker-dealer. Research reports that do not include the disclosures required by Regulation A-C and the FINRA rules may not be re-distributed by U.S. broker-dealers.

***May a foreign broker-dealer use Rule 15a-6 to advise on cross-border M&A transactions?***

Yes. In this regard, the SEC Staff has provided some relief to facilitate the involvement of foreign broker-dealers with cross-border M&A transactions. First, for the purpose of M&A transactions, the definition of MII is expanded to include any company that has at least \$100 million in total assets, excluding cash and cash equivalents. This significantly expands the number of U.S. companies that might be solicited by a foreign broker-dealer in connection with an M&A transaction. Secondly, the Staff has taken the position that a foreign broker-dealer representing a non-U.S. company in a proposed M&A transaction, may deal directly with a proposed U.S. counterparty that has an in-house group experienced in handling M&A transactions. In such

situations, there is no need to involve a U.S. broker-dealer as an intermediary.

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**Additional Activity Permitted Under Rule 15a-6**

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***May a foreign broker-dealer engage in transactions with U.S. broker-dealers?***

Yes. A foreign broker-dealer may freely engage in transactions with U.S. broker-dealers or with U.S. banks acting in a broker-dealer capacity. Such transactions may be actively solicited by the foreign broker-dealer. Transactions with U.S. broker-dealers are permitted whether the U.S. broker-dealer (or bank) is acting in a principal or agency capacity.

***May a foreign broker-dealer engage in transactions with a U.S. resident fiduciary which is acting on behalf of non-U.S. principals?***

Yes. The Staff has taken the position that a foreign broker-dealer should be free to conduct business with a U.S. resident fiduciary provided that the persons owning the beneficial interest in the fiduciary accounts are not U.S. persons.

***May a foreign broker-dealer act as administrator of an employee stock option plan (ESOP) that includes U.S. participants?***

A foreign broker-dealer may act as administrator of an ESOP organized by a foreign company that includes U.S. employees of the foreign company or its subsidiaries as participants. However, the foreign broker-dealer must enter into the arrangement outside the United States and must carry out its administrator duties from outside the United States. Communications with U.S. participants are permitted; but the foreign

broker-dealer should view the foreign company as its client and it must take any instructions from the foreign company.

*May a foreign broker-dealer engage in business with foreign branch offices of a U.S. company?*

Yes, provided that the foreign branch or agency office was established outside the United States for bona fide business purposes and not to circumvent the broker-dealer registration requirements. Transactions with a foreign branch office should be solicited, negotiated, and executed entirely outside the United States. The foreign broker-dealer should be careful not to engage in communications with the “home office” in the United States regarding effectuation of securities transactions. The trading instructions should be issued to the foreign broker-dealer by the foreign branch office and confirmations and statements should be sent to the foreign branch.

*May a foreign broker-dealer engage in transactions with U.S. citizens resident outside the United States?*

Yes. As with foreign branch offices, transactions with expatriate U.S. citizens should be solicited, negotiated, and executed entirely outside the United States. If the U.S. expatriate returns to the United States, the foreign broker-dealer must cease further business except for unsolicited transactions initiated by the former expatriate.

*Are there other categories of investors in the United States with whom a foreign broker-dealer may conduct business?*

Rule 15a-6 permits foreign broker-dealers to conduct unlimited business with the following multi-lateral financial institutions that are based in the United States:

the African Development Bank, the Asian Development Bank, the Inter-American Development Bank, the International Bank for Reconstruction and Development, the International Monetary Fund, the United Nations, and their respective agencies and pension funds.

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