

**Securities Industry Association**

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August 13, 1997

Mr. Richard R. Lindsey  
Director, Division of Market Regulation  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549

Dear Mr. Lindsey:

PSA The Bond Market Trade Association ("PSA")<sup>1</sup> and the Securities Industry Association ("SIA")<sup>2</sup> (collectively, the "Trade Associations") are writing to provide the Securities and Exchange Commission (the "SEC" or "Commission") with our views regarding potential reforms to the current U.S. regulatory requirements governing foreign broker-dealers.

We strongly favor efforts by the Commission to update the existing regulatory regime applicable to registration of foreign broker-dealers -- and thus fully support the anticipated promulgation by the Commission later this year of a Release proposing changes to Rule 15a-6 under the Securities Exchange Act of 1934 (the "Exchange Act"). U.S. broker-dealer regulatory requirements, in our view, play an important role in achieving the policy objectives of the Exchange Act. Therefore, we consider it essential that the Commission modify Rule 15a-6, consistent with these policy objectives, to enhance the international competitiveness of U.S. securities firms and the ability of U.S. investors to obtain access to foreign securities markets, as well as to eliminate unnecessary practical obstacles to participation by foreign firms in the U.S. markets.

This letter outlines the principal difficulties that securities firms have encountered in conducting their activities under existing regulatory requirements and seeks to identify potential revisions to Rule 15a-6 that could address those difficulties. Although the letter does not attempt to catalogue exhaustively the interpretive and operational issues posed by Rule 15a-6, it does endeavor to describe generally from a practical perspective the most significant problems faced by U.S. and foreign securities firms that could be addressed by revisions to the Rule without detracting from the fundamental policy objectives of the Exchange Act.

## **I. Introduction.**

Since the adoption of Rule 15a-6 in 1989, the international financial markets have evolved dramatically. A significantly greater number and range of U.S. investors are actively engaged in cross-border investment strategies and are seeking the services of foreign broker-dealers in

effecting such strategies, including with respect to research, pricing and execution.<sup>3</sup> At the same time, practical experience with Rule 15a-6 has shown that in a number of areas the Rule imposes unnecessary regulatory burdens on U.S. investors and foreign broker-dealers or interferes with the effective functioning of the international securities markets. <sup>4</sup>

The Trade Associations have identified, based on securities firms' experience with Rule 15a-6, a number of areas in which the need for reform is especially pressing. These include:

- Enhanced Flexibility To Allocate Operational Responsibilities . U.S. broker-dealers intermediating transactions between U.S. investors and foreign broker-dealers should be given significantly greater flexibility to allocate operational and functional aspects of their business efficiently among a network of global affiliates, particularly as to matters such as:

*-- clearance, settlement and bookkeeping of transactions; and*

*-- contacts with U.S. investors by personnel responsible for research, sales and trading functions.*

This flexibility should be conditioned on a requirement that a U.S. broker-dealer assume responsibility for compliance with key aspects of U.S. securities laws, including making appropriate *disclosures* to U.S. counterparties regarding the respective roles of the U.S. and foreign broker-dealer and creating sufficient transaction *records* to permit appropriate monitoring by U.S. regulators.

- Expansion of Categories of Qualified Investors Under the Rule . A substantially broader range of U.S. institutions and other qualified investors should be afforded access to foreign broker-dealers and foreign markets through U.S. broker-dealer intermediaries.

Substantial practical and policy benefits would accrue from pursuing, either independently or in combination, reforms to existing law in each of the foregoing areas. The discussion in Part II below seeks to summarize the benefits that would result from adopting reforms in these areas and to identify some of the specific implementation issues raised by the proposed changes to existing law.

The Trade Associations consider it important to note that, in our view, modifications to the existing U.S. broker-dealer regulatory scheme should apply generally to all transactions in securities and should not depend on the nature of the securities (e.g., whether they are U.S. or foreign securities). Particularly in operational and other functional contexts, implementation of different requirements for securities based on their country of issuance tends to give rise to substantial additional costs (associated with the creation and maintenance of separate systems and procedures for different categories of securities) and practical problems (such as increased credit risk where activities with a single counterparty must be divided between two broker-dealer affiliates because of regulatory distinctions).

In addition, as discussed in Part III below, the Trade Associations favor continuing Commission consideration of the potential for better acknowledging foreign regulatory regimes applicable to non-U.S. broker-dealers.<sup>5</sup> Although the Trade Associations do not necessarily encourage the Commission to provide a complete exemption from U.S. registration to a foreign broker-dealer merely because it is regulated abroad, we encourage the SEC to consider some

deference to home country regulations in determining the nature and scope of the responsibilities that should be assumed by a U.S. broker-dealer intermediary.

## **II. Principal Areas in Need of Reform Under Rule 15a-6.**

### **A. Establishment of a Flexible Approach to Allocating Operational Requirements in Transactions Intermediated by U.S. Broker-Dealers.**

The Trade Associations consider it essential that the Commission take steps to eliminate the numerous operational obstacles in Rule 15a-6 to the ability of U.S. broker-dealers to act effectively as intermediaries between U.S. investors and foreign broker-dealers. PSA and SIA acknowledge the importance of continuing to require U.S. broker-dealers to serve as intermediaries in transactions between foreign broker-dealers and many categories of U.S. investors. The detailed intermediation provisions of the current Rule that assign specific functions to U.S. broker-dealer personnel, however, have proven exceptionally difficult to interpret, awkward to implement, and resistant to adaptation in light of changing market practices. Areas of particular concern include clearance, settlement and bookkeeping for intermediated transactions, the nature of permitted contacts with U.S. investors and the treatment of repos and similar financing transactions.

#### **1. Practical Barriers to Effective Intermediation Under Current Law.**

Practical experience with Rule 15a-6 has shown that the intermediation provisions of the Rule function least effectively when they prescribe rigid procedural or operational structures to be followed in satisfying specific U.S. legal requirements. For example, the provisions of paragraph (a)(3) of the Rule relating to clearance, settlement and bookkeeping for transactions frequently raise complex and ambiguous issues of interpretation. In many cases, these provisions appear to require maintenance of duplicative clearance and settlement arrangements that provide no benefit to U.S. investors, particularly where the securities must be cleared and settled using facilities outside of the United States.<sup>6</sup> In addition, in some circumstances, the Rule appears to impose specific obligations on a U.S. broker-dealer (e.g., requirements to hold securities in the customer accounts of the U.S. broker-dealer) that are inconsistent with the operational (and in some cases legal) requirements of foreign jurisdictions.<sup>7</sup>

Similarly, the restrictions on contacts with U.S. persons by "foreign associated persons" (unless "two-hatted" as registered representatives of a U.S. broker-dealer) have raised numerous practical dilemmas. U.S. broker-dealers face a formidable task in attempting to educate foreign personnel to satisfy the highly technical and nuanced requirements of U.S. securities law regarding when a conversation with a U.S. investor must be "chaperoned."<sup>8</sup> Even if non-U.S. personnel are made "dual employees" of the U.S. and foreign broker-dealer, moreover, substantial unnecessary local tax and regulatory burdens and uncertainties may be imposed on the U.S. broker-dealer.<sup>9</sup>

These problems are compounded by the development and application of modern electronic technologies in the securities markets, which have substantially increased the potential for direct communications between U.S. investors and foreign broker-dealers. Innovative trading, sales and operational systems now permit U.S. and foreign broker-dealers to allocate the

various components of their overall securities activities between their U.S. and foreign affiliates in ways that are more consistent with the internationalization of the securities markets, more economical and more responsive to investors' needs. As the differences between the "U.S." and "foreign" operations of U.S. securities firms (and other major financial market participants) have blurred, the current intermediation requirements of Rule 15a-6 -- which impose functional obligations based on geographic distinctions -- have become increasingly difficult to apply in practice. **10**

In addition, in the context of repo transactions, buy/sell backs and (to the extent effected pursuant to the Rule) similar financing transactions, the existing provisions of Rule 15a-6 impose particularly difficult and generally superfluous operational and practical requirements, including, most significantly, the requirement that mark-to-market payments and other movements of cash and securities be transferred through the accounts of the U.S. broker-dealer (*i.e.*, "double-booked"). Effecting these types of transactions in accordance with the provisions of the Rule has proven cumbersome in the context of both "major institutional investors" and other U.S. counterparties. Moreover, the ability of investors to enter into a wide range of financing transactions with U.S. and foreign banking firms, as well as with foreign securities firms, significantly heightens the competitive impact of existing regulatory burdens.

## **2. Alternative Approach to Intermediation Requirements.**

In light of securities firms' experience with Rule 15a-6 in its current form, PSA and SIA favor granting foreign broker-dealers substantially greater operational flexibility to enter into transactions with U.S. counterparties where a U.S. broker-dealer accepts responsibility for compliance with specified U.S. legal requirements. In our view, rather than prescribe in detail the precise manner in which specific *functions* must be performed by an intermediating U.S. broker-dealer, the SEC should require the U.S. broker-dealer to assume responsibility for ensuring that key aspects of U.S. broker-dealer regulation relating to the purchase and sale of securities are satisfied, regardless of who performs the specific function. **11**

In contrast to current law, which enumerates specific mechanical obligations to be performed by U.S. and foreign broker-dealers, this proposed approach would not seek to allocate in detail the particular duties of the U.S. and foreign broker-dealer in connection with the intermediation of securities transactions. Rather, it would condition the exemption from registration by a foreign broker-dealer on a requirement that the U.S. broker-dealer assume responsibility for compliance with key aspects of U.S. broker-dealer regulation relating to the purchase and sale of securities.<sup>12</sup> Thus, while the U.S. investor would obtain the benefits provided under current law (through the U.S. broker-dealer's commitment to meet these compliance responsibilities), the U.S. and foreign broker-dealer would have the ability to allocate performance of the mechanical aspects of transactions between each other in the most efficient manner practical under the circumstances. In addition, all communications between the foreign broker-dealer and U.S. investors would continue to be subject to the anti-fraud provisions of the U.S. securities laws.

A central issue raised by this approach is the nature of the U.S. securities law responsibilities to be assumed by a U.S. broker-dealer that intermediates a transaction between a foreign broker-dealer and a U.S. investor.<sup>13</sup> As a general matter, it would seem appropriate to require the U.S. broker-dealer to ensure that:

- U.S. investors are provided with appropriate disclosures regarding the respective roles of the U.S. and foreign broker-dealers;
- basic records are maintained regarding intermediated transactions that, while not subject to the full panoply of detailed requirements set out in Rule 17a-3 and similar rules, would be sufficient to enable the Commission to monitor activity by the foreign broker-dealer;
- the foreign broker-dealer has undertaken that the personnel participating in the solicitation of securities transactions with U.S. investors will not be subject to statutory disqualification under the Exchange Act; and
- the foreign broker-dealer consents to service of process and submission to jurisdiction in the United States.

In assessing the nature and scope of the responsibilities that should be assumed by a U.S. broker-dealer in intermediating transactions, the SEC may also wish to consider the extent to which the foreign broker-dealer is subject to a domestic regulatory regime, as discussed in Part III below, and the extent to which the U.S. investor is an institutional investor or similar entity, as discussed in Part II.B below.

A U.S. broker-dealer intermediating a transaction should not, however, become obligated to:

- guarantee the performance of the foreign broker-dealer or the U.S. investor or incur charges (e.g., for "fails" or forwards) under the SEC's net capital rule;
- satisfy the requirements of the customer protection rule (including in particular custody and control requirements and the reserve formula requirement), at least where the foreign broker-dealer is a good "control" location at which the U.S. broker-dealer could maintain the counterparty's securities under current law or where the counterparty is a major institution capable of negotiating its own custody arrangements in foreign markets; or
- ensure compliance with U.S. margin requirements, except to the extent that the U.S. broker-dealer itself extends credit to the U.S. counterparty subject to Regulation T (12 C.F.R. Part 220) or arranges credit that would violate, if applicable, Regulations G, U or X (12 C.F.R. Parts 207, 221 and 224, respectively).

Each of these obligations -- which currently give rise to substantial competitive burdens in cases where they apply to transactions intermediated by a U.S. broker-dealer under Rule 15a-6 -- should be met by the foreign broker-dealer, as would be the case had the transaction been effected directly with the foreign broker-dealer in its home market.

## **B. Expansion of Types of U.S. Investors Authorized to Access Foreign Markets.**

The Trade Associations urge the Commission to improve the ability of qualified U.S. investors to access foreign securities markets. Limitations on the categories of "institutional investors" eligible to enter into transactions under Rule 15a-6 have been a continuing barrier to the Rule's utility. An increasingly broad segment of U.S. investors has become actively involved in international investment strategies and has the knowledge and resources appropriate to enter into cross-border transactions. Although no-action relief recently granted by the SEC staff significantly alleviates some of the problems faced under Rule 15a-6 by very large investors, there continue to exist significant additional categories of U.S. investors that should be

permitted direct access to foreign broker-dealers in intermediated transactions.

## **1. Need for Increased Access to Foreign Securities Markets by Qualified U.S. Investors.**

U.S. institutions and other sophisticated U.S. investors have numerous investment reasons for seeking out foreign broker-dealers as counterparties. In some cases, they may seek the benefits of foreign research and analysis with respect to local markets, or local price quotations for securities with trading markets outside the United States. In other cases, they may seek the diversification and other benefits of acquiring exposure to international securities and markets for some portion of their portfolios.

In addition, sophisticated U.S. investors may seek to achieve the broader range of attractive transactional opportunities that frequently can be offered on more competitive terms by foreign broker-dealers to foreign investors. Because certain U.S. regulatory requirements -- particularly net capital and margin requirements that have tended to lag behind rapidly evolving financial markets -- increase costs or impose burdens directly on U.S. investors, U.S. broker-dealers are effectively precluded from offering U.S. investors the same range of transactional opportunities.<sup>14</sup> At present, those U.S. investors that do not qualify as "U.S. institutional investors" (major or otherwise) under Rule 15a-6 have a significant incentive to do business with foreign broker-dealers from outside the United States ( e.g., by establishing offshore affiliates) or to seek out foreign broker-dealers that may be less attuned to compliance with existing U.S. regulatory requirements.

U.S. investors who are capable of evaluating the benefits and risks of engaging in securities transactions directly with a foreign broker-dealer should not be denied the opportunity to obtain transactional and related investment services on terms that are competitive with those offered to investors based in other countries, nor should they be compelled to engage in transactions exclusively with a U.S. broker-dealer subject to U.S. regulatory requirements. In general, U.S. regulators would not appear to have any significant interest in imposing the full panoply of U.S. regulations on qualified U.S. investors who elect to engage in intermediated transactions with broker-dealers located in foreign countries.

In some cases, naturally, the SEC (like its foreign counterparts) may have investor protection concerns relating to the solicitation of domestic investors by foreign securities firms, particularly insofar as domestic investors may not understand the differences between domestic and foreign regulatory regimes. These concerns, however, should be minimal in the case of intermediated transactions involving institutional and other large investors -- who in fact have the necessary experience regarding investment matters to understand readily the consequences of a decision to enter into a transaction with a foreign firm or on a foreign market, as well as the resources and ability to shift their investment activities offshore if they so desire.

## **2. Scope of U.S. Investors Who Should Be Eligible to Participate in Intermediated Transactions Under Rule 15a-6.**

Defining the categories of investors who should be afforded greater access to foreign broker-dealers poses a number of implementation issues that must be approached with particular care. The definitions of "U.S. institutional investor" and "major U.S. institutional

investor" currently in Rule 15a-6 do not adequately encompass the range of investors for whom regulatory relief would be appropriate. Although the SEC staff's recent no-action relief significantly broadened the range of investors falling within the scope of those definitions, the Rule continues to impose unnecessarily high minimum asset thresholds and related status restrictions.

The current \$100 million financial asset requirement does not realistically reflect the categories of investors who have the capacity and resources appropriately to be permitted intermediated access to foreign broker-dealers. The number of U.S. investors, including wealthy individuals, pursuing international investment strategies has, as the Commission itself has noted, expanded significantly in the years since adoption of Rule 15a-6.

In defining the category of U.S. investors eligible to participate under Rule 15a-6 transactions, we believe that the Commission should adopt the standard recently established by Congress in new Section 3(c)(7) to the Investment Company Act of 1940 (the "Investment Company Act"). **15** Under Section 3(c)(7), Congress exempted from registration as an investment company any issuer whose securities are owned only by "qualified purchasers," a term defined broadly to include, among others, natural persons who own \$5 million or more in investments and any person who owns \$25 million or more in investments. **16** Notably, the level of knowledge and general capacity to analyze risk required of investors for purposes of an exemption from Investment Company Act regulation would appear to be substantially greater than should be required to enter into transactions in a foreign securities market -- especially when the presence of a regulated U.S. broker-dealer intermediary is taken into account. Moreover, in a variety of other contexts, the SEC and other financial regulators have established dollar thresholds for the application of similar exemptive provisions that are significantly lower than the current requirements of Rule 15a-6 ( e.g., the definition of "eligible swap participant" in the Part 35 rules of the Commodity Futures Trading Commission (the "CFTC"), 17 C.F.R. § 35.1(b)(2)).

The Trade Associations recognize that the Commission may wish to continue to make distinctions between different categories of U.S. investors comparable to the current distinction between "major" and "non-major" U.S. institutional investors.<sup>17</sup> In particular, PSA and SIA acknowledge the importance of ensuring that larger U.S. institutional investors (i.e., "major" or "super-major" investors) have the greatest flexibility to deal with securities firms around the world. At the same time, however, substantial priority should, we believe, be given to the objective of expanding the international investment opportunities of sophisticated U.S. investors that do not meet the current \$100 million financial asset criteria.

### **III. Foreign Regulatory Regimes.**

The Trade Associations encourage the SEC to continue to assess over time whether more flexible rules could be established with respect to foreign securities firms that are subject to regulation in their home country.<sup>18</sup> As noted above, however, PSA and SIA believe that appropriate changes to Rule 15a-6 should not be delayed pending the SEC's completion of a comprehensive review of the issues involved in providing registration or other exemptions for non-U.S. broker-dealers based on foreign regulatory regimes. A large number of foreign countries, particularly those in which major capital markets are located, have established sophisticated regulatory regimes governing the activities of securities firms, including both

broker-dealers and banks. In many respects, application of U.S. regulatory requirements ( e.g., capital requirements) to foreign securities firms would overlap significantly (and in some cases potentially conflict in technical ways) with local law requirements.

PSA and SIA suggest that the SEC review a range of potential approaches to recognition of foreign regulatory regimes, including the approaches taken by U.S. banking and commodities regulators. In general, the Trade Associations would not necessarily encourage the SEC to provide a complete "pass" based on the existence of home country regulation. We would, however, encourage the Commission to provide some acknowledgment of and deference to the home country regime in determining the nature and scope of the responsibilities that a U.S. broker-dealer should assume in an intermediated transaction. In particular, we would consider it important for the Commission to examine the possibility of substantially reducing the restrictions applicable under current law to transactions with broker-dealers or banks subject to foreign regulation, such as:

- by permitting safekeeping to occur at those foreign firms if they qualify as good "control" locations under Rule 15c3-3;
- by reducing the recordkeeping and other compliance obligations of intermediating U.S. broker-dealers in transactions involving such foreign broker-dealers; and
- by expanding the categories of U.S. institutional and other investors with whom such foreign firms may engage in securities activities.

There are potentially a variety of ways in which the SEC could assess whether a foreign firm's home country regulatory requirements should give rise to relief from U.S. regulatory requirements. The approach adopted by the CFTC under its Part 30 rules (17 C.F.R. Part 30), which govern the offer and sale in the United States of futures and options contracts made or to be made on or subject to the rules of a foreign board of trade, might serve as a useful model. In an interpretive statement regarding its exemptive authority under the Part 30 rules (17 C.F.R. Part 30, App. A), the CFTC has identified the minimum elements of a comparable foreign regulatory program that the CFTC would consider in granting a general exemptive application. These minimum elements are:

- registration, authorization or other form of licensing, fitness review or qualification of persons through which customer orders are solicited and accepted;
- minimum financial requirements for those persons that accept customer funds;
- protection of customer funds from misapplication;
- recordkeeping and reporting requirements;
- minimum sales practice standards (including disclosure regarding the risk of transactions undertaken outside the jurisdiction of domestic law); and
- compliance auditing by regulatory authorities

.The CFTC also indicated in its interpretive statement that general exemptions based on comparability would be conditioned on the existence of appropriate information sharing agreements, and that it would also consider representations regarding the applicability of blocking statutes that may prevent the sharing of information. Similar requirements to those identified by the CFTC should not be overly burdensome in the context of an exemption for

foreign broker-dealers.<sup>19</sup>

In other contexts, moreover, the SEC does determine the degree to which foreign financial markets meet policy objectives established under federal securities laws. For example, the Commission has established certain regulatory and related considerations for the qualification of a foreign securities market as a "designated offshore securities market" for purposes of Regulation S under the Securities Act of 1933. Under Rule 3a12-8, moreover, the Commission has designated the debt obligations of certain foreign governments as "exempted securities" -- for the limited purpose of permitting certain foreign, exchange-traded futures contracts on such securities to be marketed and traded in the United States -- based on criteria such as the depth and liquidity of the secondary market for such debt securities and the potential benefits of such designation for U.S. investors. The multijurisdictional disclosure system between the SEC and provincial securities regulators in Canada also entails significant deference by the Commission to the securities laws of a foreign jurisdiction.

PSA and SIA greatly appreciate the opportunity to express our views to the Commission regarding potential reforms affecting the regulation of foreign broker-dealers. The Trade Associations also look forward to working with the Commission in the comment process upon promulgation of any proposed rule change and would be glad to address any questions that the Commission staff may have. Questions or comments may be addressed to Stuart J. Kaswell (202-296-9410) or George R. Kramer (202-296-9410) of SIA, Paul Saltzman (212-440-9459) or Patricia Brigantic (212-440-9454) of PSA, or our special counsel in this matter, Giovanni P. Prezioso (202-728-2758) or Robert W. Cook (202-736-2078) of Cleary, Gottlieb, Steen & Hamilton and Brandon Becker (202-663-6979) or Anthony G. Brown (202-663-6212) of Wilmer, Cutler & Pickering.

Very truly yours,

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cc: Mr. Mark P. Tellini, Counsel to the Chairman  
Mr. Robert L.D. Colby  
Mr. Michael A. Macchiaroli  
Ms. Catherine McGuire  
Mr. Richard C. Strasser, Division of Market Regulation Securities and Exchange  
Commission

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## Footnotes

<sup>1</sup> PSA represents approximately 220 securities firms and banks that underwrite, trade and sell debt securities, both domestically and internationally. Its members include all of the primary

dealers recognized by the Federal Reserve Bank of New York, as well as other government securities dealers. More information about PSA can be found at its Internet website <http://www.psa.com>.

2 SIA is the leading proponent of capital markets, bringing together the shared interests of more than 700 securities firms throughout North America to accomplish common goals. SIA members -- including investment banks, broker-dealers, specialists, and mutual fund companies -- are active in all markets in all phases of corporate and public finance. In the United States, SIA members collectively account for approximately 90 percent, or \$100 billion, of securities firms' revenues and employ about 350,000 individuals. They manage the accounts of more than 50 million investors directly and tens of millions of investors indirectly through corporate, thrift and pension plans.

3 See, e.g., Exchange Act Rel. No. 38672, 62 Fed. Reg. 30485 at 30521 (June 4, 1997) (the "Alternative Trading Systems Release") ("[t]he desire of many investors to diversify their portfolios through foreign investment has already resulted in an exponential increase in trading in foreign securities by U.S. persons").

4 The Trade Associations acknowledge and appreciate the efforts of the Commission staff, on several occasions, to grant no-action relief crafted to address, within the constraints of the existing regulatory framework under the Exchange Act, some of the most pressing U.S. securities law issues facing U.S. investors and foreign broker-dealers. See, e.g., Cleary, Gottlieb, Steen & Hamilton (Apr. 9, 1997); Morgan Stanley India Securities Pvt. Ltd. (Dec. 20, 1996); Cleary, Gottlieb, Steen & Hamilton (Jan. 30, 1996).

5 We are aware of the significant complexities that this issue may pose, however, and do not suggest that the Commission delay other needed reforms to achieve this objective.

6 The Rule appears to require transfers of securities between a foreign broker-dealer and a U.S. investor to be effected through the U.S. broker-dealer even in cases where settlement could be conducted directly between the foreign broker-dealer and the U.S. investor (although recent no-action advice from the Commission staff has ameliorated this problem in the case of certain foreign and U.S. government securities).

7 For example, some foreign jurisdictions (e.g., India) prohibit U.S. broker-dealers from holding funds or securities in those jurisdictions on behalf of U.S. investors.

8 In this connection, while recent no-action relief has been extremely helpful in liberalizing the extent of permissible unchaperoned contacts, it has, if anything, rendered more complex the task of ascertaining whether a foreign associated person may have a particular unchaperoned conversation with a U.S. investor ( e.g., Is the investor a "U.S. institutional investor" within the meaning of Rule 15a-6? If so, is the investor also a "major U.S. institutional investor"? Is the conversation occurring during U.S. trading hours? If not, is the U.S. investor seeking to place an order for a transaction in a "foreign security"?).

9 For example, a U.S. broker-dealer's efforts to maintain "dual employees" may result in its being viewed as having established a foreign branch, which could be deemed a "permanent establishment" in the foreign jurisdiction that would subject the U.S. broker-dealer to taxation in such jurisdiction.

**10** See Cleary, Gottlieb, Steen & Hamilton (Apr. 9, 1997). The Trade Associations recognize that these problems are closely related to many of the issues recently raised by the Commission's Alternative Trading Systems Release. As the Commission is aware, PSA and SIA have been active participants in ongoing Commission efforts to address the implications of changing communication and trading technologies and expect to be commenting separately on the Alternative Trading Systems Release.

**11** PSA and SIA note in this regard that Congress last year granted the Commission significantly greater exemptive authority under the Exchange Act than had been available at the time of Rule 15a-6's adoption. See Exchange Act § 36 (as amended by the National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 105, 110 Stat. 3416 (1996) (the "Markets Improvement Act")).

**12** While the Trade Associations do not consider it essential to require that the intermediating U.S. broker-dealer be affiliated with the foreign broker-dealer, the existence of such an affiliation could serve as grounds for narrowing the U.S. broker-dealer's intermediation obligations.

**13** As a practical matter, the Trade Associations consider it important to afford a U.S. broker-dealer the flexibility to assume regulatory responsibility either before or after a transaction occurs.

**14** The Trade Associations understand that the Commission is currently reviewing the net capital requirements applicable to U.S. broker-dealers, and we strongly support this initiative. PSA and SIA believe, however, that the revisions to Rule 15a-6 proposed above are in any event necessary to enhance the competitiveness of U.S. securities firms -- as well as the access to U.S. securities markets by foreign securities firms -- and therefore should be considered independent from any modifications to the net capital rule.

**15** During Congressional hearings preceding the enactment of Section 3(c)(7), the Commission testified in support of the new standard on the basis that it more accurately defined the category of "sophisticated investors" who have the capacity to analyze risk without the numerous protections afforded by the Investment Company Act. See The Securities Investment Promotion Act of 1996: Hearings on S.1815 Before the Senate Committee on Banking, Housing and Urban Affairs, 104th Cong., 2nd Sess. at 40-41 (1996) (statement of Arthur Levitt, Chairman, U.S. Securities and Exchange Commission).

**16** See Markets Improvement Act § 209. The definition of "qualified purchaser," set forth in new Section 2(a)(51)(A) of the Investment Company Act, also includes certain family owned companies that own \$5 million or more in investments and certain trusts. The Commission has adopted rules under the Investment Company Act defining the term "investments" for purposes of the "qualified purchaser" definition and clarifying certain interpretive issues under Section 3(c)(7). Investment Company Act Rel. No. 22597, 62 Fed. Reg. 17512 (Apr. 9, 1997).

**17** The Trade Associations note that establishing multiple categories of U.S. investors may create operational and compliance difficulties for U.S. broker-dealers and therefore encourage the Commission to harmonize, to the extent practical, the regulatory requirements applicable to qualifying U.S. investors.

**18** See Exchange Act Rel. No. 27018, 54 Fed. Reg. 30087 (July 18, 1989) (concept release regarding recognition of foreign broker-dealer regulation).

**19** Deference to foreign regulatory regimes could also be based on compliance with internationally-accepted bank regulatory standards. For example, the Federal Reserve Board, in defining whether a banking organization is "well-capitalized" in qualifying for streamlined approval procedures under the Board's Regulation Y, defers to the capital terms and definitions of a foreign bank's home country authority, if those standards are consistent with the international Basle Accord on bank capital requirements. 12 C.F.R. § 225.2(r)(3); 62 Fed. Reg. 9290, 9297 (Feb. 28, 1997).