

INFORMATION UPDATE FOR ADVISERS RELYING ON THE UNIBANCO NO-ACTION LETTERS

The staff of the Division of Investment Management periodically receives questions regarding how multi-national financial firms document their reliance on what are referred to as the “Unibanco letters,” including what information, if any, should be submitted to the staff or Commission to facilitate the Commission’s ability to monitor and enforce certain advisers’ performance of their obligations to their U.S. clients. In response to those questions, we have generally found the documentation outlined below to address most clearly the representations and undertakings required by the Unibanco letters.

Background—the Unibanco Letters

In many cases, multi-national financial firms rely on the staff’s positions in a line of no-action letters¹ sometimes referred to as the “Unibanco letters” regarding the extra-territorial application of the Investment Advisers Act of 1940 (“Advisers Act”).² In the Unibanco letters, the staff provided assurances that it would not recommend enforcement action to the Commission regarding the applicability of the substantive provisions of the Advisers Act with respect to a non-U.S. adviser’s relationships with its non-U.S.³ clients. In addition, the staff agreed not to recommend enforcement action to the Commission under section 203(a) of the Advisers Act if a non-U.S. advisory affiliate of a registered adviser, often termed a “participating affiliate,” shares personnel with, and provides certain services to U.S. clients through, the registered adviser, without such participating affiliate registering under the Advisers Act.⁴

Generally, the staff has provided assurances that it would not recommend enforcement action to the Commission in situations in which: the unregistered participating affiliate and the registered adviser are separately organized; the registered adviser is staffed with personnel (located in the U.S. or abroad) who are capable of providing investment advice; all personnel of the participating affiliate involved in U.S. advisory activities are deemed “associated persons” of the registered adviser; and the Commission has adequate access to trading and other records of the participating affiliate and to its personnel to the extent necessary to enable it to identify conduct that may harm U.S. clients or markets. To facilitate the Commission’s ability to monitor and enforce the



advisers' performance of their obligations to their U.S. clients and to facilitate the integrity of the U.S. markets, reliance on the Unibanco letters is conditioned upon advisers committing to certain representations and undertakings, including maintaining certain records and providing the Commission with access to their foreign personnel.

Information to be Submitted

Over the years, the staff has received a wide variety of documents from advisers seeking to rely on the Unibanco letters, which are conditioned on compliance with certain representations such as appointing a U.S. agent for service of process on participating affiliates. For arrangements in which one or more participating affiliates seek to share personnel with, and provide certain services to U.S. clients through, the registered adviser without such participating affiliate(s) registering under the Advisers Act, based on its review of these documents, the staff generally believes that documentation of the following general representations and undertakings by participating affiliate(s) addresses most clearly the concerns raised in the Unibanco letters regarding the staff's ability to monitor the conduct of participating affiliates:

- ▶ The name of the participating affiliate and registered adviser, and a representation that the participating affiliate is an associated person of the registered adviser within the meaning of Section 202(a)(17) of the Advisers Act.
- ▶ Documentation of the appointment of an agent for service of process by a participating affiliate, including the name and contact information of such agent.
- ▶ A representation that the participating affiliate is under the jurisdiction of U.S. courts for actions arising, directly or indirectly, under U.S. securities laws or the securities laws of any state in connection with any of the following for U.S. clients: (1) investment advisory activities; (2) related securities activities arising out of or relating to any investment advisory services provided by the participating affiliate through its registered adviser; and (3) any related transactions. In addition, a representation that the participating affiliate has designated and appointed, without power of revocation, [insert agent] upon whom may be served all process, pleadings, or other papers in
 - a. any investigation or administrative proceeding conducted by the Commission; and
 - b. any civil suit or action brought against the registered adviser or the participating affiliate or in which the participating affiliate has been joined as defendant or respondent,

in any appropriate court in any place subject to the jurisdiction of any state or of the U.S. or any of its territories or possessions or the District of Columbia in connection with the activities and transactions enumerated in this paragraph.

- ▶ A representation that any such civil suit or action or administrative proceeding may be commenced by the service of process upon, and service of an administrative subpoena shall be effective service upon, [insert agent], and such service shall be taken and held in all courts and administrative tribunals to be valid and binding as if personal service has been made.
- ▶ A representation that the participating affiliate will appoint a successor agent if the participating affiliate or any person discharges the [insert agent] or the [insert agent] is unwilling or unable to accept service on behalf of the participating affiliate at any time until six years have elapsed from the date of the last investment advisory activity. Additionally, the participating affiliate undertakes to advise the Commission promptly of any change to [insert agent]'s name or address during the applicable period.
- ▶ A representation that the participating affiliate will promptly, upon receipt of an administrative subpoena, demand, or request for voluntary cooperation made during a routine or special inspection or otherwise, provide to the Commission or the Commission's staff any and all of the books and records required to be maintained in accordance with staff guidance, and make available for testimony before, or other questioning by, the Commission or the Commission's staff the employees of the participating affiliate (other than clerical or ministerial personnel) involved in the investment advisory activities or related securities transactions, at such place as the Commission may designate in the U.S. or, at the Commission's option, in the country where the records are kept or such personnel reside.
- ▶ A representation that the participating affiliate will produce, pursuant to an administrative subpoena or a request for voluntary cooperation, any documents in accordance with staff guidance.

How to Submit

Information can be submitted to the staff by email at IMOCC@sec.gov. Please use the subject line "Participating Affiliate" when submitting information by email. If you would like confirmation of receipt, please indicate such in your email.

Amendments to any information can similarly be submitted by email using the email address above.

Endnotes

- 1 See, e.g., ABA Subcommittee on Private Investment Entities, SEC Staff No-Action Letter (Dec. 8, 2005); Royal Bank of Canada, SEC Staff No-Action Letter (Jun. 3, 1998); ABN AMRO Bank, N.V., SEC Staff No-Action Letter (Jul. 7, 1997); Murray Johnstone Holdings Limited, SEC Staff No-Action Letter (Oct. 7, 1994); Kleinwort Benson Investment Management Limited, SEC Staff No-Action Letter (Dec. 15, 1993); Mercury Asset Management plc, SEC Staff No-Action Letter (Apr. 16, 1993); and Uniao de Bancos de Brasileiros S.A., SEC Staff No-Action Letter (Jul. 28, 1992).
- 2 The letters grew out of recommendations in a 1992 staff study. Division of Investment Management, SEC, *Protecting Investors: A Half Century of Investment Company Regulation, May 1992* (“1992 Staff Report”), at 223-227 (recognizing that non-U.S. advisers that registered with the Commission were arguably subject to all of the substantive provisions of the Advisers Act with respect to their U.S. and non-U.S. clients, which could result in inconsistent regulatory requirements or practices imposed by the regulations of their local jurisdiction and the U.S. securities laws; in response, advisers could form separate and independent subsidiaries but this could result in U.S. clients having access to a limited number of advisory personnel and reduced access by the U.S. subsidiary to information or research by non-U.S. affiliates).
- 3 *Supra* note 1.
- 4 *Id.*

The Investment Management Division works to:

- ▲ protect investors
- ▲ promote informed investment decisions and
- ▲ facilitate appropriate innovation in investment products and services

through regulating the asset management industry.

If you have any questions about this IM Information Update, please contact:

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