

April 10, 2017

SEC Issues Update for Advisers Relying on the *Unibanco* No-Action Letters

Recently, the staff (Staff) of the US Securities and Exchange Commission's (SEC) Division of Investment Management issued an information update (the "Information Update") for investment advisers registered under the Investment Advisers Act of 1940 (the "Advisers Act") that use the investment advisory services of non-US affiliates ("participating affiliates") that are not registered under the Advisers Act. The participating affiliates are not registered under the Advisers Act in reliance on a series of no-action letters referred to as the "*Unibanco* letters."¹ The Information Update provides guidance as to what information should be submitted to the SEC to meet the requirements of the *Unibanco* letters.

The *Unibanco* Letters

In order to provide investment advice to US clients, an investment adviser generally must be registered with the SEC under the Advisers Act. However, in the *Unibanco* letters, the Staff agreed not to recommend enforcement action against participating affiliates not registered under the Advisers Act that share personnel with and provide advisory services to US clients through their registered adviser affiliates if the following conditions are met: (1) the unregistered participating affiliates and the registered advisers are separately organized; (2) the registered advisers employ personnel (located in the United States or abroad) who are capable of providing investment advice; (3) all personnel of the participating affiliates involved in providing advice to US clients are deemed "associated persons" of their affiliated registered advisers; and (4) the SEC has adequate access to trading and other records of the participating affiliates and to their personnel to the extent needed to allow the SEC to identify conduct that may harm US clients or markets.²

Information To Be Submitted

Under the *Unibanco* letters, certain documentation and representations required by the letters must be submitted to the SEC. However, the Staff did not explain in the *Unibanco* letters how such information should be submitted. The Information Update states that such information should be submitted to the Staff by email at IMOCC@sec.gov with the subject line "Participating Affiliate." In addition, the Information Update suggests that certain additional representations and information required by the *Unibanco* letters, but to

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¹ See, e.g., *Uniao de Bancos de Brasileiros S.A.* (pub. avail. Jul. 28, 1992); *Mercury Asset Management plc* (pub. avail. Apr. 16, 1993); *Kleinwort Benson Investment Management Limited* (pub. avail. Dec. 15, 1993); *Murray Johnstone Holdings Limited* (pub. avail. Oct. 7, 1994); *ABN AMRO Bank, N.V.* (pub. avail. Jul. 7, 1997); *Royal Bank of Canada* (pub. avail. June 3, 1998); *ABA Subcommittee on Private Investment Entities* (pub. avail. Dec. 8, 2005).

² Id.

date not required to be submitted to the SEC, should also be submitted to the Staff. Specifically, the Information Update suggests that submitting documentation containing the following representations and undertakings, some of which were already required to be submitted to the SEC, will “most clearly” enable the Staff “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 the agent.
- A representation that the participating affiliate is under the jurisdiction of US courts for actions arising, directly or indirectly, under US securities laws or the securities laws of any state in connection with any of the following for US 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, an agent upon whom may be served all process, pleadings, or other papers in:
 - i. any investigation or administrative proceeding conducted by the SEC; and
 - ii. 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 United States, 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 the participating affiliate’s appointed 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:
 - i. will appoint a successor agent if the participating affiliate or any person discharges the agent or the 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; and
 - ii. undertakes to advise the SEC promptly of any change to the 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 SEC or 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 SEC or 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 SEC may designate in the United States or, at the SEC’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.

The Information Update also notes that amendments to any of the above information can also be submitted to the same email address noted above.

Recommendation

While there are legitimate arguments that the Information Update goes beyond merely restating established standards and leaves open questions as to whether submission of all of this documentation is required, the enumerated information should be sent to the SEC for each participating affiliate, and such information should be amended in the event of any material change. Compliance with this Information Update could help avoid needless distractions and expense in a firm's next SEC inspection.

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