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Public Comment File

Re: File No. DF Title IV Exemptions

We applaud the Commission's decision to seek input on the implications of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") and the formulation of rules mandated by the legislation. We wish to urge the Commission to clarify an open point related to the elimination of the "private adviser" exemption in Section 203(b)(3) of the Advisers Act and the related exemption in Section 403 of Dodd-Frank for "foreign private advisers."

We ask the Commission to address the continued viability of arrangements created under the no action letters to Uniao de Bancos de Brasileiros S.A., (July 28, 1992) ("Unibanco") and subsequent similar letters. The basic thesis of these interpretations derives from the application of the "conduct and effects" principles of international law to investment adviser regulation. Under this approach as implemented in Unibanco and subsequent no action letters, a foreign financial institution with U.S. and non-U.S. investment advisory subsidiaries will be permitted to operate without registering itself or its non-U.S. advisory affiliates (i.e., the separate existence of the entities will be respected) if it meets certain conditions. Typically, the requirements of these no-action letters include (1) the U.S. registered and non-U.S. unregistered advisers being separately organized; (2) the non-U.S. affiliate appointing a U.S. agent for service of process; (3) all professional employees of the non-U.S. affiliate involved in providing the U.S. advisory services of the U.S. registered subsidiary or having access to the advice prior to dissemination to the U.S. client being deemed "associated persons" of the U.S. adviser under the Advisers Act; (4) the non-U.S. affiliate agreeing to provide the SEC with access to its records and personnel to the extent necessary for the SEC to monitor conduct that could adversely affect U.S. clients or markets; and (5) the U.S. registered subsidiary keeping all of its records (including records of advisory activities conducted by its associated persons at the non-U.S. affiliate) in accordance with the Advisers Act and providing the SEC with access to its non-U.S. personnel. In several such cases, the non-U.S. affiliates entered into "Participating Affiliate" agreements under which they agreed, among other things, to the foregoing terms. Such agreements are filed with the Division of Investment Management.

We represent a number of international financial institutions, the head offices of which are located outside the United States, but which also conduct substantial operations in the United States. Many of these institutions must comply with the regulations of a number of jurisdictions.

With respect to investment advice provided either in the U.S. or to U.S. clients, many of these have structured their operations to meet U.S. regulatory requirements in reliance on the Commission's position articulated in Unibanco and its progeny.

Under this structure, briefly, the foreign financial institution has an affiliate that is registered with the Commission as an investment adviser and complies with U.S. regulations with respect to the activities of such registered adviser. The foreign financial institution is free to conduct its business outside the U.S. without regard to U.S. regulations. Where the U.S. regulated adviser desires to use the resources, analysis or other services of any unregistered affiliate in providing its advice subject to U.S. regulation, the institution has put in place agreements among the affiliates and with the Commission whereby the U.S. registered adviser is responsible for supervising the activities of such non-U.S.-based employees to the extent of the services provided to U.S. clients, the foreign affiliates agree to comply with the U.S. registered adviser's policies and procedures with respect to such activities and the U.S. registered adviser and its affiliates agree to make the records required to be maintained by a U.S registered adviser available to the Commission when necessary. In this way, the U.S. regulatory interest is protected without undue encroachment on the non-U.S. activities of these international financial institutions and without undue burden on U.S. regulatory resources that would result if multiple related entities, some of which may only be occasionally connected to the U.S, were all required to register and be regulated by the Commission.

Dodd-Frank did not expressly address the Commission's position in the Unibanco line of no-action letters. However, by removing the "private adviser" exemption and providing a "foreign private adviser" exemption with very limited application in Title IV of Dodd-Frank, Congress has caused many international financial institutions to become uncertain as to whether the structures implemented pursuant to Unibanco and its progeny remain viable. Because of the value of such arrangements to the foreign financial institutions in terms of cost and minimization of regulatory burden and the value to the Commission in terms of efficiency without loss of regulatory jurisdiction or protection, we urge the Commission to confirm as soon as possible, in either an "FAQ" or other manner, that arrangements under Unibanco and subsequent letters continue to be effective and available to foreign financial institutions and their U.S. registered advisory affiliates.

We also believe that the continuation of the policies adopted in Unibanco and its successors are consistent with Dodd-Frank and within the Commission's authority. Congress expressly confirmed the Commission's authority to pass rules and regulations and generally to define terms under the Advisers Act appropriate to the exercise of its jurisdiction. Dodd-Frank also added a provision to Section 214 of the Advisers Act clarifying the extraterritorial jurisdiction of U.S. federal courts that adopts a "conduct or effects" standard in the enforcement area, thus tacitly supporting the approach as implemented by the Commission in Unibanco and its progeny in the regulatory area.

We are in a period of unprecedented regulatory uncertainty, much of which cannot be resolved quickly. This uncertainty harms U.S. markets and stunts the activities of financial firms in the U.S. While much of the uncertainty will necessarily take a substantial period to resolve, we believe that confirmation by the Commission of the continuance of its policies expressed in Unibanco and successors can and should be done promptly. We believe that quick confirmation of this approach would be very helpful to allay uncertainty in the market, is consistent with the regulatory objectives of the U.S. and the Commission's authority under the Advisers Act and strikes the proper balance in bringing activities of foreign advisers conducted in the U.S. or affecting U.S. markets under the Commission's jurisdiction in a way that does not create unnecessary complexity and expense.

Very truly yours,

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