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Broker-Dealer Beat: Cross-Border Brokerage Services SEC Enforcement for Failure to Register

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The SEC recently sanctioned another foreign bank for conducting cross-border brokerage activities without being registered. Since 2009, the SEC has sanctioned a number of foreign firms for failing either to register as a broker-dealer or operate pursuant to an applicable exemption. Sanctions for acting as an unregistered broker-dealer have included fines, disgorgement of profits earned from the violative conduct and, in egregious cases, a ban from associating with a registered broker-dealer. U.S. persons aiding and abetting these violations have also been sanctioned.

Briefly, Section 15(a) of the Exchange Act requires that any person soliciting or selling securities from the United States or to persons in the United States register with the SEC as a broker-dealer. Rule 15 a-6 permits unregistered foreign broker-dealers to provide research and to solicit and effect transactions with certain U.S. institutional investors under limited circumstances. However, the scope of the rule is narrow, it is generally unavailable for transactions with individual (retail) U.S. – based clients and firms operating under the exemption must comply with its record keeping, reporting and other requirements.

Some of the activities the SEC has cited as impermissible in the institutional context include:

- Sponsoring conferences in the United States,
- Traveling to the United States to meet with investors,
- Trading foreign securities on behalf of U.S. investors, and
- Participating in foreign securities offerings to U.S. institutional investors.

In the retail context, problematic activities have included:

- Soliciting, accepting and executing orders for individuals who are permanent U.S. residents,

- Establishing and maintaining accounts for U.S. residents,
- Communicating with these retail investors by telephone and e-mail, and
- Travelling to the United States to meet individual investors.

In both the institutional and the retail context, the SEC seems to have viewed a firm's failure to follow advice received about the U.S. broker-dealer registration requirements as an aggravating factor. Irrespective of whether a foreign firm is aware it is violating the U.S. registration requirements, however, it can be charged with "willfully violating" Section 15(a) of the Exchange Act so long it knows what it is doing. Thus, foreign firms should educate themselves on the U.S. broker-dealer registration requirements before they provide services to the U.S. investors.