

# SEC Staff Issues Guidance Under *Unibanco* Relief for Unregistered Advisory Affiliates

March 29, 2017

On March 13, 2017, the Staff of the Securities and Exchange Commission (the “Staff”) released a rare information update (the “Update”) on arrangements involving unregistered entities providing investment advisory services through an affiliated registered investment adviser (“RIA”).<sup>1</sup> The Update summarizes the core representations and undertakings that the Staff requires for these arrangements under a series of no-action letters dating back to the 1990s (the “Unibanco Letters”) governing when “participating affiliates” are subject to SEC registration.<sup>2</sup> While the Update does not impose new requirements, it likely will standardize the representations and undertakings in this area. It also encourages the submission of the relevant documentation by email to the Division of Investment Management’s Office of Chief Counsel.

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<sup>1</sup> SEC Division of Investment Management, Information Update for Advisers Relying on the Unibanco No-Action Letters, IM Information Update 2017-03 (March 2017), available at <https://www.sec.gov/investment/im-info-2017-03.pdf>.

<sup>2</sup> Uniao de Bancos de Brasileiros S.A. (avail. July 28, 1992) (Unibanco); see also Royal Bank of Canada (avail. June 3, 1998); ABN AMRO Bank N.V. (avail. Jan. 7, 1997); Murray Johnstone Holdings Ltd. (avail. Oct. 7, 1994); Kleinwort Benson Investment Management Ltd. (avail. Dec. 15, 1993); Mercury Asset Management plc (avail. Apr. 16, 1993); The National Mutual Group (avail. Mar. 8, 1993).



## The Unibanco Regime and the Update

No-action relief in Unibanco was conditioned on undertakings made by an unregistered parent to ensure SEC jurisdiction over the parent's operations to the extent relevant to the SEC's supervision of the parent's RIA subsidiary. These conditions included the appointment of an agent for service of process in SEC enforcement proceedings; maintaining required books and records with respect to related securities transactions; an agreement that the parent's personnel involved in U.S. advisory activities would become "associated persons" of the subsidiary;<sup>3</sup> and an agreement that the parent would produce its employees in connection with any SEC proceeding and authorize them to testify regarding the activities of the RIA and related securities transactions.

In later Unibanco Letters, the Staff extended this approach to cover registered and unregistered affiliates more generally, such as registered parent and unregistered subsidiary.<sup>4</sup>

In several of the Unibanco Letters, the requesting party provided a proposed form of stipulations and agreements from the participating affiliate.<sup>5</sup> The list of representations and undertakings in the Update closely resembles the forms approved by the Staff in the Unibanco Letters, including:

- Identifying the RIA, participating affiliate, and agent for service of process;
- Certifying that the participating affiliate is an associated person of the RIA;
- Representing that the participating affiliate is subject to the jurisdiction of U.S. courts for actions

<sup>3</sup> Advisers Act, § 202(a)(17). A registered adviser has certain supervisory and other obligations with respect to its associated persons.

<sup>4</sup> See, e.g., The National Mutual Group (registered investment adviser and unregistered participating affiliates shared the same ultimate parent).

<sup>5</sup> See Murray Johnstone Holdings Ltd.; Mercury Asset Management plc.

arising from investment advisory activities, related securities activities, and related transactions;

- Documenting that the participating affiliate has appointed an agent for service of process for investigations or civil actions, that service of process on the agent will be effective, and that a successor agent will be appointed and identified if necessary; and
- Representing that the participating affiliate will provide books and records or other documents sought by the Staff.

The Update does not indicate that any or all of these items are required or sufficient in all circumstances. Rather, the Update indicates that the Staff generally finds these items to address "most clearly the concerns raised" in the Unibanco Letters regarding the Staff's ability to monitor participating affiliates.<sup>6</sup>

## Submission of Documents to the SEC

Current market practice for many RIAs relying on the Unibanco Letters includes keeping internal records of the required representations and undertakings without making a filing with or submission to the SEC. While the Update does not explicitly require RIAs to submit documentation, the statement that information "can be submitted" to the Staff with a specific email address seems to be encouragement by the Staff to do so.

## Conclusion

The Unibanco Letters are longstanding precedents—the last, Royal Bank of Canada, was issued nearly two decades ago—and the Update does not change their requirements. While the Staff has continually assured advisers that they can rely on the Unibanco Letters,<sup>7</sup> many commenters have awaited additional guidance with regard to application of the existing letters to better address the current state of advisory structures, e.g., confirmation that two U.S. affiliates following the

<sup>6</sup> See Update at 1.

<sup>7</sup> See Registration Under the Advisers Act of Certain Hedge Fund Advisers, Rel. No. IA-2333 (Dec. 10, 2004), available at <https://www.sec.gov/rules/final/ia-2333.htm>.

guidance can rely on Unibanco. In its 2011 rule release adopting the Advisers Act's current exemptions, the SEC stated that it was not withdrawing Unibanco, because while the Unibanco guidance was provided in the context of the repealed private adviser exemption, it expected to issue guidance, as appropriate, in the context of the private fund adviser exemption and the foreign private adviser exemption.<sup>8</sup> Given those statements, it is surprising that the Update appears to only affirm the status quo. However, the Staff's guidance on umbrella registration, which allows for registration on a single Form ADV of affiliated advisers that meet certain criteria obviates the practical need for an expansion of Unibanco beyond the extraterritorial context.<sup>9</sup>

It remains to be seen whether in the future the Staff will require submission of the information specified in the Update, or if industry practice around voluntary submission will emerge, but the Update will likely standardize the representations and undertakings used to satisfy the Unibanco Letters. Therefore, in any case, any RIA currently relying on the Unibanco Letters should evaluate its internal documentation against the list in the Update and consider email submission to the Staff.

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<sup>8</sup> See Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than \$150 Million in Assets Under Management, and Foreign Private Advisers, Rel. No. IA-3222 (June 22, 2011), available at <https://www.sec.gov/rules/final/2011/ia-3222.pdf>.

<sup>9</sup> See Form ADV and Investment Advisers Act Rules, Rel. No. IA-4509 (Aug. 25, 2016), available at <https://www.sec.gov/rules/final/2016/ia-4509.pdf>. See also American Bar Association, Business Law Section (avail. Jan. 18, 2012), available at <http://www.sec.gov/divisions/investment/noaction/2012/aba011812.htm>.