

**NASD MODIFIES EXEMPTION FOR
FOREIGN INVESTMENT COMPANIES IN NEW ISSUE RULE**

On August 6, 2004, the NASD published an interpretive letter that limits the exemption for purchasers of New Issue Securities that are foreign investment companies to companies that offer their securities “to the public.” The interpretive letter is on the NASD Web site at http://www.nasdr.com/2910/2790_03.asp.

NASD Rule 2790, which replaced the “Hot Issue Rule,” governs the offer and sale of New Issue Securities (primarily equity IPO securities). Rule 2790 provides that NASD member broker-dealer firms may not sell New Issue Securities to any account in which “Restricted Persons” have a beneficial interest. Restricted Persons include, among others, directors, officers, employees and certain owners of securities broker-dealers, and managers of private investment funds. NASD Rule 2790 provides an exemption from this restriction for offers and sales made to Foreign Investment Companies. A Foreign Investment Company is defined in Rule 2790 as:

An investment company organized under the laws of a foreign jurisdiction, provided that:

- (A) the investment company is listed on a foreign exchange or authorized for sale to the public by a foreign regulatory authority; and
- (B) no person owning more than 5% of the shares of the investment company is a restricted person.

The NASD stated when adopting Rule 2790 that a Foreign Investment Company would not be considered to be authorized for sale “to the public” by a foreign regulatory authority if the Foreign Investment Company was offered only to high net worth investors. The NASD, in this recent interpretive letter, has now indicated that the requirement that the Foreign Investment Company be “offered to the public” and not restricted to high net worth investors would also apply if the Foreign Investment Company were listed on a foreign exchange. Therefore, any Foreign Investment Company wishing to rely on this exemption would be required to be offered to the public and not be restricted to high net worth investors. It is not sufficient simply to be listed on a foreign exchange to meet the first part of the definition.

If you are a broker-dealer selling New Issues to foreign investment funds or a fund in which a foreign investment fund has been an investor and treated as eligible to participate in New Issue profits, you should reconfirm that the foreign investment fund meets the new requirement of being publicly offered in addition to being listed on an exchange.

The following paragraph could be substituted in a subscription or other questionnaire asking an investor to confirm that it is a Foreign Investment Company.

Yes No You are an investment company organized under the laws of a foreign jurisdiction, and all of the following are true: (i) ownership of your shares is not limited to high net worth investors, (ii) no Restricted Person owns more than 5% of your shares, and (iii) you are listed on a foreign exchange for sale to the public or are authorized for sale to the public by a foreign regulatory authority.

If the foreign investment fund does not meet this requirement it should be treated as restricted unless another exemption is available. A foreign investment fund offered only to high net worth investors, and not now able to rely on the Foreign Investment Company exemption, may be able to rely on another exemption for private investment funds in which the aggregate beneficial ownership by Restricted Persons is 10% or less. However, a fund would have to determine if its investors are Restricted Persons in order to determine if this 10% de minimis exemption is available.

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If you have any questions concerning this new interpretation of “Foreign Investment Company” in NASD Rule 2790, please contact Daniel Schloendorn (212-728-8265 or dschloendorn@willkie.com), Emily Zeigler (212-728-8284 or ezeigler@willkie.com) or Martin R. Miller (212-728-8690 or mmiller@willkie.com).

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