

CLIENT MEMORANDUM

SEC Fines Non-U.S. Entities for Unregistered Cross-Border Brokerage and Advisory Activities

October 25, 2016

AUTHORS

James R. Burns | **Kimberly Beattie Saunders**

A recent settlement involving a foreign financial institution, its non-U.S. subsidiaries, and the U.S. Securities and Exchange Commission (the “SEC”) demonstrates that the SEC continues to vigorously police the activities of foreign firms that reach into the United States. The settlement underscores the SEC’s recent focus on entities that have avoided broker-dealer or investment adviser registration¹ and helps to further define the scope of activities that require registration under the federal securities laws.

On October 18, 2016, the SEC announced a settlement order (the “Order”) involving over a decade of unregistered cross-border activities by Bank Leumi le-Israel B.M., Bank Leumi (Luxembourg) S.A., and Leumi Private Bank (collectively, “Bank Leumi”).² The Order resolves charges that Bank Leumi had, without registering as a broker-dealer, induced

¹ See, e.g., “SEC Enforcement Act Relating to Private Equity Transaction Fees and Broker-Dealer Registration,” Willkie Farr & Gallagher LLP Client Memorandum (Jun. 2, 2016) available [here](#); *In the Matter of Blackstreet Capital Management, LLC et al.*, Exchange Act Release No. 77959 (Jun. 1, 2016); and *In the Matter of Ranieri Partners LLC and Donald W. Phillips*, Exchange Act Release No. 69091 (Mar. 8, 2013).

² *SEC Charges Bank Leumi With Conducting Unregistered U.S. Cross-Border Business*, SEC Press Release, (Oct. 18, 2016), available [here](#). Bank Leumi le-Israel B.M. is a banking corporation founded in 1902, and incorporated and domiciled in Tel Aviv, Israel. Leumi Private Bank, a wholly owned subsidiary of Bank Leumi le-Israel B.M. that is headquartered in Zurich, Switzerland, provides private banking services to international high net worth individuals. Bank Leumi (Luxembourg) S.A., a wholly owned subsidiary of Bank Leumi le-Israel B.M. that is located in Senningerberg,

SEC Fines Non-U.S. Entities for Unregistered Cross-Border Brokerage and Advisory Activities

Continued

securities transactions for U.S. customers from 2002 through 2013.³ The Order also resolved charges that Leumi Private Bank had provided investment advice to U.S. clients from 2002 through at least 2009 without registering as an investment adviser.⁴ In announcing the charges and associated penalty, Scott Friestad, Associate Director of the SEC's Division of Enforcement, noted that Bank Leumi continued its unregistered activities long after it was aware that its actions were not in compliance with the U.S. federal securities laws.⁵

Background

The Order states that from 2002 through 2013, Bank Leumi relationship managers solicited, established, and maintained brokerage accounts for certain U.S. customers; accepted and executed orders for securities transactions; actively solicited securities transactions; handled certain U.S. customers' funds and securities; and provided account statements and other account information to U.S. customers. Bank Leumi received transaction-based compensation for these services. In addition, from 2002 through at least 2009, Leumi Private Bank provided, and was compensated for providing, investment advice to U.S. clients using U.S. jurisdictional means. Bank Leumi relationship managers traveled to the U.S. to meet with existing or prospective customers or clients, soliciting securities transactions or providing investment advice. The Order indicates that at least 65 trips to the U.S. were made over this time period, involving at least 245 individual meetings with existing and potential customers and clients. In addition to the U.S. travel, Bank Leumi's relationship managers used the phone, mail, and e-mail to communicate with customers and clients located in the United States and discussed securities transactions and investment recommendations. At no time was a Bank Leumi entity registered under the U.S. federal securities laws as either a broker-dealer or an investment adviser, and no exemption from such registration was available.

The SEC notes that as early as 2008, Bank Leumi was aware, based on advice from U.S. counsel and a peer institution's public announcements, that providing services of this nature in the U.S. or otherwise using the mails or means of interstate commerce in connection with its activities could require U.S. broker-dealer or investment adviser registration. That same year, Bank Leumi adopted policies and procedures designed to comply with the U.S. federal securities laws and prevent its employees from traveling to the United States to solicit new or service existing U.S. customers (including to solicit or to attempt to solicit securities transactions) or otherwise to provide brokerage services to U.S. customers.

Luxembourg, serves as the marketing arm for the Bank Leumi private banking services. In March 2015, Bank Leumi finalized the sale of the majority of its private banking business to Julius Baer.

³ See *In the Matter of Bank Leumi le-Israel B.M., Leumi Private Bank, and Bank Leumi (Luxembourg) S.A.*, Exchange Act Release No. 34-79113 (Oct. 18, 2016).

⁴ *Id.*

⁵ See *SEC Charges Bank Leumi With Conducting Unregistered U.S. Cross-Border Business*, SEC Press Release, (Oct. 18, 2016), available [here](#) (indicating "Bank Leumi's efforts to come into compliance with these laws took years, during which time the bank continued to profit from its unlawful cross-border business").

SEC Fines Non-U.S. Entities for Unregistered Cross-Border Brokerage and Advisory Activities

Continued

However, these policies failed to prevent continued violations of the federal securities laws. According to the Order, the SEC identified at least 711 customer accounts that held securities and were beneficially owned by U.S. customers. Bank Leumi maintained the majority of these U.S. customer securities accounts that received services in violation of the U.S. federal securities laws until 2011. Following an internal review that identified continuing compliance issues, nearly all of these accounts were closed by the end of 2011 and the last of the accounts was closed in 2015.

Settlement

The SEC charged Bank Leumi with violating the broker-dealer registration requirements of Section 15(a) of the Securities Exchange Act of 1934 and charged Leumi Private Bank with violating the investment adviser registration requirements of Section 203(a) of the Investment Advisers Act of 1940. Notably, Bank Leumi agreed to admit to the facts in the SEC's order, conceded the SEC's jurisdiction, acknowledged that its conduct violated the federal securities laws, and accepted a censure and a cease-and-desist order. Bank Leumi also agreed to pay \$65,700 in disgorgement, \$8,713.20 in interest, and a \$1,517,715 penalty. The SEC action follows a December 2014 deferred prosecution agreement with the U.S. Department of Justice involving violations of U.S. tax laws. Under that agreement, Bank Leumi agreed to pay \$3,307,000 in disgorgement that was associated with profits from U.S. securities accounts.⁶ This agreement also required Bank Leumi to cease providing banking and investment services for all accounts held or beneficially owned by U.S. taxpayers.

Conclusion

The Order is an important reminder that the SEC continues to focus on the scope of activities that could require registration as a broker-dealer or investment adviser. It also highlights that the SEC interprets its jurisdiction to extend to activities of foreign financial institutions that occur in the United States or are conducted using the means of U.S. interstate commerce. In appropriate circumstances, access to the U.S. markets may still be permissible for non-U.S. financial institutions that do not plan to register as broker-dealers or investment advisers. For example, limited brokerage services may be provided pursuant to Rule 15a-6 under the Securities Exchange Act of 1934. Similarly, an entity may provide limited investment advice in accordance with the line of no-action letters known as the *Unibanco* letters.⁷ Other exemptions from registration may be available as well. However, given the SEC's current enforcement focus, it is critical that financial institutions take care to conduct their activities with an understanding of the regulatory requirements associated with the provision of brokerage and advisory services to U.S. clients and customers – including, for many firms, registration as an investment adviser, broker-dealer, or both.

⁶ See *Bank Leumi Admits to Assisting U.S. Taxpayers in Hiding Assets in Offshore Bank Accounts*, Dept. of Justice Press Release (Dec. 22, 2014), available [here](#). The deferred prosecution agreement required a full payment of \$270,000,000 to the United States, including a \$157,000,000 penalty for U.S. taxpayer accounts held at Leumi Private Bank in Switzerland.

⁷ The letters (collectively, the *Unibanco* letters) include: *Uniao de Bancos de Brasileiros*, SEC No-Action Letter (Jul. 28, 1992); *The National Mutual Group*, SEC No-Action Letter (Mar. 8, 1993); *Mercury Asset Management plc*, SEC No-Action Letter (Apr. 16, 1993); *Kleinwort Benson Investment Management Limited*, SEC No-Action Letter (Dec. 15, 1983); *Murray Johnstone Holdings Ltd.*, SEC No-Action Letter (Oct. 7, 1994); *ABN AMRO Bank N.V.*, SEC No-Action Letter (Jul. 1, 1997); and *Royal Bank of Canada et al.*, SEC No-Action Letter (Jun. 3, 1998).

SEC Fines Non-U.S. Entities for Unregistered Cross-Border Brokerage and Advisory Activities

Continued

If you have any questions regarding this memorandum, please contact James R. Burns (202-303-1241, jburns@willkie.com), Kimberly Beattie Saunders (202-303-1268, ksaunders@willkie.com) or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.

October 25, 2016

Copyright © 2016 Willkie Farr & Gallagher LLP.

This memorandum is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum may be considered advertising under applicable state laws.