



DIVISION OF  
TRADING AND MARKETS

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

December 31, 2009

Jack P. Drogin, Esq.  
Schiff Hardin LLP  
1666 K Street Northwest  
Washington, DC 20006

Re: Exemption of BNY Mellon Capital Markets, LLC from Paragraphs (a)(2)(i)(A) and (a)(2)(i)(D) of Rule 10b-10 under the Exchange Act

Dear Mr. Drogin:

Based on the facts and representations set forth in your letter dated December 31, 2009, we find that it is appropriate in the public interest and consistent with the protection of investors to grant, and hereby grant, to Capital Markets,<sup>1</sup> an exemption pursuant to Rule 10b-10(f) under the Exchange Act from the requirements in: (1) paragraph (a)(2)(i)(A) of Rule 10b-10 to disclose to Customers of Capital Markets the name of the person from whom a security was purchased, or to whom it was sold, or the fact that such information will be provided upon the Customer's written request; and (2) paragraph (a)(2)(i)(D) of Rule 10b-10 to disclose the source and amount of other remuneration received or to be received by Capital Markets in connection with the transaction, for transactions in Illiquid Debt Securities effected on the Auction Platform on behalf of Customers by Capital Markets.<sup>2</sup>

The exemption is subject to modification or revocation if at any time the Commission or the staff of the Division of Trading and Markets determines that such action is necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, this exemption from Rule 10b-10 is based solely upon the representations you have made and is strictly limited to the facts and conditions described in your incoming

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<sup>1</sup> Unless otherwise noted, each defined term in this letter has the same meaning as defined, directly or by reference, in your letter.

<sup>2</sup> As requested in your letter, this exemption also extends to Pershing LLC and to any successor clearing broker clearing transactions effected by Capital Markets through the Auction Platform.

letter.<sup>3</sup> Any different facts or circumstances, including any changes to the operation of the Auction Platform, including the expansion of the Auction Platform to include securities or customers beyond the type described in your letter, may require a different response.<sup>4</sup> Finally, we express no view with respect to other questions the proposed activities of the Auction Platform may raise, including the applicability of other federal or state laws or the applicability of self-regulatory organization rules concerning customer accounts statements or confirmations.

You request, under 17 C.F.R. Section 200.81(b), that your letter and the staff's response be accorded confidential treatment for 120 days following the date of our response. Because we believe that your request for confidential treatment is reasonable and appropriate, we grant it.

For the Commission, by the Division  
of Trading and Markets, pursuant to  
delegated authority,<sup>5</sup>



Paula R. Jenson  
Deputy Chief Counsel

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<sup>3</sup> We note your representations that: (1) SSC is owned by the Bank; (2) the Auction Platform will be operated by Capital Markets; and (3) Capital Markets will keep and maintain records of the identities of counterparties as required by Rules 17a-3 and 17a-4 under the Exchange Act.

<sup>4</sup> In this respect, we note that any changes to the operation of the Auction Platform may also require Capital Markets to update its Form ATS.

<sup>5</sup> 17 CFR 200.30-3(a)(32).



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December 31, 2009

**FOIA CONFIDENTIAL**  
**TREATMENT REQUESTED**

Mr. James L. Eastman  
Associate Director and Chief Counsel  
Division of Trading and Markets  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549

Re: Request for Exemption from Paragraphs (a)(2)(i)(A) and (a)(2)(i)(D) of Rule 10b-10  
under the Exchange Act

Dear Mr. Eastman:

On behalf of our client BNY Mellon Capital Markets, LLC, a registered broker-dealer and member of the Financial Industry Regulatory Authority ("Capital Markets"), Schiff Hardin LLP respectfully requests that the Securities and Exchange Commission ("Commission") exempt Capital Markets from the requirements in (1) paragraph (a)(2)(i)(A) of Rule 10b-10 under the Securities Exchange Act of 1934 ("Exchange Act") to disclose to a customer (each, a "Customer"), upon written request or otherwise, the name of the person from whom the security was purchased, or to whom it was sold ("Contra-Party Information"), or the fact that such information will be provided upon the Customer's written request and (2) paragraph (a)(2)(i)(D) of Rule 10b-10 to disclose to the Customer the source and amount of remuneration received or to be received by Capital Markets ("Other Remuneration") in connection with transactions effected by Capital Markets as sponsor of Structured Credit Connection ("SCC"), an Internet-based system owned by The Bank of New York Mellon ("Bank"), that includes a securities auction platform (the "Auction Platform"), as described below.<sup>1</sup>

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<sup>1</sup> Capital Markets requests further that the Commission grant an exemption from paragraphs (a)(2)(i)(A) and (a)(2)(i)(D) of Rule 10b-10 to Pershing LLC, as clearing broker to Capital Markets, and to any successor clearing broker clearing transactions effected by Capital Markets through the Auction Platform, as described herein. The Commission's exemptive authority is set forth in paragraph (f) of Rule 10b-10. The Division of Trading and Markets has delegated authority to issue Rule 10b-10 exemptions pursuant to 17 CFR 200.30-3(a)(32).

I. Background - Structured Credit Connection

SCC is an Internet-based system that is intended to provide a central location to facilitate monitoring of portfolios of, price discovery for and transactions in certain illiquid debt securities (“Illiquid Debt Securities”)<sup>2</sup> by major institutional investors, broker-dealers and certain federal agencies. Transactions through the Auction Platform will be effected by means of anonymous single-seller, multiple-bidder auctions initiated and controlled by sellers.<sup>3</sup>

Among other things, SCC will provide tools that will allow system users to monitor their holdings and provide information regarding the Illiquid Debt Securities they may be interested in selling or purchasing. In this regard, SCC will provide the means by which a system user may input an Illiquid Debt Security it owns or in which it has an interest into its private home page within the system, and this information will be used by the system to provide alerts to the user when a similar security is being auctioned by another system user through the system. The system also will provide pricing tools and other information by which system users can monitor and analyze the Illiquid Debt Securities in their portfolios. Likewise, system users will be able to access publicly-available documents, such as trustee reports and offering documents relating to the Illiquid Debt Securities, through the system. Finally, certain users of the system (i.e., “Subscribers”) will be permitted to participate in individualized, anonymous auctions of these Illiquid Debt Securities through the system.<sup>4</sup>

A user of the SCC system that wishes to participate in an auction through SCC as a Subscriber (other than a registered broker-dealer) must become a Customer of Capital Markets and meet certain credit and other criteria. Once it receives approval from Capital Markets to participate in auctions, a Subscriber may initiate an auction by submitting a request through the system to Capital Markets. As a pre-condition to instituting an auction, the Illiquid Debt Securities that a selling Subscriber wishes to sell must be maintained in a custody account at the Bank during the pendency of the auction. Once delivery has been confirmed, the selling Subscriber specifies on the auction portion of the platform the Illiquid Debt Securities it wishes to sell through the auction, the length of time the auction will remain open, the

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<sup>2</sup> The financial instruments initially auctioned through the Auction Platform will be residential mortgage-backed securities, collateralized debt obligations, asset-backed securities and whole loans. SCC is registered as an alternative trading system, as that term is defined in Rule 300(a) of Regulation ATS.

<sup>3</sup> Customers, other than governmental agencies, will meet the definition of “qualified institutional buyer” (“QIB”) as that term is defined in Rule 144A under the Securities Act of 1933.

<sup>4</sup> It is anticipated that not all users of the system will be participants in auctions through the system. Subscribers will be limited to Customers and registered broker-dealers. Although the SCC platform is owned and operated by the Bank, through its Global Corporate Trust division, the Auction Platform will be operated by Capital Markets, a registered broker-dealer affiliate of the Bank.

minimum price the seller will accept in the auction (which price will be disclosed to bidders), and the type of auction it wishes to initiate.<sup>5</sup> Interested bidders may submit their bids at any time during the pendency of an auction. At the completion of an auction, the highest bid will be matched with the seller, and the trade will be executed.<sup>6</sup> Trades effected by Capital Markets through the Auction Platform will be executed as agency cross transactions. Upon the successful completion of an auction, the subject Illiquid Debt Securities will be delivered from the selling Subscriber's custody account at the Bank to Pershing, LLC ("Pershing") for settlement, and the purchasing Subscriber will deliver the purchase price, plus applicable transaction fees and commissions to Pershing, a registered broker-dealer and affiliate of Capital Markets, which will clear and settle the trade on a delivery vs. payment/receipt vs. payment ("DVP/RVP") basis. Neither the Bank, Capital Markets nor Pershing will give any investment advice or recommendations to Subscribers through SCC. All investment decisions are made solely by the Subscribers participating in the auctions.

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<sup>5</sup> The three types of auctions currently available through SCC are an English auction, an English With Proxy Bidding auction, and a First Price Sealed auction. In an English auction, a bidder may begin bidding with a low price. As progressively higher bids are submitted, the price is raised incrementally until either the auction is closed or no higher bids are received. At the completion of the auction, the bidder with the highest bid, subject to any reserve price wins. In an English With Proxy Bidding auction, the winning bidder pays the price of the second-highest bid plus a defined increment. This type of auction is very similar to an English auction; however, the price paid is determined only by competitors' bids and not necessarily by the amount of the new bid. When participating in this type of auction, a bid will automatically be adjusted within a range the bidder sets at the time it submits its bid. If a bidder is the leading bidder and a competitor submits a higher bid, the leading bidder's bid will automatically increase to an amount greater than the competitor's bid, or the leading bidder's proxy (maximum bid), whichever is lower. If, at the completion of the auction the leading bidder has the highest bid, subject to any reserve price, such bidder wins. In the third type of auction, a First Price Sealed Bid auction bidder can submit bids in a concealed fashion. At the completion of the auction, the submitted bids are then compared and if a bidder has the highest bid, subject to any reserve price, that bidder wins. Additional auction types may be available in the future through SCC.

<sup>6</sup> Each auction run through the system is separate and distinct from every other auction on the system. A seller wishing to sell numerous different Illiquid Debt Securities may have more than one auction open at any one time. A seller may sell the same Illiquid Debt Security in more than one auction at any time (as long as the securities offered in each auction collectively are maintained in custody as required before the auctions are initiated). Likewise, more than one seller may be auctioning the same Illiquid Debt Security in different auctions at the same time. Illiquid Debt Securities owned by different Subscribers, however, will never be combined into a single auction.

Similarly, bidders may submit bids to a single auction for a particular Illiquid Debt Security, or may submit bids into multiple open auctions for that same Illiquid Debt Security at the same time. Bids, however, will never be transferred by the system from one auction into another auction for the same Illiquid Debt Security. A bidder may withdraw its bid at any time before the completion of the auction. Only the winning bid in each auction, if it meets or exceeds the seller's minimum acceptable price, will receive an execution.

At no time are the identities of the Subscribers made available to other Subscribers or to the general public. In the event that one of the counterparties to a successful auction fails to deliver the subject Illiquid Debt Securities or the purchase price for those Illiquid Debt Securities within the applicable settlement period, however, Capital Markets may, in its discretion, inform the non-defaulting party of the identity of the defaulting party.<sup>7</sup>

II. Request for Exemptive Relief for Capital Markets

**(a) Rule 10b-10(a)(2)(i)(A)**

Rule 10b-10, among other things, requires that a broker-dealer disclose to its customers the identity of the party the broker-dealer sold to or bought from to fill the customer's order ("Contra-Party Information"). Specifically, under paragraph (i)(A) of Rule 10b-10(a)(2), when a broker-dealer is acting as agent for a customer, some other person, or for both the customer and some other person, the broker-dealer must identify the party to whom securities were sold or from whom securities were purchased, to fill the customer's order. A broker-dealer can provide this information on the confirmation, or it may provide the information to the customer at a later time after receiving a written request from the customer. The broker-dealer selecting the latter option must disclose on the confirmation that the Contra-Party Information will be provided upon written request.

**(b) Rule 10b-10(a)(2)(i)(D)**

Rule 10b-10(a)(2)(i)(D) requires a broker-dealer, acting as agent for its customer, to disclose to its customer the source and amount of remuneration received by the broker-dealer from persons other than the customer in connection with a transaction. As is the case for Contra-Party Information, the broker-dealer can provide this information on the confirmation, or it may provide the information to the customer at a later time after receiving a written request from the customer. The broker-dealer selecting the latter option must disclose on the confirmation that the Other Remuneration will be provided upon written request.

**(c) Policy Reasons for not Requiring Contra-Party Information and Other Remuneration Requirements**

The requirements to provide Contra-Party Information and Other Remuneration were adopted as part of Rule 10b-10 to provide disclosure upon request to a customer in cases where the identity of the other side to a transaction and that the fact that the customer's broker-dealer was receiving remuneration from the "other side" of the transaction might have a bearing on a recommendation the broker-dealer had made to the customer, the market or manner of execution, the price at which the

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<sup>7</sup> Capital Markets will keep and maintain records of the identities of counterparties as required by Rules 17a-3 and 17a-4 under the Exchange Act.

transaction was crossed, or any of these items. In discussing the Contra-Party Information and Other Remuneration requirements, the Commission stated that:<sup>8</sup>

Brokers have often represented both parties to a transaction but such dual representation often presents a potential for abuse since there is a prima facie problem in representing fairly the interests of parties having conflicting interests, particularly if the broker is given substantial discretion. Equally important, it may be difficult, long after the fact, to reach firm conclusions about the broker's resolution of conflicts in such situations. While disclosure of the source and amount of remuneration is one means of alerting customers to possible conflicts of interest, the likelihood of problems may be lessened for securities transactions which are made in relation to prices established in an independent market and are widely reported.

As discussed above, the buyers and sellers of Illiquid Debt Securities through the SCC auctions will not be disclosed to one another (except possibly in the event of a default by one party to a trade). Similarly, the identities of the sellers and bidders for Illiquid Debt Securities auctioned through SCC will not be made available to SCC Subscribers or to the general public. It is the anonymity of SCC auctions that entices Subscribers to sell and purchase Illiquid Debt Securities through SCC. Information on the identity of the participants or the prices at which they are willing to sell and purchase the Illiquid Debt Securities sold through SCC could otherwise influence the willingness of Subscribers to participate and the prices at which Subscribers are willing to purchase or sell the auctioned Illiquid Debt Securities. In some cases, Subscribers may include governmental agencies that would not want their identities disclosed in order to comply with applicable law or regulation or otherwise for reasons of public policy. Subscribers will agree upon subscribing to SCC that they will not request, nor will they be informed, of the names of counterparties to transactions effected as a result of SCC auctions, except, in Capital Markets' discretion, in the event of a default.<sup>9</sup> To permit a Subscriber who has willingly agreed to the condition of anonymity to defeat the legitimate expectations of the other Subscribers by using Rule 10b-10 to discover the identity of a counterparty would undermine the operation of the SCC auctions. There is no reason for a Subscriber to expect, under the circumstances of trading through Capital Markets as sponsor of the SCC auctions that the Subscriber should have reason to know the identity of a

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<sup>8</sup> Securities Exchange Act Release No. 12806 (September 16, 1976) in text preceding n. 9. In the release adopting the disclosure requirement, the Commission noted that the provision in the proposed rule, adopted in modified form (*e.g.*, to delete a reference to discretionary accounts) had replaced a more exacting and onerous provision in the former Rule 15c1-4 that had proven unworkable in the environment of negotiated commission rates. Securities Exchange Act Release No. 13508 (May 5, 1977) in text accompanying nn. 35-42.

<sup>9</sup> Capital Markets may also disclose the identities of the counterparties where required by other law or regulation, including upon request of a court, a governmental agency or a self-regulatory organization of applicable jurisdiction.

counterparty, because it is or should be indifferent to that information, has not relied on the credit of the counterparty in agreeing to do the trade<sup>10</sup> and has willingly undertaken to trade in a system that it knows has established strict anonymity as a precondition to participation.

The SCC auctions will not involve any of the opportunities for conflict or customer abuse that the Commission sought to control in requiring disclosure of Contra-Party Information and Other Remuneration. Securities auctions are initiated by sellers of the Illiquid Debt Securities, and bids are made by interested Subscribers, in each case without any recommendation by SCC or Capital Markets personnel. Capital Markets and SCC exercise no discretion in connection with Illiquid Debt Securities auctioned through SCC, and neither Capital Markets nor SCC influences the price or prices of any transactions, the manner of execution or any other aspect of the trade as it is being effected by a Subscriber. Accordingly, there is no opportunity for the conflicts to arise that the requirements in Rule 10b-10 to provide Contra-Party Information or Other Remuneration sought to address.

Revealing the amount of compensation paid by the counterparty could in some cases remove a significant part of the anonymity intended by SCC and agreed to by Subscribers. The commissions paid by certain Subscribers (e.g., a broker-dealer) may differ significantly from that paid by other Subscribers (e.g., a governmental agency), and, in a given case, knowing whether the counterparty was a broker-dealer or a governmental agency might go a long way towards revealing the identity of the counterparty, particularly if the inquisitive Subscriber knew there were only a few other market participants that were likely to be trading a particular Illiquid Debt Security at a particular time. For that reason, we request that the Commission exempt Capital Markets from paragraph (a)(2)(i)(D) as well as paragraph (a)(2)(i)(A). We note further that granting the relief requested will help enable Capital Markets to provide liquidity to Illiquid Debt Securities that otherwise would trade, if at all, in an illiquid market.

We therefore request on behalf of Capital Markets that the Commission exempt Capital Markets from providing to its Customers that are selling or purchasing Illiquid Debt Securities as Subscribers to SCC's auction system from the requirements in Rule 10b-10(a)(2)(i) to provide those Customers with the Contra-Party Information and Other Remuneration amount, either on the confirmation or upon written request. We note that substantially identical relief was previously granted by delegated authority to another alternative trading system operated by broker-dealer effecting transactions as agent for their subscribers.<sup>11</sup>

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<sup>10</sup> As noted above, the securities to be sold in an auction are held in a custody account at the Bank during the pendency of an auction and will be delivered to Pershing for settlement of the trade at the completion of the auction. Furthermore, all auction participants will be required to meet credit and other criteria, such as holding QIB status.

<sup>11</sup> See *Bloomberg Tradebook LLC* (December 18, 1997). This relief was recently re-affirmed when Bloomberg TradeBook LLC entered into a new clearing arrangement with Calyon Securities (USA) Inc. See *Wilkie Farr & Gallagher LLP and Cadwalader, Wickersham & Taft LLP* (December 31, 2007).

Mr. James L. Eastman  
December 31, 2009  
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By separate letter, we are requesting that this letter and the staff's response be afforded confidential treatment as provided in Regulation 200.83 of the Rules of Practice of the Commission, or alternatively, that his letter and the staff's response be kept confidential for a period of 120 days from the date of the staff's response pursuant to Section 200.81 of the Rules of Practice.

If you have any questions, please contact me at 202-778-6422.

Sincerely,



Jack P. Drogin

Cc: Paula R. Jenson  
Ignacio A. Sandoval  
Deborah H. Kaye  
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