

August 13, 2014

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Mary J. Kosterlitz, Esq.  
Chief, Office of Enforcement Liaison  
Division of Corporation Finance  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549

Re: In the Matter of Barclays Capital Inc. File No. \_\_\_\_.

Dear Ms. Kosterlitz:

This letter is submitted on behalf of Barclays PLC and its affiliates (“Barclays”), in connection with the settlement of the above-captioned administrative proceeding by the Securities and Exchange Commission (the “Commission” or “SEC”) with Barclays Capital Inc. (“BCI”), a broker-dealer subsidiary of Barclays PLC. The settlement resulted in the entry of an administrative and cease-and-desist order against BCI (the “Order”), which is described below.

Pursuant to Rule 405 promulgated under the Securities Act of 1933 (the “Securities Act”), Barclays hereby requests that the Division of Corporation Finance, acting on behalf of the Commission, determine that for good cause shown it is not necessary under the circumstances that Barclays be considered an “ineligible issuer” under Rule 405. Barclays requests that this determination be effective upon the entry of the Order. The staff of the Division of Enforcement has informed us that it does not object to the grant of the requested waiver.

**BACKGROUND**

On \_\_\_\_\_, 2014, BCI entered into a settlement with the Commission resulting in the Commission issuing the Order. BCI consented to the entry of the Order, which found that BCI willfully violated the Advisers Act Sections 204(a), 206(2), 206(3), 206(4), and 207 and Rules 204-2, 206(4)-2, and 206(4)-7 thereunder arising as a result of BCI’s systemic failures after it acquired Lehman Brothers Inc.’s advisory business in September 2008. The Order found that when BCI integrated this advisory business into its existing business, it did not enhance its infrastructure to support the new business, did not adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act, and did not make and keep certain books and records.

The Order also found these deficiencies contributed to other violations – specifically, that BCI:

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- executed more than 1,500 principal transactions with its advisory client accounts without required written disclosures or client consent;
- charged commissions and fees, and earned revenues, that were inconsistent with its disclosures to 2,785 advisory client account;
- violated custody provisions of the Advisers Act; and
- underreported its assets under management in its March 31, 2011 amendment to its Form ADV by \$754 million.

Solely for the purpose of settling these proceedings, BCI consented to the Order without admitting or denying the matters in it (except the Commission's jurisdiction). The Order requires BCI to cease and desist from committing or causing any violations and any future violations of Advisers Act Sections 204(a), 206(2), 206(3), 206(4), and 207 and Rules 204-2, 206(4)-2 and 206(4)-7; censures BCI; and requires BCI to pay a civil monetary penalty of \$15,000,000. BCI must also comply with certain undertakings, including retaining an independent compliance consultant ("IC") within 270 days of the date of this Order, notify existing and prospective clients of the order, and keep records of BCI's compliance with the undertakings.

## DISCUSSION

In 2005, the Commission revised the registration, communications, and offering processes under the Securities Act.<sup>1</sup> As part of this offering reform, the Commission revised Securities Act Rule 405, creating a new category of issuer, the "well-known seasoned issuer" (or "WKSI"), and a new category of offering communication, the "free writing prospectus." A well-known seasoned issuer is eligible for important reforms that have changed the way corporate finance transactions for larger issuers are planned and structured. These reforms include the ability to "file-and-go" (i.e., eligibility for automatically effective shelf registration statements) and "pay-as-you-go" (i.e., the ability to pay filing fees as the issuer sells securities off the shelf). These reforms have removed the risk of regulatory delay in connection with capital formation. In addition, well-known seasoned issuers are provided with the most flexibility in terms of communications, including the ability to use free writing prospectuses in advance of filing a registration statement.

The Commission also created another category of issuer under Rule 405, the "ineligible issuer." An ineligible issuer is excluded from the category of "well-known seasoned issuer" and is ineligible to make communications by way of free writing prospectuses, except in limited circumstances.<sup>2</sup> As a result, an ineligible issuer that would otherwise be a well-known seasoned

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<sup>1</sup>See Securities Offering Reform, Securities Act Release No. 8591, Exchange Act Release No. 52,056, Investment Company Act Release No. 26,993, 70 Fed. Reg. 44,722, 44,790 (Aug. 3, 2005).

<sup>2</sup>See Securities Act Rules 164(e), 405 & 433, 17 C.F.R. §§ 230.164(e), 230.405 & 230.433.

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issuer does not have access to file-and-go or pay-as-you-go, and cannot use most free writing prospectuses.

Securities Act Rule 405 authorizes the Commission to determine, “upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer.”<sup>3</sup> The Commission has delegated the function of granting or denying such applications to the Director of the Division of Corporation Finance.<sup>4</sup>

Barclays understands that the entry of the Order would make Barclays an ineligible issuer under Rule 405. As an ineligible issuer as a result of the Order, Barclays would not be able to qualify as a well-known seasoned issuer, and, therefore, would not have access to file-and-go and other reforms available to well-known seasoned issuers, and would not be able to be eligible to take advantage of all of the free writing prospectus reforms of Rules 164 and 433.

### **REASONS FOR GRANTING A WAIVER**

Barclays respectfully requests that the Commission determine that it is not necessary for Barclays to be considered an ineligible issuer as a result of the Order. Applying the ineligibility provisions to Barclays would be disproportionately and unduly severe, for the reasons described below.

#### Nature of Violation: Responsibility for and duration of the alleged violations

The alleged violations addressed in the Order do not pertain to activities undertaken by Barclays in connection with Barclays’ role as an issuer of securities (or any disclosure related thereto) or any of its filings with the Commission or otherwise involve alleged fraud in connection with Barclays’ offerings of its own securities. BCI’s alleged violations occurred over approximately three years in the context of a period of rapid and complex integration by BCI of multiple business lines acquired from Lehman. This integration included Lehman’s former investment advisory business, which was part of a new wealth management offering for BCI in the U.S. As discussed below, BCI has taken steps to address the conduct alleged in the Order.

As noted above, the Order found that BCI failed to take necessary steps to assure that its infrastructure was enhanced to support the integration of Lehman’s advisory business, failed to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act, and failed to make and keep certain required books and records. The Order also found these deficiencies contributed to other violations, specifically BCI’s execution of principal transactions with advisory client accounts without making the proper written

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<sup>3</sup> Securities Act Rule 405, 17 C.F.R. § 230.405.

<sup>4</sup> 17 C.F.R. § 200.30-1(a)(10).

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disclosures or obtaining client consent, inadequate disclosures regarding fees charged to certain advisory client accounts, investments in deposit programs and money market funds on behalf of advisory client accounts that were not eligible to participate in those investments, violations of certain of the custody provisions of the Advisers Act, and underreporting of its assets under management on an amendment to its Form ADV.

The BCI disclosure inadequacies set forth in the Order are related to discrete products or services that were generally new with respect to BCI after the acquisition of Lehman's advisory business. Barclays believes that such conduct does not call into question the reliability of Barclays' current and future disclosure as an issuer of securities because none of the alleged conduct is related in any material way to any of Barclays' current or future disclosures as an issuer of securities. Barclays does not believe that its disclosure controls and procedures as an issuer or its filings with the SEC were deficient.

In addition, the SEC did not make findings of any misconduct by the board of directors, executive management, or other senior officers of Barclays. Moreover, only BCI was held responsible; no affiliated issuer was involved in any way. No Barclays employees are named in the Order, and the SEC did not allege that any of Barclays' directors or senior management were aware of violative conduct or ignored any warning signs or "red flags" regarding the violations.

### Remedial Steps

Barclays has a strong record of compliance with the securities laws and has cooperated with the investigation into this matter by the Division of Enforcement. BCI has taken steps to ensure that the conduct alleged in the Order does not recur. Prior to the SEC Office of Compliance Inspections and Examinations' issuance of a deficiency letter in connection with this matter in January 2012, and for over a year thereafter, BCI retained and used outside specialists to develop and implement an action plan aimed at enhancing its compliance program. BCI also appointed several new senior leaders, including new heads of Compliance, Business Control / Supervision, Marketing Compliance, and Change / Platform Development. In addition, BCI has reimbursed or credited its affected clients approximately \$3.8 million, including interest. Moreover, the Order requires BCI to comply with certain undertakings, including to:

- (a) retain an IC to conduct a review to assess the adequacy of BCI's policies, procedures, controls, recordkeeping, and systems, in particular those relating to (1) BCI's wealth management division's ("BWIM's") trading and investment parameters, billing, reporting, and the related processing of new clients; (2) BCI principal trading for or with BWIM advisory clients; (3) the disclosures to BWIM advisory clients regarding the fees BCI earns, or pays solicitors, in connection with client accounts; (4) the identification of advisory accounts for annual surprise examination and Form ADV filing purposes; (5) the distribution of annual audited financial statements of entities for which BCI is

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authorized to withdraw client funds maintained with a custodian upon its instruction to the custodian; and (6) the receipt of written internal control reports for related persons that maintain custody of assets of BWIM advisory clients;

(b) require the IC to submit a written and detailed report of its findings to BCI and to the Commission staff, which shall include a description of the review performed, the names of the individuals who performed the review, the conclusions reached, and the IC's recommendations for changes or improvements (the "Recommendations");

(c) adopt all of the IC's Recommendations or, in the event BCI considers any Recommendations to be unduly burdensome, impractical, or inappropriate, all of the IC's final determinations regarding the Recommendations;

(d) cooperate fully with the IC and provide the IC with access to such files, books, records and personnel as are reasonably requested by the IC for review;

(e) certify, in writing, implementation of the IC's Recommendations or final determinations;

(f) preserve a record of BCI's compliance with the undertakings; and

(g) provide notice to advisory clients of the Order.

Also, BCI took the following steps to identify and address various deficiencies, and to address compliance and structural issues at various times prior to the entry of the Order:

(a) BCI terminated the conduct addressed in the Order.

(b) BCI has reimbursed or credited its affected clients approximately \$3.8 million, including interest.

(c) BCI created a steering committee to direct various changes, including:

(i) Enhancements to the overall control structure;

(ii) Increased staffing levels;

(iii) Expansion of BWIM General Counsel's responsibilities to include risk and compliance functions;

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- (iv) Formation of a dedicated compliance team for its advisory activities; and
  - (v) Enhanced staffing, training, and evaluation practices and procedures regarding portfolio management, trading, trade allocation, and supervisory controls.
- (d) With respect to marketing, BCI created new procedures for the review, approval and retention of marketing materials and other communications with clients and prospective clients.
- (e) With respect to regulatory reporting, BCI implemented procedures to address the accuracy of regulatory filings and improved processes for identifying, aggregating, calculating, and storing data needed for the Form ADV.
- (f) With respect to principal trades and conflicts of interests, BCI implemented procedures for a more thorough review of potential conflicts and acting on conflicts identified.
- (g) With respect to referral arrangements, BCI established controls associated with cash payments to solicitors pursuant to which BCI must (i) execute a written solicitation agreement with each solicitor that meets all the requirements of Rule 206(4)-3 under the Advisers Act, (ii) require solicitors to provide written disclosure statement to each actual or prospective client that fully describes the referral arrangement, (iii) require the solicitor to obtain from each actual or prospective client a signed and dated copy of the disclosure statement and deliver the executed disclosure statements to BCI for its records, and (iv) obtain an acknowledgement from each referred advisory client that the client has received the relevant investment adviser's Form ADV Part 2A or brochure.

Barclays has not been the subject of an order relating to this type of conduct in the past. Barclays has once previously requested a waiver regarding its WKSII status from the Division of Corporation Finance. Such waiver was granted on June 6, 2007 and related to Barclays Bank PLC's settlement with the Commission. The settlement involved purchases and sales of distressed debt securities by a proprietary trading desk of Barclays Bank PLC during 2002-2003 that resulted in violations of the anti-fraud provisions of the federal securities laws. Barclays Bank PLC strengthened its compliance programs in order to prevent recurrence of such conduct. The conduct that was the subject of the previous waiver request is unrelated to the conduct which is the subject of this request. Taking into account the nature of the conduct and the remediation steps which have been described above, Barclays does not believe that the prior conduct or the conduct that is the subject of this WKSII waiver request calls into question the adequacy of BCI's affiliated issuers' internal controls or their ability to produce reliable disclosure.

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### Impact on Issuer

The Order is the result of substantial negotiations between BCI and the Commission's Division of Enforcement. The Order directs BCI to pay a substantial penalty, cease and desist from violating certain provisions of the Advisers Act, and comply with certain undertakings. Applying ineligible issuer status to Barclays would be unduly and disproportionately severe and impose a significant burden on Barclays.

The WKSI shelf (as defined below) process allows access to the widest possible global investor base and provides an important means of accessing capital and funding for Barclays' global operations. Barclays PLC and Barclays Bank PLC (the holding company and principal bank entity within Barclays) are frequent issuers of securities that are registered with the Commission and offered and sold under its current Form F-3 registration statements (the "WKSI shelf").

Barclays issues a variety of securities that are registered under the WKSI shelf, including ordinary shares, regulatory capital securities (Additional Tier 1 contingent convertibles and Tier 2 subordinated debt), senior debt securities issued in syndicated transactions in "benchmark" size, and "vanilla" and structured senior debt securities under Barclays' Series A MTN program. Since 2009, Barclays has issued off the WKSI shelf the USD-equivalent of approximately \$8.6 billion of regulatory capital securities, which represents approximately 72% of all regulatory capital securities issued by Barclays in that period. In that same period, and including senior funding and securities issued under the Series A MTN program, the USD-equivalent value of all securities issued by Barclays off the WKSI shelf is approximately \$74 billion. These figures demonstrate the importance of the WKSI shelf to Barclays in meeting its capital, funding, and business requirements.

As an ineligible issuer, Barclays would lose the flexibility (i) to offer additional securities of the classes covered by a registration statement without filing a new registration statement, (ii) to register additional classes of securities not covered by the registration statement by filing a post-effective amendment which becomes immediately effective, (iii) to omit certain information from the prospectus, (iv) to take advantage of the pay-as-you-go fees, (v) to qualify a new indenture under the Trust Indenture Act of 1939, as amended, should the need arise, without filing or having the Commission declare effective a new registration statement, or (vi) to use a free writing prospectus other than one that contains only a description of the terms of the securities in the offering or the offering itself, which would severely limit the ability of Barclays to use general or educational marketing materials, such as product brochures or general investment strategy materials that are routinely used and relied upon for product offerings conducted using the WKSI shelf.

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The WKSI shelf process is particularly important to Barclays in light of current regulatory and market conditions. First, it is expected that material quantities of securities will be issued by Barclays PLC and Barclays Bank PLC in coming years for capital raising, general funding needs, and other important business requirements, and the flexibility offered by the WKSI shelf to offer new types of products and register additional types of securities not covered by the WKSI shelf with immediate effectiveness will be critical to achieving successful offerings. Second, because markets remain volatile, the procedural and financial flexibility that a WKSI shelf provides is of particular importance in facilitating swift execution of Barclays' funding and capital raising activities.

In light of these considerations, subjecting Barclays to ineligible issuer status is not necessary under the circumstances, either in the public interest or for the protection of investors, and good cause exists to determine that Barclays should not be considered an ineligible issuer under Rule 405 as a result of the Order. We respectfully request the Division of Corporation Finance to make that determination.

Please contact me at the above listed telephone number if you should have any questions regarding this request.

Sincerely,

A handwritten signature in black ink that reads "Jonathan S. Pressman" followed by a stylized monogram "JSP".

Jonathan S. Pressman