



DIVISION OF
TRADING AND MARKETS

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC 20549

July 15, 2015

Michael Hogan
FOLIO*fn* Investments, Inc.
8180 Greensboro Drive, 8th Fl.
McLean, VA 22102

**Re: FOLIO*fn* Investments, Inc. -- Request for No-Action Relief from Rule 15c2-4(b)(1)
TP Track No. 15-16**

Dear Mr. Hogan:

By letter dated July 15, 2015 (“Letter”), you request on behalf of FOLIO*fn* Investments, Inc. (“Folio”), that the staff of the Division of Trading and Markets (“Division”) provide you with assurance that it will not recommend enforcement action to the Securities and Exchange Commission (“Commission”) under Exchange Act Rule 15c2-4(b)(1) if Folio accepts money received for certain best efforts contingent offerings offered on the Platform in a manner consistent with the Letter and the representations contained therein.¹

Exchange Act Rule 15c2-4(b)(1) states that it shall constitute a “fraudulent, deceptive, or manipulative act or practice, as used in Section 15(c)(2) of the [Exchange] Act, for any broker, dealer . . . participating in any distribution of securities, other than a firm-commitment underwriting, to accept any part of the sale price of any security being distributed unless . . . [i]f the distribution is being made on an ‘all-or-none’ basis, or on any other basis which contemplates that payment is not to be made to the person on whose behalf the distribution is being made until some further event or contingency occurs, (1) the money or other consideration received is promptly deposited in a separate bank account, as agent or trustee for the persons who have the beneficial interest therein, until the appropriate event or contingency has occurred, and then the funds are promptly transmitted or returned to the persons entitled thereto.”² Rule 15c2-4 is designed to protect investors and issuers by insulating the proceeds of an offering from the financial reverses or unlawful activities of a broker-dealer participating in a securities distribution (other than a firm commitment underwriting) once a broker-dealer accepts funds in connection with such offerings. Rule 15c2-4 was adopted in response to situations in which an underwriter or other broker-dealer participating in an offering sold offering securities, collected payments due, and then failed to remit such payments to the person entitled thereto (e.g., sometimes the insolvency of a broker-dealer made it impossible for the issuer to receive the offering proceeds from that broker-dealer).³ Rule 15c2-4(b) imposes an obligation on broker-

¹ We have attached a copy of your letter. Each defined term in our response has the same meaning as defined, directly or by reference, in your attached letter, unless we note otherwise.

² 17 CFR sec. 240.15c2-4(b)(1).

³ Exchange Act Release No. 6689 (Dec. 20, 1961).

dealers to ensure that an issuer receives offering proceeds promptly if a contingency occurs and the transaction closes; or if the contingency is not satisfied the investors receive a prompt reimbursement of their funds.

Folio represents that it offers a Platform to facilitate Folio Customers who wish to submit Conditional Offer(s) in securities offerings, which may include offerings subject to Exchange Act Rule 15c2-4.⁴ In particular, we note that Folio will be accepting funds under Rule 15c2-4 when the customer is required at any point, in an other than firm commitment underwriting, to have funds in the Folio Customer's account to purchase shares in the offering prior to the offering's contingencies being met. For these best efforts contingent offerings made available on the Platform, Folio proposes to promptly sweep (or maintain) an amount of cash equivalent to the relevant Conditional Offer by the customer into (or in) its Cash Sweep Program,⁵ which utilizes FDIC-insured bank accounts. The cash would remain in the FDIC-insured bank accounts used as part of the Cash Sweep Program until such Conditional Offer is (i) cancelled by the customer (if then cancellable), (ii) the conditions of the offering are satisfied and the offering closes, or (iii) the issuer's offering is withdrawn or expired. Once one of these enumerated activities occurs, the funds will be promptly transmitted or returned to the persons entitled thereto.

Based on the facts and representations Folio has made in the Letter, including that the Platform will comply with Rule 10b-9, but without necessarily concurring in Folio's analysis, the Division will not recommend enforcement action to the Commission under Rule 15c2-4(b)(1) if Folio establishes a Platform in which Folio Customers' funds are swept into an FDIC-insured bank account as part of Folio's Cash Sweep Program⁶ for Folio Customers on a daily basis when the Federal Reserve Banks are open, and in particular on Folio's representations that:

1. Folio is a registered, self-clearing broker-dealer that holds cash and securities on behalf of customer accounts pursuant to Exchange Act Rule 15c3-3 and maintains minimum net capital pursuant to Exchange Act Rule 15c3-1.
2. No Folio Customer funds will come into the possession of the issuer until all contingencies are satisfied and the offering closes.
3. Each issuer is unaffiliated with Folio.

⁴ Folio represents that it will comply with the requirements and obligations under the Securities Act of 1933 and the rules thereunder. In particular, in the context of a registered offering, a "Cancel By Date," "Cash Needed By Date," and "Revocation Date" may not precede, nor may customers be invited to transfer funds sufficient to pay for Conditional Offers prior to, the effective date of the related registration statement.

⁵ Folio represents that they use a Cash Sweep Program utilizing FDIC-insured accounts to sweep that portion of Folio Customers' free credit balances, in excess of any amounts maintained as free credit balances, from the Folio Customers' securities accounts to FDIC-insured bank accounts.

⁶ We understand that the funds are not further separated for each offering where the issuer selects a Cash Needed By Date or requires cash to be in the Folio Customer account or in a Cash Sweep Account at the time a Conditional Offer is submitted.

4. Issuers will promptly receive the offering proceeds due to the issuer if the contingencies are satisfied and the offering closes.
5. Folio Customer funds remain in the Cash Sweep Accounts until Settlement Date.
6. In the event that an offering or a Conditional Offer is cancelled or a contingency is not met, Folio will promptly make Folio Customer funds available to the Folio Customer for use.
7. FDIC protection will be afforded to each Folio Customer in its Cash Sweep Program.
8. Except for a de minimis amount of Folio assets treated as non-allowable under SEC Rule 15c3-1, which are used by Folio for testing and demonstrations as well as facilitating customer trading in fractional shares and odd lots, Folio will neither sweep any assets of Folio into any Cash Sweep Accounts that hold funds for securities offered on the Platform, nor otherwise hold assets owned by Folio in such accounts.
9. To the extent a Conditional Offer requires that funds be available in the amount of the Conditional Offer until Settlement Date, the amount of cash required will be promptly swept to or maintained in the FDIC-insured bank accounts used as part of the Cash Sweep Program for the benefit of the Folio Customer until such Conditional Offer is cancelled (if then cancellable), the conditions of the offering are satisfied and the offering closes, or the issuer's offering is withdrawn or expired.
10. The amount of funds for each Folio Customer participating in the Cash Sweep Program at each bank participating in the Cash Sweep Program is recorded daily on Folio's books and records. These amounts are clearly identified and recorded on a distinct section of the stock record or similar record. Furthermore, Folio preserves this record for a period of not less than six years, the first two years in an easily accessible place in a manner consistent with the requirements of Exchange Act Rule 17a-4.
11. Folio treats records pertinent to the establishment and operation of the Cash Sweep Program as its own records and preserves these records for a period of not less than six years, the first two years in an easily accessible place in a manner consistent with the requirements of Rule 17a-4.
12. Folio will make and keep a separate record of each Conditional Offer including:
 - a. Each transfer of offering proceeds to the issuer's account on behalf of the Folio Customer, whether each applicable contingency has been met, any cancellation of a Conditional Offer, and the Settlement Date for the Conditional Offer, and
 - b. A separate file containing a current list of issuers of securities that are carried on its books and records subject to the terms and conditions set forth above.

This position is based solely on the facts presented and representations made in your Letter and is strictly limited to the application of the use of the Cash Sweep Program for purposes of 15c2-4(b)(1), as described above and in your Letter. Any different facts or representations may require a different response. In the event that any material change occurs in

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the facts or representations in your Letter, the use of the Cash Sweep Program for purposes of 15c2-4(b)(1) shall be discontinued, pending presentation of the facts for our consideration. This position is subject to modification or revocation in the future. The Division expresses no view with respect to any other questions the proposed activities may raise, including, but not limited to, the adequacy of disclosure concerning, and the applicability of other federal and state laws or rules of any self-regulatory organization to, the proposed activities. In addition, this no-action position does not address the potential application of the anti-fraud and anti-manipulation provisions of the Exchange Act, particularly Sections 9(a) and 10(b), and Rules 10b-5 and 10b-9 thereunder.

Sincerely,



Josephine J. Tao
Assistant Director

Attachment

July 15, 2015

Josephine J. Tao
Assistant Director
Division of Trading and Markets
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, DC 20549

Re: **Request for No-Action Relief from Rule 15c2-4(b)(1)**

Dear Ms. Tao:

We respectfully request assurance that the staff of the Division of Trading and Markets ("Staff") of the Securities and Exchange Commission ("Commission") will not recommend enforcement action to the Commission against FOLIO*fn* Investments, Inc. ("Folio") under Rule 15c2-4(b)(1) if, subject to certain conditions and in light of certain representations, Folio provides certain services related to offerings to its customers through its electronic platform that services privately placed and/or unlisted securities (the "Platform").

Background

Folio was launched in 1999, is a member of the Financial Industry Regulatory Authority ("FINRA"), and is a member of the Securities Investor Protection Corporation ("SIPC"). Folio is a self-clearing broker-dealer that holds cash and securities on behalf of customer accounts pursuant to Securities Exchange Act of 1934 ("Exchange Act") Rule 15c3-3 and maintains minimum net capital pursuant to Exchange Act Rule 15c3-1. Folio opens and carries securities accounts for persons that may come to Folio through Folio's own marketing and sales efforts or from referrals to Folio from third parties (including, for example, issuers and clients of registered investment advisors) or come to Folio through introducing broker-dealers or funding portals (all of which shall be referred to herein as "Folio Customers"). Folio currently engages primarily in agency trading for Folio Customers and generally does not engage in the business of trading in a principal capacity (except in the context of facilitating its customers' trades), and does not trade options, futures or foreign exchange products. Folio uses a multi-bank cash sweep program ("Cash Sweep Program") utilizing Federal Deposit Insurance Corporation ("FDIC") insured accounts ("Cash Sweep Accounts") to sweep that portion of Folio Customers' free credit balances, in excess of any amounts maintained as free credit

balances, from the Folio Customers' securities accounts to the FDIC-insured bank accounts.¹

The Platform

Folio offers its Platform to facilitate Folio Customers who wish to submit conditional offers to purchase securities ("Conditional Offer(s)") in securities offerings. The Platform automates for issuers² the process of distributing securities (including, but not limited to, private placements and unlisted debt, equity and other types of securities that may be registered)³ to investors. Among other things, the Platform provides means for offer creation, offer management, documentation, customer verification, audit trails, cash movement, offering execution, custody, and settlement.

To create an offer, an issuer determines the terms of the offering that are then displayed on the Platform. Unless the issuer elects otherwise, a Folio Customer is permitted to submit a Conditional Offer in an offering that is both non-binding and is not at the time of submission supported by funds available in the Folio Customer's account or in the Cash Sweep Program. The issuer also is provided the option to specify a date: (i) by which all Conditional Offers, if previously submitted, need to be supported by adequate funds in order to remain outstanding (and not cancelled on the Platform); or (ii) after which any new Conditional Offer would be required to be supported by adequate funds when placed in order to be accepted on the Platform (both, the "Cash Needed By Date").⁴ The amount of funds needed on the Cash Needed By Date is the amount sufficient to pay for the security if the Conditional Offer is accepted by the issuer and the

¹ See paragraphs (a)(17) and (j)(2)(ii) of Exchange Act Rule 15c3-3 regarding certain requirements with respect to broker-dealer sweep programs.

² Folio, or another broker-dealer, may work with or on behalf of an issuer or participate in distribution efforts pursuant to a separate agreement with an issuer.

³ Folio will comply with the requirements and obligations under the Securities Act of 1933 and the rules thereunder. In particular, in the context of a registered offering, a "Cancel By Date," "Cash Needed By Date," and "Revocation Date" (as defined below in the text) may not precede, nor may customers be invited to transfer funds sufficient to pay for Conditional Offers prior to, the effective date of the related registration statement.

⁴ The defined terms used herein to describe functionality or process sequencing on the Platform are intended to be descriptive terms and are used for ease of reference. Such terms may or may not be used currently or evident on the Platform, and may be named differently on the Platform, but will not be changed in a material way as to substance.

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offering closes.⁵ In the event the issuer elects a Cash Needed By Date, Folio will verify on the Cash Needed By Date that the Folio Customer has sufficient available funds to pay for the security either in its account at Folio or in the Cash Sweep Accounts. If there are insufficient funds to pay for the security, the relevant Conditional Offer will be cancelled. If there are sufficient funds, an amount of cash equivalent to the relevant Conditional Offer will be promptly swept to or maintained in (if already swept) the Cash Sweep Program until such Conditional Offer is canceled (if then cancellable), the conditions of the offering are satisfied and the transaction closes, or the issuer's offering is withdrawn or expired.

The Platform also provides for a date on which the offer will expire and no longer be available on the Platform (the "Expiration Date")⁶ if all contingencies have not been satisfied or, if for any other reason, the issuer does not close the offering. For example, an issuer may create an offering on the Platform that would allow investors to cancel any Conditional Offer until the Expiration Date, but specify that funds needed to support the Conditional Offer must be available in the customer's account at Folio or in the Cash Sweep Accounts at least two weeks in advance of the Expiration Date (i.e., the Cash Needed By Date is two weeks before the Expiration Date). In that event, if there are insufficient funds available as of a Cash Needed By Date to support a Folio Customer's outstanding Conditional Offer, such Conditional Offer will be cancelled.

Folio also intends to provide the ability for an issuer to specify a date after which Conditional Offers in the issuer's offering cannot be cancelled by the Folio Customer (the "Cancel By Date"). Conditional Offers would be fully and immediately revocable by the Folio Customer until the Cancel By Date, but not thereafter (unless the offer is cancelled or the Expiration Date passes without the offer closing). In sum, Conditional Offers on the Platform are fully and immediately revocable by an investor at any time until the earlier of (i) all contingencies are satisfied (which is the default) with a closing then expected forthwith, or (ii) if an option available on the Platform and the issuer so elects a Cancel By Date, the Cancel By Date (the earlier of (i) and (ii) being the "Revocation Date").

⁵ As noted, if the Cash Needed By Date is subsequent to the date the investor placed the Conditional Offer, the investor would not be required to have available funds in their Folio account at the time of submitting such Conditional Offer and, perhaps, for some time thereafter.

⁶ After the Expiration Date, the Platform will not accept any new Conditional Offers and the issuer will be required to close the offering within a reasonable period of time (i.e., three to five business days) or all outstanding Conditional Offers will be cancelled and the offering will be removed from the Platform.

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After the Cash Needed by Date, the amounts displayed on the Platform for "cash available for trading" and "cash available for withdrawal" (which may differ based upon pending orders, pending settlements, deposits that have not yet cleared, and other factors) will not reflect the amount of funds needed to settle the Conditional Offer. If the Conditional Offer is cancelled for any reason, all funds associated with the Conditional Offer will again be immediately reflected in the Folio Customer's "cash available for trading" and "cash available for withdrawal" amounts. In sum, the actual cash in the Folio Customer's account and in the Cash Sweep Accounts never changes due to the Conditional Offer – only the stated "cash available for trading" and "cash available for withdrawal" amounts may change.

Consequently, until the Revocation Date, the Folio Customer retains the ability to use all funds in its Folio account for any purpose by cancelling the Conditional Offer. If the Folio Customer has not cancelled its Conditional Offer, the issuer has accepted that Folio Customer's Conditional Offer, the contingencies have been met, and the offering is closed then -- and only then -- are the Folio Customer's funds deducted from the Folio Customer's account balance or withdrawn from the Cash Sweep Accounts and credited to the issuer's account with Folio. Simultaneous with the prompt transfer of funds to the issuer, the Folio Customer receives the issued securities (the "Settlement Date"). The Settlement Date is usually the next business day after the transaction closes (i.e., these securities are usually treated as "T+1 settled" securities).

In all instances, Folio and the Platform will be in compliance with Rule 10b-9.⁷

⁷ Exchange Act Rule 10b-9 prohibits as a manipulative or deceptive device or contrivance any representation that a security is being offered on an "all or none" basis or a "part or none" basis, unless prompt refunds are made to purchasers if the represented number of securities are not sold at the specified price within the specified time and the total amount due the seller is not received by the specified date. See 17 CFR 240.10b-9. We note that the Commission staff has issued guidance regarding Rule 10b-9. See, e.g., Tucson Hotel Associates Letter (April 11, 1985), 1985 SEC No-Act. LEXIS 2922 (stating "under Rule 10b-9 an issuer that reduces the specified minimum number of units to be sold in an offering must return all funds to the subscribers. We believe that a reconfirmation procedure is inappropriate in this context."). If an issuer were to reduce the minimum number of units to be sold in an offering on the Platform, Folio would promptly cancel all then outstanding Conditional Offers for that offering and require the issuer to terminate that offering on the Platform. The issuer could then commence a new offering with the revised minimum number of units to be sold on the Platform.

Rule 15c2-4

Rule 15c2-4 is designed to protect investors and issuers by insulating the proceeds of an offering from the financial reverses or unlawful activities of a broker-dealer participating in a securities distribution (other than a firm commitment underwriting) once a broker-dealer accepts funds in connection with such offerings. Rule 15c2-4 was adopted in response to situations in which an underwriter or other broker-dealer participating in an offering sold offering securities, collected payments due, and then failed to remit such payments to the person entitled thereto (e.g., sometimes the insolvency of a broker-dealer made it impossible for the issuer to receive the offering proceeds from that broker-dealer).⁸ Rule 15c2-4(b) imposes an obligation on broker-dealers to ensure that an issuer receives offering proceeds promptly if a contingency occurs and the transaction closes; or if the contingency is not satisfied the investors receive a prompt reimbursement of their funds.

In reliance on previous staff guidance,⁹ when investors submitted funds payable to a special custodial bank in connection with contingent offerings, broker-dealers established separate bank accounts for each offering in order to comply with Rule 15c2-4(b)(1). Folio, in requesting this relief makes the following representations, which ensures that the policy rationale behind Rule 15c2-4 is complied with by Folio in the context of the Platform:

1. Folio is a registered, self-clearing broker-dealer that holds cash and securities on behalf of customer accounts pursuant to Exchange Act Rule 15c3-3 and maintains minimum net capital pursuant to Exchange Act Rule 15c3-1.
2. Folio is a member of FINRA and SIPC.
3. No Folio Customer funds will come into the possession of the issuer until all contingencies are satisfied and the offering closes.
4. Each issuer is unaffiliated with Folio.
5. Issuers will promptly receive the offering proceeds due to the issuer if the contingencies are satisfied and the offering closes.

⁸ Exchange Act Release No. 6689 (Dec. 20, 1961).

⁹ See *Birr, Wilson & Co. Letter* (Feb. 26, 1982), 1982 SEC NO-Act LEXIS 1977.

6. Folio Customer funds remain in the Cash Sweep Accounts until Settlement Date.
7. In the event that an offering or a Conditional Offer is cancelled or a contingency is not met, Folio will promptly make Folio Customer funds available to the Folio Customer for use.
8. FDIC protection will be afforded to each Folio Customer in its Cash Sweep Program.
9. Except for a de minimis amount of Folio assets treated as non-allowable under SEC Rule 15c3-1, which are used by Folio for testing and demonstrations as well as facilitating customer trading in fractional shares and odd lots, Folio will neither sweep any assets of Folio into any Cash Sweep Accounts that hold funds for securities offered on the Platform, nor otherwise hold assets owned by Folio in such accounts.
10. To the extent a Conditional Offer requires that funds be available in the amount of the Conditional Offer until Settlement Date, the amount of cash required will be promptly swept to or maintained in the FDIC-insured bank accounts used as part of the Cash Sweep Program for the benefit of the Folio Customer until such Conditional Offer is canceled (if then cancellable), the conditions of the offering are satisfied and the offering closes, or the issuer's offering is withdrawn or expired.
11. The amount of funds for each Folio Customer participating in the Cash Sweep Program at each bank participating in the Cash Sweep Program is recorded daily on Folio's books and records. These amounts are clearly identified and recorded on a distinct section of the stock record or similar record. Furthermore, Folio preserves this record for a period of not less than six years, the first two years in an easily accessible place in a manner consistent with the requirements of Exchange Act Rule 17a-4.
12. Folio treats records pertinent to the establishment and operation of the Cash Sweep Program as its own records and preserves these records for a period of not less than six years, the first two years in an easily accessible place in a manner consistent with the requirements of Rule 17a-4.
13. Folio will make and keep a separate record of each Conditional Offer including:
 - a. Each transfer of offering proceeds to the issuer's account on behalf of the Folio Customer, whether each applicable contingency has

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been met, any cancellation of a Conditional Offer, and the Settlement Date for the Conditional Offer, and

- b. A separate file containing a current list of issuers of securities that are carried on its books and records subject to the terms and conditions set forth above.

Request for No-Action Relief

Based on the facts and representations set forth in this letter, we request assurance that the Staff would not recommend enforcement action to the Commission under Rule 15c2-4(b)(1) if Folio establishes a Platform in which Folio Customers' funds are swept to an FDIC-insured bank account as part of Folio's Cash Sweep Program for Folio Customers on a daily basis when the Federal Reserve Banks are open and not further separated for each offering where the issuer selects a Cash Needed By Date or requires cash to be in the Folio Customer account or in a Cash Sweep Account at the time a Conditional Offer is submitted, based on the representations above and on the representation that Folio and the Platform comply with Rule 10b-9 and that all funds are promptly transmitted to the issuer on Settlement Date if the contingencies are met, or promptly released to the Folio Customer if the contingencies are not met.

Sincerely,



Michael J. Hogan
President & CEO