

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-80010, File No. TP 17-06)

February 10, 2017

ORDER GRANTING LIMITED TEMPORARY EXEMPTION FROM EXCHANGE ACT SECTION 12(j)

I. INTRODUCTION

On June 17, 2008, the Commission instituted settled proceedings against NEC Corporation (“NEC”) pursuant to Section 12(j) and Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”). The resulting order revoked the U.S. registration of “each class” of NEC’s registered securities¹ and ordered NEC to cease and desist from committing certain violations based on NEC’s failure to file annual reports and maintain sufficient internal controls, and failure to make and keep accurate books and records (the “Revocation Order”).² Eight years following the issuance of the Revocation Order, NEC Securities remain listed for trading, and actively trade, in Japan.

Section 12(j) of the Exchange Act prohibits members of a national securities exchange, brokers, or dealers from effecting any transaction in any security the registration of which has

¹ NEC initially registered its securities under Section 12(g) of the Exchange Act, on July 27, 1984, by filing a Form 8-A, and became quoted on the predecessor trading facilities that have become the Nasdaq Stock Market LLC. While NEC filed its Form 8-A for “American Depositary Receipts representing Common Stock,” American Depositary Receipts (“ADRs”) are exempt from registration under the Exchange Act. See Exchange Act rules 12a-8 and 12g3-2(c). As a result, NEC in 1984 registered its underlying ordinary shares. As part of Nasdaq’s transition to being a national securities exchange, on July 31, 2006, the Commission issued an omnibus order that bulk registered the Nasdaq Section 12(g) securities under Section 12(b), including the securities of NEC. See Exchange Act Release No. 54241 (July 31, 2006), 71 FR 45246 (Aug. 8, 2006). The Nasdaq Stock Market LLC filed a Form 25 on October 17, 2007, delisting its ADRs, and causing NEC securities to revert to their previous Section 12(g) registration, which were subsequently the subject of the Revocation Order. Subsequently, BNY Mellon terminated its ADR facility and there are no longer NEC ADRs in the United States. See infra note 10. The NEC ordinary shares (“NEC Securities”) previously registered under the Exchange Act are subject to the Revocation Order.

² In the Matter of NEC Corporation, Exchange Act Release No. 57974 (June 17, 2008) (stating “pursuant to Section 12(j) of the Exchange Act, that the registration of each class of Respondent NEC’s securities registered pursuant to Section 12 of the Exchange Act be, and hereby is, revoked.”).

been revoked.³ As discussed below, although the prohibition of Section 12(j) directly affects broker-dealers, it also affects holders of the security. The Commission has received a request on behalf of UBS AG for limited relief from the prohibitions of Section 12(j) with respect to NEC Securities.⁴ UBS AG is a global financial services company domiciled in Switzerland that operates a wealth management business in the United States through UBS Financial Services Inc. (“UBS FSI”) and an investment banking business in the Americas through UBS Securities LLC (“UBS Securities”). UBS FSI and UBS Securities are registered broker-dealers in the United States. Specifically, the requestor seeks to accommodate UBS FSI customers’ requests to sell their owned NEC Securities on the Tokyo Stock Exchange. Absent relief from the prohibitions of Section 12(j), such customers will continue to be unable to sell their NEC Securities given the need for a U.S. broker-dealer to be involved in effecting the transactions. The requestor represents that none of these UBS FSI customers is a broker-dealer, and neither UBS FSI nor UBS Securities will sell any NEC Securities for its own account pursuant to the requested relief.

The requestor describes certain unique circumstances relating to NEC and NEC Securities in support of limited relief consistent with the protection of U.S. investors. Among other things, an overseas securities exchange was the primary trading market for the NEC Securities at the time the Revocation Order was issued. Eight years following the issuance of

³ Accordingly, Section 12(j) of the Exchange Act prohibits members of a national securities exchange, brokers, or dealers from effecting any transaction in NEC ordinary shares (symbol: “NIPNF” and any other symbol under which NEC ordinary shares may currently, or in the future, be traded) unless the securities are registered under the Exchange Act. This prohibition also applies to transactions in NEC ADRs (symbol: “NIPNY” and any other symbol under which NEC ADRs, sponsored or unsponsored, may currently, or in the future, be traded), as ADRs are instruments that trade in U.S. markets and represent shares (or a fraction of shares) of foreign securities.

⁴ Letter from Bruce C. Bennett, Covington & Burling LLP, to Brent J. Fields, Secretary, dated February 9, 2017 (“Relief Request”).

Revocation Order, NEC continues to operate as a substantial operating business, and there continues to be a robust trading market on that overseas securities exchange in NEC Securities.

In light of the unique circumstances described herein, pursuant to Section 36 of the Exchange Act,⁵ the Commission is providing limited, temporary exemptive relief from the prohibitions of Exchange Act Section 12(j) to permit UBS FSI and UBS Securities to effect sales of NEC Securities on behalf of UBS FSI customers on the Tokyo Stock Exchange subject to specified conditions.

II. EXCHANGE ACT SECTION 12(j) AND RELIEF REQUEST

Section 12(j) of the Exchange Act provides the Commission with authority to suspend or revoke the registration of a security in circumstances where the issuer of the security has failed to comply with any Exchange Act provision or rule, including requirements to file annual reports with the Commission. In addition, Exchange Act Section 12(j) prohibits any member of a national securities exchange, broker, or dealer from effecting any transaction in, or inducing the purchase or sale of, any securities the registration of which has been and is suspended or revoked pursuant to Section 12(j). Such suspension or revocation and trading prohibition help to prevent continued purchases and sales of securities in the U.S. market for which accurate information does not exist, thereby protecting potential new U.S. investors in those securities.

The Relief Request seeks limited, temporary relief from the prohibitions of Exchange Act Section 12(j) based on certain unique circumstances relating to NEC and NEC Securities that have continued to exist for several years following the issuance of the Revocation Order. First,

⁵ Section 36 of the Exchange Act authorizes the Commission, by rule, regulation or order, to exempt, either conditionally or unconditionally, any person, security or transaction, or any class or classes of persons, securities or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors. 15 U.S.C. 78mm(a).

an overseas securities exchange was the primary trading market for NEC Securities at the time the Revocation Order was issued. Next, eight years following the issuance of the Revocation Order, NEC continues to operate as a substantial operating business, there continues to be a robust trading market overseas in NEC Securities and a number of U.S. investors continue to hold NEC Securities that they purchased prior to the issuance of the Revocation Order. In addition, the requested relief would not result in the development or resumption of a U.S. market in the securities or in purchases by U.S. investors of NEC Securities in the United States.

The Relief Request describes NEC as a major Japanese information technology company the securities of which, since before the Revocation Order was issued in 2008 and for the eight years following the date of issuance of the Revocation Order, continue to be listed for trading, and actively trade on the first section of the Tokyo Stock Exchange, based on a review of publicly available information.⁶ In addition, the requestor states that NEC continues to have a substantial market capitalization.⁷ The requestor also states that NEC uses Japanese accounting standards.⁸ Further, the requestor states that NEC was established in 1899, and that based on a review of publicly available information, NEC is an issuer with business operations that continue to provide substantial services and products to a worldwide market, such as computing solutions, business designs, broadband services, semiconductors, displays, and other electronic

⁶ Relief Request at 3 n. 8 (“During the month of October 2016, NEC’s average daily trading volume on the first section of the Tokyo Stock Exchange was 9,630,800 shares at an average closing per share price of ¥269.25 (US\$2.555).”).

⁷ Id. at 3 n. 9 (“At November 1, 2016, NEC had a market capitalization of ¥750,162,998,880 (JPX Stock Data Search under the caption ‘Quotes’)(approximately US \$7,117,296,004).”).

⁸ Id. n.10 (“Since the fiscal year ended March 31, 2007, NEC has prepared its consolidated financial statements solely in accordance with Japanese GAAP.”).

components.⁹ Moreover, the requestor states that during the eight years since the issuance of the Revocation Order, certain U.S. investors may have had opportunities to sell NEC Securities outside the United States without using the services of a U.S. broker-dealer whose involvement would have been in violation of Section 12(j).¹⁰ The requestor therefore believes that continuing to bar UBS FSI customers from selling their NEC Securities outside the United States under such unique circumstances creates an uneven result.

Under Section 12(j), no broker-dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked. Thus, broker-dealers have been prohibited since June 17, 2008 (the date of the issuance of the Revocation Order) from effecting transactions in NEC's securities registered pursuant to Section 12. In the case of NEC, however, the requestor states that, due to the lengthy passage of time, in conjunction with the continued existence of a non-U.S. market for NEC Securities and the other factors discussed in this Order, NEC's settlement of a Commission enforcement action that resulted in the Revocation Order is causing an uneven result for existing UBS FSI customers who have lacked the ability to sell these securities outside the United States. In addition, the requestor states that eight years have elapsed since the issuance of the Revocation Order, and NEC has not re-registered any class of securities in the United States. Moreover, the requester emphasizes that its request is limited to effecting sales of NEC Securities owned by customers of

⁹ Id. n.7 (citing Annual Report 2016, NEC CORP. 7–13, 41–55, <http://www.nec.com/en/global/ir/pdf/annual/2016/ar2016-e.pdf>).

¹⁰ For example, certain investors may have held their NEC Securities at a custodial bank not subject to Section 12(j), which could have arranged for the sale of such securities. In 2010, BNY Mellon notified owners of NEC ADRs that its ADR facility would be terminated. The notice alerted NEC ADR holders of the option to surrender such ADRs and “obtain payment of proceeds of sale of shares after the Depositary sells the remaining deposited shares . . .” BNY Mellon, Corporate Action Notice (March 1, 2010). <http://www.adrbnymellon.com/files/TN28916.pdf>.

UBS FSI on the Tokyo Stock Exchange and explains that this limitation is intended to help preclude new U.S. investors from purchasing NEC Securities in the United States or from creating a renewed market for NEC Securities in the United States.

The requestor seeks limited, temporary relief to permit UBS FSI and UBS Securities to effect sales of NEC Securities owned by customers of UBS FSI on the Tokyo Stock Exchange via a broker-dealer not registered as such with the Commission for a twelve-month period. The requestor states that the request is limited to effecting transactions in accordance with Exchange Act Rule 15a-6(a)(4)¹¹ and Rule 904 of Regulation S.¹²

III. DISCUSSION

Given the unique circumstances and the passage of time described above, we find that it is necessary or appropriate in the public interest, and is consistent with the protection of investors, to grant a limited, temporary exemption from the prohibitions of Exchange Act Section 12(j), subject to the conditions described below. Therefore, pursuant to Section 36 of the Exchange Act, the Commission is granting a limited, temporary exemption from the prohibitions of Exchange Act Section 12(j) to permit UBS FSI and UBS Securities to sell certain NEC Securities on the Tokyo Stock Exchange as described in this Order, including permitting certain enumerated activities necessary to effect such sales within the conditions of this Order.

This relief is limited to sales of NEC Securities on the Tokyo Stock Exchange made on behalf of persons holding NEC Securities in UBS FSI accounts (“UBS NEC Holders”) who elect to sell some or all of their NEC Securities in reliance on this Order (each such selling UBS NEC

¹¹ 17 CFR 240.15a-6(a)(4).

¹² 17 CFR 230.904.

Holder, a “UBS FSI customer”).¹³ In addition, all such sellers must be deemed to own NEC Securities pursuant to Rule 200(b)(1) of Regulation SHO.¹⁴ This relief does not extend to sales of NEC Securities for any purpose other than to facilitate customer orders in a manner that is consistent with this Order.

This relief permits certain activities necessary to effect sales of NEC Securities on the Tokyo Stock Exchange. This relief permits limited solicitation activity to inform UBS NEC Holders and investment advisers registered under Section 203 of the Advisers Act of 1940 (“Advisers Act”) managing accounts of UBS NEC Holders of the availability of this relief.¹⁵ This relief also permits the acceptance and routing of orders to sell NEC Securities and sales of NEC Securities on the Tokyo Stock Exchange in a manner that is consistent with this Order.

In addition, this relief permits clearance and settlement activities related to, and other activities solely incidental to, sales of NEC Securities in a manner that is consistent with this Order. This relief does not extend to any activity except as provided in this Order.

This relief requires disclosure in certain limited circumstances. This disclosure must be provided to UBS FSI customers that are “retail customers” – namely, those customers who are not U.S. institutional investors¹⁶ or investment advisers registered with the Commission under section 203 of the Advisers Act. In particular, this relief requires that retail customers are

¹³ The Order notes the requestor’s representation that no UBS FSI customer is a broker-dealer, and neither UBS FSI nor UBS Securities will sell any NEC Securities for its own account pursuant to the Order.

¹⁴ 17 CFR 242.200(b)(1) (stating that a person is deemed to own a security if such “person or his agent has title to it.”). This condition is designed to prevent short selling NEC Securities.

¹⁵ Only investment advisers registered with the Commission under Section 203 of the Advisers Act are utilized in the relevant UBS FSI program.

¹⁶ For purposes of this Order, the term “U.S. institutional investor” has the same meaning as in Exchange Act Rule 15a-6(b)(7). 17 CFR 240.15a-6(b)(7).

provided a written pre-sale disclosure that contains (1) a good faith estimate of charges to the customer in connection with effecting the sale of NEC Securities pursuant to the terms of this Order,¹⁷ and (2) a good faith description of the currency conversion rate to be used and any charges to the customer in connection with the currency conversion.¹⁸ The pre-sale disclosure must be provided to the customer prior to execution of an order to sell NEC Securities pursuant to this Order. This disclosure is not required to be made to customers that are U.S. institutional investors or registered investment advisers.

Next, this relief requires that retail customers are provided a written post-sale disclosure, but only if the actual charges to the retail customer differ materially from the estimates or descriptions in the pre-sale disclosure. Thus, if there are no material differences between the pre-sale disclosure estimates and descriptions and the actual charges to the customer, this post-sale disclosure is not required. This relief recognizes that certain charges to the customer may be imposed by someone other than UBS FSI, UBS Securities, or their affiliates. In such circumstance, the information required in the post-sale disclosure regarding such charges must be provided when UBS FSI or UBS Securities can reasonably and on a timely basis access such information.

When required, this post-sale disclosure must be provided to the customer promptly following the execution of the sale of NEC Securities pursuant to this Order. This post-sale transparency is intended to help retail customers evaluate the reasonableness of all charges to them by providing them with a written document that solely contains information relating to the

¹⁷ See infra condition 4(a).

¹⁸ See infra condition 4(b).

sale of the NEC Securities.¹⁹ As mentioned above, the pre-sale and post-sale disclosures are not required to be provided to customers that are U.S. institutional investors or investment advisers registered with the Commission under Section 203 of the Investment Advisers Act of 1940.

Moreover, UBS FSI and UBS Securities must fully comply with all restrictions and provisions of Section 12(j) of the Exchange Act with respect to NEC Securities except as permitted by this Order. This limitation is designed to promote compliance with Section 12(j) except as provided by this limited exemption. Further, this relief requires that UBS FSI and UBS Securities make and keep accurate books and records sufficient to demonstrate that they followed the conditions in this Order. This relief requires UBS FSI and UBS Securities to provide such books and records to the Commission or self-regulatory organization staff upon request. Lastly, the relief is temporary and expires one year after issuance in order to promote timely relief to UBS FSI customers who wish to sell their NEC Securities.

IV. CONCLUSION

Accordingly, IT IS ORDERED, pursuant to Section 36 of the Exchange Act, that until midnight (Eastern Time) on February 10, 2018, UBS FSI and UBS Securities are exempt from the prohibitions of Exchange Act Section 12(j) in connection with certain specified activities necessary to effect sales of certain NEC Securities on the Tokyo Stock Exchange (such activities are referred to collectively as “Exempt Activity”), as set forth herein and subject to the following conditions:

¹⁹ See infra condition 5.

1. UBS FSI and UBS Securities may only engage in Exempt Activity to effect sales of NEC Securities held by persons in UBS FSI accounts (“UBS NEC Holders”) who elect to sell some or all of their NEC Securities in reliance upon this Order (each such selling UBS NEC Holder, a “UBS FSI customer”)²⁰ on the Tokyo Stock Exchange via a broker-dealer not registered as such with the Commission;
2. All UBS FSI customers must be deemed to own the NEC Securities to be sold pursuant to Rule 200(b)(1) of Regulation SHO;²¹
3. Exempt Activity is limited solely to:
 - (a) solicitations of UBS NEC Holders or of investment advisers registered with the Commission under Section 203 of the Investment Advisers Act of 1940 (the “Advisers Act”) managing accounts of UBS NEC Holders pursuant to discretionary authority in order to inform such persons of the ability to sell their NEC Securities pursuant to the terms of this Order;
 - (b) accepting and routing orders to sell NEC Securities in a manner consistent with this Order;
 - (c) effecting sales of NEC Securities on the Tokyo Stock Exchange in a manner consistent with this Order; and
 - (d) clearance and settlement activities related to, and other activities solely incidental to, sales of NEC Securities in a manner consistent with this Order;

²⁰ As noted above, the requestor represents that no UBS FSI customer is a broker-dealer, and neither UBS FSI nor UBS Securities will sell any NEC Securities for its own account pursuant to this Order.

²¹ 17 CFR 242.200(b)(1).

4. UBS FSI shall fully and accurately disclose to each UBS FSI customer that is not a U.S. institutional investor (as such term is defined in Rule 15a-6(b)(7) under the Exchange Act) or an investment adviser registered with the Commission under Section 203 of the Advisers Act in writing prior to executing an order to sell NEC Securities described in condition 1 for such customer:
 - (a) A good faith estimate of all commissions, markups/markdowns, fees, and other remuneration to be charged to the customer by UBS FSI and UBS Securities, by any other broker-dealer involved in effecting such sale (other than with respect to the currency conversion, which is instead subject to the provisions of Condition 4(b)), and by any other person, including all fees and other remuneration to be collected by the Tokyo Stock Exchange for the sale of the customer's NEC Securities on such exchange that are charged to the customer ("Japanese Securities Exchange Fee"); and
 - (b) A good faith description of how the currency conversion rate (the "FX conversion rate") to be used will be established, and a good faith description made on a reasonable basis of any fees and other remuneration to be charged to the customer by UBS FSI and UBS Securities, by any other broker-dealer involved in effecting such sale, and by any other person to convert the sale proceeds from Japanese yen to U.S. dollars (or another currency if the customer requests that the sale proceeds be converted from Japanese yen to a currency other than U.S. dollars);
5. For each UBS FSI customer that is not a U.S. institutional investor (as such term is defined in Rule 15a-6(b)(7) under the Exchange Act) or an investment adviser registered with the Commission under section 203 of the Advisers Act, if (i) any commission,

markup/markdown, fee, or other remuneration (other than the Japanese Securities Exchange Fee) is charged to the customer by, for, or on behalf of any broker-dealer involved in effecting the order to sell NEC Securities described in condition 1, or any other person; *or* (ii) the conversion of the sale proceeds from Japanese yen to U.S. dollars (or another currency if the customer requests that the sale proceeds be converted from Japanese yen to a currency other than U.S. dollars), or any fees or other remuneration charged to the customer for such conversion, differs materially from the estimate or description provided to the customer pursuant to condition 4(a) or 4(b), then, UBS FSI shall fully and accurately disclose to such customer promptly following the execution of the sale of NEC Securities described in condition 1, in a written document (separately from confirmation and account statement disclosures with respect to such sale) that solely contains the following information relating to such sale, provided, however, that if any such information relates to commissions, markups/markdowns, fees or other remuneration that is imposed by a third party other than UBS FSI or UBS Securities or any of their affiliates, such information shall be provided to the extent that UBS FSI or UBS Securities can reasonably and on a timely basis access such information:

- (a) the date of the sale of such customer's NEC Securities on the Tokyo Stock Exchange;
- (b) the number of shares sold;
- (c) the execution price per share (in Japanese yen);
- (d) the gross proceeds from the execution (in Japanese yen);
- (e) the actual amount of any commissions, markup/markdown, fee, or other remuneration that was charged to the customer, if such fees or other remuneration

differed materially from the estimate disclosed to such customer in the pre-trade disclosure provided pursuant to Condition 4(a) or 4(b), as the case may be, and the estimated amount of such commission, markup/markdown, fee, or other remuneration as disclosed to such customer in the pre-trade disclosure provided pursuant to Condition 4(a) or 4(b), as the case may be;

- (f) if the FX conversion rate that was applied to the net proceeds of such customer's sale of NEC Securities was determined in a manner that differed materially from the description disclosed to such customer in the pre-trade disclosure provided pursuant to Condition 4(b), a description of the manner in which such FX conversion rate was actually determined; and
 - (g) the net sale proceeds in Japanese yen and in U.S. dollars (or such other currency other than U.S. dollars as requested by the customer) received by the customer;
6. UBS FSI and UBS Securities shall fully comply with Section 12(j) of the Exchange Act with respect to NEC Securities, except as provided in this Order, and any other rule, regulation, or order to which UBS FSI and UBS Securities are subject under the federal securities laws with respect to NEC Securities; and
7. UBS FSI and UBS Securities shall make and keep accurate books and records sufficient to demonstrate that UBS FSI and UBS Securities followed the conditions in this Order and containing information related to the estimates required by condition 4(a) and the descriptions required by condition 4(b), including any discrepancies between the estimates and actual costs of the transaction to the customer, and will promptly provide such books and records to Commission or self-regulatory organization staff upon request.

The limited and temporary exemption granted herein is subject to modification or revocation at any time the Commission determines that such action is necessary or appropriate in furtherance of the purposes of the Exchange Act. This Order expires at midnight (Eastern Time) on February 10, 2018 (which is one year after Order issuance). This Order does not lift the registration revocation set forth in the Revocation Order but rather provides limited, temporary relief from Section 12(j) of the Exchange Act. Any activities that do not fully comply with the terms and conditions of this Order are not covered by this Order.

This Order does not provide retroactive relief. In addition, this Order is inapplicable to any activities occurring subsequent to midnight (Eastern Time) on February 10, 2018, including any transaction effected subsequent to midnight (Eastern Time) on February 10, 2018 that would otherwise have been in conformance with the terms and conditions contained in this Order.

This Order should not be considered to express a view with respect to NEC Securities or any other question that activities involving NEC Securities may raise or the applicability of other federal or state laws to the activity exempted herein. This Order is based on the facts and representations presented. Any different facts or representations may require a different response. UBS FSI and UBS Securities are directed to the anti-fraud and anti-manipulation provisions of the federal securities laws, particularly Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder. Responsibility for compliance with these and any other applicable provisions of the federal securities laws rests with UBS FSI and UBS Securities.

By the Commission.

Eduardo A. Aleman
Assistant Secretary