

December 31, 1991

Marketing One Securities, Inc.

851 S.W. Sixth Avenue

Portland, Oregon 97204-1346

TELEPHONE(503) 220-0515

Mr. Michael Macchiaroli

Division of Market Regulation

Securities and Exchange Commission

M-S 5-1, Room 5197

450 Fifth Street, N.W.

Washington, D.C. 20549

Re: Request for Interpretative Relief Under SEC Rule 15c3-3

Dear Mr. Macchiaroli:

In November of 1989 we wrote to your office regarding an issue which has been raised again during our most recent NASD examination.

The NASD is requiring that we renew our request for an interpretation of "constructive receipt" of customer funds. Therefore, we respectfully request you review the following facts and provide us with your response at your earliest convenience.

Marketing One Securities, Inc. (MOSI) is a self-clearing general securities broker/dealer, fully subject to the provisions of SEC Rule 15c3-3. The firm's business mix consists of approximately 90% Investment Company products with the balance in debt and equity transactions on an agency or riskless principal basis through an omnibus account at Pershing. The firm does limited margin and options business, (less than six accounts), and does not handle commodities. The firm does not maintain an inventory.

The firm's registered representatives are located on the premises of banks, savings and loan associations and other financial institutions throughout the country. These locations are designated as non-OSJ branch offices of the broker/dealer.

It is not uncommon for a MOSI customer to provide payment for their purchase by way of personal check made payable to MOSI for their purchase at the time of trade since most often the purchase is for a specific dollar amount of a mutual fund. During a recent NASD examination It was brought to the attention of the firm that, In the examiner's view, the firm could be deemed to have "constructive receipt of customer funds at the time a representative accepts a customer's check for transmission to the OSJ for credit to the customer's account and deposit. If the field examiner's interpretation is correct, the firm must include the amount represented by the check in the reserve formula at the time the customer's check is given to the representative to forward to the OSJ for final review and acceptance of the account and order. If accepted, the check is deposited. Until the check, which represents a promise to pay, is deposited, the funds remain in the customer's account and control.

The receipt of the check by the representative, which is clearly only a promise to pay, does not result in a credit balance in the customer's account until such time as it is received, through the U.S. mail, at the OSJ where it is posted to the customer's account and the check is deposited. At this time it is included in Item 1 of the reserve formula. When the registered representative of MOSI receives a check for payment, payable to MOSI, he/she is acting in a purely clerical capacity, immediately mailing the check to the OSJ with the attendant paperwork (i.e., new account form).

In a letter from the SEC staff to Gibraltar Securities, Inc., dated March 5, 1986, the staff indicated the firm must include payments made prior to settlement date at such time as they resulted in a credit balance, which is MOSI's case does not occur until that customer's check is received at the OSJ and if accepted, posted to the customer's account.

In a letter to Brooks-Hamburger Securities Company on May 14, 1973, the SEC staff indicated that customers securities are considered fully paid upon the receipt of the customers check. We are in agreement with this position at such time as the check

is received in the OSJ, the account reviewed and accepted, and the check posted to the customer's account and presented for negotiation.

To require the firm to include customer payments at the time a representative receives the check for forwarding to the OSJ places an undue hardship on the firm and on the customer.

The firm cannot accurately compute Item 1 until such time as it posts the payment to the customer account which cannot occur until it is received in the OSJ. Further, it is unrealistic to expect a customer to mail the check himself when he rightfully expects such service to be performed on his behalf by the representative.

This firm requests the staff review the question of whether a customer's check, received at an outlying non-OSJ branch, and forwarded immediately by U.S. mail to the OSJ must be included in Item 1 of the reserve formula prior to receipt at the OSJ, and requests the staff issue an interpretative letter which indicates the customer checks need not be included in Item 1 of the Reserve Formula until such time as the check is received at the OSJ, posted to the customer account resulting in a credit balance, and presented for negotiation by deposit to the firm's account.

Sincerely,

Sharon Pennell

Senior Vice President

SP/tt

cc: NASD, Seattle

Sandy McIntosh

December 9, 1992

Ms. Sharon Pennell

Senior Vice President

Marketing One Securities, Inc.

851 S.W. Sixth Avenue

Portland, Oregon 97204-1346

Dear Ms. Pennell:

This letter is In response to your letter of December 31, 1991, in which you request a no-action position from the Division of Market Regulation (the "Division") with respect to Rule 15c3-3 (17 C.F.R. §240.15c3-3) under the Securities Exchange Act of 1934.

I understand the facts to be as follows: Marketing One Securities, Inc. ("MOSI") is a registered broker-dealer and a member of the National Association of Securities Dealers, Inc. MOSI's registered representatives are located on the premises of banks, savings and loan associations, and other financial institutions throughout the country. MOSI's customers usually provide payment by check. These checks are received by MOSI's registered representatives, and are then forwarded by United States mail to MOSI's central office.

You ask whether MOSI should be required to include these checks in MOSI's Formula for Determination of Reserve Requirement for Brokers and Dealers (the "Reserve Formula") under Rule 15c3-3 at the time the checks are received by the registered representatives. You assert that MOSI cannot accurately compute the amount to be Included in the Reserve Formula until it posts the payment to its customers' accounts at MOSI's central office. You request that the Division recommend no-action to the Securities Exchange Commission (the "commission") if MOSI does not include these checks as credit items in the Reserve Formula until such time as the check is received by MOSI's central office, posted to the customer's account, and presented by MOSI for deposit.

Rule 15c3-3(e)(1) requires that every broker-dealer maintain with a bank or banks a "Special Reserve Bank Account for the Exclusive Benefit of Customers" that is

separate from any other bank account of the broker-dealer. Under the Reserve Formula, "free credit balances and other credit balances in customers' security accounts" must be included as credits in computing the required periodic deposits. "Free credit balances" generally are liabilities of a broker-dealer subject to immediate cash payment to customers upon demand (such as dividends or interest), and "other credit balances" are cash liabilities of a broker-dealer to customers other than free credit balances. Rule 15c3-3(a)(8).

Rule 15c3-3 was adopted in response to a congressional directive to the Commission to insure the integrity of customer funds and securities. See Securities Exchange Act Release No. 9856 (Nov. 10, 1972). With regard to customer funds, the Commission intended to "insure that customers' funds held by a broker-dealer ... are deployed in safe areas of the broker-dealer's business related to servicing his customers, or to the extent that the funds are not deployed in these limited areas, that they be deposited in a 'Special Reserve Bank Account for the Exclusive Benefit of Customers'" Id. at 2. In this regard, the Commission has taken a broad view of the congressional mandate by requiring that the Reserve Account include all funds that have as their source customer assets." d . The Commission intended to facilitate liquidation of insolvent broker-dealers and to protect customer assets in the event of a liquidation by the Securities Investor Protection Corporation. Id.

It is the view of the Division of Market Regulation that under these provisions a broker-dealer must make deposits that reflect customer funds received by the broker-dealer for the account of the customer. Customer checks, though not yet deposited, are customer funds. MOSI's registered representatives, as agents of MOSI, receive possession of customer checks at their branch offices. Accordingly, under the Rule, checks must be included in the Reserve Formula when they are received by MOSI's registered representatives. Your request for relief from these provisions is incompatible with the purposes of Rule 15c3-3, and therefore, cannot be granted.

Sincerely,

Michael A. Macchiaroli

Assistant Director