

## **JAMES CAPEL AND COMPANY LIMITED**

**Publicly Available December 6, 1989**

### **SEC LETTER**

#### **Exchange Act Rule 15a-6**

**December 6, 1989**

By letter dated November 6, 1989, you request our assurance that we will not recommend that the Commission take enforcement action against James Capel & Co. Limited ("JC & Co") and certain of its non-U.S. affiliates under the Investment Advisers Act of 1940 ("Advisers Act") if JC & Co distributes investment research in the United States through its U.S. affiliate, James Capel Incorporated ("JCI"), in the manner described in your letter without registering as an investment adviser.

JC & Co is a broker-dealer incorporated under the laws of England with its principal office in London. JC & Co provides brokerage and investment advisory services worldwide through broker-dealer affiliates ("Non-U.S. Affiliates"). JC & Co and its Non-U.S. Affiliates are not registered with the Commission as broker-dealers. JCI, a Delaware corporation with offices in New York, Houston, and Los Angeles, is a broker-dealer registered with the Commission and a member of the National Association of Securities Dealers, Inc. ("NASD"). JCI and JC & Co are both part of the James Capel Group and are affiliated through common ownership by The Hong Kong and Shanghai Banking Corporation. JCI provides investment advice to customers only as an incident to its brokerage services and receives no special compensation for providing that advice. Accordingly, JCI has not registered as an investment adviser under the Advisers Act.

As more fully described in your letter, JCI proposes to distribute research and commentary on various securities and economic issues (collectively, "Notes") prepared by JC & Co and its Non-U.S. Affiliates to U.S. customers. You state that JC & Co will transmit the Notes directly to JCI in New York City, where a registered principal of JCI, or the principal's designee, will review and edit the Notes for compliance with U.S. securities laws and NASD requirements. Once they are reviewed and edited, JCI will forward the Notes to First Call Corporation ("FCC") for input into FCC's U.S. electronic distribution system.<sup>1</sup> JCI will provide for a legend to appear on the electronic screen as a prelude to the Notes stating that JCI assumes responsibility for the contents of the Notes, that the Notes were prepared by JC & Co and its Non-U.S. Affiliates, and that any orders for the purchase or sale of securities mentioned in the Notes should be directed to JCI, not JC & Co or the Non-U.S. Affiliates.<sup>2</sup> JC & Co and the Non-U.S. Affiliates will communicate with U.S. investors regarding the Notes or securities discussed in the Notes only as may be permissible under Rule 15a-6 under the Securities Exchange Act of 1934 ("Exchange Act"). In addition, JC & Co and the Non-U.S. Affiliates will take steps to ensure that their personnel do not execute trades for U.S. customers in securities referred to in the Notes, except to the extent permitted by, and subject to the conditions prescribed in, Rule 15a-6.

JCI will receive no compensation for distributing the Notes prepared by JC & Co and the Non-U.S. Affiliates. Where FCC distributes the Notes received from JCI to U.S. investors through third-party vendors, however, JC & Co and the Non-U.S. Affiliates will receive a fee for contributing their Notes. In the release adopting Rule 15a-6, the Division stated that, in general, it expected to respond favorably to no-action requests regarding registration under the Advisers Act by foreign brokers and dealers who meet the conditions of Rule 15-6, provided that any investment services provided are solely incidental to the foreign broker-dealer's brokerage activities and no special compensation is received for such advisory services. While under certain circumstances JC & Co will receive compensation for providing its Notes to U.S. investors, it will not transmit such Notes directly to U.S. investors, but will distribute them through JCI. The Notes will be considered advice rendered by JCI. See Citicorp (pub. avail. Sept. 14, 1986).

We would not recommend any enforcement action to the Commission against JC & Co or its Non-U.S. Affiliates if JC & Co distributes investment research in the U.S. through JCI in the manner described in your letter without registering as an investment adviser. Our position is based on the facts and representations contained in your letter. Any change in facts may require a different conclusion. You do

not ask and we do not address whether TFN and FCC are required to register with the Commission as investment advisers. In addition, the Division of Market Regulation, which has reviewed your request, expresses no opinion on the application of Rule 15a-6 to JC & Co and its Non-U.S. Affiliates.

Roberta R.W. Kameda  
Special Counsel

#### **Footnotes**

1 FCC is a majority-owned subsidiary of Thomson Financial Networks, Inc. ("TFN"). TFN is a U.S. corporation that directly, and indirectly through its subsidiaries, disseminates investment information electronically to investors worldwide. FCC distributes investment information electronically to U.S. subscribers. Neither TFN nor FCC is registered as an investment adviser under the Advisers Act.

2 See Securities Exchange Act Rel. No. 27017 at n. 114 (July 11, 1989) (release adopting Rule 15a-6 under the Exchange Act).

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#### **INCOMING LETTER**

**November 6, 1989**

**Thomas S. Harman, Esq.**  
**Chief Counsel**  
**Division of Investment Management**  
**Securities and Exchange Commission**  
**450 Fifth Street, N.W.**  
**Washington, D.C. 20549**

**Re: James Capel & Co. Limited—Request for "No-Action" Position**

Dear Mr. Harman:

In accordance with our telephone conversation Thursday morning, November 2, with you and other members of the Securities and Exchange Commission staff, we enclose a redrafted letter addressed to you requesting a no-action position for our client, James Capel & Co. Limited ("JC & Co"). The letter now makes clear at page 2 that JCI accepts no special compensation in providing investment advice to its customers as part of its brokerage services. The restated letter also deletes all but the first sentence of the paragraph that had begun at the bottom of page 5 and concerned procedures JC & Co would employ in communicating with U.S. customers regarding the Notes. As suggested, that first sentence now appears midway through the paragraph at the top of page 5.

Sincerely,

Winthrop N. Brown

ENCLOSURE

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November 6, 1989

Thomas S. Harman, Esq.  
Chief Counsel  
Division of Investment Management  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549

**Re: James Capel & Co. Limited—Electronic Distribution of Research in the United States—  
Request for “No-Action” Position**

Dear Mr. Harman:

On behalf of our client, James Capel & Co. Limited (“JC & Co”), we request the Staff's assurance that it will not recommend to the Securities and Exchange Commission (the “Commission”) that the Commission take enforcement action against JC & Co and certain of its non-U.S. affiliates under the Investment Advisers Act of 1940 (the “Advisers Act”) if JC & Co distributes investment research in the United States through its U.S. affiliate, James Capel Incorporated (“JCI”), in the manner described below without registering as an investment adviser.

## **1. Background and Description of Proposed Activities**

### **a. The Parties**

JC & Co is a broker-dealer incorporated under the laws of England with its principal office in London. JC & Co is a member of both The Securities Association and the International Stock Exchange and is regulated under the Financial Services Act. It is authorized by The Securities Association to provide broker-dealer and investment management services in a wide range of investments. JC & Co also provides brokerage and investment advisory services worldwide through broker-dealer affiliates (the “Non-U.S. Affiliates”), which are regulated by various local stock exchanges and applicable laws.<sup>1</sup>

JCI is a corporation incorporated under the laws of the State of Delaware with offices in New York City, Houston and Los Angeles. JCI is a broker-dealer registered with the Commission and is a member of the National Association of Securities Dealers, Inc. (the “NASD”). JCI and JC & Co are both part of the James Capel Group and are affiliated through common ownership by The Hong Kong and Shanghai Banking Corporation (“HSBC”). JCI, which has 92 employees, offers brokerage and advisory services in the United States to the extent permitted under restrictions imposed on HSBC by the Bank Holding Company Act of 1956, as amended. JCI provides investment advice to customers only as an incident to its brokerage services and does not accept special compensation for providing such advice. Accordingly, JCI has not registered as an investment adviser under section 203 of the Advisers Act.

Thomson Financial Networks, Inc. (“TFN”) is a U.S. corporation that maintains offices in Boston and that directly, and indirectly through its subsidiaries, disseminates investment information electronically to investors worldwide. TFN is the successor by merger to Technical Data International Limited (“TDI”), a former wholly-owned subsidiary of Thomson Corporation, TFN's parent.<sup>2</sup> TFN, as the successor to TDI, owns a majority interest in two subsidiaries. In particular, TFN owns 50.1 percent of the shares of First Call Corporation (“FCC”); the remaining 49.9 percent being owned by eleven Wall Street brokerage houses. TFN also owns 60 percent of the shares of First Call International (“FCI”); the remaining 40 percent being owned by FCC. TFN's electronic distribution system, described more fully below, is marketed under the name “First Call.” FCC delivers First Call services to U.S. subscribers while FCI delivers First Call services to non-U.S. customers. Neither TFN nor FCC is registered as an investment adviser under the Advisers Act.

### **b. The First Call and Third Party First Call Electronic Distribution Services**

Each morning of each trading day, JC & Co compiles research and commentary on various securities for

distribution to its sales representatives and customers. Most of the content of this research and commentary is originated by JC & Co; however, some of the content is drawn from similar material made available to JC & Co by the Non-U.S. Affiliates. In addition to these so-called Morning Notes, JC & Co prepares from time to time other topical research bulletins on securities and economic issues affecting securities. It distributes these bulletins both internally and to customers. Neither the Morning Notes nor the topical bulletins are tailored to any particular customer; rather, they are intended for general use by the investing public worldwide.

In late 1987, JC & Co and certain other U.K. broker-dealers (collectively, the "Group of Brokers") each entered into an agreement (the "Main Agreement") with TDI, predecessor in interest to TFN, to distribute to non-U.S. customers their Morning Notes and other topical research bulletins on equity securities or economic issues affecting such securities of the type that the brokers usually make available on a regular basis to customers (collectively, the "Notes") by means of the First Call electronic distribution network. Under the terms of the Main Agreement, JC & Co keys its Notes into FCI's database each morning.<sup>3</sup> The Notes are then distributed electronically by FCI to subscribers in the U.K., and elsewhere in Europe and Asia, for display on personal computer monitors. FCI provides the necessary proprietary software and servicing for the input and distribution of the Notes. Under the Main Agreement, JC & Co may direct FCI to provide the Notes to a particular customer and must approve any customer to which or any geographic market in which FCI may wish to provide the Notes. The First Call system also permits JC & Co's offices worldwide to receive its Notes without additional charge.

JC & Co and other members of the Group of Brokers also propose to enter into a Supplemental Agreement to the Main Agreement (the "Supplemental Agreement") under which TFN also agrees to distribute the brokers' Notes through distribution agreements TFN will enter into with one or more third-party vendors that operate their own electronic networks for the distribution of financial information. As of now, TFN plans to market this third-party vendor service under the name "Third Party First Call." As in the case of the First Call service, JC & Co retains the right under the Supplemental Agreement to withhold distribution of its Notes over a particular network or to particular customers of a third-party vendor.

Under the Main Agreement, JC & Co and the other members of the Group of Brokers each pay TFN a quarterly fee for the privilege of contributing their Notes to the First Call system and having them distributed. The fee payable by each broker is reduced, however, for each U.K. subscriber in excess of 50 that receives that broker's Notes through the system. TFN also collects fees from subscribers. By contrast, under the Supplemental Agreement, TFN will pay JC & Co and each other contributing member of the Group of Brokers a fee for contributing its Notes to the Third Party First Call service. Each broker will receive a small, specified share of the subscription fees received by TFN from a third-party vendor based on whether its Notes are delivered over the third-party vendor's network. A third-party vendor's subscription fees may be based on the number of subscribers to its system or may be a flat rate, depending on the arrangement TFN and the third-party vendor negotiate.

### **c. Proposed Distribution of the Notes in the U.S.**

JC & Co now proposes to distribute its Notes via the First Call and Third Party First Call services to customers in the United States on the terms provided for in the Main Agreement and Supplemental Agreement. In the case of the First Call service, because JC & Co's fees are reduced only if additional U.K. customers subscribe to its Notes, JC & Co will receive no reduction of fees under the Main Agreement as the result of the addition of U.S. subscribers to the First Call service. In the case of Third Party First Call, JC & Co and the Non-U.S. Affiliates will be compensated as described above.

To avoid registration as a broker-dealer under the Securities Exchange Act of 1934 (the "1934 Act"), JC & Co intends to comply with recently promulgated Rule 15a-6 (SEC Release No. 34-27017). Under certain circumstances, that rule permits a foreign broker-dealer directly to distribute its research to and solicit U.S. institutional and certain other types of sophisticated investors. In order, however, to obtain the broadest possible distribution of the Notes in the United States, JC & Co will deliver the Notes to FCC indirectly through JCI as follows.<sup>4</sup> JC & Co will transmit the Notes directly to JCI in New York City. At JCI, a registered principal or his designee will review and edit the Notes for compliance with U.S. securities laws and NASD requirements. Once they are reviewed and edited, JCI will forward the Notes to FCC in Boston for input into FCC's U.S. delivery system. JCI will provide for a legend to appear on the

electronic screen as a prelude to the Notes stating that JCI assumes responsibility for the contents of the Notes, that they were prepared by JC & Co and the Non-U.S. Affiliates, and that any orders for the purchase or sale of securities mentioned in the Notes should be directed to JCI, not JC & Co or the Non-U.S. Affiliates. JC & Co and the Non-U.S. Affiliates will communicate with U.S. investors regarding the Notes or securities discussed in the Notes only as may be permissible under Rule 15a-6. In addition, JC & Co and the Non-U.S. Affiliates will take steps to ensure that their personnel do not execute trades for U.S. customers in securities referred to in those of their Notes distributed in the United States, except to the extent permitted by, and subject to the conditions prescribed in, Rules 15a-6(a)(2) and (4).<sup>5</sup> Accordingly, except in those limited circumstances, all orders generated by the Notes will in fact be executed by JCI.

The Notes will be distributed in the U.S. by JCI, not JC & Co. JC & Co's Notes will be delivered via the First Call and Third Party First Call services only upon JCI's instructions and only to customers and third-party vendors that JCI directs may receive them. JCI will thus have the right to withhold distribution of JC & Co's Notes to particular U.S. First Call subscribers or U.S. customers of a third-party vendor. In the case of Third Party First Call, TFN will pay JC & Co all fees due under the Supplemental Agreement for distribution of JC & Co's Notes in the United States. No portion of these fees will be remitted to JCI.

## **2. Discussion and Request for No-Action Position**

Section 203(a) of the Advisers Act requires any person or entity that acts as an "investment adviser" and makes use of "the mails or any means or instrumentality of interstate commerce" in connection with its business as such to register with the Commission. Section 202(a)(11) defines the term "investment adviser" as "any person who, for compensation, engages in the business of advising others ... as to the value of securities or as to the advisability of investing in, purchasing or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities."

JCI is not, and will not be, registered as an investment adviser in reliance on the exclusion provided by section 202(a)(11)(C) of the Advisers Act. That section exempts a "broker" or "dealer" from registration if (i) its "performance of [advisory] services is solely incidental to the conduct of [its] business as a broker or dealer" and (ii) it "receives no special compensation" for providing such services.<sup>6</sup>

In general, foreign broker-dealers, such as JC & Co and the Non-U.S. Affiliates, are unable to rely on the section 202(a)(11)(C) exclusion. The Staff takes the position that the broker-dealer exclusion in this section is available only to U.S. registered broker-dealers. Consequently, foreign broker-dealers such as JC & Co that disseminate research information in the United States pursuant to Rule 15a-6 could, absent no-action relief, potentially be required to register as investment advisers under section 203(a) of the Advisers Act.<sup>7</sup>

In an earlier no-action letter, however, the Staff took the position that an unregistered foreign broker-dealer is not required to register as an investment adviser if its research is sold to and then distributed to U.S. investors by a U.S. registered broker-dealer under certain conditions designed to protect U.S. investors. See Citicorp (pub. avail. Sept. 14, 1986). Citicorp committed, however, that there would be no direct contact between its foreign broker-dealer subsidiaries and customers of the U.S. registered broker-dealer through which the research was to be distributed, unless the representative of the foreign broker-dealer who would come into direct contact with U.S. investors first became a registered representative of the U.S. broker-dealer. In addition, all transactions in securities discussed in research distributed to U.S. investors were to be executed by the U.S. registered broker-dealer.

As described above, JC & Co proposes to structure its distribution of research via First Call and Third Party First Call in the same manner as that described in Citicorp, and subject to the same conditions material to the Division of Investment Management's no-action position in that case, except to the extent that the Commission has since liberalized applicable limitations under the broker-dealer registration requirement through promulgation of Rule 15a-6. The Commission has determined that permitting foreign broker-dealers to distribute their research in the United States through U.S.-registered broker-dealers such as JCI under the conditions prescribed in Rule 15a-6 will make available to U.S. investors research on non-U.S. securities without unduly sacrificing the safeguards afforded U.S. investors by the broker-dealer registration requirement.

Based on the foregoing, we request confirmation from the Staff that it will not recommend any enforcement action to the Commission against JC & Co or the Non-U.S. Affiliates under the Advisers Act if JC & Co and the Non-U.S. Affiliates enter into the proposed arrangements described above.

Sincerely,

Winthrop N. Brown

### **Footnotes**

1 These affiliates are Van Meer James Capel NV, Amsterdam, The Netherlands; James Capel (Far East) Limited, Hong Kong; DLP James Capel S.A., Paris, France; James Capel (Australia) Limited, Sydney, Australia; James Capel (Taiwan) Limited, Taipei, Taiwan; James Capel Pacific Limited, Tokyo, Japan; and Brown Baldwin Nisker James Capel, Toronto, Canada.

2 TFN is 100 percent owned by Thomson Corporation, a large Canadian company engaged directly, and indirectly through its subsidiaries, in the information, communications and travel/leisure businesses.

3 As discussed above, in practice, FCI acts on behalf of TFN in distributing the Notes via First Call outside the United States.

4 This procedure is necessary in order for transactions resulting from distribution of the Notes to be considered "unsolicited" for purposes of Rule 15a-6(a)(1).

5 These subsections of Rule 15a-6 permit JC & Co and the Non-U.S. Affiliates to effect trades directly for the account of major U.S. institutional investors and certain other specified entities, subject to certain conditions, without having to register as broker-dealers in the United States.

6 The phrase "solely incidental" is not defined by the Advisers Act or relevant SEC staff opinions but is generally considered to cover investment information and advice provided by a broker to its customers in the ordinary course of its brokerage (as distinguished from a separate portfolio management) business. The phrase "special compensation" also is not defined by the Advisers Act. However, the Commission previously has stated that it regards "special compensation" to exist "only where there is a clearly definable charge for investment advice" and that brokerage firms' commissions as a general rule will not be regarded as special compensation absent either an explicit or implicit two-tier rate structure, one fee for discount brokerage services and another higher fee for full service brokerage services. SEC Release No. IA-626 (April 27, 1978).

7 See SEC Release No. 34-27017, 54 Fed.Reg. 30013, 30023 (July 18, 1989). This requirement potentially applies even if the foreign broker-dealer distributes its research indirectly through a U.S. registered broker-dealer. Section 208(d) of the Advisers Act makes it unlawful for any person "indirectly, or through or by any other person, to do any act or thing which it would be unlawful for such person to do directly" under the Advisers Act.