

**MEMORANDUM**

TO: Non-U.S. Broker-Dealer Clients

FROM: Arnold & Porter LLP

DATE: April 1, 2012

RE: Update No. 29 — Survey of Where and to Whom Unregistered Broker-Dealers  
May Effect Securities Transactions

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There have been no substantive changes to the Memorandum since January 1, 2012.

If you would like further information regarding the Blue Sky laws, please feel free to call D. Grant Vingoe (212-715-1130) or Lauren Bittman (212-715-1199) in our New York office.

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## **GENERAL**

This Memorandum specifies the conditions under which and the institutions to whom U.S.-registered broker-dealers who are unregistered in particular states may sell securities under the Blue Sky laws of the various states.

In preparing this Memorandum, we have examined the latest unofficial compilations that are available to us of the statutes and regulations, if any, relating to broker-dealer registration or licensing and certain exemptions therefrom in the various states but we have not corresponded or conversed with officials of the securities commissions or other administrative bodies or officials of such jurisdictions pertaining to the individual requirements to be satisfied in order to qualify for exemptions from broker-dealer registration. We have not consulted local counsel in any jurisdiction with respect to the conclusions stated in this survey. This Memorandum has been prepared by attorneys in our New York office who are members of the bar of the State of New York and who do not purport to be experts as to the law of any other state.

Statements made and conclusions expressed herein are subject to the existence of broad discretionary powers of the authorities administering the securities laws, authorizing them, among other things, to impose additional requirements to qualify for an exemption, to issue stop orders or deny, withdraw, revoke or suspend the exemptions from registration requirements. Accordingly, the information furnished herein must be regarded as a practical guide for your general information and not an opinion from us with regard to the laws of the jurisdictions concerned. This Memorandum does not address state securities registration requirements or the United States federal broker-dealer registration requirements, including the exemption provided by Securities and Exchange Commission (“SEC”) Rule 15a-6 for certain activities of unregistered foreign broker-dealers. In addition, the Memorandum does not address the

requirements or restrictions, if any, with respect to the content, filing, approval or use in any state of any advertising or offering materials.

We have sought to include definitions of terms that are likely to be relevant in the ordinary course of your firm's activities in either the text of the Memorandum or in the Glossary appended hereto. However, in certain cases additional definitions would add undue complexity to this Memorandum. Please contact us for a further explanation if any of these undefined references become relevant to your operations. Any references herein to dollars or "\$" shall refer to United States dollars.

## **INTRODUCTION**

The state securities or Blue Sky statutes regulate the registration of securities as well as broker-dealers, investment advisers and their agents. The statutes commonly require registration of the securities prior to an offer or sale, and registration of the broker-dealer making the offer or sale. The statutes also provide various exemptions from securities and broker-dealer registration. For instance, all states exempt certain transactions from securities registration. A standard transactional exemption from securities registration is provided by most states for sales to institutions such as banks and insurance companies. Such exemption is premised on the sophistication of the particular institutions. In some, but not all statutes, the institutional transactional exemption extends to broker-dealer registration as well as securities registration. Several other statutes, which do not extend the institutional exemption to broker-dealers, exclude from the definition of broker-dealer persons who do not have an office in the state and who offer and sell exclusively to specified institutions. A few states take a more restrictive approach and also condition the broker-dealer registration exemption on registration with the SEC under the Securities Exchange Act of 1934.

While the statutes consistently provide an exemption based on sales to institutions, they do not recognize the same institutions nor do all of the states define consistently the terms used in the exemption provisions. For instance, many states include specified institutions and “other institutional buyers” within the exemption, but not all states have defined the term “other institutional buyer” and, when they do, there are discrepancies among the definitions that can be significant. The definition of a qualified institutional buyer found in SEC Rule 144A is a useful guide to determine whether an entity is an “other institutional buyer,” but it may not necessarily be determinative. State regulators generally construe the registration provisions broadly and the exemptive provisions narrowly. Accordingly, it is advisable to read each state provision carefully, to take a conservative approach to reliance on the exemption for sales to “other institutional buyers” and to obtain clarification from counsel when there is any doubt about the availability of an exemption or exclusion from registration. Similarly, in certain cases a broader exemption or exclusion from registration may be available in a particular state depending on specific facts and circumstances that should be addressed with counsel.

The issue regarding the exemption for “other institutional buyers” is discussed in more detail in our client advice memorandum dated July 1, 2002 and entitled “Reliance Upon The Exemption For Sales To ‘Other Institutional Buyers’ Under State Blue Sky Laws,” which is attached as Appendix B.

**I. States Which Do Not Permit Sales To Institutions By An Unregistered Broker-Dealer**

Louisiana  
Ohio

A. Any person who transacts business in **Louisiana** should be registered. The state takes the position by fiat that the statutory exemptions from broker-dealer registration are not applicable.

B. Any person who buys or makes offers or who sells securities within or from **Ohio** should be registered.

## **II. States Which Exempt A Broker-Dealer From Registration If The Broker-Dealer Is Selling To Specified Institutions**

Unregistered broker-dealers may make an offer or sale of securities:

A. To a bank, savings institution, trust company, insurance company or Investment Company, pension or profit-sharing trust or other financial institution or institutional buyer, or to a broker-dealer, whether the purchaser is acting for itself or in some fiduciary capacity in the following states:

Alabama<sup>1</sup>  
Arizona<sup>2</sup>  
Kentucky  
Montana<sup>3</sup>  
Washington

B. In **Florida** to a bank, or trust company, savings institution, insurance company, dealer, Investment Company or pension or profit-sharing trust, or Qualified Institutional Buyer, acting either in its individual or a fiduciary capacity; provided such offer or sale is not for the direct or indirect promotion of any scheme or enterprise with the intention of violating or evading any provision of the Florida Securities Act.

C. In **Illinois** to the following:

(1) a corporation, bank, savings bank, savings institution, savings and loan association, trust company, insurance company, building and loan association, dealer, pension fund or pension trust, employees' profit-sharing trust, government or political subdivision or instrumentality thereof, other financial institution (including, but not

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<sup>1</sup> Includes credit unions in the list of institutions.

<sup>2</sup> The Arizona transactional exemption for offers or sales to banks, savings institutions and trust, insurance and investment companies was granted for a company's offer and sale of ownership interests to credit unions by the Arizona Director of Securities in a no-action letter.

<sup>3</sup> Includes Qualified Institutional Buyers in the list of institutions.



limited to, a manager of investment accounts on behalf of other than natural persons, who, with affiliates, exercises sole investment discretion with respect to such accounts, and provided such accounts exceed 10 in number and have a fair market value of not less than \$10,000,000 at the end of the calendar month preceding the month of the transaction for which the exemption is utilized) or institutional investor, whether any purchaser heretofore mentioned is acting for itself or in a fiduciary capacity, or to any partnership or other association engaged as a substantial part of its business or operations in purchasing or holding securities, or any trust in respect of which a bank or a trust company is trustee or co-trustee;

(2) a natural person (a) whose individual net worth, or joint net worth with that of the person's spouse at the time of sale exceeds \$1,000,000 excluding the value of such person's principal residence, or (b) who has an individual or joint spousal income in excess of \$200,000 in each of the two most recent years and who reasonably expects, or is reasonably expected to have, an income in excess of \$200,000 in the current year; or any person that is not a natural person and in which 90% of the equity interest is owned by persons who meet either of the tests set forth in clauses (a) or (b) of this subparagraph (2); provided that no offer or sale under this subparagraph (2) is made by means of any general advertising or general solicitation in Illinois;

(3) an entity in which at least 90% of the equity is owned by persons heretofore described under subparagraphs (1) or (2); or to an employee benefit plan within the meaning of Title I of the Employee Retirement Income Security Act of 1974 if (i) the investment decision is made by a plan fiduciary as defined in Section 3(21) of such Act and such plan fiduciary is either a bank, savings and loan association, insurance

company, registered investment adviser or an investment adviser registered under the Investment Advisers Act of 1940, or (ii) the plan has total assets in excess of \$5,000,000, or (iii) in the case of a self-directed plan, investment decisions are made solely by persons that are described under subparagraphs (1) or (2) above; or to a plan established and maintained by, and for the benefit of the employees of, any state or political subdivision or agency or instrumentality thereof if such plan has total assets in excess of \$5,000,000; or to a Section 501(c)(3) Organization, Massachusetts or similar business trust, or partnership, if such organization, trust, or partnership has total assets in excess of \$5,000,000;

(4) a person who purchases at least \$150,000 in cash of the relevant securities, where the purchaser's total purchase price does not exceed 20% of the purchaser's net worth at the time of sale, provided that such security is not offered or sold by means of any general advertising or general solicitation in Illinois.

D. In **Nebraska** to the following, whether the purchaser is acting for itself or in some fiduciary capacity:

(1) a bank, savings institution, trust company, insurance company or Investment Company;

(2) a pension or profit-sharing trust which is an employee benefit plan within the meaning of Title I of the Employee Retirement Income Security Act of 1974 that has (a) total assets in excess of \$5,000,000 or (b) its investment decisions are made by a plan fiduciary, as defined in Section 3(21) of such Act, which is either a bank, insurance company or registered investment adviser;

(3) an individual Accredited Investor who is either (a) a director, executive officer, or general partner of the issuer of the securities being offered or sold, or a director, executive officer, or general partner of a general partner of that issuer; or (b) any manager of a limited liability company that is the issuer of the securities being offered or sold; or (c) a natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his or her purchase, exceeds \$1,000,000; or (d) a natural person who had an individual income in excess of \$200,000 in each of the two most recent years or joint income with that person's spouse in excess of \$300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;

(4) a broker-dealer; or

(5) other financial institution or institutional buyer, including a Business Development Company and a Small Business Investment Company.

E. In **New York** to a broker-dealer, state or national bank, trust company or savings institution incorporated under the laws and subject to the examination, supervision and control of any state or of the United States or of any insular possession thereof; provided that if the unregistered broker-dealer effects such transactions from New York, such unregistered broker-dealer must restrict its transactions in all states to the above-specified institutions.

Note: A broader exemption may be available for certain private placements in New York depending upon the facts and circumstances. This matter should be addressed with legal counsel.

F. In **Oregon** to the following:

(1) a bank, savings institution, trust company, insurance company, investment company, pension or profit-sharing trust, or other financial institution or institutional buyer (including but not limited to the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Housing Administration, the United States Department of Veterans' Affairs and the Government National Mortgage Association) or a broker-dealer, whether the purchaser is acting for itself or in a fiduciary capacity when the purchaser has discretionary authority to make investment decisions; or

(2) an Accredited Investor, provided that the securities are not sold by means of any public advertising or general solicitation in Oregon.

G. In **Texas** to the following, provided the institution is acting for its own account or as a bona fide trustee of a trust organized and existing other than for the purpose of acquiring the specific securities to be purchased:

(1) a bank, trust company, building and loan association, insurance company, surety or guaranty company;

(2) a federally chartered credit union, savings and loan association, or federal savings bank;

(3) a credit union or savings and loan association chartered under the laws of any state of the United States;

(4) an Investment Company;

(5) a small business investment company as defined in the Small Business Investment Act of 1958;

(6) a plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions for the benefit of its employees, if such plan has total assets in excess of \$5,000,000;

(7) an employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such Act which is either a bank, savings and loan association, insurance company or investment adviser registered under the Investment Advisers Act of 1940 or if the employee benefit plan has total assets in excess of \$5,000,000;

(8) a private business development company as defined in section 202(a)(22) of the Investment Advisers Act of 1940;

(9) an organization described in Section 501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of \$5,000,000;

(10) a registered dealer actually engaged in buying and selling securities; or

(11) a Qualified Institutional Buyer.

H. In **Virginia** to a corporation, investment company or pension or profit-sharing trust, or to a broker-dealer.

### III. States Which Exclude Persons Who Effect Transactions With Specified Institutions From The Definition Of Broker-Dealer If They Have No Place Of Business In The State

A number of states exclude from the definition of broker-dealer, and thus from registration requirements persons who (1) have no place of business in the state and (2) effect transactions exclusively with the issuers of the securities involved in the transaction, other locally registered broker-dealers or the institutions specified below for the respective states.

A. To a bank, savings institution, trust company, insurance company, Investment Company, pension or profit-sharing trust, or other financial institution or institutional buyer, whether acting for itself or as a trustee in the following states:

Arkansas  
Delaware  
New Hampshire  
New Jersey<sup>4 5</sup>  
North Carolina  
Utah  
West Virginia  
Wyoming

B. In **Alaska** to a bank, savings institution, trust company, insurance company, Investment Company or pension or profit-sharing trust, whether the purchaser is acting for itself or as a trustee.

C. In **Connecticut** to any bank and trust company, national banking association, savings bank, savings and loan association, federal savings bank, federal savings and loan association, credit union, federal credit union, trust company, insurance company, Investment

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<sup>4</sup> Includes Qualified Institutional Buyers in the list of institutions.

<sup>5</sup> Savings institution means any savings and loan association or building and loan association operating pursuant to the Savings and Loan Act (1963), P.L. 1963, c.144 (C.17:12B-2 et seq.), and any federal savings and loan association and any association or credit union organized under the laws of the United States or of any state whose accounts are insured by a federal corporation or agency.

Company, pension or profit-sharing trust, or other financial institution or institutional buyer, whether the purchaser is acting for itself or as a trustee.

D. In the **District of Columbia** to the following, whether the purchaser is acting for itself or as a trustee:

- (1) a Depository Institution, insurance company, separate account of an insurance company, Investment Company or Business Development Company;
- (2) an employee pension, profit-sharing or benefit plan if its investment decisions are made by a named fiduciary as defined in the Employee Retirement Income Security Act of 1974 that is either a Depository Institution, an insurance company, a broker-dealer registered under the Securities Exchange Act of 1934 or an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940 or if the plan has total assets in excess of \$5,000,000;
- (3) a Qualified Institutional Buyer;
- (4) a broker-dealer;
- (5) an Accredited Investor; or
- (6) a limited liability company with net assets of at least \$500,000.

E. In **Iowa** to the following, whether acting for itself or for others in a fiduciary capacity unless otherwise noted:

- (1) a banking institution organized under the laws of the United States, a member bank of the Federal Reserve System and any other banking institution, whether incorporated or not, doing business under the laws of a state or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to be exercised by national banks under the

authority of the Comptroller of the Currency pursuant to Section 1 of Public Law 87-722 (12 U.S.C. Section 92a), and which is supervised and examined by a state or federal agency having supervision over banks, and which is not operated for the purpose of evading this state's securities laws; and a receiver, conservator, or other liquidating agent of any institution or firm described above;

(2) a savings institution, trust company, credit union, or similar institution that is organized or chartered under the laws of a state or of the United States, authorized to receive deposits, and supervised and examined by an official or agency of a state or the United States if its deposits or share accounts are insured to the maximum amount authorized by statute by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or a successor authorized by federal law; but not including a Morris Plan bank or industrial loan company;

(3) an international financial institution of which the United States is a member and whose securities are exempt from registration under the Securities Act of 1933;

(4) a company organized as an insurance company whose primary business is writing insurance or reinsuring risks underwritten by insurance companies and which is subject to supervision by the insurance commissioner or a similar official or agency of a state;

(5) a separate account of an insurance company specified in subparagraph (4) above;

(6) an Investment Company;

(7) a broker-dealer registered under the Securities Exchange Act of 1934;



(8) an employee pension, profit-sharing, or benefit plan if the plan has total assets in excess of \$5 million or its investment decisions are made by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, that is a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, an investment adviser registered under this state's securities laws or an entity specified in subparagraph (1), (2) or (4) above;

(9) a plan established and maintained by a state, a political subdivision of a state, or an agency or instrumentality of a state or a political subdivision of a state for the benefit of its employees, if the plan has total assets in excess of \$5 million or its investment decisions are made by a duly designated public official or by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, that is a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, an investment adviser registered under this state's securities laws or an entity specified in subparagraph (1), (2) or (4) above;

(10) a trust, if it has total assets in excess of \$5 million, its trustee is an entity specified in subparagraph (1) or (2) above and its participants are exclusively plans of the types specified in subparagraphs (8) and (9) above regardless of the size of their assets; provided that such trust may not include as a participant any self-directed individual retirement account or similar self-directed plan;

(11) a Section 501(c)(3) Organization, corporation, Massachusetts trust or similar business trust, limited liability company, or partnership, not formed for the

specific purpose of acquiring the securities offered, with total assets in excess of \$5 million;

(12) a small business investment company licensed by the Small Business Administration under Section 301(c) of the Small Business Investment Act of 1958 (15 U.S.C. Section 681(c)) with total assets in excess of \$5 million;

(13) a private business development company as defined in Section 202(a)(22) of the Investment Advisers Act of 1940 (15 U.S.C. Section 80b-2(a)(22)) with total assets in excess of \$5 million;

(14) an investment adviser registered under the Investment Advisers Act of 1940 and acting for its own account;

(15) a Qualified Institutional Buyer except for those entities described in Rule 144A(a)(1)(i)(H) under the Securities Act of 1933;

(16) a “major U.S. institutional investor” as defined in Rule 15a-6(b)(4)(i) adopted under the Securities Exchange Act of 1934 (17 C.F.R. 240.15a-6); and

(17) any other person, other than an individual, of institutional character with total assets in excess of \$5 million and not formed for the specific purpose of evading this state’s securities laws.

F. In **Maryland**<sup>6</sup> to an Investment Company, bank, trust company, savings and loan association, insurance company, employee benefit plan with assets of not less than \$1,000,000 qualifying as a pension or profit-sharing trust, whether acting for itself or as a trustee with investment control.

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<sup>6</sup> The Maryland transactional exemption from registration for sales to qualified institutional buyers was granted for a company’s offer and sale of ownership interests to credit unions in a no-action letter.

G. In **Massachusetts** to the following, whether the purchaser is acting for itself or as a trustee:

(1) a bank, savings institution, trust company, insurance company or

Investment Company;

(2) a pension or profit-sharing trust defined as:

(a) any such trust with total assets in excess of \$5,000,000 and which is (i) an employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974, as amended; or (ii) a self-directed employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974, as amended, with investment decisions made by a person that is an Accredited Investor; or

(b) any employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974, as amended, with investment decisions made by a plan fiduciary, as defined in Section 2(21) of the Employee Retirement Income Security Act of 1974, as amended, which is either a bank, savings and loan association, insurance company or registered investment adviser; or

(c) an employee benefit plan established and maintained by a state, its political subdivisions or any agency or instrumentality of a state or its political subdivisions; or

(3) other financial institution or institutional buyer, including:

(a) a Small Business Investment Company;

(b) a private business development company as defined in Section 202(a)(22) of the Investment Advisors Act of 1940, as amended;

(c) a Business Development Company;

(d) an entity with total assets in excess of \$5,000,000 that is either (i) a company (whether a corporation, a Massachusetts or similar business trust, partnership, limited liability company or limited liability partnership), not formed for the specific purpose of acquiring the securities, a substantial part of whose business activities consists of investing, purchasing, selling or trading in securities issued by others and whose investment decisions are made by persons who are reasonably believed by the seller to have such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risks of investment, or (ii) a Section 501(c)(3) Organization; or

(4) any Qualified Institutional Buyer.

H. In **Georgia, Hawaii, Idaho, Indiana, Kansas, Michigan, Minnesota, Mississippi, Missouri, New Mexico, North Dakota, Oklahoma, South Carolina, South Dakota, U.S. Virgin Islands, Vermont and Wisconsin** to the following, whether acting for itself or for others in a fiduciary capacity unless otherwise noted:

(1) a banking institution organized under the laws of the United States, a member bank of the Federal Reserve System and any other banking institution, whether incorporated or not, doing business under the laws of a state or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to be exercised by national banks under the authority of the Comptroller of the Currency pursuant to Section 1 of Public Law 87-722 (12 U.S.C. Section 92a), and which is supervised and examined by a state or federal agency having supervision over banks, and which is not operated for the purpose of

evading this state's securities laws; and a receiver, conservator, or other liquidating agent of any institution or firm described above;

(2) a savings institution, trust company, credit union, or similar institution that is organized or chartered under the laws of a state or of the United States, authorized to receive deposits, and supervised and examined by an official or agency of a state or the United States if its deposits or share accounts are insured to the maximum amount authorized by statute by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or a successor authorized by federal law; but not including a Morris Plan bank or industrial loan company;

(3) an international financial institution of which the United States is a member and whose securities are exempt from registration under the Securities Act of 1933;

(4) a company organized as an insurance company whose primary business is writing insurance or reinsuring risks underwritten by insurance companies and which is subject to supervision by the insurance commissioner or a similar official or agency of a state;

(5) a separate account of an insurance company specified in subparagraph (4) above;

(6) an Investment Company;

(7) a broker-dealer registered under the Securities Exchange Act of 1934;

(8) an employee pension, profit-sharing, or benefit plan if the plan has total assets in excess of \$10 million or its investment decisions are made by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, that is a

broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, an investment adviser registered under this state's securities laws or an entity specified in subparagraph (1), (2) or (4) above;

(9) a plan established and maintained by a state, a political subdivision of a state, or an agency or instrumentality of a state or a political subdivision of a state for the benefit of its employees, if the plan has total assets in excess of \$10 million or its investment decisions are made by a duly designated public official or by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, that is a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, an investment adviser registered under this state's securities laws or an entity specified in subparagraph (1), (2) or (4) above;

(10) a trust, if it has total assets in excess of \$10 million, its trustee is an entity specified in subparagraph (1) or (2) above and its participants are exclusively plans of the types specified in subparagraphs (8) and (9) above; provided that such trust may not include as a participant any self-directed individual retirement account or similar self-directed plan;

(11) a Section 501(c)(3) Organization, corporation, Massachusetts trust or similar business trust, limited liability company, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of \$10 million;

(12) a small business investment company licensed by the Small Business Administration under Section 301(c) of the Small Business Investment Act of 1958 (15 U.S.C. Section 681(c)) with total assets in excess of \$10 million;

(13) a private business development company as defined in Section 202(a)(22) of the Investment Advisers Act of 1940 (15 U.S.C. Section 80b-2(a)(22)) with total assets in excess of \$10 million;

(14) an investment adviser registered under the Investment Advisers Act of 1940 and acting for its own account;

(15) a Qualified Institutional Buyer except for those entities described in Rule 144A(a)(1)(i)(H) under the Securities Act of 1933;

(16) a “major U.S. institutional investor” as defined in Rule 15a-6(b)(4)(i) adopted under the Securities Exchange Act of 1934 (17 C.F.R. 240.15a-6); and

(17) any other person, other than an individual, of institutional character with total assets in excess of \$10 million and not formed for the specific purpose of evading this state’s securities laws.

I. In **Maine** to the following, whether acting for itself or for others in a fiduciary capacity unless otherwise noted:

(1) a banking institution organized under the laws of the United States, a member bank of the Federal Reserve System and any other banking institution, whether incorporated or not, doing business under the laws of a state or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to be exercised by national banks under the authority of the Comptroller of the Currency pursuant to Section 1 of Public Law 87-722

(12 U.S.C. Section 92a), and which is supervised and examined by a state or federal agency having supervision over banks, and which is not operated for the purpose of evading this state's securities laws; and a receiver, conservator, or other liquidating agent of any institution or firm described above;

(2) a savings institution, trust company, credit union, or similar institution that is organized or chartered under the laws of a state or of the United States, authorized to receive deposits, and supervised and examined by an official or agency of a state or the United States if its deposits or share accounts are insured to the maximum amount authorized by statute by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or a successor authorized by federal law; but not including a Morris Plan bank or industrial loan company;

(3) an international financial institution of which the United States is a member and whose securities are exempt from registration under the Securities Act of 1933;

(4) a company organized as an insurance company whose primary business is writing insurance or reinsuring risks underwritten by insurance companies and which is subject to supervision by the insurance commissioner or a similar official or agency of a state;

(5) a separate account of an insurance company specified in subparagraph (4) above;

(6) an Investment Company;

(7) a broker-dealer registered under the Securities Exchange Act of 1934;



(8) an employee pension, profit-sharing, or benefit plan if the plan has total assets in excess of \$10 million or its investment decisions are made by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, that is a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, an investment adviser registered under this state's securities laws or an entity specified in subparagraph (1), (2) or (4) above;

(9) a plan established and maintained by a state, a political subdivision of a state, or an agency or instrumentality of a state or a political subdivision of a state for the benefit of its employees, if the plan has total assets in excess of \$10 million or its investment decisions are made by a duly designated public official or by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, that is a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, an investment adviser registered under this state's securities laws or an entity specified in subparagraph (1), (2) or (4) above;

(10) a trust, if it has total assets in excess of \$10 million, its trustee is an entity specified in subparagraph (1) or (2) above and its participants are exclusively plans of the types specified in subparagraphs (8) and (9) above; provided that such trust may not include as a participant any self-directed individual retirement account or similar self-directed plan;

(11) a Section 501(c)(3) Organization, corporation, Massachusetts trust or similar business trust, limited liability company, or partnership, not formed for the

specific purpose of acquiring the securities offered, with total assets in excess of \$10 million;

(12) a small business investment company licensed by the United States Small Business Administration under Section 301(c) of the federal Small Business Investment Act of 1958 (15 U.S.C. Section 681(c)) with total assets in excess of \$5 million;

(13) a private business development company as defined in Section 202(a)(22) of the Investment Advisers Act of 1940 (15 U.S.C. Section 80b-2(a)(22)) with total assets in excess of \$5 million;

(14) an investment adviser registered under the Investment Advisers Act of 1940 and acting for its own account;

(15) a Qualified Institutional Buyer except for those entities described in Rule 144A(a)(1)(i)(H) under the Securities Act of 1933;

(16) a “major U.S. institutional investor” as defined in Rule 15a-6(b)(4)(i) adopted under the Securities Exchange Act of 1934 (17 C.F.R. 240.15a-6); and

(17) any other person, other than an individual, of institutional character with total assets in excess of \$10 million and not formed for the specific purpose of evading this state’s securities laws.

J. In **Pennsylvania** to the following:

(1) a bank, savings bank, savings institution, savings and loan association, thrift institution, trust company or similar organization which is organized or chartered under the laws of a state or of the United States, is authorized to and receives deposits and is supervised and examined by an official or agency of a state or by the United States

if its deposits are insured by the Federal Deposit Insurance Corporation or a successor authorized by Federal law;

(2) an Insurance company;

(3) a pension or profit-sharing plan or trust (i) which has plan assets of at least \$5,000,000 or (ii) which has retained on an ongoing basis the services of a person knowledgeable and experienced in financial and business matters to render professional investment management advice and which has investments of at least \$500,000 in securities;

(4) an Investment Company;

(5) a person, other than an individual, which controls any of the foregoing institutions specified in paragraphs (1) through (4) hereof;

(6) the federal government, state or any agency or political subdivision thereof, except public school districts of the state of Pennsylvania;

(7) a corporation, business trust or any wholly owned subsidiary of such corporation or business trust (i) which has been in existence for 18 months and (ii) which has a tangible net worth on a consolidated basis, as reflected in its most recent audited financial statements (meaning not more than 16 months prior to the date of the transaction) of not less than \$10,000,000;

(8) a college, university or other public or private institution which has received exempt status under Section 501(c)(3) of the Internal Revenue Code and which has a total endowment or trust funds (including annuity and life income funds) of not less than \$5,000,000 according to its most recent audited financial statements (meaning not more than 16 months prior to the date of the transaction), provided the aggregate dollar

amount of the securities sold to such college, university or institution shall not exceed five percent of such endowment or trust funds;

(9) a Small Business Investment Company, which either (1) has a total capital of \$1,000,000 or more or (2) is controlled by institutional investors as that term is defined herein;

(10) a business development credit corporation, as authorized by the Business Development Credit Corporation Law (15 P.S. Sections 2701-2716);

(11) a Qualified Institutional Buyer; or

(12) a person whose security holders consist exclusively of institutional investors as that term is defined herein or broker-dealers.

K. In **Puerto Rico** to a bank, savings institution, trust company, investment company as defined in the Investment Companies Act of Puerto Rico, pension trust, or other financial institution or institutional buyer that acts in their own name or as a trustee.

**IV. States Which Condition The Institutional Exemption From Broker-Dealer Registration On Registration Under The Securities Exchange Act Of 1934 And Not Having A Place Of Business In The State**

Certain states either exclude from the definition of broker-dealer or exempt from broker-dealer registration or licensing requirements a person who (1) has no place of business in the state, (2) is a broker-dealer registered under the Securities Exchange Act of 1934 and (3) makes offers or sales only to locally licensed broker-dealers<sup>7</sup> or to specified institutions.

Those states and the specified institutions are as follows:

A. In **California**<sup>8 9 10</sup> to the following:

(1) a bank, savings and loan association, trust company, insurance company, Investment Company, pension or profit-sharing trust (other than a pension or profit-sharing trust of the issuer, a self-employed individual retirement plan or individual retirement account);

(2) a Section 501(c)(3) Organization, which has total assets (including endowment, annuity and life income funds) of not less than \$5,000,000 according to its most recent audited financial statement;

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<sup>7</sup> To qualify for the exemption the person may not act as a clearing broker-dealer for the locally licensed broker-dealers.

<sup>8</sup> The broker-dealer must never have had any certificate denied or revoked under the California Blue Sky laws or any predecessor statute.

<sup>9</sup> The securities being offered and sold must be registered in California, unless (i) the institution purchasing the securities represents that it is purchasing for investment and not with a view to or for sale in connection with any distribution of the securities, or (ii) the securities are otherwise exempt from registration in California.

<sup>10</sup> A person who has no place of business in California and who is not registered as a broker-dealer under the Securities Exchange Act of 1934 may nevertheless make offers and sales in California exclusively to California registered broker-dealers; provided such sales are made in a principal transaction or for resale pursuant to an exemption from California's securities registration requirements.

(3) a corporation which has a net worth on a consolidated basis according to its most recent audited financial statement of not less than \$14,000,000, provided that if the securities are common stock of a corporation or securities exchangeable for or convertible into common stock of a corporation the holders of less than 25% of the outstanding shares of such common stock have addresses in California and provided that the securities to be acquired by a purchaser in the exempt transaction (plus other similar securities held by such purchaser) will not represent more than 5% of the total number of shares of common stock of the issuer assuming the exchange or conversion of all securities is exchangeable for or convertible into common stock; or

(4) a wholly owned subsidiary of any of the foregoing purchasers.

B. In **Colorado** to the following, whether acting for itself or in a fiduciary capacity:

(1) a Depository Institution, insurance company, separate account of an insurance company, Investment Company or Business Development Company;

(2) private business development company, as defined in the federal Investment Advisers Act of 1940;

(3) an entity, other than a natural person, a substantial part of whose business activities consists of investing, purchasing, selling or trading in securities of more than one issuer not of its own issue and that has total assets in excess of \$5,000,000 at the end of its latest fiscal year;

(4) an employee pension, profit-sharing or benefit plan, if (a) its investment decisions are made by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, that is a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the

Investment Advisers Act of 1940, a Depository Institution, or an insurance company, or

(b) the plan has total assets in excess of \$5,000,000;

(5) a Small Business Investment Company; or

(6) any other institutional buyer.

C. In **Tennessee** to a bank, trust company, insurance company, Investment Company, a holding company which controls any of the foregoing, a trust or fund over which any of the foregoing has or shares investment discretion, a pension or profit sharing plan or any other person engaged as a substantial part of its business in investing in securities, in each case having a net worth in excess of \$1,000,000.

**V. States Which Condition The Institutional Exemption From Broker-Dealer Registration On Registration (Or Exemption From Registration) Under The Securities Exchange Act Of 1934 And Not Having A Place Of Business In The State**

Certain states either exclude from the definition of broker-dealer or exempt from broker-dealer registration or licensing requirements a person who (1) has no place of business in the state, (2) is a broker-dealer registered under the Securities Exchange Act of 1934 or is exempt from such registration and (3) makes offers or sales only to locally licensed broker-dealers or to specified institutions.

Those states and the specified institutions are as follows:

A. In **Nevada** to the following, whether acting for itself or others in a fiduciary capacity other than as agent:

(1) a Depository Institution, insurance company, separate account of an insurance company or Investment Company;

(2) an employee pension, profit-sharing, or benefit plan that has (a) total assets in excess of \$5,000,000 or (b) its investment decisions made by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, who is either a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, a Depository Institution or an insurance company; or

(3) an Accredited Investor.

B. In **Rhode Island**<sup>11</sup> to the following, whether acting for itself or another in a fiduciary capacity:

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<sup>11</sup> If the broker-dealer is not registered under the Securities Exchange Act of 1934, such broker-dealer may not deal solely in U.S. government securities.



(1) a Depository Institution, insurance company, separate account of an insurance company or Investment Company;

(2) employee pension, profit-sharing, or benefit plan that has (a) total assets in excess of \$5,000,000 or (b) its investment decisions made by a plan fiduciary, as defined in the Employee Retirement Income Security Act of 1974, who is either a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, a Depository Institution or an insurance company; or

(3) any other institutional buyer.

## Glossary

1. **Accredited Investor** - (Defined in Rule 501(a) of SEC Regulation D) means any person who comes within any of the following categories at the time of the sale of the securities to that person:

(1) any bank as defined in Section 3(a)(2) of the Securities Act of 1933, or any savings and loan association or other institution as defined in Section 3(a)(5)(A) of the Securities Act of 1933, whether acting in its individual or fiduciary capacity; any broker or dealer registered pursuant to Section 15 of the Securities Exchange Act of 1934; any insurance company as defined in Section 2(a)(13) of the Securities Act of 1933; any investment company registered under the Investment Company Act of 1940 or a business development company as defined in Section 2(a)(48) of the Investment Company Act of 1940; any small business investment company licensed by the U.S. Small Business Administration under Section 301(c) or (d) of the Small Business Investment Act of 1958; any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions for the benefit of its employees, if such plan has total assets in excess of \$5,000,000; any employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 if the investment decision is made by a plan fiduciary, as defined in Section 3(21) of the Employee Retirement Income Security Act of 1974, which is either a bank, savings and loan association, insurance company, or registered investment adviser, or if the employee benefit plan has total assets in excess of \$5,000,000 or, if a self-directed plan, with investment decisions made solely by persons that are accredited investors;

(2) any private business development company as defined in Section 202(a)(22) of the Investment Advisers Act of 1940;

(3) any organization described in Section 501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of \$5,000,000;

(4) any director, executive officer, or general partner of the issuer of the securities being offered or sold or any director, executive officer, or general partner of a general partner of that issuer;

(5) any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of the purchase exceeds \$1,000,000;<sup>12</sup>

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<sup>12</sup> For purposes of calculating an individual's net worth, the individual's primary residence should not be included as an asset. As of February 27, 2012, when calculating net worth, indebtedness secured by the individual's primary residence, up to the estimated fair market value of the primary residence, is not treated as a liability, unless the borrowing occurs in the 60 days preceding the purchase of securities in the exempt offering and is not in connection with the

Footnote continued on next page

(6) any natural person who had an individual income in excess of \$200,000 in each of the two most recent years or joint income, with that person's spouse in excess of \$300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;

(7) any trust, with total assets in excess of \$5,000,000, not formed for the specific purpose of acquiring the securities offered, whose purchase is directed by a sophisticated person as described in SEC Rule 506(b)(2)(ii); and

(8) any entity in which all of the equity owners are Accredited Investors.

2. **Business Development Company** - (defined in Section 2(a)(48) of the Investment Company Act of 1940) means a closed-end company which:

(A) is organized under the laws of, and has its principal place of business in, any State or States;

(B) is operated for the purpose of making investments in securities described in paragraphs (1) through (3) of section 55(a) of the Investment Company Act of 1940 and makes available significant managerial assistance with respect to the issuers of such securities, provided that a business development company must make available significant managerial assistance only with respect to the companies which are treated by such business development company as satisfying the 70 per centum of the value of its total assets condition of section 55 of the Investment Company Act of 1940; and

(C) has elected to be subject to the Sections 55 through 65 of the Investment Company Act.

3. **Charitable Organization** - As defined in Section 170(b)(1)(A) of the Internal Revenue Code, includes in relevant part and among other entities:

(1) a church or a convention or association of churches;

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acquisition of the primary residence. In such cases, the debt secured by the primary residence must be treated as a liability in calculating net worth. In addition, any indebtedness secured by an individual's primary residence in excess of the property's estimated fair market value is treated as a liability. However, this will not apply to any calculation of an individual's net worth made in connection with a purchase of securities in accordance with a right to purchase such securities, provided that (1) such right was held by the individual on July 20, 2010; (2) the individual qualified as an accredited investor on the basis of net worth at the time the individual acquired such right; and (3) the individual held securities of the same issuer, other than such right, on July 20, 2010.

(2) an educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on;

(3) an organization the principal purpose or functions of which are the providing of medical or hospital care or medical education or medical research, if the organization is a hospital, or if the organization is a medical research organization directly engaged in the continuous active conduct of medical research in conjunction with a hospital, and during the calendar year in which the charitable contribution is made such organization is committed to spend such contributions for such research before January 1 of the fifth calendar year which begins after the date such contribution is made; and

(4) an organization which normally receives a substantial part of its support (exclusive of income received in the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501(a)) from the United States or any State or political subdivision thereof or from direct or indirect contributions from the general public, and which is organized and operated exclusively to receive, hold, invest, and administer property and to make expenditures to or for the benefit of a college or university which is an organization referred to in clause (2) above and which is an agency or instrumentality of a State or political subdivision thereof, or which is owned or operated by a State or political subdivision thereof or by an agency or instrumentality of one or more States or political subdivisions.

4. **Depository Institution** - means (a) a person, other than an insurance company or other organization primarily engaged in the insurance business, which is organized, chartered or holding an authorization certificate under the laws of a state or of the United States which authorizes the person to receive deposits and which is regulated, supervised and examined for the protection of depositors by an official or agency of a state or the United States and the accounts of which are federally insured, and (b) a trust company or other institution that is authorized by federal or state law to exercise fiduciary powers of the type a national bank is permitted to exercise under the authority of the Comptroller of the Currency and is regulated, supervised and examined by an official or agency of a state or the United States, but does not include in either case a Morris Plan bank, industrial loan company or a similar bank or company.

5. **Investment Company** - means an entity which is registered as an investment company under the Investment Company Act of 1940 such as a registered open-end mutual fund, registered closed-end fund and a registered unit investment trust.

6. **Qualified Institutional Buyer** - Defined in SEC Rule 144A (17 C.F.R. 230.144(A)(a)) - The provision defines a qualified institutional buyer as:

(1) any of the following entities, acting for its own account or the accounts of other Qualified Institutional Buyers, that in the aggregate owns and invests on a discretionary basis at least \$100 million in securities of issuers that are not affiliated with such buyer:

(A) any insurance company as defined in Section 2(a)(13) of the Securities Act of 1933;

(B) any Investment Company registered under the Investment Company Act of 1940 or any Business Development Company;

(C) any Small Business Investment Company;

(D) any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees;

(E) any employee benefit plan within the meaning of Title I of the Employee Retirement Income Security Act of 1974;

(F) any business development company as defined in Section 202(a)(22) of the Investment Advisers Act of 1940;

(G) any Section 501(c)(3) Organization, corporation (other than a bank as defined in Section 3(a)(2) of the Securities Act of 1933 or a savings and loan association or other institution referenced in Section 3(a)(5)(A) of the Securities Act of 1933 or a foreign bank or savings and loan association or equivalent institution), partnership, or Massachusetts or similar business trust; and

(H) any investment adviser registered under the Investment Advisers Act of 1940.

(2) any dealer registered pursuant to Section 15 of the Securities Exchange Act of 1934, acting for its own account or the accounts of other Qualified Institutional Buyers, that in the aggregate owns and invests on a discretionary basis at least \$10,000,000 of securities of issuers that are not affiliated with the broker-dealer, provided that (A) securities constituting the whole or part of an unsold allotment to or subscription by a dealer as a participant in a public offering shall not be deemed to be owned by such dealer and (B) a dealer registered pursuant to Section 15 of the Securities Exchange Act of 1934 may act as agent, on a non-discretionary basis, in a transaction with a Qualified Institutional Buyer without itself having to be a Qualified Institutional Buyer;

(3) any investment company registered under the Investment Company Act of 1940, acting for its own account or for the accounts of other Qualified Institutional Buyers, that is part of a family of investment companies (as defined in Rule 144A) which own in the aggregate at least \$100,000,000 in securities of issuers, other than issuers that are affiliated with the investment company or are part of such family of investment companies;

(4) any entity, all of the equity owners of which are Qualified Institutional Buyers, acting for its own account or the accounts of other Qualified Institutional Buyers; and

(5) any bank as defined in Section 3(a)(2) of the Securities Act of 1933, any savings and loan association or other institution as referenced in Section 3(a)(5)(A) of the Securities Act of 1933, or any foreign bank or savings and loan association or equivalent institution, acting for its own account or the accounts of other Qualified Institutional Buyers, that in the aggregate owns and invests on a discretionary basis at least \$100,000,000 in securities of issuers that are not affiliated with it and that has an audited net worth of at least \$25,000,000 as demonstrated in its latest annual financial statements, as of a date not more than 16 months preceding the date of the relevant sale in the case of a United States bank or savings and loan association, and not more than 18 months preceding such date of sale for a foreign bank or savings and loan association or equivalent institution.

7. **Section 501(c)(3) Organizations** - Organizations described in Section 501(c)(3) of the Internal Revenue Code including corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

8. **Small Business Development Company** - (defined in Section 202(a)(22) of the Investment Advisers Act of 1940 as a Business Development Company) means any company which is a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 and which complies with Section 55 of the Investment Company Act of 1940, except that -

(A) the 70 per centum of the value of total assets condition referred to in Sections 2(a)(48) and 55 of the Investment Company Act of 1940 shall be 60 per centum for purposes of determining compliance therewith;

(B) such company need not be a closed-end company and need not elect to be subject to the provisions of sections 55 through 65 of the Investment Company Act of 1940; and

(C) the securities which may be purchased pursuant to Section 55(a) of the Investment Company Act of 1940 may be purchased from any person.

9. **Small Business Investment Company** - means a company licensed by the United States Small Business Administration under Section 301(c) or (d) of the Small Business Investment Act of 1958.

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## APPENDIX A

In late 1995, the North American Securities Administrators Association (“NASAA”) approved a proposal presented by its Cross-Border Trading Committee (the “Cross-Border Committee”) which provided for a special limited broker-dealer and salesman registration procedure for Canadian-based broker-dealers and their Canadian-based salesmen if the transactions were effected with Canadians temporarily present in the respective state and with whom the Canadian broker-dealer had a prior business relationship and/or persons present in the respective state whose transactions are in a self-directed tax-advantaged retirement plan in Canada (hereafter referred to as “Canadian Transactions”). Unfortunately, NASAA’s approval of the Cross-Border Committee’s proposal had the status of a recommendation and was not (and legally could not have been) binding on the states so that its implementation is totally dependent upon further action by the individual states.

At the present time, numerous states have adopted a special exemption from or a special limited registration procedure for Canadian-based broker-dealers and their Canadian salesmen to permit them to effect Canadian Transactions. In both cases the procedures and requirements are similar so that appropriate filings must be made and maintained with the respective state prior to effecting any Canadian Transactions in reliance thereon and a number of other conditions must be met (for instance, the Canadian broker-dealer may not have an office or other physical presence in the respective state, must file a consent to service of process with the respective state and must disclose to its Canadian clients in the respective state that it is not subject to the full regulatory requirements of the state). In some states, however, the exemption is self-executing and does not require a filing if all the conditions of the exemption are met.

In June 2000 the U.S. Securities and Exchange Commission (“SEC”) took two important actions that have affected Canadian-based broker-dealers:

- The SEC exempted Canadian-based broker-dealers from the broker-dealer registration requirements of the Securities Exchange Act of 1934 to the extent they effect securities transactions for self-directed tax-advantaged retirement plans in Canada (“Canadian Retirement Accounts”) when the participants reside in the United States. Subject to various conditions, the SEC exemptive order is designed to permit Canadian-based broker-dealers who are not registered in the United States to conduct such activities as are necessary to allow individuals who have established Canadian Retirement Accounts and later moved to the United States to effectively manage the assets in the accounts. SEC Release No. 34-42906; International Series Release No. 1227.
- Effective June 23, 2000 the SEC adopted Rule 237 under the Securities Act of 1933 and Rule 7d-2 under the Investment Company Act of 1940 which exempt from their respective securities registration and investment company registration requirements the offer and sale of eligible foreign (*i.e.*, non-U.S.) securities and mutual funds to Canadian Retirement Accounts when the participants reside in the United States. The rules are designed to permit participants in Canadian Retirement Accounts who reside in the United States to purchase eligible foreign securities and mutual funds for their Canadian Retirement Accounts consistent

with the requirements of the Canadian tax laws. SEC Release Nos. 33-7860, 34-42905, IC-24491; File No. S7-10-99 International Series Release No. 1226.

These two SEC actions, when taken together with SEC Rule 15a-6 which exempts Canadian-based broker-dealers from the broker-dealer registration requirements of the Securities Exchange Act of 1934 to the extent they effect securities transactions with Canadians who are temporarily present in the United States, may represent a significant opportunity for Canadian investment dealers.

The following chart lists the states that have adopted regulatory relief for Canadian broker-dealers when dealing with holders of Canadian self-directed tax advantaged retirement plans and in most cases with Canadian clients who are temporarily present in the respective states. The states have been grouped generally under three categories and a sample summary of the requirements for one state in each category has been provided. Some states listed under a particular category, however, have adopted significant variations from other states in the same category.

**Category 1: Self-Executing Exemption.** Wyoming provides self-executing exemptions for the Canadian broker-dealer, its salesmen and the securities they sell to Canadians temporarily present in the state and Canadian self-directed tax advantaged retirement plans, provided that the Canadian broker-dealer meets all of the following requirements.

The Canadian broker-dealer must:

- Be a Canadian resident.
- Have no office or other physical presence in the state.
- Only effect or attempt to effect transactions in securities:
  - With or for a person from Canada who is temporarily present in the state, with whom the Canadian broker-dealer had a bona fide business-client relationship before the person entered the state; or
  - With or for a person from Canada who is present in the state, whose transactions are in a self-directed tax-advantaged retirement plan in Canada of which the person is the holder or contributor.
- Be a member in good standing of a self-regulatory organization or stock exchange in Canada.
- Maintain its provincial or territorial registrations and its membership in a self-regulatory organization or stock exchange in good standing.
- Not be in violation of the anti-fraud laws of the state in connection with its securities transactions therein.

**Category 2: Exemption by Notice Filing Procedure.** Florida provides exemptions for the Canadian broker-dealer, its salesmen and the securities they sell to Canadians temporarily present in the state and Canadian self-directed tax advantaged retirement plans, provided that:

The Canadian broker-dealer must:

- Be located in Canada.
- Have no office or other physical presence in the state.
- Only effect or attempt to effect transactions in securities:
  - With or for a person from Canada who is present in the state and with whom the Canadian broker-dealer had a bona fide broker-dealer-client relationship before the person entered the United States; or
  - With or for a person from Canada who is present in the state and whose transactions are in a self-directed, tax-advantaged retirement plan in Canada of which the person is the holder or contributor.
- Make a notice filing to claim the exemption, a consent to service of process and a filing fee of \$200.
- Provide evidence that the Canadian broker-dealer is registered as a broker-dealer in the jurisdiction in which the dealer's main office is located.
- Provide evidence that the Canadian broker-dealer is a member of a self-regulatory organization or stock exchange in Canada.
- Provide to the Florida Securities Commission, upon request, its books and records relating to its business in the state as a broker-dealer and notice of each civil, criminal or administrative action initiated against the broker-dealer.
- Disclose to its clients in the state that the broker-dealer and its associated persons are not subject to the full regulatory requirements of the Florida Blue Sky laws.
- Renew the filing annually.

**Category 3: Special Registration Procedure.** New Hampshire provides a limited registration requirement for the Canadian broker-dealer, its salesmen and the securities they sell to Canadians temporarily present in the state and Canadian self-directed tax advantaged retirement plans, provided that:

The Canadian broker-dealer must:

- Be a Canadian resident.

- Have no office or other physical presence in the state.
- Only effect or attempt to effect transactions in securities:
  - With or for a person from Canada who is temporarily resident in the state, with whom the Canadian broker-dealer had a bona fide broker-dealer-client relationship before the person entered the United States; or
  - With or for a person who is resident in the state, whose transactions are in a self-directed tax-advantaged retirement plan in Canada of which the person is a holder or contributor.
- File an application in the form required by the jurisdiction in which it has its head office and a consent to service of process.
- Be registered as a broker-dealer in good standing in the jurisdiction from which it is effecting transactions into the state and files evidence thereof.
- Be a member of a self-regulatory organization or stock exchange in Canada.
- Disclose to its clients in the state that the broker-dealer and its agents are not subject to the full regulatory requirements of the New Hampshire Blue Sky laws.
- Provide the secretary of state, upon request, its books and records relating to its business in the state as a broker-dealer and inform the secretary of state of any criminal action taken against the broker-dealer or its agent or of any finding or sanction imposed on the broker-dealer as a result of any self-regulatory or regulatory action involving fraud, theft, deceit, misrepresentation or similar conduct.
- Renew the registration annually.

**States Listed by Category of Exemption or Limited Registration Requirement**

<b>Category 1</b>	<b>Category 2</b>	<b>Category 3</b>
California	Alabama	Alaska
Connecticut	Arizona	District of Columbia
Georgia	Arkansas	Iowa
Idaho	Colorado	New Hampshire
Illinois	Delaware	North Carolina
Kansas	Florida	Oregon
Kentucky	Hawaii	
Maryland	Indiana	
Michigan	Maine	
Minnesota	Massachusetts	
Missouri	Mississippi	
Nevada	Montana	

New Mexico	New Jersey
Ohio	North Dakota
Oklahoma	Rhode Island
Pennsylvania	South Carolina
South Dakota	Tennessee
Texas	Utah
Vermont	Washington
West Virginia	
Wisconsin	
Wyoming	

Several other states, described below, do not fit into one of these three categories.

The Louisiana Commissioner of Securities has adopted a Statement of Policy intended to provide regulatory relief for Canadian broker-dealers, their salesmen and the securities sold when sold in Canadian Transactions. Compliance with the Statement of Policy appears to provide protection for Canadian broker-dealers from enforcement actions by the Louisiana Securities Commission; however, it is unclear what effect the Statement of Policy may have regarding a customer's statutory right to bring a civil action against an unregistered broker-dealer for any losses in his account.

On July 17, 2002, the Nebraska Department of Banking and Finance issued a no-action letter intended to provide regulatory relief for Canadian broker-dealers, their salesmen and the securities sold when sold to Canadian Retirement Accounts. Compliance with the no-action letter provides protection for Canadian broker-dealers from enforcement actions by the Nebraska Department of Banking and Finance if they effect transactions with holders of Canadian Retirement Accounts in Nebraska. However, the no-action letter expressly states that it "does not affect the right of any individual to pursue a private action in connection with the activity of any broker-dealer covered by this no-action position." Thus, customers will have the right to bring a civil action against an unregistered broker-dealer relying on the no-action letter for any losses in their account. Furthermore, the no-action letter only provides regulatory relief for transactions with Canadian Retirement Accounts; it does not provide any relief for transactions with Canadians who are temporarily present in Nebraska, which are still not permitted.

In 2001, New York granted a Canadian broker-dealer's request for a no-action letter confirming that the state would take no action for failure to register in New York as a broker-dealer or as salesmen. The no-action letter was granted provided that (1) the broker-dealer and its salesmen only service Canadian Retirement Accounts held by former Canadian residents currently residing in New York and current Canadian residents temporarily residing in or visiting New York, and other transactions permitted by New York law; (2) the Canadian broker-dealer remains a member in good standing of the IDA; (3) the Canadian broker-dealer advises the New York residents in writing that it is not registered to transact securities business in the U.S.; and (4) the Canadian broker-dealer notifies its salesmen that they must be subject to enforcement actions regarding fraud or other securities violations. Staff at the New York Bureau of Securities have taken the position that Canadian broker-dealers are expected to individually request their own no-action relief and have provided the 2001 request discussed above as an example of a request for such relief.

As of February 12, 2005, the U.S. Virgin Islands has a comprehensive Blue Sky law in place. This new Blue Sky law authorizes the adoption of rules to provide for (1) an exemption from registration for Canadian broker-dealers and their salesmen when dealing with Canadian snowbirds and Canadian Retirement Accounts and (2) an exemption from registration for the securities sold in such transactions. However, the necessary implementing rules have not yet been proposed or adopted.

Virginia Rules 21VAC 5-20-85 and 21VAC 5-20-155 provide a special registration procedure for Canadian broker-dealers and their salesmen when dealing with Canadians temporarily residing in or visiting Virginia or with holders of or contributors to Canadian Retirement Accounts in Virginia. In addition, Rule 21VAC 5-40-160 provides a parallel securities registration exemption for the securities sold. However, Canadian broker-dealers and their salesmen who register in Virginia will be subject to the requirements of 21VAC 5-20-280, which imposes certain U.S. compliance and conduct requirements that Canadian broker-dealers may not be willing or able to meet. Accordingly, the Virginia registration procedure may be of limited usefulness.

## **APPENDIX B**

### **RELIANCE UPON THE EXEMPTION FOR SALES TO “OTHER INSTITUTIONAL BUYERS” UNDER STATE BLUE SKY LAWS**

The state securities laws (the “Blue Sky laws”) of many states provide an exemption from their broker-dealer and securities registration requirements for sales to specified institutions and “other institutional buyers.” While some states have clarified the term “other institutional buyer” by statute, rule or policy pronouncement, many states have not given any formal guidance and, when they have, there are discrepancies among the states that can be significant. In light of several recent developments, we recommend that broker-dealers evaluate their compliance policies and procedures and take a conservative approach to reliance on the exemption for sales to “other institutional buyers.”

The Blue Sky laws impose the burden of proving the availability of an exemption on the party claiming the benefit of the exemption. Thus, a broker-dealer must be able to demonstrate that a particular investor qualifies as an “other institutional buyer.” While broker-dealers often have sufficient evidence in their files to adequately demonstrate compliance, it comes down to a facts and circumstances determination that can be second-guessed by a state securities commission. And as everyone knows, securities regulators tend to take an expansive view of their mandate and a correspondingly restrictive view of exemptions.

Recently the states have taken an increasingly active enforcement role as demonstrated by New York’s high profile action against Merrill Lynch. In addition, rigorous state scrutiny of Form D filings for Rule 506 private placements indicates that an increasing number of states have become concerned about the activities of unregistered broker-dealers. For instance, some states have launched inquiries of broker-dealers who have been identified in the Form D as selling in particular states, but who were not registered as broker-dealers in such states in reliance upon the exemption for sales to “other institutional buyers.” In addition, the Form D filing gives the state a basis not only to request information regarding the sales reported on the Form D but also to go on a fishing expedition. In one case, the state demanded detailed information regarding all sales in the state for the prior six years. Since Form D’s are often prepared by issuer’s counsel who are unaware of the consequences of listing an unregistered broker-dealer on the Form D, broker-dealers are being faced with more state inquiries.

While a broker-dealer may be able to restrict the inquiry to a shorter period and to demonstrate the availability of exemptions for its sales, the process can be expensive and uncertain. As a result, we recommend that broker-dealers evaluate their compliance policies and procedures and take a conservative approach to reliance on the exemption for sales to “other institutional buyers.” In addition, Canadian broker-dealers who sell in the U.S. through U.S. registered broker-dealer affiliates should consider having their U.S. registered broker-dealer affiliates register in additional states where warranted.

For some time after the Global Securities Corp. case in 1998, state registration was not an attractive alternative for the U.S. registered affiliates of Canadian broker-dealers because the states often demanded information about prior sales by the Canadian broker-dealer. While that is



still possible, the states now appear more interested in the prior activities of the applicant rather than any affiliated Canadian broker-dealers. In a recent inquiry, the state investigator never asked about affiliated Canadian broker-dealers' activities. Of course, as part of the registration process, the applicant would have to be prepared to justify exemptions for any prior sales in the states where broker-dealer registration applications are to be filed.

*This memorandum is intended for general information purposes only and should not be construed as legal advice or legal opinions on any specific facts or circumstances. Members of the Arnold & Porter LLP Financial Institutions Practice Group will be pleased to provide further information regarding the matters discussed in this memorandum.*