NOTICE OF NATIONAL INSTRUMENT 35-101 AND COMPANION POLICY 35-101CP CONDITIONAL EXEMPTION FROM REGISTRATION FOR UNITED STATES BROKER-DEALERS AND AGENTS

Notice of National Instrument and Companion Policy

The Commission has made National Instrument 35-101 Conditional Exemption from Registration for United States Broker-Dealers and Agents (the "National Instrument") under section 196.1 of the *Securities Act* (the "Act").

The Commission has adopted Companion Policy 35-101CP Conditional Exemption from Registration for United States Broker-Dealers and Agents (the "Companion Policy"). The Companion Policy will come into force on the date that the National Instrument comes into force.

The National Instrument and Companion Policy are being adopted by all members of the Canadian Securities Administrators (the "CSA").

Special Note Regarding this Publication

On September 15, 2000 Commission staff published in this Summary text of final rule National Instrument 35-101 and Companion Policy 35-101CP. That publication was made in error. This publication supercedes the September 15, 2000 publication.

Substance and Purpose of National Instrument and Companion Policy

The substance and purpose of the National Instrument are to provide United States of America (the "U.S.A.") broker-dealers and their agents with a conditional exemption from the applicable registration and prospectus requirements under Canadian securities legislation in order to facilitate certain cross-border trading in foreign securities between U.S.A. broker-dealers and their clients from the U.S.A. who are present in a Canadian jurisdiction (the "exemption").

Summary of National Instrument and Companion Policy

The National Instrument provides certain U.S.A. broker-dealers and their agents with an exemption from the applicable registration and prospectus requirements under Canadian securities legislation. Under the exemption, a U.S.A. broker-dealer and its agents may engage in specific types of cross-border trading activities in foreign securities.

Each of the Canadian securities regulatory authorities retains the authority to revoke the exemptions, subject to applicable statutory provisions governing hearings and reviews, as it applies to a particular broker-dealer or agent if it considers the broker-dealer's or agent's conduct to be contrary to the public interest.

The Companion Policy advises that the CSA are of the view that a person does not normally cease to be "ordinarily resident" in the U.S.A. while retaining status as "temporarily resident" in Canada under the National Instrument. The Companion Policy also provides guidance on the operation of the exemptive relief provided in the National Instrument and information about the types of inquiries the CSA may make about past conduct of broker-dealers and their agents in Canada.

Text of National Instrument and Companion Policy

The text of the National Instrument and Companion Policy follow.

Dated: December 15, 2000

APPENDIX A TO NOTICE 35-101

CONDITIONAL EXEMPTION FROM REGISTRATION
FOR UNITED STATES BROKER-DEALERS AND AGENTS

Summary of Comments Received

During the comment period, which ended January 19, 1998, the CSA received 36 comment letters. Below is a summary of the comments received, accompanied by CSA responses.

1. *Reciprocity*

Every comment letter addressed the issue of ensuring that Canadian dealers received reciprocal treatment from U.S.A. state and federal securities authorities.

At the time of the request for comments twelve state securities authorities had implemented substantially similar regulatory accommodations but the Securities and Exchange Commission (the "SEC") had yet to do so.

Twenty-three comment letters recommended that unless the SEC's restriction was lifted, the implementation of that part of the National Instrument relating to individual's tax-advantaged retirement savings plans should be delayed.

Seven comment letters urged the CSA to defer making any part of the National Instrument effective until U.S.A. state and federal securities authorities granted reciprocity to Canadians who are either:

(i) temporarily resident in the U.S.A.; or

(ii) permanent residents in the U.S.A. and holding assets in Canadian tax-advantaged accounts.

One commenter recommended amending the National Instrument to provide that the exemptions apply only to broker-dealers in jurisdictions which afford reciprocal relief to Canadian SRO-member dealers.

Another commenter suggested that the CSA should proceed with the implementation of the National Instrument with a "sunset provision" with the express intention that the CSA will consider withdrawing the National Instrument after a prescribed period of time in the event that the reciprocity in the U.S.A. is not achieved to the CSA's satisfaction.

CSA response:

The SEC has adopted new Rule 237 under the *Securities Act of 1933*, new Rule 7d-2 under the *Investment Company Act* and amendments to Rule 12g3-2 under the *Securities Exchange Act of 1934*. The SEC has also issued an order conditionally exempting Canadian dealers that are members of the Investment Dealers Association or of a Canadian exchange from the broker-dealer registration requirements and related provisions of the *Securities Exchange Act of 1934* to the extent they effect transactions for Canadian tax-deferred individual retirement accounts. Currently, twenty-four state securities regulators provide a form of reciprocal relief.

The relief provided by the National Instrument is broader than the relief provided by the SEC in that the exemptions from registration requirements are limited to transactions involving Canadian tax-deferred retirement accounts. Therefore, except as permitted under Rule 15a-6, Canadian residents temporarily in the United States are not able to manage their investments in Canadian accounts that are not tax-deferred retirement accounts. By contrast, U.S. residents temporarily in Canada will be able to manage all of their accounts with their U.S. broker-dealers. The CSA have asked the SEC to expand its relief so as to

harmonize completely with that provided in the National Instrument.

The exemptions provided by the National Instrument will be extended to broker-dealers in all U.S.A. jurisdictions. At the expiration of two years from the effective date, the National Instrument will be revisited and may be amended to provide that the exemptions will be applied only to U.S.A. jurisdictions which provide reciprocal relief to Canadian SRO-member dealers.

2. *Inquiries Regarding Past Activities*

One commenter expressed concern respecting the lack of reciprocity of the waiver of possible past registration transgressions set out in Part 4 of the Companion Policy. The commenter stated that only certain state securities regulators in the U.S.A. have agreed not to make inquiries of Canadian dealers or salespersons on a reciprocal basis. In light of this, the commenter recommended that the CSA consider withholding its agreement not to make enquiries concerning possible failures to register in respect of past trading activities until a greater degree of reciprocity is achieved in the U.S.A.

CSA response:

The proposal approved by the members of the North American Securities Administrators Association ("NASAA") in 1995, which is the genesis of the National Instrument, had included a notice to be issued by each participating securities regulatory authority stating that it would not make inquiries into any possible failure to register in the state, province or territory in relation to past trading activities up to a certain time. The purpose of the waiver is to encourage the participation of all broker-dealers and their agents who are acting under the National Instrument. By withholding its agreement not to make enquiries concerning the CSA believes that it would discourage the participation of some broker-dealers and their agents.

3. *Documentation and Agent for Services*

(a) One commenter addressed the requirement in former section 2.4 of the National Instrument that the broker-dealer deliver the most recent copy of its Form BD, evidence of membership in a National Association of Securities Dealers and evidence that the broker-dealer is registered in the U.S.A. state from which the trade took place. The commenter questioned the utility of requiring these materials to be delivered stating that, among other things, the utility of requiring materials to be delivered will likely not outweigh the burden of reviewing and maintaining them.

CSA response:

Former sections 2.4 and 3.2 (now sections 2.1(f) and 3.1(f)) have been amended such that materials required to be delivered would be limited to a one page notice that registrants are using the exemption and a certificate stating that they are registered in the state from which the trade took place.

(b) One commenter suggested that the CSA may not wish to impose a requirement that the broker-dealer has an agent for service of process in each Canadian jurisdiction in which the broker-dealer has clients pursuant to this exemption. The commenter questioned the need for agents for service of process given that the customers accessed pursuant to the National Instrument are those which have pre-existing relationships with the broker-dealer and are well aware that they are not dealing with a Canadian dealer. The commenter suggested that the CSA may instead wish to require that the broker-dealer indicate in their prescribed client disclosure statement that they have not submitted to the Canadian jurisdiction or appointed an agent for service therein.
CSA response:

It is the opinion of the CSA that it is integral to the protection of investors in Canadian jurisdictions to ensure that their U.S.A. broker-dealers and salespersons have submitted to the Canadian jurisdiction and have appointed an agent for service in each jurisdiction in which business is conducted.

4. *Solicitations*

Section 2.2 of the published draft of the proposed National Instrument (now section 2.1(e)) read as follows:

> "The broker-dealer shall not advertise for or solicit new accounts in any jurisdiction."

A commenter suggested that if the intention is to preclude solicitation of accounts with individuals other than pre-existing clients of the U.S.A. broker-dealer, the phrase "new accounts" is overly broad and could be replaced by "new clients". The commenter argued that a broker-dealer should not be precluded from soliciting new business from an existing client that becomes a temporary resident in Canada provided that any resulting trades are made in compliance with the exemptions provided in section 2.1 of the National Instrument.

CSA response:

The CSA agree with this comment and the recommended amendment has been made to the National Instrument.

5. *Ordinarily Resident*

One commenter recommended that the CSA consider whether it is appropriate to require that an individual be "ordinarily resident" in the U.S.A. in order for the exemption set forth in clause 2.1(c)(I) of the National Instrument to be available or whether it would be sufficient to require that the individual be "temporarily resident" in Canada and previously resident in the U.S.A. The commenter suggested the CSA should either:

(i) confirm or clarify that it would not be possible to cease to be "ordinarily resident" in the U.S.A. and to remain "temporarily resident" in Canada; or

(ii) consider amending clause 2.1(c)(I) to ensure that all temporary work assignments, particularly those of longer duration, are covered by the exemption, regardless of the individual's residency status in the U.S.A.

CSA response:

The Companion Policy has been amended to clarify that it is the CSA's view that it would not be possible to cease to be "ordinarily resident" in the U.S.A. while still retaining status as a U.S.A. resident "temporarily resident" in Canada under the National Instrument.

6. *Relief for Advising Activities*

One commenter is of the view that many of the advising activities which the U.S.A. broker-dealers and advisers might seek to conduct with their U.S.A. clients that become resident in Canada, temporarily or otherwise, would not likely fall within the exemption provided by section 2.1 of the National Instrument, since these activities would not be solely incidental to trades made pursuant to the section 2.1 exemption. The commenter is concerned that advising activities may have been overlooked as a meaningful area of investment activity, and believes that due consideration be given to providing corollary relief in respect of these activities.

CSA response:

The CSA does not want to broaden exemptions from registration for advising activities.

Sections 2.3 and 3.3 permit advising activities which are incidental to broker-dealer and agent activities on the same basis that it is permitted for domestic registrants.

APPENDIX B TO NOTICE 35-101

CONDITIONAL EXEMPTION FROM REGISTRATION FOR UNITED STATES BROKER-DEALERS AND AGENTS

The CSA received comment letters from the following parties:

1. CT Securities International Inc.
2. Pope & Company
3. Caldwell Securities Ltd.
4. Research Capital Corporation
5. TD Securities Inc.
6. RBC Dominion Securities Inc.
7. Investment Dealers Association of Canada
8. Thomas Kernaghan & Co. Limited
9. MacDougall, MacDougall & MacTier Inc.
10. Acker Finley Inc.
11. Sprott Securities Limited
12. Royal Bank Action Direct Inc.
13. Loewen, Ondaatje, McCutcheon Limited
14. Goepel Shields & Partners Inc.
15. MD Management Limited
16. Maison Placements Canada Inc.
17. CIBC Securities Inc.
18. Ocean Securities Inc.
19. The Investment Funds Institute of Canada
20. Nesbitt Burns Inc.
21. Scotia Securities Inc.
22. Merrill Lynch Canada Inc.
23. Midland Walwyn Capital Inc.
24. Canadian Bankers Association
25. MMI Group Inc.
26. ScotiaMcLeod Inc.
27. The Vancouver Stock Exchange
28. TD Asset Management Inc.
29. CT Investment Management Group Inc.
30. Investment Dealers Association of Canada - Saskatchewan District Council
31. Deacon Capital Corporation
32. Osler, Hoskin & Harcourt
33. Investment Dealers Association of Canada - Manitoba District Council
34. Nomvra Canada Inc.
35. Valeurs mobilières Desjardins
36. Department of Finance Canada