

Companion Policy 35-101
Conditional Exemption from Registration for United States Broker-Dealers and Agents

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PART 1 INTRODUCTION

1.1 Introduction

Cross-border trading activities between Canada and the United States of America often take place because of the movement of residents between the two countries. In order to facilitate certain cross-border trading activities that may arise between United States broker-dealers and their existing clients who are now located in Canada, the Canadian securities regulatory authorities have adopted National Instrument 35-101 Conditional Exemption From Registration for United States Broker-Dealers and Agents (the “Instrument”) which provides certain broker-dealers, and their agents, resident in the United States of America with a conditional exemption from the applicable registration requirements and the prospectus requirement. This approach is consistent with the Instrument’s underlying policy that investors will be relying primarily upon the regulation by securities regulators and statutory liability imposed by legislation in the broker-dealer’s or agent’s home jurisdiction for protection.

PART 2 GENERAL PRINCIPLES

2.1 General

The Instrument provides that a United States broker-dealer and its agents may engage in two specific types of cross-border trading activities in foreign securities with an individual who was previously resident in the United States of America, and is now located in Canada, regardless of nationality. In Quebec, the term foreign securities includes futures.

2.2 Temporarily resident

The first category of activity provided for under clause 2.1(c)(i) and clause 3.1(d)(i) of the Instrument permits brokers-dealers and their agents to deal in foreign securities with an individual ordinarily resident in the United States of America who is temporarily resident in a Canadian jurisdiction and with whom the broker-dealer had a broker-dealer client relationship before the individual became temporarily resident in the Canadian jurisdiction. This aspect of the Instrument is intended to allow persons from the United States who are on a temporary work assignment in Canada, or who may be in Canada on vacation or for other reasons, to trade with their home broker-dealer and agent in the United States of America. The concept of “temporarily” as it appears in the National Instrument is based upon SEC Rule 15a-6 which exempts certain non-United States broker-dealers from registering under the 1934 Act.

The Canadian Securities Administrators are of the view that a person that ceases to be “ordinarily resident” in the United States of America would not retain status as a United States resident “temporarily resident” in Canada under the Instrument.

2.3 Tax-advantaged plans

The second category of activity provided for under clause 2.1(c)(ii) and clause 3.1(d)(ii) of the Instrument permits broker-dealers and their agents to deal in foreign securities with an individual who was previously resident in the United States of America and who is resident in a Canadian jurisdiction for trades for and with the individual's tax-advantaged retirement savings plan (for example, an Individual Retirement Account), if the plan is located in the United States and the individual is either a holder of, or contributor to, the plan. Under laws of the United States of America, tax-advantaged retirement savings plans must be located in the United States of America and result in adverse tax consequences for United States individuals if collapsed. For these reasons, individuals are permitted by the Instrument to continue this type of trading activity with a broker-dealer and its agent in the United States of America whether or not there was a preexisting relationship with the broker-dealer or agent while the individual was in the United States of America.

2.4 Prospectus and underwriter exemption

Part 4 of the Instrument exempts a distribution of foreign securities by United States broker-dealers and their agents under the registration exemptions provided for in the Instrument from the prospectus requirement and the underwriter registration requirement. However, the distribution of foreign securities must comply with applicable United States federal securities law and state law requirements in the United States of America, which include securities registration and prospectus delivery.

2.5 Underwriter registration requirement in a CMR Jurisdiction

"Underwriter registration requirement" is defined in National Instrument 14-101 *General Definitions* as "the requirement in securities legislation that prohibits a person or company from acting as an underwriter unless the person or company is registered in the appropriate category of registration under securities legislation". In a CMR Jurisdiction, that requirement is found in section 22 [Requirement to be registered] of the *Capital Markets Act*, which prohibits a person from acting as a "dealer" unless registered in the appropriate category. "Dealer" is defined in section 2 [Definitions] of the *Capital Markets Act*, and includes someone who "acts as an underwriter".

PART 3 OPERATION OF EXEMPTIVE RELIEF

3.1 Affiliates

Section 2.1 of the Instrument requires that the broker-dealer have "no office or physical presence in any jurisdiction." A broker-dealer that has a Canadian affiliate in any jurisdiction is still able to take advantage of the exemptions provided for under the Instrument. The Canadian affiliate, however, is not able to take advantage of the exemptions.

3.2 Limitation of exemptions

Any activity beyond the scope of the exemptions will constitute unregistered activity and will be subject to the applicable enforcement provisions provided for under Canadian securities legislation.

3.3 Retention of authority

Under Canadian securities legislation, each of the Canadian securities regulatory authorities retains the authority to revoke the exemptions as they apply to a broker-dealer or agent if the broker-dealer's or agent's conduct is considered to be contrary to the public interest.

3.4 Receipt of documentation

The Canadian securities regulatory authorities will acknowledge receipt of material sent by broker-dealers and agents under the Instrument.

3.5 Fees

No fees will be imposed on broker-dealers or agents by the Canadian securities regulatory authorities under the exemptions provided for under the Instrument.

PART 4 INQUIRIES REGARDING PAST ACTIVITIES

4.1 Restricted activities

A Canadian securities regulatory authority will not make inquiries about any possible failure by broker-dealers or their agents to register that rely on the exemption from registration for their

- (a) ~~trading activities and related incidental advising activities that may have been conducted with an individual from the United States of America that take place before the date which is 120 days after the coming into effect of the Instrument in the jurisdiction in which the Canadian securities regulatory authority is situate, if the individual~~
 - (i) ~~was temporarily resident in the jurisdiction and the broker-dealer or agent had a broker-dealer client relationship with the individual before the individual became temporarily resident in the jurisdiction, or~~
 - (ii) ~~if the trades were for or with a tax-advantaged retirement savings plan located in the United States of America and the individual was either the holder of, or contributor to, the plan; and [Intentionally Blank]~~
- (b) any other trading and related incidental advising activities that may have been conducted in the jurisdiction before September 1, 1996.

4.2 Other activities

A Canadian securities regulatory authority may make inquiries if it comes to its attention that a broker-dealer or its agent may have been engaged in improper activities in the jurisdiction in which the Canadian securities regulatory authority is situate beyond failing to register.