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July 1, 2010

Marcia E. Asquith Office of Corporate Secretary FINRA 1735 K Street, NW Washington, DC 20006-1506

Re: FINRA Regulatory Notice 10-25

Dear Ms. Asquith:

We appreciate the opportunity to comment on Regulatory Notice 10-25, which proposes extending registration requirements to certain supervisory employees engaged in a FINRA member's back-office functions. We represent a number of Canadian-based financial services firms with U.S. broker-dealer affiliates who are FINRA members in connection with this comment letter. The firms we represent in this connection are listed in Exhibit A. These and many other U.S. broker-dealer affiliates of Canadian investment dealers were established to conduct brokerage business involving Canadian securities for U.S. institutional customers and to effect cross-border corporate finance transactions involving Canadian securities. These U.S. broker-dealers typically have service agreements in place between them and their Canadian parent companies, in which the Canadian parent companies agree to assist the U.S. broker-dealers in their back-office operations, particularly with regard to settlement services and related administrative functions.

FINRA's rule proposal may have unnecessary and negative consequences for the current cross-border operations in place between many U.S. broker-dealers and their Canadian parent companies. We believe the same issues will also apply to other international securities firms.

As noted above, many Canadian-affiliated U.S. broker-dealers use their Canadian parent companies to assist with U.S. settlement services and related administrative functions on their behalf. This is permissible even though the Canadian parent companies are not registered clearing firms in the United States because the U.S. broker-dealers are "self-clearing" firms that rely on the exemption from the Securities and

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Exchange Commission's (the "SEC") Customer Protection Rule afforded by Rule 15c3-3(k)(2)(i), and the transactions between parent and subsidiary are broker-to-broker transactions that comply with Rule 15a-6(a)(4)(i) under the Securities Exchange Act of 1934 (the "Exchange Act"). The service agreements between the U.S. broker-dealers and their Canadian parent companies document the relationship between the two firms and define their respective responsibilities in a manner consistent with the U.S. broker-dealers' full regulatory responsibility as self-clearing firms. In addition, the service agreements reinforce the exclusive relationship between the U.S. broker-dealers and their customers and provide that no obligations or relationships are established between the Canadian parent companies and the U.S. broker-dealers' customers. These arrangements are particularly appropriate in the case of our clients, since the securities traded for U.S. customers are listed on Canadian marketplaces and clear and settle through the Canadian Depository for Securities Ltd.

In Regulatory Notice 10-25, FINRA proposes to require defined back-office personnel to be subject to qualification and registration requirements regardless of whether such back-office personnel are employed by or are otherwise associated persons of the FINRA member firm. Therefore, under FINRA's rule proposal, employees of the Canadian parent companies who assist their U.S. broker-dealer affiliates with back-office functions, but who are not employed by or otherwise associated persons of the U.S. broker-dealers, could be required to become qualified and registered with FINRA as Operations Professionals. If such Canadian personnel were required to be registered with their U.S. broker-dealer affiliates as Operations Professionals, they would also be subject to all other FINRA rules applicable to registered persons of U.S. broker-dealers even though their employers, the Canadian parent companies, would not be required under SEC rules to be registered as broker-dealers in the United States.

We submit that since the U.S. broker-dealers are fully responsible for their own back-office functions, and closely monitor and supervise the administrative functions performed by the Canadian parent companies, we do not believe that the Canadian parent companies' personnel should be required to become registered with the U.S. broker-dealers as Operations Professionals. In addition, we believe that the cooperative relationship between securities regulators in the United States and Canada makes such registration requirement unnecessary.

Pursuant to NASD Rule 1011(b), such Canadian back-office personnel would not even be considered to be associated persons of the U.S. broker-dealers since their employers, the Canadian parent companies, are vendors providing support services and such personnel are not "controlled" by the U.S. broker-dealers. In addition, the Canadian

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personnel are not engaged in the securities business of the U.S. broker-dealer subsidiaries.

Currently, the Canadian personnel assisting the U.S. broker-dealers with their back-office functions are not required to be registered in any capacity with the U.S. broker-dealers. They are not partners, directors, officers or other employees of the U.S. broker-dealers. Therefore, the only reason why the Canadian parent companies' employees could be considered to be associated persons of the U.S. broker-dealers would be if they controlled or were controlled by the U.S. broker-dealers. The SEC's Uniform Application for Broker Dealer Regulation ("Form BD") defines the term "control" to mean "the power, directly or indirectly to direct the management or policies of a company whether through ownership of securities, by contract, or otherwise." Although the U.S. broker-dealers supervise and monitor the functions performed by their Canadian parent companies, since those activities affect the U.S. broker-dealers' responsibilities to their customers, their books and records, their net capital and their customer protection obligations, the U.S. broker-dealers do not control the day-to-day operations of the Canadian employees. Further, the tasks performed by the Canadian personnel are generally clerical and ministerial in nature. The actual responsibility for the back-office functions lies with the U.S. broker-dealers' principals and they enlist the Canadian personnel to perform mechanical functions under their supervision.

It would be a significant extraterritorial application of FINRA's rules to require employees of foreign affiliates of U.S. broker-dealers, who are not associated persons of the U.S. broker-dealers, to have to qualify and register with the U.S. broker-dealers. In other contexts, FINRA has refrained from subjecting foreign personnel to registration based on attenuated involvement in the U.S. broker-dealers' activities. In addition, when such personnel are already subject to another country's advanced securities regime, as is the case for the Canadian personnel, additional U.S. regulation seems particularly unnecessary.

¹ Form BD also states that any person that (i) is a director, general partner or officer exercising executive responsibility (or having similar status or functions), (ii) directly or indirectly has the right to vote 25% or more of a class of voting securities, or (iii) in the case of a partnership, has the right to receive upon dissolution, or has contributed, 25% or more of the capital, is presumed to have control.

² For example, in FINRA Regulatory Notice 08-15, FINRA stated that certain research analysts employed by a FINRA member firm's foreign affiliate who contribute to the preparation of a member firm's research reports would be exempt from the Research Analyst Qualification Examination per NASD Rule 1050 and Incorporated NYSE Rule 344.

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Another concern that arises under FINRA's rule proposal is whether many of these U.S. broker-dealers that have service agreements in place with their Canadian parent companies will be able to continue to rely on the exemption set forth in subparagraph (k)(2)(i) of Rule 15c3-3 under the Exchange Act. These U.S. broker-dealers are not required to comply with the full parameters of Rule 15c3-3 because they conduct their institutional brokerage business under this exemption. Under the (k)(2)(i) exemption, no customer securities or funds may be held beyond settlement date and transactions are effected so that delivery of securities takes place only against payment by the customer. The U.S. broker-dealers confirm all transactions to their U.S. customers and take all required charges in connection with fail transactions.

Because the U.S. broker-dealers relying on the (k)(2)(i) exemption clear the relevant transactions on a DVP/RVP basis, these U.S. broker-dealers are characterized as "clearing firms," but not as "carrying firms." Although the Canadian parent companies assist their U.S. broker-dealer affiliates with clearing and settlement functions, the relationship between the U.S. broker-dealers and their Canadian parent companies is not that of introducing brokers/carrying brokers and the service agreements between the U.S. broker-dealers and the Canadian parent companies do not create such relationship. Rather, the relationship resembles typical correspondent relationships between U.S. broker-dealers and foreign securities dealers.

³ See RMK International Securities, Inc., SEC No-Action Letter (January 29, 1991) and Dominion Securities, Inc., SEC No-Action Letter (December 7, 1978).

⁴ In the event that customer funds are received prior to the time required to complete a transaction (e.g., funds are delivered by a customer before settlement date), the U.S. broker-dealers utilize a special bank account for the exclusive benefit of their customers, as required by Rule 15c3-3(f). If the funds are not capable of being immediately applied to a customer settlement obligation, they are required to be returned to the customer by noon the next day.

⁵ See SEC Release No. 34-31511 (November 24, 1992).

⁶ In SEC Release No. 34-31511, the SEC characterizes an introducing broker relationship as one in which the carrying firm takes responsibility for the proper dispensation of funds or securities between the trade date and settlement date (among other things). In such arrangements, the carrying firm also holds any customer funds and securities following the trade date. In contrast, in the arrangement under discussion, it is the exception that any funds or securities are held by the U.S. broker-dealers in advance of settlement, and then only through the use of the special (k)(2)(i) account, and the Canadian parent companies never carry any accounts for such customers.

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Since the Canadian parent companies' contractual relationship does not extend beyond their U.S. broker-dealer affiliates, the Canadian parent companies are exempt from registration as broker-dealers in the United States pursuant to Rule 15a-6 under the Exchange Act. Customers have no confusion regarding this relationship since they transact only with the U.S. broker-dealers and the U.S. broker-dealers' registered personnel; they receive research only from the U.S. broker-dealers or as permitted by Rule 15a-6 with notice requiring that transactions be effected only through the U.S. broker-dealers; and all confirmations and statements are issued by the U.S. broker-dealers.

The risk to these arrangements posed by the FINRA proposal is that the Canadian parent companies' back-office will be considered part of the U.S. broker-dealers' operations and that the parent companies that are the employers of these personnel will thereby be considered to be conducting business with U.S. customers.

The Canadian-affiliated broker-dealers were established to satisfy U.S. institutional demand for Canadian securities in institutional DVP/RVP transactions. This was facilitated by a combination of (1) the availability of the (k)(2)(i) exemption, (2) the Rule 15a-6 broker-to-broker exemption, and (3) the ability to assign primary responsibility for clearance and settlement to designated supervisors of the U.S. broker-dealers and to outsource administrative functions to the Canadian unregistered parent companies. We submit that these arrangements have worked very efficiently without risk to U.S. customers and should not be altered by FINRA's proposal.⁷

⁷ FINRA's rule proposal also raises similar issues for Rule 15c3-3 fully-computing U.S. broker-dealers that operate using the same cross-border clearance and settlement arrangements with their Canadian parent companies as U.S. broker-dealers operating under the (k)(2)(i) exemption. The U.S. broker-dealers who are fully-computing are entitled to carry customer accounts under Rule 15c3-3. These U.S. broker-dealers have applied to the SEC and received permission to have their Canadian parent companies designated as satisfactory control locations under Rule 15c3-3(c)(4). However, even if the Canadian parent companies are able to hold the U.S. broker-dealers' customer securities due to their classification as satisfactory control locations, the customer securities are under the control of the U.S. broker-dealers based on the definition in Rule 15c3-3, and the U.S. broker-dealers are ultimately responsible for their customers' securities. Canadian-based personnel of the parent companies perform back-office functions pursuant to service arrangements involving Canadian securities executed and cleared in Canada. The U.S. brokerdealers supervise, but do not manage, back-office, clerical tasks on a day-to-day basis. Nonetheless, just as with the U.S. broker-dealers operating under the (k)(2)(i) exemption, under FINRA's rule proposal, the Canadian personnel assisting the fully-computing U.S. broker-dealers with their back-office functions involving Canadian securities and Canadian clearance and settlement may be swept into the proposed Footnote continued on next page

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FINRA's rule proposal may also call into question whether the service agreements in place constitute permissible outsourcing arrangements. FINRA has stated that although U.S. broker-dealers cannot contract away their supervisory and compliance activities from their direct control, they are not precluded from outsourcing certain activities that support the performance of their supervisory and compliance responsibilities. FINRA has published guidance on outsourcing, but has not specifically stated what functions may or may not be outsourced or provided opinions regarding the appropriateness of a U.S. broker-dealer outsourcing any particular function to a third-party service provider. However, FINRA has stated that regardless of the activities that are outsourced, a U.S. broker-dealer must maintain ultimate responsibility for its supervisory and compliance activities. FINRA has also stated that outsourced functions should not require qualification or registration with the U.S. broker-dealer.

Although the U.S. broker-dealers always maintain ultimate responsibility for any back-office support functions performed by their Canadian parent companies, the service agreements between the U.S. broker-dealers and their Canadian parent companies could be deemed to be impermissible outsourcing arrangements if the Canadian personnel are required to register with the U.S. broker-dealers.

FINRA has acknowledged that many U.S. broker-dealers outsource their back-office functions. In FINRA's 2010 List of Exam Priorities, FINRA contemplated its member firms outsourcing key operating functions, including back-office securities processing activities. ¹⁰ In fact, U.S. broker-dealers often outsource their back-office functions to affiliated entities who are better able to perform such support functions. Through specialized expertise that the affiliated entities develop, they become more efficient in performing such functions than if the U.S. broker-dealers had to do them on their own. This is especially important for U.S. broker-dealers engaged in cross-border clearance and settlement arrangements where the U.S. broker-dealers are part of a much

Footnote continued from previous page registration regime. We submit that such personnel should also be excluded from the scope of FINRA's proposal.

⁸ See http://www.finra.org/Industry/Regulation/Guidance/InterpretiveLetters/P017175.

⁹ See FINRA Regulatory Notice 05-48.

¹⁰ See 2010 FINRA Examination Priorities Letter (March 2010) http://www.finra.org/web/groups/industry/@ip/@reg/@guide/documents/industry/p121004.pdf.

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larger international organization and the U.S. broker-dealers have the limited purpose of effecting institutional brokerage transactions involving foreign securities.

We believe that rather than impeding U.S. broker-dealers' ability to contract with their affiliates to assist with back-office functions, FINRA should encourage these types of service arrangements. Efficiencies result from global financial services firms sharing resources in order to achieve the most cost-effective manner of securities processing, record-keeping and compliance. In addition, because the U.S. broker-dealers maintain ultimate responsibility over the functions performed by their affiliated entities, U.S. securities markets and U.S. customers are not under any greater risk than if the U.S. broker-dealers had performed such functions on their own.

We are also concerned that the FINRA proposal involves the extraterritorial application of its rules. FINRA is not a recognized self-regulatory organization ("SRO") in any Canadian jurisdiction. Therefore, if FINRA plans to assert authority in Canada over Canadian personnel on Canadian territory, it must do so in conjunction with Canadian securities regulators. We do not see what legal basis FINRA has to require employees of Canadian regulated entities conducting activities solely in Canada, who are not associated persons of the broker-dealer, to subject themselves to FINRA registration without FINRA becoming an SRO in Canada or seeking relief from Canadian securities commissions from the need to be recognized in Canada as an SRO. It is not enough to say that FINRA is a voluntary organization and the requirement is imposed on the members, when the activities are all performed in Canada, the relevant individuals are employed solely by foreign entities, and the foreign entities are not subject to U.S. registration. To the extent that registration or recognition, whether as a dealer or SRO, is based on a territorial principle, FINRA's proposal crosses this territorial line in the potential application of this proposal to international securities firms.

We believe that if FINRA does require registration of foreign personnel who assist U.S. broker-dealers with back-office functions, it could lead to a regulatory environment in which many jurisdictions will attempt to assert registration and qualification requirements on individuals employed at global financial services firms. If FINRA asserts its jurisdiction over Canadian personnel, there is no reason why securities regulators in other countries would not try to assert authority over U.S. personnel as well. However, we believe that rather than having multiple regulators attempt to control the activities of particular employees, it makes more sense for such personnel employed by local registrants to be subject to their home-country regulators, and have foreign jurisdictions cooperate with such regulators when necessary, rather than trying to assert authority on their own.

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There is a long history of cooperation between U.S. securities regulators and securities regulators in other countries. This is particularly true with regard to U.S. and Canadian securities regulators. Because of this, even if the Canadian personnel did not become registered with FINRA as Operations Professionals, FINRA would likely be able to obtain records and information that it needed in connection with any examinations or enforcement efforts. As recently as June 10, 2010, the SEC, the Quebec Autorité des marchés financiers and the Ontario Securities Commission reaffirmed their cooperative relationship by signing a memorandum of understanding designed to bolster cross-border supervision. 11 The memorandum of understanding sets forth a framework for consultation, cooperation and information-sharing related to the day-to-day supervision and oversight of regulated entities.

Because of the widespread ramifications that FINRA's rule proposal could have on the cross-border clearing and settlement arrangements that are currently in place between many U.S. broker-dealers and their Canadian parent companies, we believe that FINRA should clarify that back-office registration should be limited to designated supervisors within the U.S. broker-dealers who oversee the service arrangements between the U.S. and Canadian firms. FINRA indicated in Regulatory Notice 10-25 that it was interested in requiring only those individuals with "decision-making and/or oversight" of back-office functions to be registered as Operations Professionals. Therefore, we do not believe that it would be unreasonable for FINRA to provide that back-office registration would not be required for Canadian personnel who assist with U.S. broker-dealers' backoffice functions in the manner we described, but who are ultimately supervised by registered principals of such U.S. broker-dealers. This type of clarification would avoid (1) upsetting the highly efficient cross-border arrangements presently in effect; (2) unnecessary and duplicative regulation; and (3) impermissible extraterritorial

application of FINRA's rules.

If FINRA nonetheless determines to proceed with its rule proposal, without prejudice to the jurisdictional arguments we have advanced, we believe that such rules should be very limited in their application. Consistent with such limited application, we submit that an exception to any examination requirement should be provided for

¹¹ See SEC, Quebec Autorité des marchés financiers and Ontario Securities Commission Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to the Supervision of Cross-Border Regulated Entities (June 10, 2010) http://www.sec.gov/about/offices/oia/oia_bilateral/canada_regcoop.pdf.

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personnel who assist U.S. broker-dealer affiliates with their back-office functions involving clearance and settlement of foreign securities. This makes sense given the overall similarities of the securities regimes in the United States and Canada, and the fact that the actual back-office operations involve Canadian listed securities that are cleared and settled in Canada through Canadian clearing organizations. Any general examination for U.S. back-office personnel would unlikely be directly applicable to these cross-border securities services and therefore would not further FINRA's goals in advancing this proposal.

Thank you for providing us with the opportunity to provide comments on FINRA's rule proposal. We would be pleased to discuss any comments herein, or provide FINRA with any additional assistance as it proceeds with the rule proposal. Please do not hesitate to contact me at (212) 715-1130 if you have any questions.

Very truly yours,

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D. Grant Vingoe

cc: Mark Attar, Securities and Exchange Commission Leigh Bothe, Securities and Exchange Commission Yui Chan, Financial Industry Regulatory Authority

Exhibit A

This submission is made on behalf of the following firms:
Cormark Securities (USA) Limited
Desjardins Securities International Inc.
Dundee Securities Inc.
Griffiths McBurney Corp.
Maple Securities U.S.A. Inc.
National Bank of Canada Financial Inc. NBF Securities USA Corp.
Peters & Co. Equities Inc.
PI Financial (US) Corp.
Salman Partners (USA) Inc.
TD Securities (USA) LLC