ARNOLD & PORTER LLP

D. Grant Vingoe
Grant.Vingoe@aporter.com

212.715.1130
212.715.1399 Fax

399 Park Avenue
New York, NY 10022-4690

April 8, 2011

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: SEC Release No. 34-64080
File No. SR-FINRA-2011-013

Dear Ms. Murphy:

We appreciate the opportunity to comment on SEC Release No. 34-64080, dated March 14, 2011, in which Financial Industry Regulatory Authority ("FINRA") proposes creating new registration requirements for certain employees engaged in operations (or "back-office") functions on behalf of FINRA members, whether or not these employees are actually employed by a FINRA member (the "Proposed FINRA Rule"). In a dramatic departure from longstanding SEC law, regulation and practice, the Proposed FINRA Rule would extend its reach extraterritorially to Canadian back-office personnel employed by Canadian broker-dealers who provide clearing services for securities listed on Canadian stock exchanges.

We believe that FINRA's proposal raises novel and complex issues, involving the extraterritorial application of U.S. laws by self-regulatory organizations, and should therefore be considered by the full Commission after publication of a new release analyzing these issues and requesting comment concerning them.

We represent a number of Canadian-financial services firms with U.S. broker-dealer affiliates who are FINRA members. The firms we represent are listed in Exhibit A. All of these firms are members of the Canadian national securities self regulatory organization, the Investment Industry Regulatory Organization of Canada ("IIROC") and are registered with the Canadian securities commissions to conduct business in Canada. Their U.S. broker-dealer affiliates were established to conduct brokerage business and to effect U.S. cross-border corporate finance transactions involving Canadian securities with U.S. institutional customers. In their capacities as Canadian-regulated investment dealers, our clients provide settlement services to their U.S. broker-dealer affiliates in Canadian securities trading in Canadian markets. These Canadian firms are qualified for the exemption from registration as a U.S. broker-dealer

under the Securities Exchange Act of 1934 (the "Exchange Act") afforded by SEC Rule 15a-6(a)(4) under the Exchange Act. Their U.S. broker-dealer affiliates operate either pursuant to the exemption under Rule 15c3-3(k)(2)(i) or are fully computing firms in instances where their Canadian affiliates have been designated by the SEC as satisfactory control locations. The Proposed FINRA Rule conflicts with the policy underlying the interrelationship of these existing SEC regulations, essentially rendering them "dead letters" in the context of cross-border clearance and settlement practices. We enclose for your reference a submission we previously made concerning this proposed rule on behalf of the U.S. broker-dealer affiliates when it was previously circulated by FINRA under its own rulemaking comment procedures. See Exhibit B.

The Proposed FINRA Rule raises serious issues under the U.S. Supreme Court's recent decision in *Morrison v. National Australia Bank Ltd.*, 561 U.S. ___, 130 S. Ct. 2869 (2010), and its holding that the Exchange Act should be applied extraterritorially only when explicitly authorized by statute. The Exchange Act does not permit the SEC to allow FINRA--a self-regulatory organization or "SRO" under the Exchange Act--to issue the kind of extraterritorial rule it proposes. Existing SEC regulation has long allowed employees of non-registered broker dealers outside the United States to perform their back-office duties involving foreign securities without the kind of proposed registration or reporting obligations contained in the Proposed FINRA Rule. FINRA has no legal authority under *Morrison* or the Exchange Act to change abruptly that historical SEC legal standard.

Further, the Proposed FINRA Rule is inconsistent with current SEC regulation. SEC Rule 15a-6 currently provides a conditional safe harbor from SRO qualification requirements for non-U.S. broker-dealer firms. Allowing the Proposed FINRA Rule to go ahead would effectively gut key exemptions provided by Rule 15a-6 that are extensively relied upon by the international financial services community. The Proposed FINRA Rule would, via the back door, curtail an SEC rule in material ways without going through the SEC's own rule amendment process. This is improper.

FINRA's Proposed Rule would also violate the obligations of the United States under the North American Free Trade Agreement ("NAFTA") because it would assert extraterritorial reach in Canada over cross-border financial activities that were allowed by the SEC at the time that the United States became a party to NAFTA and which have since been permitted by the SEC without any kind of registration by these Canadian persons. Of even greater concern is the fact FINRA is already issuing examination deficiencies to U.S. broker-dealers with Canadian

affiliates as if the Proposed FINRA Rule has already been approved by the SEC under its rule-making procedures for SRO's.[1]

We therefore urge the SEC not to approve the Proposed FINRA Rule as it sharply conflicts with U.S. Supreme Court precedent, SEC law and NAFTA. We amplify each of these points below, but before doing so, we clarify FINRA's status under existing laws as a self-regulatory organization controlled by United States securities laws and the SEC. We also provide a summary of FINRA's Proposed Rule to set the stage for our ensuing analysis of the serious legal issues it raises.

FINRA's Legal Status Under the Exchange Act

FINRA is an SRO under the Exchange Act. *See* Self-Regulatory Organizations, Nat'l Assoc. of Securities Dealers, Inc.; Order Approving Proposed Rule Change To Amend the By-Laws of NASD To Implement Governance and Related Changes To Accommodate the Consolidation of the Member Firm Regulatory Functions of NASD and NYSE Regulation, Inc., 72 Fed. Reg. 42,169 (Aug. 1, 2007); 15 U.S.C. §§ 78c(a)(26), 78s(b). The SEC has granted FINRA the power of "regulatory oversight of all securities firms that do business with the public; professional training, testing and licensing of registered persons," among other functions. 72

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[1] For example, on March 15, 2011, one day after the Commission solicited comments on the Proposed FINRA Rule, FINRA issued the following examination finding to one of our clients:

> EXCEPTION:
>
> The firm was not in compliance with SEA Rule 15c3-3(k)(2)(i) (Exemptions) and NASD Rule 3010 (Supervision).
>
> DETAILS:
>
> A review of the firm's clearance arrangement disclosed that the firm outsources its clearance functions to its Canadian Broker/Dealer parent, through an operating agreement. Due to this outsourcing arrangement, of the clearance functions, with a Non-FINRA regulated, foreign broker/dealer, the FINRA member-firm is not operating under its 15c3-3(k)(2)(i) exemption.

The cross-border structure used by this firm is typical of many firms that have been reviewed over and over by NASD and later FINRA examiners without such adverse findings and that have been the subject of discussions with SEC staff over many years.

Despite this long history ,we are aware of four such examination findings during the FINRA comment period, as well as numerous other informal demands by FINRA staff that firms change their operations to conform to the proposed rule.

Fed. Reg. at 42,170. While FINRA may also operate as a private actor, its operations remain subject to the SEC's oversight: the SEC may "abrogate, add to, and delete" FINRA's bylaws to "conform its rules to requirements of this chapter and the rules and regulations thereunder applicable to such organization. . . ." 15 U.S.C. § 78s(c).

FINRA's proposed rules are subject to approval by the SEC through its Division of Market and Trading. 17 C.F.R. § 200.30-3(a)(12). As an SRO, FINRA bears the burden of "demonstrat[ing] that [its] proposed rule change is *consistent with the Exchange Act and the rules and regulations issued thereunder*. . . . A mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient." 17 C.F.R. § 201.700(b)(3) (emphasis added); *see also* 15 U.S.C. § 78s(b)(2)(C)(i).

The SEC can *only* approve the proposed rule if that rule does *not* conflict with the Exchange Act and those rules promulgated thereunder. 15 U.S.C. §§ 78s(b)(2)(C)(i)-(ii); 17 C.F.R. § 201.700(b)(3). For example, when the proposed rule conflicts with Sections 15 or 19 of the Exchange Act or regulations thereunder, the SEC disapproves the rule. *See, e.g.*, Order Disapproving Proposed Rule Change to Amend FINRA Rule 6140 (Other Trading Practices), 76 Fed. Reg. 9,062 (Feb. 10, 2011) (proposed FINRA rule was inconsistent with Section 15A(b)(6) due to its potential to confuse investors and cause investor harm); Chicago Bd. Options Exch., Inc., Exchange Act Release No. 17,198, 21 SEC Docket 88 (Oct. 7, 1980) (disapproving rule for inconsistency with Exchange Act Sections 19(g)(1) and 19(h)(4) requiring enforcement of compliance and administration of disciplinary processes); *see also* Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Link Market Data Fees and Transaction Execution Fees, Exchange Act Release No. 63,796 (Jan. 28, 2011) (SEC instituting disapproval proceedings where, *inter alia*, the proposed NASDAQ rule conflicted with 17 CFR sections 242.600(b)(46) and (47), and 242.603(a)(1)).[2] As will be discussed, we do not believe that the Proposed FINRA Rule is "consistent with the Exchange Act and the rules and regulations issued thereunder." FINRA has not met its burden of showing that its proposal complies with such law.

Because FINRA's rulemaking power derives from the SEC, its authority can extend no further than that of the SEC. *See D'Alessio v. N.Y. Stock Exch., Inc.*, 258 F.3d 93, 105 (2d Cir. 2001) (noting that FINRA "stands in the shoes of the SEC" when it exercises its power to

[2] Additionally, when deciding whether to approve a proposed SRO rule the SEC may consider the rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. § 78c(f).

regulate members pursuant to the Exchange Act).[3] Likewise, the SEC itself cannot approve any FINRA action that is beyond the SEC's statutory authority. *See* 15 U.S.C. § 78y(b)(4) (statute providing for mechanism and scope of judicial review of rules promulgated by SRO's under Exchange Act Section 19, stating that courts will not "affirm and enforce" such rules when they are promulgated in "excess of statutory jurisdiction, authority, or limitations, or short of statutory right"); *see also Sacks v. S.E.C.*, ___ F.3d. ____, Case No. 07-74647, 2011 WL 590308 (9th Cir. Feb. 11, 2011) (holding that FINRA could not retroactively apply a rule as promulgated by the SEC since the SEC had no authority to regulate retroactively). Therefore, when FINRA exercises its delegated power, it is restrained by the limits of the authority delegated to the SEC by the Exchange Act.[4] If the SEC cannot regulate matters outside the United States under the Exchange Act, then neither can FINRA.

Additionally, the SEC must approve FINRA's rules before these may be enforced. The Exchange Act provides that, except in limited circumstances not applicable here, FINRA's proposed rules cannot take effect without the SEC's approval. *See* 15 U.S.C. § 78s(b)(1).[5] While FINRA has the power to enforce the rules and regulations it promulgates under the Exchange Act, *id.* § 78o-3(b)(2), it may only exert that power after a proposed rule has taken effect unless the new rule was clearly implied by existing FINRA rules. *See General Bond & Share Co. v. S.E.C.*, 39 F.3d 1451, 1457-58 (10th Cir. 1994) (disciplinary sanctions impermissible where NASD failed to get SEC's approval of rule change implementing new standard of conduct prior to its enforcement). Because the Proposed FINRA Rule mandates a new standard of conduct for its members not already implied by another FINRA rule, FINRA

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[3] *Cf. Business Roundtable v. S.E.C.*, 905 F.2d 406, 414 (D.C. Cir. 1990) (under the Exchange Act "Congress appears to have contemplated exchanges taking (1) some measures that regulate members with delegated governmental authority and that are required to be, at a minimum, related to the purposes of the Act, and (2) others, that do not regulate members and do not rely on government regulatory authority, for which there is no such requirement").

[4] For example, as FINRA testified before Congress, "FINRA is not authorized to enforce compliance with the Investment Advisers Act. Authority to enforce that Act is granted solely to the SEC and to the states." Stephen Luparello, Interim Chief Executive Officer, Testimony Before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, Committee on Financial Services, U.S. House of Representatives; *see also Bakas v. Ameriprise Fin. Servs., Inc.*, 651 F. Supp. 2d 997 (D. Minn. 2009) (FINRA members not subject to FINRA arbitration rules when acting as investment advisers rather than broker/dealers).

[5] Even when the rule is effective on filing, as is the case for "housekeeping" rules, the SEC may summarily abrogate that rule within sixty days of filing and require FINRA to re-file in accordance with the Exchange Act's usual rulemaking procedures. *See Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1130 n.11 (9th Cir. 2005).

cannot enforce it prior to final SEC approval. Notwithstanding that, FINRA is improperly enforcing its proposed rule as if already approved by the SEC. *See supra* note 1.

Summary of the Proposed FINRA Rule

The Proposed FINRA Rule would mandate that certain back-office personnel in Canada are subject to new U.S. qualification, registration and continuing education requirements as "Operations Professionals." FINRA defines such persons as subject to the Proposed FINRA Rule by the functions they perform (the "covered functions"), regardless of whether or not they are employed by a U.S. FINRA member. Thus, where a FINRA member relies on a Canadian affiliate or Canadian third-party vendor to perform covered functions for transactions in securities on a Canadian exchange, such foreign employees of non-FINRA members would be required to comply with the Proposed FINRA Rule.

Further, "persons subject to the new Operations Professional registration category would be considered associated persons of a member irrespective of their employing entity," and hence subject to all FINRA rules covering such associated persons. Proposed FINRA Rule, at p. 5. Canadian employees performing covered functions involving transactions in securities on a Canadian exchange for registered U.S. broker-dealer affiliates would therefore be subject to all FINRA rules, even though their own Canadian employers are exempt from registration as broker-dealers in the United States, in accordance with SEC Rule 15a-6.

Again, this interpretation of the Proposed FINRA Rule is not speculative. FINRA has already applied this interpretation in examinations of the U.S. broker-dealers affiliated with our clients. *See supra* note 1.

Under the Supreme Court's Decision in *Morrison v. National Australia Bank Ltd.*, the Proposed FINRA Rule Is an Improper Extraterritorial Application of the Exchange Act

In *Morrison v. National Australia Bank Ltd.*, 561 U.S. ___, 130 S. Ct. 2869 (2010), the U.S. Supreme Court reaffirmed the presumption against extraterritoriality and applied it to the Exchange Act. The Court held that the Act can be applied extraterritorially *only* when the plain wording of the statute authorized such application. *See id.* at ___, 130 S. Ct. at 2883. There is no such plain wording in the Exchange Act allowing extraterritorial application of the Proposed FINRA Rule to Canada or elsewhere. The Proposed Rule purports to rely upon Exchange Act Section 15A(b)(6) as legal authority for asserting regulatory control over employees of a non-registered Canadian broker-dealer. *See* Proposed FINRA Rule, at p.21. However, that provision contains no extraterritorial wording empowering FINRA to assert control over back-office

operations in Canada performed by employees of a Canadian broker-dealer, clearing the purchase and sale of Canadian-issued securities. *See* 15 U.S.C. § 78o-3(b)(6). As the Supreme Court made clear, if "a statute gives no clear indication of an extraterritorial application, there is none." *Morrison*, 561 U.S. at __, 130 S. Ct. at 2877-78.

Moreover, Section 30(b) of the Exchange Act goes further and actually *forbids* such extraterritorial extension by FINRA: "The [Exchange Act] or any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, *unless* he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors to prevent the evasion of this Act." 15 U.S.C. § 78dd(b) (emphasis added). FINRA's Proposed Rule does not cite any SEC regulation as an explicit basis for authorizing FINRA regulation outside the United States. In fact, FINRA'S Proposed Rule actually conflicts with an existing SEC regulation, Rule 15a-6, which specifically *declines* to authorize such extraterritorial reach.

The Proposed FINRA Rule Is Inconsistent with SEC Rule 15a-6

SEC Rule 15a-6, provides a conditional exemption from registration for foreign broker-dealers.

In promulgating this Rule, the SEC stated that its purpose was to "facilitate investment by U.S. institutional investors in foreign securities" in a manner "consistent with the investor safeguards afforded by broker-dealer regulation." Registration Requirements for Foreign Broker-Dealers, 54 Fed. Reg. 30,013, 30,014 (July 18, 1989) (codified at 17 C.F.R. pt. 240). The SEC noted the numerous regulatory requirements placed on registered broker-dealers, specifically citing mandatory SRO membership, satisfaction of "SRO qualification requirements," and "extensive recordkeeping and reporting obligations." *Id.* at 30,015. Rather than requiring all foreign broker-dealers who come in contact with U.S. investors to be subject to such comprehensive regulation, Rule 15a-6 created a framework within which foreign broker-dealers can have limited circumscribed contact with U.S. institutional investors. Most importantly for our clients, the Rule authorizes foreign broker-dealers to effect securities transactions with U.S. registered broker dealers, either acting for their own accounts or as agents for others, without becoming subject to the obligations attendant upon U.S. registration.

The Proposed FINRA rule would undermine this policy by extending its regulatory reach to employees of exempt foreign broker-dealers. One of the benefits of exemption under Rule 15a-6 is that employees of foreign broker-dealers are free from SRO qualification requirements--the very requirements that FINRA now seeks to impose on persons outside the United States,

including Canada. If Canadian back-office personnel can be subject to U.S. registration by FINRA rule notwithstanding that their employer is a Canadian registered broker-dealer, the benefit of Rule 15a-6's safe harbor--fully exempting the Canadian employer from U.S. broker dealer regulation--is negated.[6] For all practical purposes, the Proposed FINRA Rule would revoke Rule 15a-6 in important respects and saddle foreign broker dealers and their employees with the very reporting and registration requirements which the SEC intended not to apply to foreign persons under that Rule.

Implicit in the Rule 15a-6 broker-to-broker exemption is the determination that the U.S. broker-dealer will carefully select its foreign correspondents, enter into appropriate binding contracts with them and supervise their performance because it is the U.S. broker-dealer that bears full legal responsibilities for execution, clearance and settlement to its U.S. customers, even where the transactions are executed abroad.

This determination is demonstrated by the fact that the separate chaperoning exemption set forth in Rule 15a-6(a)(3), which is wholly separate from the independent broker-to-broker exemption of Rule 15a-6(a)(4), includes a detailed roadmap of what a chaperoned firm can do and what a chaperoning firm must do. Even in the chaperoning context, it is accepted that the non-U.S. firm can execute the transaction in foreign markets and may assist a U.S. firm in the foreign settlement process while the U.S. firm retains responsibility.[7]

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[6] FINRA's assertion of extraterritorial jurisdiction over Canadian back-office operations also raises other U.S. regulatory and tax issues for Canadian firms by potentially effectively deeming these to be extraterritorial U.S. branches. These issues do not arise today because of the broker-to-broker exemption set forth in Rule 15a-6(a)(4)(i).

[7] FINRA examiners have not applied the appropriate distinction between the broker-to-broker exemption in Rule 15a-6 (a)(4) and the Rule 15a-6(a)(3) chaperoning exemption. Some FINRA examiners have mistakenly asserted in conversations with member firms that all cross border configurations constitute 'chaperoning', and hence operations personnel at the Canadian affiliate must be 'chaperoned.' Regardless of whether these requirements should apply to U.S. chaperoning firms, we reiterate that non-customer facing, back-office personnel of a Canadian affiliated firm never have been and are not presently required to be chaperoned under Rule 15a-6. None of our Canadian clients on whose behalf we are submitting this letter utilize such chaperoning arrangements. All are only using U.S. registered personnel in connection with brokerage contacts with U.S. investors. Any such confusion about chaperoning among FINRA examiners should not be allowed to undermine the important policy objectives achieved by Rule 15a-6 in facilitating safe and efficient cross-border securities transaction processing.

In addition, were the SEC to permit FINRA to impose requirements antithetical to Rule 15a-6, given that all SEC-registered broker-dealer conducting a public securities business must be members of FINRA, the SEC would in effect be improperly amending an existing SEC rule without going through its own standard rulemaking requirements which are more stringent than those of FINRA.[8] The Proposed FINRA Rule's abrogation of an important Rule 15a-6 exemption should not be permitted without careful consideration by all the Commissioners of the implications for extraterritoriality, especially following the Supreme Court's decision in *Morrison v. National Australia Bank, Ltd.*, and after sufficient time for comment by all affected constituencies on such important issues.

The FINRA Proposed Rule Would Cause a Violation of the North American Free Trade Agreement by the United States

Finally, under Article 1402 of NAFTA, the United States is required to insure that FINRA, as a "self-regulatory organization," fully complies with the NAFTA obligations of the United States. North American Free Trade Agreement ("NAFTA") art. 1402, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) (where a treaty party requires its cross-border financial services providers be members of an SRO, that party "shall ensure observance of" the party's obligations under NAFTA's financial services provisions). The Proposed FINRA rule violates such U.S. treaty obligations with Canada. FINRA improperly asserts jurisdiction over employees of Canadian broker-dealers when the SEC, by virtue of Rule 15a-6, has affirmatively decided not to do so.

Article 1404(1) of NAFTA forbids the United States from "[adopting] any measure restricting any type of cross-border trade in financial services by cross-border financial service providers of another Party that the Party permits on the date of entry into force of [NAFTA], except to the extent set out in Section B of the Party's Schedule to Annex VII." NAFTA, at art. 1404(1). Under Section B of Annex VII, the United States did reserve the right "to adopt any measure relating to cross border trade in securities services that derogates from Article 1404(1)."

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[8] For example, unlike proposed SEC rules, FINRA's proposed rules need not be reviewed and approved by the SEC's five Commissioners, but by the Division of Trading and Markets. *See* 17 C.F.R. § 200.30-3(a)(12). The Commissioners only become involved if the Division of Trading and Markets decides to disapprove a new FINRA rule. *See generally* 17 C.F.R. §§ 201.700, 201.701. Additionally, the comment period for a proposed SEC rule is typically 30 to 60 days, whereas the comment period for a proposed FINRA rule is typically 21 days. *See* How the SEC Rulemaking Process Works, *available at* http://www.sec.gov/about/ whatwedo.shtml; FINRA Rulemaking Process, General Overview, *available at* http://www.finra.org/Industry/Regulation/FINRARules/RulemakingProcess/.

Since NAFTA entered into force and to this day, the United States, through the relevant agency--the SEC--has never adopted any such extraterritorial measure regulating cross border financial transactions with Canada, otherwise exempted by Rule 15a-6. Until such time as Congress either amends Exchange Act Section 30, extending the statute's extraterritorial reach, or the SEC issues a rule purporting to regulate such extraterritorial activity under *Morrison*'s stringent requirements, FINRA itself--under NAFTA Articles 1402 and 1404(1)--cannot regulate such cross border financial services activity on its own initiative as an SRO.

Failure to Consider Reasonable Alternatives

In the context of a global market, it would be preferable if each regulating jurisdiction did not impose overlapping requirements on the same individuals. What might be an appropriate reform in a domestic context should be adapted to recognize that certain jurisdictions share regulatory goals with the United States and have their own robust regulatory systems. FINRA has an information sharing arrangement that works effectively with its counterpart in Canada -- IIROC. IIROC oversees for the registration and qualification of securities industry personnel in Canada with a jurisdictional scope similar to that of FINRA. The SEC also has effective memoranda of understanding governing information sharing with Canadian securities regulators. In the context of FINRA's proposal, the operations personnel sought to be regulated by FINRA are already subject to comprehensive regulation in Canada. Despite the obvious benefit of avoiding overlapping requirements, and the legal objections we have discussed above, FINRA has not even considered the possibility of evaluating the adequacy of Canadian securities regulatory requirements as a substitute for the requirements which FINRA seeks to impose involving foreign markets, clearing and securities. We believe that cooperation, rather than duplication, should be pursued consistent with the treaty objectives of NAFTA. Such cooperation between each country's regulatory agencies and SRO's will promote greater efficiency and harmony in U.S./Canadian cross-border financial transactions and regulation.

Conclusion

As demonstrated above, the Proposed FINRA Rule, as *already* being improperly interpreted and enforced by FINRA, is in conflict with the Exchange Act, SEC Rule 15a-6, Supreme Court precedent and NAFTA. FINRA has not met its burden of showing that its Proposed Rule complies with such applicable law and is in the public interest. FINRA has also not considered reasonable alternatives to avoid these legal problems. We therefore urge the SEC to disapprove the Proposed FINRA Rule. We also urge the SEC to take immediate action requiring FINRA to cease its *de facto* enforcement of the Proposed FINRA Rule, which is illegal under NAFTA, and undermines existing SEC law and policy, as well as principles of fairness.

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 the Commission with any additional assistance as it proceeds. Please do not hesitate to contact me at (212) 715-1130 if you have any questions.

Very truly yours,

D. Grant Vingoe

Cc. Mary L. Schapiro, Chairman, SEC
Commissioner Kathleen L. Casey
Commissioner Elisse B. Walter
Commissioner Luis A. Aguilar
Commissioner Troy A. Paredes
Richard G. Ketchum, President & CEO, FINRA
Robert W. Cook, Director, SEC Division of Trading and Markets
Jeremy Rudin, Assistant Deputy Minister, Department of Finance Canada, Financial Sector Policy Branch
Rob Stewart, Assistant Deputy Minister, Department of Finance Canada, International Trade and Finance Branch
Ian C.W. Russell, President, Investment Industry Association of Canada
Ramon Marks, Arnold & Porter LLP

Encl.

EXHIBIT A

BMO Nesbitt Burns Inc.

Cormark Securities Inc.

Desjardins Securities Inc.

Dundee Securities Ltd.

GMP Securities L.P.

Haywood Securities Inc.

Maple Securities Canada Limited

National Bank Financial Inc.

Peters & Co. Limited

PI Financial Corp.

Salman Partners Inc.

TD Securities Inc.

EXHIBIT B

ARNOLD & PORTER LLP

D. Grant Vingoe
Grant.Vingoe@aporter.com

212.715.1130
212.715.1399 Fax

399 Park Avenue
New York, NY 10022-4690

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

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

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."[1] 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.[2] 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.

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[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.

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.[3] 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.[4] 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."[5] 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.[6] Rather, the relationship resembles typical correspondent relationships between U.S. broker-dealers and foreign securities dealers.

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[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.

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. broker-dealers 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

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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.[8] 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.[9]

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

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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.

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.

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' back-office 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

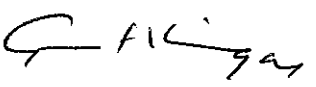
[11] *See* SEC, Quebec Autorité des marchés financiers and Ontario Securities Commission Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to the Supervision of Cross-Border Regulated Entities (June 10, 2010) http://www.sec.gov/about/offices/oia/oia_bilateral/canada_regcoop.pdf.

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,



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