

# SECURITIES AND EXCHANGE COMMISSION

Securities Exchange Act of 1934  
Release No. 51253 /February 25, 2005

## ORDER EXEMPTING CIBC MELLON TRUST COMPANY FROM BROKER-DEALER REGISTRATION

### I. Introduction

Pursuant to Section 15(a)(2) of the Securities Exchange Act of 1934 (“Exchange Act”), the Securities and Exchange Commission (“Commission”) is granting CIBC Mellon Trust Company (“CIBC Mellon Trust”) a conditional exemption from the broker-dealer registration requirement of Section 15(a)(1) of the Exchange Act to the extent CIBC Mellon Trust acts, subsequent to the entry of this order, as a broker as defined in Section 3(a)(4) of the Exchange Act in connection with its administration of dividend reinvestment and stock purchase plans, employee stock purchase plans, employee stock option plans, and odd-lot programs (collectively, “Stock Plans”) with U.S. resident investors. Pursuant to Section 36 of the Exchange Act, the Commission also is granting CIBC Mellon Trust a conditional exemption from the reporting and other requirements specifically imposed by the Exchange Act, and the rules and regulations thereunder, on a broker or dealer that is not registered with the Commission to the extent CIBC Mellon Trust acts, subsequent to the entry of this order, as a broker under Section 3(a)(4) of the Exchange Act in connection with its administration of Stock Plans with U.S. resident investors.

### II. Background

CIBC Mellon Trust has agreed to consent to the entry of an order, without admitting or denying the findings, in which the Commission finds that it violated Sections 15(a)(1) and 17A(c)(1) of the Exchange Act. With respect to Section 15(a)(1), the Commission finds that, from 1998 to the present, CIBC Mellon Trust acted as a broker and dealer as defined in Sections 3(a)(4) and 3(a)(5) of the Exchange Act in connection with its administration of Stock Plans by engaging in the business of effecting securities transactions in these Stock Plans with U.S. resident investors.<sup>1</sup> With respect to Section 17A(c)(1), the Commission finds that, from 1998 to 2004, CIBC Mellon Trust acted as a transfer agent, as defined by Section 3(a)(25) of the Exchange Act, for 113 companies that have securities registered under Section 12 of the Exchange Act. At the time of this activity, CIBC Mellon Trust was not registered as a broker-dealer or as a transfer agent as required by Sections 15(a)(1) and 17A(c)(1) of the Exchange Act, respectively. Effective February 6, 2004, CIBC Mellon Trust registered with the Commission as a transfer agent.

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<sup>1</sup> For purposes of this order, a U.S. resident investor is any participant in a Stock Plan who permanently resides in the United States. CIBC Mellon Trust shall treat all Stock Plan participants with U.S. mailing addresses as U.S. resident investors unless CIBC Mellon has been informed that a participant with a U.S. address is not a permanent U.S. resident.

In addition, CIBC Mellon Trust agreed to consent to the entry of a permanent injunction in a civil action in the United States District Court for the District of Columbia, permanently enjoining CIBC Mellon Trust from, among other things, future violations of Sections 15(a) and 17A(c) of the Exchange Act.

### **III. Discussion**

Section 15(a)(1) of the Exchange Act generally requires any broker or dealer that makes use of the mails or any instrumentality of interstate commerce to effect transactions in, or to induce the purchase or sale of, any security to register with the Commission. Section 3(a)(4) of the Exchange Act generally defines a broker as any person engaged in the business of effecting transactions in securities for the account of others, and Section 3(a)(5) of the Exchange Act generally defines a dealer as any person engaged in the business of buying and selling securities for its own account, whether through a broker or otherwise. In its complaint, the Commission alleged that, over the time period at issue, CIBC Mellon Trust violated Section 15(a)(1) by, in connection with its administration of Stock Plans, engaging in the business of effecting securities transactions for U.S. resident investors without being a registered broker-dealer.<sup>2</sup> Absent an exception or exemption, CIBC Mellon Trust would be required to register as a broker-dealer with the Commission to continue this activity.<sup>3</sup>

Section 15(a)(2) of the Exchange Act authorizes the Commission to exempt, either conditionally or unconditionally, from the broker-dealer registration requirements of Section 15(a)(1) of the Exchange Act any broker or dealer or class of broker or dealer, by rule or order, as it considers consistent with the public interest and the protection of investors. Similarly, but more broadly, Section 36 of the Exchange Act authorizes the Commission to exempt, either conditionally or unconditionally, any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, by rule, regulation, or order, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

Banks registered as transfer agents are conditionally excepted from broker-dealer registration under Section 3(a)(4)(B)(iv) of the Exchange Act for their activities in administering Stock Plans. CIBC Mellon Trust, however, is not a bank as defined in Section 3(a)(6) of the Exchange Act. Absent an exemption, CIBC Mellon Trust would be required to register with the

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<sup>2</sup> CIBC Mellon Trust has consented to the entry of an injunction enjoining it from violating Section 15(a) of the Exchange Act based upon the allegations in the Commission's complaint. As the Commission recognized in addressing the Direct Registration System, some activities in connection with dividend reinvestment and stock purchase plans may require broker-dealer registration under Section 15(a) of the Exchange Act. See Exchange Act Release No. 35038 (Dec. 1, 1994), 59 FR 63652 (Dec. 8, 1994).

<sup>3</sup> Absent an exception or exemption, CIBC Mellon Trust also would be in violation of the injunction pertaining to Section 15(a) of the Exchange Act by engaging in these activities without being registered as a broker-dealer pursuant to Section 15(b) of the Exchange Act.

Commission as a broker-dealer to continue to administer Stock Plans with U.S. resident investors.

The Commission has determined to grant CIBC Mellon Trust a limited conditional exemption from broker-dealer registration. CIBC Mellon Trust will only administer Stock Plans with U.S. resident investors for issuers for which it acts as transfer agent.<sup>4</sup> The Commission finds that a limited exemption from broker-dealer registration, subject to the conditions set forth below, is consistent with the public interest and the protection of investors. CIBC Mellon Trust's Stock Plan administration activities require CIBC Mellon Trust to engage in limited broker-dealer activities, as well as transfer agent activities. The Commission believes that granting a limited conditional exemption is warranted because (1) CIBC Mellon Trust is registered with the Commission as a transfer agent; (2) the conditions of the exemption impose appropriate protections designed to safeguard investors' funds and securities; and (3) CIBC Mellon Trust's broker-dealer activities performed in connection with administering Stock Plans with U.S. resident investors will be limited.<sup>5</sup> Moreover, the exemption will allow investors that have established relationships with issuers through Stock Plans administered by CIBC Mellon Trust to continue those relationships without interruption. Under these circumstances, the Commission believes that it is not necessary to require CIBC Mellon Trust to register both as a transfer agent and a broker-dealer.

The Commission therefore finds that it is consistent with the public interest and the protection of investors to exempt, subject to the conditions set forth below, CIBC Mellon Trust from the broker-dealer registration requirement of Section 15(a)(1) of the Exchange Act to the extent that CIBC Mellon Trust acts as a broker in connection with administering Stock Plans

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<sup>4</sup> The allegations in the Commission's complaint were limited to CIBC Mellon Trust's administration of Stock Plans with one or more U.S. resident investors. CIBC Mellon Trust's administration of Stock Plans with no U.S. resident investors was not the subject of Commission action. Neither this order nor the conditions set forth herein apply to Stock Plans with no U.S. resident investors.

<sup>5</sup> CIBC Mellon Trust will be prohibited from engaging in certain activities that it engaged in prior to the issuance of this order, such as netting customer orders to buy and sell issuer plan securities.

with U.S. resident investors, for issuers for which it acts as transfer agent.<sup>6</sup> This order is granted subject to the following conditions<sup>7</sup>:

1. CIBC Mellon Trust will maintain its registration as a transfer agent under Section 17A of the Exchange Act as long as it continues to administer Stock Plans with U.S. resident investors.
2. In connection with administering Stock Plans with U.S. resident investors, CIBC Mellon Trust will not solicit transactions or provide investment advice to U.S. resident investors with respect to the purchase or sale of securities in connection with the Stock Plan, other than by delivering written or electronic Stock Plan materials to U.S. resident employees of the issuer, U.S. resident shareholders of the issuer, or U.S. resident members of affinity groups of the issuer so long as such materials are comparable in scope or nature to those permitted by the Commission as of the date of enactment of the Gramm-Leach-Bliley Act.<sup>8</sup>
3. In connection with administering Stock Plans with U.S. resident investors, CIBC Mellon Trust will not net customers' buy and sell orders. To the

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<sup>6</sup> The Commission notes, however, that this order only addresses broker-dealer registration issues with regard to CIBC Mellon Trust as a Stock Plan administrator, and that nothing in this order affects prior positions with respect to plans or programs. See, e.g., Exchange Act Release No. 38067 (Dec. 20, 1996), 62 FR 520, 532 at n. 98 (Jan. 3, 1997)(adopting Regulation M governing the activities of underwriters, issuers, selling security holders and others in connection with offerings of securities).

<sup>7</sup> Upon the effective date of this order, CIBC Mellon Trust shall comply immediately with all conditions of this order, except for conditions 4 and 5. CIBC Mellon Trust shall comply with conditions 4 and 5 within 90 days of the effective date of this order.

<sup>8</sup> See Section 3(a)(4)(B)(iv) of the Exchange Act. For example, each brochure for Stock Plans with U.S. resident investors sponsored and administered by CIBC Mellon Trust will include a prominent statement on the cover that: "The Program is sponsored and administered by CIBC Mellon Trust, not by [the appointing issuer]." Each brochure will indicate that the securities held in program accounts are not subject to protection under the Securities Investor Protection Act of 1970. Each brochure will be plain and factual in tone and approach, and will be descriptive of all material Stock Plan features, contractual terms, and fee and processing arrangements, but not of the issuer's securities. The brochure will not encourage individuals to engage in any particular transactions, whether purchases or sales, and no advice or recommendations will be included in the brochure (or otherwise be given during the administration of Stock Plans).

Administration of Stock Plans involving shares required to be registered pursuant to the Securities Act of 1933 continues to be subject to the provisions set forth in the exemption issued to The Securities Transfer Association, Inc. See Exchange Act Release No. 35041 (Dec. 1, 1994).

extent that CIBC Mellon Trust's administration of Stock Plans with U.S. resident investors results in a trade in the United States, CIBC Mellon Trust will direct such trade to a U.S.-registered broker or dealer for execution.

4. In connection with administering Stock Plans with U.S. resident investors, CIBC Mellon Trust will maintain with a bank (or banks) at all times a bank account (or accounts) for the exclusive benefit of customers that shall be separate from any other CIBC Mellon Trust bank account. Solely for purposes of this condition, a bank shall have the same meaning as in Exchange Act Rule 15c3-3(a)(7).<sup>9</sup> The account (or accounts) shall be designated as a "Special Bank Account for the Exclusive Benefit of Customers." All customers' funds in CIBC Mellon Trust's custody and possession that are related to Stock Plans with U.S. resident investors will be maintained in such account (or accounts) until paid to the customer or the issuer, or used to settle a transaction with or through a broker or dealer.
5. In connection with administering Stock Plans with U.S. resident investors that make periodic purchases, if the specified time intervals for such periodic purchases are quarterly or more frequent, CIBC Mellon Trust will send each U.S. resident investor, at least quarterly, a written account statement containing at a minimum the information in items (a) through (h), below. In connection with administering all other Stock Plans with U.S. resident investors, CIBC Mellon Trust will send each U.S. resident investor, not later than four trading days after the date of the last transaction effected in the aggregated batch, a written transaction notification containing, at a minimum, the following information:
  - (a) The name of CIBC Mellon Trust;
  - (b) The name of the customer;
  - (c) The capacity in which CIBC Mellon Trust is acting;
  - (d) The date of each transaction for the account of the customer;
  - (e) The identity, price, and number of shares or units purchased or sold for the customer in each such transaction; and, in a periodic statement, the total number of shares or units of such securities held by the customer at the end of the account period;
  - (f) The aggregate amount of fees that the customer has paid or will pay in connection with the transaction;

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<sup>9</sup> 17 CFR 240.15c3-3(a)(7). Under this rule, with respect to a broker or dealer that maintains its principal place of business in the Dominion of Canada, the term "bank" also means a Canadian bank subject to supervision by an authority of the Dominion of Canada.

- (g) The source and amount of remuneration CIBC Mellon Trust has or will receive from a party other than the customer, unless the written statement or notification discloses whether CIBC Mellon Trust has received or will receive remuneration from a party other than the customer, and that CIBC Mellon Trust will furnish within a reasonable time the source and amount of this remuneration upon written request of the U.S. resident customer. This election is not available however, if, with respect to a purchase, CIBC Mellon Trust was participating in a distribution of that security or, with respect to a sale, CIBC Mellon Trust was participating in a tender offer for that security;<sup>10</sup> and
  - (h) The name of the registered broker-dealer utilized; or where there is no registered broker-dealer, the name of the person from whom the security was purchased or to whom the security was sold, or a statement that CIBC Mellon Trust will furnish this information within a reasonable time upon written request of the U.S. resident customer.
6. In connection with administering Stock Plans with U.S. resident investors, personnel at any call center operated by or on behalf of CIBC Mellon Trust will be limited to responding to inquiries received from a U.S. resident customer about a Stock Plan, but may not: (a) identify to a U.S. resident investor a particular security except as requested by the investor and then only as necessary to be responsive to the specific inquiry; (b) respond to inquiries from U.S. resident investors concerning the advisability of investing in the particular security or participating in the Stock Plan rather than using the services of a registered broker-dealer; or (c) take verbal orders to buy or sell securities for U.S. resident investors. Call center personnel may provide U.S. resident customers general information about Stock Plan services as described in the Stock Plan brochure and the status of the customer's account, as well as accommodate telephone requests for brochures, account statements, certificated shares and replacement dividend checks. CIBC Mellon Trust will be responsible for ensuring that call center personnel are strictly instructed not to provide recommendations or advice to U.S. resident customers and that they will be monitored and supervised closely in this respect.<sup>11</sup>
7. In connection with administering Stock Plans with U.S. resident investors, CIBC Mellon Trust will effect purchases and sales at least once a day

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<sup>10</sup> CIBC Mellon Trust would not be required to disclose any payments it receives from issuers for acting in a transfer agent capacity.

<sup>11</sup> This condition would not affect, for example, CIBC Mellon Trust's ability to operate a call center outside of the U.S. that takes orders from non-U.S. residents.

unless orders received produce such a low share volume as to dictate less frequent transaction intervals. In all cases, purchases and sales will occur at least once a week (assuming an order is received during the week), except in the case of Odd-Lot Plans, where purchases and sales will occur when sufficient shares have been tendered to constitute a standard unit of trading on the marketplace.

8. In connection with administering Stock Plans with U.S. resident investors, CIBC Mellon Trust will not receive payment for order flow, as defined in Exchange Act Rule 10b-10.<sup>12</sup>
9. In connection with administering Stock Plans with U.S. resident investors, CIBC Mellon Trust will make and keep current all material books and records relating to customers' funds, securities, and orders to purchase or sell securities, including the following:
  - (a) Records reflecting customer ownership in the Stock Plan;
  - (b) Any statement, checkbook, or cancelled check regarding any bank account established pursuant to condition 4 above; and records reflecting funds submitted by Stock Plan customers, funds held on behalf of customers pursuant to condition 4 above, and reconciliation of the funds submitted and the funds held;
  - (c) An original of any communication received by CIBC Mellon Trust from a Stock Plan customer or a copy of any materials sent to Stock Plan customers by CIBC Mellon Trust;
  - (d) A record of any order by a Stock Plan customer to purchase or sell securities;
  - (e) A copy of any transaction notification or statement sent pursuant to condition 5 above;
  - (f) A copy of any supervisory procedures relating to condition 6 above;
  - (g) A copy of any transaction notification received pursuant to condition 7 above; and
  - (h) A copy of any agreement relating to Stock Plans entered into with an affiliated or unaffiliated third party, including agreements with banks, broker-dealers, and entities providing services related to processing and call centers.

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<sup>12</sup> 17 CFR 240.10b-10.

10. Any record maintained pursuant to condition 9 will be retained for a period of not less than six years, the first year in a readily accessible place for purposes of examination and inspection by the Commission.

In sum, in finding that this exemption is appropriate in the public interest, we stress that CIBC Mellon Trust will only administer Stock Plans with U.S. resident investors for issuers for which it acts as transfer agent, and that its activities as a registered transfer agent are subject to Commission regulation and inspection.<sup>13</sup> This exemption is subject to modification or revocation at any time the Commission determines that such modification or revocation is consistent with the public interest or the protection of investors.

IT IS THEREFORE ORDERED, pursuant to Section 15(a)(2) of the Exchange Act, that a conditional exemption for CIBC Mellon Trust from the registration requirements of Section 15(a)(1) of the Exchange Act to the extent CIBC Mellon Trust is acting as a broker under Section 3(a)(4) of the Exchange Act be, and hereby is, granted. This exemption is limited to administering Stock Plans with U.S. resident investors and subject to the conditions listed above.

IT IS FURTHER ORDERED, pursuant to Section 36 of the Exchange Act, that CIBC Mellon Trust shall be exempt, in connection with engaging in Stock Plan administration activities consistent with the conditions set forth above, from the reporting and other requirements specifically imposed by the Exchange Act, and the rules and regulations thereunder, on a broker or dealer that is not registered with the Commission to the extent CIBC Mellon Trust is acting as a broker under Section 3(a)(4) of the Exchange Act.<sup>14</sup>

IT IS FURTHER ORDERED, that the exemptions granted herein to CIBC Mellon Trust pursuant to Section 15(a)(2) and Section 36 of the Exchange Act shall become effective upon the date the United States District Court for the District of Columbia enters a final order permanently enjoining CIBC Mellon Trust from, among other things, future violations of Sections 15(a) and 17A(c) of the Exchange Act.

By the Commission.

Jonathan G. Katz  
Secretary

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<sup>13</sup> In contrast, the Stock Plan activities that are the subject of the Commission's enforcement order were conducted more broadly and outside any Commission oversight.

<sup>14</sup> CIBC Mellon Trust remains subject to all other applicable provisions of the federal securities laws, including, without limitation, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. 17 CFR 240.10b-5.