

## Headnote

NP 11-203– *Process for Exemptive Relief Applications in Multiple Jurisdictions* – Hybrid Application – Filer requested relief from the trade confirmation and statement of account requirements in securities laws where acting solely as execution-only broker in the context of “give-up” trades – Relief granted with respect to give-up trades for institutional customers, provided that a give-up trade agreement is executed with institutional customer and clearing broker and that clearing broker agrees to provide the customers with statements which include give-up trade details.

## Applicable Legislative Provisions

Sections 14.14 and 15.1 of National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations*; Sections 90(1) and 213 of the Act.

**Citation: Merrill Lynch Canada Inc., Re, 2012 ABASC 460**

**Date: 20121031**

In the Matter of  
the Securities Legislation of  
Alberta, Saskatchewan, Ontario and Newfoundland and Labrador

and

In the Matter of the Process for  
Exemptive Relief Applications  
in Multiple Jurisdictions

and

In the Matter of  
Merrill Lynch Canada Inc. (the **Filer**)

Decision

## Background

The securities regulatory authority or regulator in each of Alberta and Ontario (the **Dual Exemption Decision Makers**) has received an application from the Filer for a decision under the securities legislation of those jurisdictions for an exemption, in the context of Give-up Transactions (as defined below), from the requirement (the **Statement of Account Requirement**) that a dealer must deliver a statement of account to each client at least once every three months, or at the end of a month if the client has requested statements on a monthly basis or if a transaction was effected in the client's account during the month (the **Dual Exemption**).

The securities regulatory authority or regulator in each of Alberta, Saskatchewan, Ontario and Newfoundland and Labrador (the **Coordinated Exemption Decision Makers**) has received an application from the Filer for a decision under the securities legislation of those jurisdictions for an exemption, in the context of Give-up Transactions, from the requirement (the **Trade**

**Confirmation Requirement**) that every registered dealer that has acted as principal or agent in connection with a purchase or sale of a security must promptly send by pre-paid mail or deliver to the client a written confirmation of the purchase or sale (the **Coordinated Exemption**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a hybrid application):

- (a) the Alberta Securities Commission is the principal regulator for this application;
- (b) the Filer has provided notice under section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) that the Dual Exemption is intended to be relied upon in British Columbia, Saskatchewan, Manitoba, Québec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, the Northwest Territories and Yukon;
- (c) the decision with respect to the Dual Exemption evidences the decision of the principal regulator and the securities regulatory authority or regulator in Ontario; and
- (d) the decision with respect to the Coordinated Exemption evidences the decision of each Coordinated Exemption Decision Maker.

### **Interpretation**

Terms defined in MI 11-102 or National Instrument 14-101 *Definitions* have the same meaning if used in this decision unless otherwise defined herein.

### **Representations**

This decision is based upon the following facts represented by the Filer:

1. The Filer is registered as an investment dealer under the securities legislation of Alberta, British Columbia, Manitoba, New Brunswick, the Northwest Territories, Nova Scotia, Prince Edward Island, Saskatchewan and Yukon, an investment dealer and a futures commission merchant in Ontario, an investment dealer and a portfolio manager in Newfoundland and Labrador and an investment dealer and derivatives dealer in Québec.
2. The Filer is a participating organization or member of the Toronto Stock Exchange, TSX Venture Exchange and Montréal Exchange and other electronic markets. The Filer is a member of the Canadian Derivatives Clearing Corporation.
3. The head office of the Filer is located in Toronto, Ontario.
4. The Filer acts as an executing and clearing broker for Give-up Transactions (as defined below) that involve the purchase or sale of options on equities or indices that are listed or traded on one or more marketplaces (**Options**).
5. **Give-up Transactions** are purchases or sales of Options by investors, each of whom is an "institutional customer" within the meaning of IIROC Dealer Member Rule 1.1 (each, an **Institutional Customer**), that have an existing relationship as a client with a clearing

broker but wish to use the trade execution services of one or more executing brokers for the purpose of executing such purchases or sales (**Subject Transactions**). Under these circumstances, the executing broker will execute the Subject Transactions in accordance with the Institutional Customer's instructions and then "give up" the Subject Transactions to the clearing broker for clearing, settlement and/or custody. The service provided by the executing broker is limited to trade execution only.

6. The clearing broker remains subject to the Trade Confirmation Requirement and Statement of Account Requirement in respect of its Institutional Customers in Give-up Transactions. The clearing broker maintains an account for the Institutional Customer that is administered in accordance with the terms and conditions of the account documentation of the clearing broker that has been signed by the Institutional Customer. For a Give-up Transaction, the Institutional Customer does not sign account documentation with the executing broker, and the executing broker does not receive any money, securities, margin or collateral from the Institutional Customer. The Institutional Customer does, however, enter into an agreement with the executing broker and the clearing broker that governs their Give-up Transaction relationship (a **Give-up Agreement**).
7. Although the Filer is responsible for its own record-keeping, bookkeeping, custody and other administrative functions (**Account Services**) in respect of its own clients, it does not provide Account Services for execution-only customers in Give-up Transactions. Such Account Services remain the responsibility of those clients' clearing brokers.
8. The Filer does, however, record in its own books and records and accounting system all Give-up Transactions that it executes, which generally comprise those Options positions held by it that are not allocated to any of its own client accounts. The Filer communicates these unallocated positions to the relevant clearing brokers who either accept or reject the positions so allocated on behalf of their clients based on existing Give-Up Agreements. If a clearing broker rejects a proposed allocation, the Filer contacts the person who executed the trade to obtain clarifying instructions and then allocates the position in accordance with the instructions so received.
9. The Filer prepares a monthly or transaction-by-transaction invoice detailing all Give-up Transactions (including the amount of any commission to the Filer for execution thereof) that the Filer conducted during the month for each Institutional Customer under a Give-up Agreement. The Filer delivers such invoice to the clearing broker who then reconciles the Give-up Transactions with its own records.
10. The clearing broker will have the primary relationship with the Institutional Customers and is contractually responsible for trade and risk monitoring as well as reporting trade confirmations and sending out monthly statements.
11. The Filer is, to the best of its knowledge, in compliance with all IIROC requirements relating to the maintenance of records of executed transactions, and all applicable securities, futures or derivatives legislation in any jurisdiction.

12. Application of the Trade Confirmation Requirement and Statement of Account Requirement to the Filer when it provides only trade execution services in respect of Give-up Transactions would:
- (a) be duplicative and confusing because delivery of the required trade confirmations and statements of account to execution-only Institutional Customers would capture only some, not all, of the information that would be contained in the trade confirmations and statements of account delivered to the same Institutional Customers by their clearing brokers; and
  - (b) not be required to establish an audit trail or to facilitate reconciliation of Give-up Transactions as between the Filer and a clearing broker.

**Decision**

Each Coordinated Exemption Decision Maker is satisfied that the decision meets the test set out in the legislation of the jurisdiction for the relevant regulator or securities regulatory authority to make the decision.

The decision of the Dual Exemption Decision Makers under the legislation of the Dual Exemption Decision Makers is that the Dual Exemption is granted, and the decision of the Coordinated Exemption Decision Makers under the legislation of the Coordinated Exemption Decision Makers is that the Coordinated Exemption is granted, provided that:

- (a) the Filer provides trade execution services in respect of Give-up Transactions only for Institutional Customers;
- (b) the Filer enters into a Give-Up Agreement with the clearing broker and the Institutional Customer; and
- (c) the clearing broker has agreed to provide each Institutional Customer with written trade confirmations and statements of account that include information for any Subject Transaction.

**For the Commission:**

*“original signed by”*

\_\_\_\_\_  
Glenda Campbell, QC  
Vice-Chair

*“original signed by”*

\_\_\_\_\_  
Stephen Murison  
Vice-Chair