

# 2012 BCSECCOM 335

June 12, 2012

## Headnote

Securities Act s.48 Dealer –Exemption from s.34(1)(a) requirement to be registered as a dealer to trade securities – A person not registered as a dealer in BC wants to do a trade that requires a BC registered dealer – The person is registered or qualified as a dealer in the jurisdiction in which they reside or carry on business; the person will only trade exchange contracts with sophisticated investors

## Applicable British Columbia Provisions

*Securities Act*, R.S.B.C. 1996, c. 418, s.48

## Exemption Order

**R.J. O’Brien & Associates, LLC**

**Section 48 of the *Securities Act*, R.S.B.C. 1996, c.18**

## Background

- ¶ 1 R.J. O’Brien & Associates, LLC (the “Filer”) applied to the Executive Director for a decision (the “Exemption Sought”) under section 48 of the Securities Act (British Columbia) (the “Act”) that the Filer be exempt from the requirement in section 34(a) of the Act to be registered as a dealer in connection with trades (“Futures Trades”) in commodity futures contracts and options on commodity futures contracts (collectively, “Futures Contracts”) that trade on certain exchanges located outside Canada (“Exchange-Traded Futures”) with the Filer’s clients in British Columbia that fall within the category of investors defined as “permitted clients” in section 1.1 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (“NI 31-103”) (“Permitted Clients”).

## Interpretation

- ¶ 2 Terms defined in National Instrument 14-101 – *Definitions* have the same meaning in this decision unless they are defined in this decision.

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### Representations

¶ 3 The Filer represents that:

1. the Filer is a limited liability company organized under the laws of the state of Delaware. Its head office is located at 222 South Riverside Plaza, Suite 900, Chicago, Illinois, 60606;
2. the Filer is a privately-held business wholly-owned by the O'Brien family of Chicago, Illinois. The Filer was founded in 1914 as is based in Chicago, Illinois, with additional offices in New York, New York, Houston, Texas and Winnipeg, Manitoba;
3. the Filer is a futures brokerage company and provides execution and clearing services in the United States. The Filer services a network of introducing broker offices, as well as financial, industrial and agricultural institutions;
4. the Filer is a registered futures commission merchant with the U.S. Commodity Futures Trading Commission ("U.S. CFTC") and a member of the U.S. National Futures Association ("U.S. NFA");
5. the Filer is also a member of the Chicago Mercantile Exchange Group, the IntercontinentalExchange, the NYSE Liffe, Dubai Mercantile Exchange, The Options Clearing Corporation, One Chicago, LCH.Clearnet Ltd., Eurex AG, the Clearing Corporation and the Chicago Climate Exchange;
6. the Filer is not in default of securities legislation in any jurisdiction;
7. pursuant to its registrations and memberships, the Filer is authorized to handle customer orders and receive and hold customer margin deposits, and otherwise act as a futures broker, in the United States. Rules of the CFTC and NFA require the Filer to maintain adequate capital levels, make and keep specified types of records relating to customer accounts and transactions, and comply with other forms of customer protection rules including know-your-customer obligations, account opening, suitability, anti-money laundering checks, credit checks, delivery of confirmation statements, clearing deposits and initial and maintenance margins. These rules do not permit the Filer to treat Permitted Clients materially differently from the Filer's US customers with respect to transactions made on US exchanges. With respect to transactions made on US exchanges, in order to protect customers in the event of the

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- insolvency or financial instability of the Filer, the Filer is required to ensure that customer securities and monies be separately accounted for, segregated at all times from the securities and monies of the Filer and custodied exclusively with such banks, trust companies, clearing organizations or other licensed futures brokers and intermediaries as may be approved for such purposes under the U.S. *Commodity Exchange Act* and the rules promulgated by the CFTC thereunder (the “R.J. O'Brien Approved Depositories”). The Filer is further required to obtain acknowledgements from any R.J. O'Brien Approved Depository holding customer funds or securities related to US-based transactions or accounts that such funds and securities are to be separately held on behalf of such customers, with no right of set-off against the Filer's obligations or debts;
8. the Filer proposes to offer certain of its clients in British Columbia that are Permitted Clients the ability to trade in Exchange-Traded Futures through the Filer;
  9. the Filer will not maintain an office, sales force or physical place of business in British Columbia;
  10. the Filer will solicit business in British Columbia only from persons who qualify as Permitted Clients;
  11. clients of the Filer that are Permitted Clients will only be offered the ability to trade Exchange-Traded Futures trading on exchanges located outside Canada and that are listed in BCI 21-501 – *Recognition of Exchanges, Self Regulatory Bodies, and Jurisdictions* (the “Recognized Exchanges”);
  12. the Exchange-Traded Futures to be traded by Permitted Clients will include, but will not be limited to, Futures Contracts for equity index, interest rate, energy, agricultural and other commodity products;
  13. Permitted Clients will be able to execute trades in Exchange-Traded Futures through the Filer by contacting the Filer's exchange floor staff or global execution desk. Permitted Clients may also be able to self execute trades electronically in Exchange-Traded Futures via an independent service vendor and/or other electronic trading routing;
  14. the Filer may execute a client's order on the relevant Recognized Exchange in accordance with the rules and customary practices of the exchange, or engage another broker to assist in the execution of orders. The Filer will remain responsible for the execution of each such trade;

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15. the Filer may perform both execution and clearing functions for Futures Trades or may direct that a trade executed by it be cleared through a carrying broker if the Filer is not a member of the Recognized Exchange on which the trade is executed. Alternatively, the client will be able to direct that trades executed by the Filer be cleared through clearing brokers not affiliated with the Filer in any way (each a Non-R.J. O'Brien Clearing Broker);
16. if the Filer performs only the execution of a client's Futures Contract order and "gives-up" the transaction for clearance to a Non-R.J. O'Brien Clearing Broker, such clearing broker will also be required to comply with the rules of the exchanges of which it is a member and any relevant regulatory requirements, including requirements under the Act as applicable. Each such Non-R.J. O'Brien Clearing Broker will represent to the Filer in a give-up agreement that it will perform its obligations in accordance with applicable laws, governmental, regulatory, self-regulatory, exchange and clearing house rules and the customs and usages of the exchange or clearing house on which the relevant client's Futures Contract orders will be executed and cleared. The Filer will not enter into a give-up agreement with any Non-R.J. O'Brien Clearing Broker located in the United States unless such clearing broker is registered with the U.S. CFTC and/or U.S. Securities and Exchange Commission, as applicable;
17. as is customary for all trading in Exchange-Traded Futures, a clearing corporation appointed by the exchange or clearing division of the exchange is substituted as a universal counterparty on all trades in Futures Contracts and client orders are submitted to the exchange in the name of the Non-R.J. O'Brien Clearing Broker or the Filer or, on exchanges where the Filer is not a member, in the name of another carrying broker. The client is responsible to the Filer for payment of daily mark-to-market variation margin and/or proper margin to carry open positions and the Filer, the carrying broker or the Non-R.J. O'Brien Clearing Broker is in turn responsible to the clearing corporation/division for payment;
18. clients that direct the Filer to give up transactions in Exchange-Traded Futures for clearance and settlement by Non-R.J. O'Brien Clearing Brokers will execute the give-up agreements described above;

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19. clients that are Permitted Clients will pay commissions for trades to the Filer or the Non-R.J. O'Brien Clearing Broker or such commissions may be shared with the Non-R.J. O'Brien Clearing Broker;
20. as a futures commission merchant subject to regulatory oversight by the U.S. CFTC, the Filer is required to ensure that customer positions and monies be separately accounted for and segregated from the positions and monies of the Filer. The U.S. CFTC regulations are designed to protect customers in the event of insolvency or financial instability of a futures commission merchant through which they clear their futures and futures options business. The Filer receives acknowledgements from those of its banks and brokers holding the Filer's client funds that such funds are to be separately held on behalf of the Filer's clients, with no right of set-off against the Filer's obligations or debts; and
21. all representatives of the Filer who trade options in the United States have passed the futures and options proficiency examination (i.e., the National Commodity Futures Examination (Series 3) administered by FINRA.

### Order

¶ 4 Considering that it is not prejudicial to the public interest, the Executive Director orders that the Exemption Sought is granted under section 48 of the Act provided that:

- (a) at the time trading activity is engaged in:
  - (i) the Filer is permitted to trade in Futures Contracts in the U.S. and is registered with the U.S. CFTC as a futures commission merchant and is a member of the U.S. NFA in good standing;
  - (ii) the Filer's representatives are permitted to trade Futures Contracts in the U.S. and are registered with the U.S. CFTC and U.S. NFA; and
  - (iii) the Filer has filed a submission to jurisdiction and appointment of service in the form of Form 31-103F2 *Submission To Jurisdiction And Appointment Of Agent For Service* ("F2") with the British Columbia Securities Commission, except that the Filer must delete from the F2 title "(sections 8.18 [*international dealer*] and 8.26 [*international adviser*])", and the Filer must delete paragraph 6 of the F2 referring to the section of NI 31-103

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relied on, and in paragraph 11 of the F2 the Filer must replace the phrase, “ceases to rely on section 8.18 [*international dealer*] or section 8.26 [*international adviser*]” with the phrase, “ceases to rely on the exemption from s. 34(a) of the Securities Act (British Columbia) granted by the British Columbia Securities Commission on June 12, 2012”.

- (b) each client in British Columbia effecting Futures Trades through the Filer is a Permitted Client and, if using a Non-R.J. O’Brien Clearing Broker, such clearing broker has represented and covenanted that it is or will be appropriately registered or exempt from registration under the Act;
- (c) the Filer only executes Futures Trades for clients in British Columbia that are Permitted Clients on the Recognized Exchanges; and
- (d) the Filer provides each client in British Columbia effecting Futures Trades through the Filer with disclosure upon entering into the agreement by which it establishes an account with the Filer that includes:
  - (i) a statement that there may be difficulty in enforcing any legal rights against the Filer or any of its directors, officers or employees because they are resident outside of Canada and all or substantially all of their assets are situated outside of Canada;
  - (ii) a statement that the Filer is not registered as a dealer under the Act and, accordingly, the protection available to clients of a dealer registered under the Act will not be available to clients of the Filer;
  - (iii) the name and address of the agent for service in British Columbia; and
  - (iv) a risk disclosure statement providing substantially similar disclosure to the disclosure in BC Form 91-903F *Risk Disclosure Statement (Exchange Contracts)*.
- (e) the Filer notifies the British Columbia Securities Commission of any regulatory action after the date of this order in respect of the Filer, or any predecessors, or specified affiliates of the Filer, by

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completing and filing Appendix “A” within 10 days of the commencement of such action;

- (f) this Order will expire five years after the date of this decision.

Mark Wang  
Acting Director, Capital Markets Regulation  
British Columbia Securities Commission

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## Appendix A Notice of Regulatory Action

1. Has R.J. O'Brien & Associates, LLC (the "firm") , or any predecessors or specified affiliates of the firm entered into a settlement agreement with any financial services regulator, securities or derivatives exchange, self regulatory organization ("SRO") or similar agreement with any financial services regulator, securities or derivatives exchange, SRO or similar organization?

A specified affiliate is a person that is a parent of the firm, a specified subsidiary of the firm, or a specified subsidiary of the firm's parent. A specified subsidiary is a person of which another person has significant control.

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, provide the following information for each settlement agreement:

Name of entity
Regulator/organization
Date of settlement (yyyy/mm/dd)
Details of settlement
Jurisdiction

2. Has any financial services regulator, securities or derivatives exchange, SRO or similar organization:

	Yes	No
(a) Determined that the firm, or any predecessors or specified affiliates of the firm violated any securities regulations or any rules of a securities or derivatives exchange, SRO or similar organization?		
(b) Determined that the firm, or any predecessors or specified affiliates of the firm made a false statement or omission?		
(c) Issued a warning or requested an undertaking by the firm, or any predecessors or specified affiliates of the firm?		
(d) Suspended or terminated any registration, licensing or membership of the firm, or any predecessors or specified affiliates of the firm?		
(e) Imposed terms or conditions on any registration or membership of the firm, or predecessors or specified affiliates of the firm?		
(f) Conducted a proceeding or investigation involving the firm, or any predecessors or specified affiliates of the firm?		
(g) Issued an order (other than an exemption order) or a sanction to the firm, or any predecessors or specified affiliates of the firm for securities or derivatives-related activity (e.g. cease trade order)?		



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If yes, provide the following information for each action:

Name of Entity	
Type of Action	
Regulator/organization	
Date of action (yyy/mm/dd)	Reason for action
Jurisdiction	

3. Is the firm aware of any ongoing investigation of which the firm or any of its specified affiliate is the subject?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, provide the following information for each investigation:

Name of entity
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Reason or purpose of investigation
Regulator/organization
Date investigation commenced (yyyy/mm/dd)
Jurisdiction

Name of firm
Name of firm's authorized signing officer or partner

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Title of firm's authorized signing officer or partner
Signature
Date (yyyy/mm/dd)

### Witness

The witness must be a lawyer, notary public or commissioner of oaths.

Name of witness
Title of witness
Signature
Date (yyyy/mm/dd)

British Columbia Securities Commission  
701 West Georgia Street  
P.O. Box 10142, Pacific Centre  
Vancouver, B.C. V7Y 1L2  
Attention: Manager, Registration Department  
Telephone: 604-899-6692  
email: [karmstrong@bcsc.bc.ca](mailto:karmstrong@bcsc.bc.ca)

**Appendix A**  
**Notice of Regulatory Action**

1. Has R.J. O'Brien & Associates, LLC (the "firm") , or any predecessors or specified affiliates of the firm entered into a settlement agreement with any financial services regulator, securities or derivatives exchange, self regulatory organization ("SRO") or similar agreement with any financial services regulator, securities or derivatives exchange, SRO or similar organization?

A specified affiliate is a person that is a parent of the firm, a specified subsidiary of the firm, or a specified subsidiary of the firm's parent. A specified subsidiary is a person of which another person has significant control.

Yes \_\_\_\_ No \_\_\_\_

If yes, provide the following information for each settlement agreement:

Name of entity
Regulator/organization
Date of settlement (yyyy/mm/dd)
Details of settlement
Jurisdiction

2. Has any financial services regulator, securities or derivatives exchange, SRO or similar organization:

	Yes	No
(a) Determined that the firm, or any predecessors or specified affiliates of the firm violated any securities regulations or any rules of a securities or derivatives exchange, SRO or similar organization?		
(b) Determined that the firm, or any predecessors or specified affiliates of the firm made a false statement or omission?		
(c) Issued a warning or requested an undertaking by the firm, or any predecessors or specified affiliates of the firm?		
(d) Suspended or terminated any registration, licensing or membership of the firm, or any predecessors or specified affiliates of the firm?		
(e) Imposed terms or conditions on any registration or membership of the firm, or predecessors or specified affiliates of the firm?		
(f) Conducted a proceeding or investigation involving the firm, or any predecessors or specified affiliates of the firm?		
(g) Issued an order (other than an exemption order) or a sanction to the firm, or any predecessors or specified affiliates of the firm for securities or derivatives-related activity (e.g. cease trade order)?		

If yes, provide the following information for each action:

Name of Entity	
Type of Action	
Regulator/organization	
Date of action (yyy/mm/dd)	Reason for action
Jurisdiction	

3. Is the firm aware of any ongoing investigation of which the firm or any of its specified affiliate is the subject?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, provide the following information for each investigation:

Name of entity
----------------

Reason or purpose of investigation
Regulator/organization
Date investigation commenced (yyyy/mm/dd)
Jurisdiction

Name of firm
Name of firm's authorized signing officer or partner

Title of firm's authorized signing officer or partner
Signature
Date (yyyy/mm/dd)

Witness

The witness must be a lawyer, notary public or commissioner of oaths.

Name of witness
Title of witness
Signature
Date (yyyy/mm/dd)

British Columbia Securities Commission  
701 West Georgia Street  
P.O. Box 10142, Pacific Centre  
Vancouver, B.C. V7Y 1L2  
Attention: Manager, Registration Department  
Telephone: 604-899-6692  
email: [karmstrong@bcsc.bc.ca](mailto:karmstrong@bcsc.bc.ca)