

October 25, 2000

IN THE MATTER OF: THE SECURITIES ACT

- and -

IN THE MATTER OF: CIBC WORLD MARKETS INC.

**REASONS FOR DECISION
OF
THE MANITOBA SECURITIES COMMISSION**

Chairman: D. G. Murray
Board Members: E. O. E. Bergman
R. G. McEwen
L. M. McCarthy
W. J. A. Bulman
M. S. Fages
K. S. Kristjanson

APPEARANCES:

P. Anisman) for CIBC World Markets Inc.
R. Bret Mecredy-Williams)
D. R. Brown) for The Manitoba Securities
C. P. Besko) Commission

CIBC World Markets Inc. ("CIBC" or the "applicant") made application to the Manitoba Securities Commission (the "Commission") by way of letter dated March 1, 2000. The application was made to the Commission under the Mutual Reliance Review System For Exemptive Relief Applications (Commission Rule 12-201) ("MRRS") and was made to the Commission and to all other Canadian Securities Regulatory Authorities in Canada, with the exception of the Ontario Securities Commission. In the case of the Ontario Securities Commission the applicant is relying on a registration exemption contained in OSC Policy 4.8 and does not require a decision from the Ontario Commission.

The Commission received formal submissions relating to this matter from both counsel for the applicant and staff of the Commission on September 6, 2000. At the conclusion of the meeting the Commission reserved decision on the application and advised that written reasons would follow. What follows is the reasons for decision of the Commission on the application.

The Commission has considered all materials provided to it both during and prior to the September 6, 2000 meeting. The Commission also received a further submission from CIBC by way of a letter dated September 12, 2000. Although the letter did not raise new points and was

sent "to clarify a few issues which arose in the course of the hearing" the Commission members also considered the letter in its deliberations.

The Commission has determined that it would not be in the public interest to grant the order requested.

The Program

CIBC (formerly CIBC Wood Gundy Securities Inc.) received an order from the Commission by way of an MRRS Decision Document dated October 9, 1998 ("1998 Decision") which provided an exemption from the registration requirements of The Securities Act (Manitoba) (The "Act") for certain advisors participating in what is referred to in the 1998 Decision as the "Wood Gundy Investment Advisory Service" and is now referred to as "CIBC Wood Gundy Investment Advisory Service" (the "Program").

In general terms, clients who have sufficient funds to meet minimum balance requirements and who choose to participate in the Program provide CIBC with investment objectives and other information necessary to enable a client profile to be prepared. In the case of the 1998 Decision (concerning the initial phase of the Program limited to U.S. dollar accounts) CIBC Oppenheimer Corp. ("Oppenheimer") receives the information provided to CIBC by the client and prepares the client profile.

Once the client profile is completed, Oppenheimer (in the case of the initial phase of the Program) prepares a list of advisors which is provided to the client by CIBC. The client chooses an advisor from this list to manage his or her account.

The advisors who are exempt from the requirement to be registered under the Act under the 1998 Decision are portfolio managers registered as advisors in the United States under the Investment Advisors Act.

Under the Program CIBC may or may not execute all transactions in the client's account. CIBC will provide confirmations of transactions to clients and act as custodian for the securities held in the account unless otherwise directed by the client. Account activities are conducted through CIBC, although there is provision for clients to meet with an advisor or potential advisor. CIBC expects meetings between clients and advisors will be rare, but any such meetings will be conducted in the presence of CIBC personnel who are registered under the Act.

All fees related to the Program are paid to CIBC and no additional fees are payable directly to the advisor by the client.

The 1998 Decision (clause 3.17) also refers to subsequent phases of the Program as follows:

3.17 subsequent phases of the Program, which will enable Participating Clients to establish Canadian dollar accounts to invest in Canadian securities, will be administered by Wood Gundy and Oppenheimer in the manner described above but with portfolio managers registered under securities legislation in Canada acting as advisors;

Applications Generally

Both the 1998 Decision and the present application are made pursuant to section 20(1) of the Act. This section permits the Commission to exempt an applicant from a requirement of the Act or the regulations (with or without terms and conditions) "Where the commission is of the opinion that it is not prejudicial to the public interest".

In both the 1998 Decision and in the present application the Commission does not have a public interest concern with respect to the structure and operation of the Program itself. Documentation and contracts required to participate and administer the Program are detailed and provide a reasonable description of the Program and the obligations of all parties.

What was considered by the Commission in the 1998 Decision and in the present application is whether an order exempting advisors participating in the Program from the registration requirements of the Act is in the public interest.

Although the Commission did not issue reasons for the 1998 Decision it is necessary to understand the basis for the 1998 Decision in order to put the Commission's decision on the present application into proper context.

1998 Decision

As set out above the 1998 Decision provides an exemption from the requirement to be registered under the Act for advisors acting in the Program that were approved by Oppenheimer and are registered under United States law.

The Commission reached the conclusion that it would not be practical for advisors under the 1998 Decision to register under the Act as the business of those advisors is to provide advice relating to United States markets. The United States advisors have little, if any connection to Canada outside of the Program and would not be in the position to qualify for registration under the Act without obtaining additional educational requirements. The value and need for requiring the United States advisors to meet those requirements is limited given the advisor is not providing advice with respect to Canadian markets.

Without the 1998 Decision it is reasonable to conclude that Canadian clients who participate in the Program would not have the opportunity to receive advice from the United States advisors. It is also reasonable to conclude that the effect of permitting these advisors to act as advisors within the province would add more choice for participants in the Program as these advisors would have expertise in United States markets that in most cases would be greater than a registrant under the Act who conducts business in Canadian markets.

Prior to issuing the 1998 Decision the Commission did consider the fact that the Commission would not have the same administrative and enforcement powers over an United States advisor as would exist over a person registered under the Act. The Commission determined that although this raised a public interest concern, the concerns raised by this situation were less than the alternative of not having the United States advisors available to clients in the Program. The Commission at no time intended the 1998 Decision to be viewed as a policy direction from the

Commission which would permit an exemption from registration requirements for individuals who were otherwise in a position to obtain registration under the Act.

At the time of the 1998 Decision the Commission relied on the representation contained in clause 3.17 of the 1998 Decision that subsequent phases of the Program involving Canadian dollar amounts would involve portfolio managers registered under the Act. Although the applicant suggested to the Commission during the present application that this portion of the 1998 Decision contemplated the relief requested in the March 2000 application, no application relating to Canadian advisors was made in 1998 and the decision of the Commission at that time was limited to public policy considerations relating to a registration exemption for United States advisors acting within the limits of the Program.

March 2000 Application

The March 1, 2000 application seeks to expand the 1998 Decision to provide a registration exemption for portfolio managers performing the function of an advisor under the Program who are registered in at least one Canadian jurisdiction.

The application was made under MRRS with the Alberta Securities Commission as lead regulator. The Commission notes that comments made by Manitoba staff relating to the application were not included in the analysis of the application by the lead regulator.

Although the Commission whenever possible attempts to exercise its discretion in a manner consistent with other jurisdictions, it is the opinion of the Commission that it would be inappropriate to do so in this application because of public interest concerns.

During the course of submissions CIBC advised that there are presently six participating Canadian advisors in the Program. Of this number only one is presently not registered in Manitoba. When questioned as to why CIBC would pursue the application given there is no immediate need for the registration exemption, the response given by CIBC was that there was a possibility that there may be a problem in the future with retaining an advisor in the Program.

In effect, CIBC takes the position that advisors under the Program should be exempted from registration because there may or may not be a problem with finding advisors to participate in the Program. The Commission is being asked to exercise discretionary powers based on the hypothetical possibility that there may be an advisor registered in at least one Canadian jurisdiction who is prepared to participate in the Program but who does not wish to obtain registration in Manitoba. It is the opinion of the Commission that this does not demonstrate a sufficient public interest need for the order requested.

The Commission is also concerned with the precedent that would be set in granting a registration exemption under these facts. In exercising discretionary jurisdiction under the Act the Commission examines whether the relief requested would be in the public interest. Exemptions from requirements of the Act are generally granted where the fact situation has resulted in a situation where the applicant cannot practically or realistically comply with the Act unless it receives an exemption from one or more of the requirements of the Act or regulations. In the present application the Canadian advisors who are already registered in one Canadian

jurisdiction could comply with the Act without the order requested by applying for registration under the Act. It is only because a particular advisor chooses or may choose not to register that the perceived need for a registration exemption exists.

As the registration requirements under the Act are an important and fundamental part of the regulatory system it is the view of the Commission that there must be more than inconvenience shown to justify a registration exemption.

It is important to note in this context that there is no suggestion that the Canadian advisors who would benefit from the registration exemption requested do not have the qualifications necessary to register under the Act. As registration requirements imposed by Canadian securities authorities are for the most part consistent, there is no hardship or imposition resulting from requiring an advisor to register in more than one jurisdiction. This is a key difference between the present application and the 1998 Decision.

It should also be noted that the Commission as a member of the Canadian Securities Administrators is actively involved in coordinating and streamlining the process for registration across Canada. Initiatives include the development of a National Registration Database as a single point of entry for all registration applications, as well as the development of a coordinated system for the review of registration applications by Canadian Securities Regulatory Authorities. These initiatives would permit an applicant for registration to access the registration system in one or more Canadian jurisdiction by way of a single point of entry.

The coordinated approach to registration recognizes the need of a regulatory authority such as the Commission to retain jurisdiction over registration matters within the province.

The effect of the registration exemption requested would be to reduce the ability of the Commission to review activities of a Canadian advisor under the Program, and to take administrative action against an advisor if such action were warranted by the facts. It is the opinion of the Commission that this would not be in the public interest as it provides a reduced level of investor protection to the public in Manitoba.

A further consequence of the order requested would be to create an inconsistent level of registration within the province. A member of the public in Manitoba who seeks the services of an advisor may or may not be receiving the services of an advisor registered under the Act. A member of the public who approaches the Commission with a complaint that an advisor has not acted appropriately could rightly criticize the Commission for retaining jurisdiction over some, but not all advisors. Such a situation also indirectly penalizes advisors registered in the province by making those advisors subject to requirements not imposed on advisors who are exempt from registration.

The applicant took the position that the granting of the exemption requested did not put the Commission at a disadvantage with respect to its ability to regulate the activities of the advisor. The Commission does not agree with this position. Although the Commission has hearing and enforcement powers which apply to both registrants and non-registrants, the jurisdiction under the Act to investigate and hold hearings with respect to whether a registration under the Act

should continue permits the Commission to exercise a greater degree of oversight over the activities of a registrant. This jurisdiction is broader in scope than other enforcement powers under the Act, recognizing the need of the Commission to have sufficient authority to regulate the activities of registrants.

If the registration exemption requested were to be granted, the ability of the Commission to take action against an advisor under the Program would be limited. Although the Commission could take action against CIBC as administrator of the Program, it is the view of the Commission that there could be a situation with facts that show misconduct on the part of an advisor in the Program but suggest no inappropriate activities on the part of CIBC. Under such circumstances it is difficult to understand what public interest concern would be satisfied by conducting an administrative action against CIBC in lieu of an exempted advisor.

Relationship between CIBC and advisor

The requirement for registration under the Act is intended to ensure persons who trade in securities in the province are qualified and are properly supervised through a registered firm. The relationship between the individual salesman and the firm is critical in this context. A firm sponsors the registration of the individual and performs a significant public protection function by supervising the actions of individual registrants. The firm in this situation cannot contractually limit or rely on exclusionary clauses to limit its responsibility for the actions of an individual trading in securities under its registration.

In the case of the Program there are clauses of the contract between CIBC and the client which arguably have the effect of limiting the responsibility of the firm for the actions of an advisor under the Program. Much of the information presented to the Commission by the applicant described how the firm and its registrants administer the decisions of the client and the advisor. The advisor makes investment decisions on each account and there is a separation made between CIBC and the actions of the advisor.

Although it is outside the scope of this decision to interpret the scope and limitations of liability of the applicant for advice provided by advisors under the Program, it is clear that if the advisors were acting directly under CIBC's registration that such limitations would not be required or permitted. All actions of each advisor would be subject to supervision and compliance by CIBC itself.

The absence of an employer-employee relationship between CIBC and the advisors under the Program is a further reason to deny the relief requested. The need for registration of advisors under the Program is greater because the relationship between the advisors and CIBC is subject to contractual limits and is not subject to the same unrestricted requirements that would be in effect if the advisors were registered directly by CIBC.

Staff of the Commission raised the question as to whether Ontario Securities Commission Policy 4.8 relating to Non-resident advisers can properly apply to the Program on the basis that the limitations contained in the contracts result in advisors not acting as sub advisors of CIBC. As a decision on this question is not required for the determination of this application, the Commission declines to comment on this issue.

For the reasons set out above the Commission is of the opinion that it would not be in the public interest to grant the order requested.

October 25, 2000

Chairman

On behalf of Members of the Manitoba Securities Commission