

May 5, 2021

VIA EMAIL

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission
Ontario Securities Commission
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Financial and Consumer Affairs Authority of Saskatchewan
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward
Island
Superintendent of Securities, Nunavut

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**Re: Proposed Amendments to NI 33-109 and Related Instruments (collectively,
the “Proposed Amendments”)**

The Canadian Advocacy Council of CFA Societies Canada¹ (the “CAC”) appreciates the opportunity to provide the following comments on the Proposed

¹ The CAC is an advocacy council for CFA Societies Canada, representing the 12 CFA Institute Member Societies across Canada and over 18,000 Canadian CFA charterholders. The council includes investment professionals across Canada who review regulatory, legislative, and standard setting developments affecting investors, investment professionals, and the capital markets in Canada. Visit www.cfacanada.org to access the advocacy work of the CAC.

CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion of ethical behavior in investment markets and a respected source of knowledge in the global financial community. Our aim is to create an environment where investors' interests come first, markets function at their best, and economies grow. There are over 173,000 CFA charterholders worldwide in over 160 markets. CFA Institute has nine offices worldwide and there are 159 local member societies. For more information, visit www.cfainstitute.org.

Amendments. We wish to comment specifically on the proposed changes to the reporting requirements for Outside Activities.

General Comments

We are generally supportive of efforts to lessen unnecessary regulatory reporting obligations. We agree that the current requirement to report all outside business activities, regardless of whether they have a business purpose or a nexus to a potential or actual conflict of interest, is overly broad and we support a more principled, consistent and risk-based reporting framework. We are concerned, however, that the Proposed Amendments are potentially problematic and may result in gaps and underreporting of positions or activity that could raise conflict of interest issues.

In our view, the Proposed Amendments go too far with respect to lessening the reporting requirements for Outside Activities. We believe the proposed changes may result in disclosure of fewer positions or activity that can give rise to conflict of interest issues, resulting in potential investor harm. We do not agree with what appears to be a change in the onus of disclosure, from one where registrants must consider a wide array of potential disclosure triggers, to one where registrants are only required to disclose certain activities in the narrower enumerated categories and/or if an aggregate hours threshold has been reached. For the reasons set out below, we believe this change is inherently problematic and that the temporal threshold proposed has not yet been adequately explained by a data-driven or analytical case.

The Companion Policy to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (“NI 31-103CP”) specifically indicates that conflicts can arise when registered individuals are involved in outside business activities, including being the owner of a holding company, and that prior to approving any such activity, registered firms should consider whether the potential conflicts of interest can be properly controlled. We strongly believe that the potential for conflicts of interest must be a defining characteristic and decision metric of any framework for the reporting of Outside Activities.

The Proposed Amendments significantly narrow the type of activities that would be reportable as an Outside Activity, including those that could have otherwise brought potential issues to the attention of a registrant’s compliance personnel, and through filings, its principal regulator. Of note, NI 31-103 specifically states that regulators will consider whether the activity provides the individual with access to privileged, confidential or insider information relevant to their registerable activities and to help ensure the activity is consistent with the registrant’s duty to deal fairly, honestly and in good faith with clients. Further, recent amendments to NI 31-103 Reforms to Enhance the Client-Registrant Relationship (Client Focused Reforms) are based on the concept that in the client-registrant relationship, the interests of the client come first. Narrowing the types of activities that are reportable as proposed may result in firms or individual registrants failing to adequately assess the nature of any existing or ‘reasonably foreseeable’ conflict of interest that may arise.

The Proposed Amendments would not require reporting of certain activities such as being the owner of a holding company if the total amount of time spent on all Outside Activities does not exceed the chosen threshold of 30 hours (on average) per month. Under the proposed revisions, these “specified activities” are defined to include all activities (whether or not compensated) for which the individual registrant is a director or officer, or holds an equivalent position for the entity, or activities for an entity where the individual is a partner or shareholder of the entity. We believe that this class of activities should be reportable regardless of the time spent by a registered individual because the potential for certain conflict of interest issues arising does not depend on time spent, but on the economic relationship existing between the individual and the holding company (or other similar entity) and the associated potential for unavoidable conflicts. Rather than base the disclosure obligation solely on what appears to be an arbitrary time threshold, an Outside Activity should always be required as reportable if it relates to an existing or reasonably foreseeable material conflict of interest that would be required to be identified and/or inventoried by registrants under NI 31-103. This would include all conflicts where the interests of a client and those of the registrant are inconsistent or divergent.

There are numerous potential sources of conflicts between the best interests of a registrant’s clients and the individual registrant where the individual registrant holds an officer, director, partnership, shareholder or other equivalent or economically beneficial position in an outside entity. It is possible for the entity (and therefore the registrant) to economically benefit from preferential access to product, information, or transactions, particularly where there are undisclosed economic relationships to either or both of clients and/or regulators. For example, a registrant could be a trustee or beneficiary of a family trust or other holding company-like structure that is a client of the registrant’s firm, and as such receive perceived preferential treatment through a side account or other investment vehicle with access to different investment opportunities or trades than could materially differ from those for a pooled investment vehicle client of the registrant firm. Similarly, a registrant’s personal holdco account could receive IPO or limited-availability transactional allocations that may not always be made widely available to the firm’s clients. Finally, client accounts for entities in which a registrant has an undisclosed personal interest could be provided with additional reporting or liquidity rights. It is unclear that such conflicts and activity would fall within the category for Outside Activities (category 4) related to the provision of financial or financial related services where the funds are not those of a third party. We are deeply concerned that without an explicit linkage between potential conflicts and Outside Activity reporting obligations that regulators may not have appropriate visibility into sources of problematic conduct and potential investor harm.

It is also unclear to us how the 30 hours of aggregate time for the proposed disclosure requirements was determined as the appropriate threshold, or how any particular amount of time is commensurate with the potential risk to investors of non-reporting (and potentially then non-disclosure), beyond the obvious negative effects of registrants not giving or having temporal capacity to give adequate attention to their clients and registerable activities. Additional empirical and data-driven justification would be helpful in the consideration of any particular aggregate time threshold that is proposed as determinative of disclosure requirements.

We do agree that certain other outside activities need not require disclosure, as suggested by other commentators. For example, unless it amounts to a position of authority or trust (**which may be a broader concept than just a formal position of authority**), volunteer or community work unrelated to securities or financial services should not be reportable as an Outside Activity. We are aware of concerns from some registrants that firm-level approvals and processes relating to existing OBA disclosure has been materially dissuasive from engaging in certain volunteer or community activities and believe that this is an unfortunate outcome of the current regime that should be rectified through constructive regulatory engagement and guidance relating to these matters.

With respect to other general comments, we welcome additional reporting requirements regarding business/professional title(s), simplifying changes to firm-level reporting, clarity on required disclosure of registrant information relating to professional bodies' standards of conduct and related investigations/processes/sanctions, and the codification of the rules relating to the client base of registrants whose Outside Activities would include positions of influence. We note however that a position of influence will be defined in Section 13.4.3 of NI 31-103 as a position, other than a position with a sponsoring firm, if, due to the functions of the position or the training or specialized knowledge required for the position, an individual in the position would be considered by a reasonable person to have influence over other individuals. These would be deemed to include positions such as leaders in a religious or similar organizations, medical doctors, professors and lawyers. While we appreciate this linkage and the specificity, we believe that additional clarity could be provided to include those individuals with trust-based relationships and positions of influence founded on positions of community, cultural, or religious leadership, either formal or informal.

While we appreciate the concern raised by registrants that the current 10-day period for reporting outside business activities is too short, we believe that changing the time period to 30 days, while extending the deadlines for other filings to 15 days, will continue to lead to confusion and late filings by market participants. We recommend converging all deadlines, including those for Outside Activities, to 15 days for the sake of simplification and the encouragement of greater compliance.

Responses to Select Questions

1. Are there other categories of Outside Activities that should be reportable to regulators? If so, please describe what categories of Outside Activities should be reportable to regulators.

As noted in our General Comments, we believe any Outside Activity relating to a potential or actual conflict of interest with the interests of a registrant's clients should be reportable.

5. Is 30 hours per month (based upon 7.5 hours per week for four weeks) an appropriate cumulative minimum time threshold for reporting all Outside Activities? Please explain your view.

As noted in our General Comments, it is unclear to us how the 30 hours of aggregate time for the proposed disclosure requirements was determined as the appropriate threshold, or that this will in any way proxy a significant swath of registrant activities that can generate potential or actual conflicts between the interests of the individual registrant and their clients. Inclusion criteria must be added that do not relate to temporal thresholds but to potential conflicts if this framework is to be effective. Additional empirical and data-driven justification would be helpful in the consideration of any particular aggregate time threshold that is proposed as determinative of reporting requirements.

7. Are there other positions that should be considered positions of influence? If so, please describe these positions and explain why they should be positions of influence.

While we appreciate the linkage to Section 13.4.3 of NI 31-103, and the guidance provided in the corresponding section of the Companion Policy, we believe that additional clarity could be provided to include those individuals with trust-based relationships and positions of influence founded on positions of community, cultural, or religious leadership, either formal or informal.

Concluding Remarks

We are generally supportive of the Proposed Amendments, but strongly believe that the reporting framework as currently proposed could be materially enhanced with additional principles-based criteria to trigger mandatory reporting. Any outside activity or position where a potential or actual conflict of interests between those of the registrant and their clients exist must require reporting. We believe that this criteria in combination with the other proposed categories and clarifications should serve to provide registrants and regulators with a more functional, useful, and principles-based outside business activity reporting framework.

We thank you for the opportunity to provide these comments and would be happy to address any questions you may have. Please feel free to contact us at cac@cfacanada.org on this or any other issue in future.

(Signed) *The Canadian Advocacy Council of
CFA Societies Canada*

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