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Attn: John Stevenson, Secretary

Madame Anne-Marie Beaudoin
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British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Securities Commission
Manitoba Securities Commission
Securities Commission of Newfoundland and Labrador

New Brunswick Securities Commission
Securities Office, Prince Edwards Island
Nova Scotia Securities Commission
Registrar of Securities, NorthwestTerritories
Registrar of Securities, Yukon Territory
Registrar of Securities, Nunavit

Re: Proposed National Instrument 23-102 – Use of Client Brokerage Commissions as Payment for Order Execution Services or Research ("Soft Dollar" Arrangements) and Companion Policy 23-102

Ladies and Gentlemen:

We appreciate the opportunity to respond to the Canadian Securities Administrators' ("CSA") publication of proposed National Instrument 23-102 ("NI 23-102") and Companion Policy 23-102 ("CP 23-102") regarding soft dollar arrangements.

The CSA's proposals clarify how money managers and registered dealers can use soft dollars and they provide useful guidelines regarding disclosure of soft dollar arrangements. The CSA has also sought to harmonize Canada's regulatory regime with the recent regulatory initiatives of the U.K.'s Financial Services Authority (the "FSA")[1] and the U.S. Securities and

[1] U.K. Financial Services Authority, Policy Statement 05/9, Bundled Brokerage and Soft Commission Arrangements: Feedback on CP 05/5 and Final Rules (July 2005).

Exchange Commission (the "SEC").[2] We fully agree with the CSA that it would be beneficial for its proposed rules to be as consistent as possible with FSA and SEC rules and interpretations and we commend the CSA for its considerable efforts in meeting that important goal. We support the CSA proposals in large part. We have the following specific comments regarding the proposed National Instrument and the proposed Companion Policy followed by our responses to several of the questions the CSA posed.

In its Notice accompanying the draft text of the proposed National Instrument and Companion Policy, the CSA, referring to Section 3.2 of the proposed National Instrument, says:

> While advisers have the responsibility to act in the best interests of their clients, registered dealers must also ensure that commissions received from advisers on brokerage transactions are only used as payment for goods and services that meet the definition of order execution services or research.

We respectfully suggest, however, that dealers would likely not be in the best position to evaluate how a client was using a particular product or service. Dealers should of course refrain from knowingly participating in a course of conduct that violates a client's fiduciary duties.

We comment below on some of the questions raised in the CSA proposal:

<u>Question 1</u>: Should the application of the Proposed Instrument be restricted to transactions where there is an independent pricing mechanism (e.g., exchange-traded securities) or should it extend to principal trading in OTC markets? If it should be extended, how would the dollar amount for services in addition to order execution be calculated?

We respectfully recommend that the CSA's position remain as consistent as possible with those of the FSA and the SEC. As drafted, the proposed National Instrument and Companion Policy could be applied to transactions in all securities as long as brokerage commissions are charged. Under the CSA proposals, "brokerage commissions" include any commission or similar transaction-based fee.

As the CSA notes, the SEC has taken a narrower view, interpreting Section 28(e) as applying to client commissions on agency transactions and fees on certain riskless principal transactions. The SEC soft dollar regime does not extend to fixed-income securities that are not executed on an agency basis, nor to most principal trades or to instruments traded net with no explicit commission. The FSA has taken an even narrower view. Its dealing commission rules apply to shares and certain related instruments; they do not apply, however, to fixed-income securities.

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[2] Securities Exchange Act Release No. 54165 (July 18, 2006).

Unless there is a strong policy reason to diverge from the approaches taken by the SEC and the FSA, we think it would be better for the CSA not to do so. It should restrict the application of soft dollar regulation (i) to transactions executed on an explicit commission basis, or its economic equivalent and, if soft dollars are also to be applied to fixed-income transactions, (ii) only to those fixed-income transactions executed on an agency basis for a commission.

Question 3: What are the current uses of order management systems? Do they offer functions that could be considered to be order execution services? If so, please describe these functions and explain why they should, or should not, be considered "order execution services".

Order management systems consist of accounting and recordkeeping systems as well, typically, as order routing functions. The latter should be considered order execution services.

Question 4: Should post-trade analytics be considered order execution services? If so, why?

The FSA takes the position that post-trade analytics are not considered order execution services. The SEC treats both pre- and post-trade analytics as mixed-use products. We think the SEC approach is based upon a more accurate assessment of the role played by pre- and post-trade data in the investment decision-making process.

In markets in which trades are executed in milliseconds, post-trade data is no longer merely historical. It is integral to ongoing decision-making processes, both for portfolio managers and trading desks. As such, post-trade analytics ought properly to be considered order execution services to be paid for with soft dollars. Where post-trade analytics are used to evaluate portfolio performance and for marketing purposes, they should not be eligible for payment with client commissions.

Question 5: What difficulties, if any, would Canadian market participants face in the event of differential treatment of goods and services such as market data in Canada versus the U.S. or the U.K.?

We would expect that establishing different compliance regimes for Canada would be more cumbersome and costly than having a uniform approach.

Question 6: Should raw market data be considered research under the Proposed Instrument? If so, what characteristics and uses of raw market data would support this conclusion?

Raw market data are essential inputs for the analytics and related functions the buy-side uses in its own research and analytical efforts. That use is directly beneficial to investors and ought to be encouraged. We recommend raw market data be available for purchase for commissions to the extent it consists of real-time quotation and transactional data and is used by money managers to evaluate research generated by others or otherwise to assist in managing

money. If it is not considered research, it should be considered part of execution to the extent it is used by money managers or buy-side traders in the execution of orders.

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If the CSA or any of its members would like to discuss these issues with us, we would be pleased to make ourselves available for that purpose.

Respectfully submitted,

Bruce Garland by R.D.B.

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