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BY E-MAIL

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Dear Sirs, Mesdames:

Subject: Draft Regulation 23-102 respecting Use of Client Brokerage Commissions as Payment for Order Execution Services or Research (« Soft Dollar » Arrangements)

We are submitting this letter on behalf of Canadian Imperial Bank of Commerce and its affiliates, (collectively, "**CIBC**"), in response to the Notice of Proposed National Instrument 23-102 - Use of Client Brokerage Commissions as Payment for Order Execution Services or Research ("Soft Dollar" Arrangements) (the "**Instrument**") and Companion Policy 23-102 CP (the "**Policy**") and related Request for Comments (the "**Request for Comments**") published by the Canadian Securities Administrators (the "**CSA**") on July 21, 2006.

Our comments are provided in response to the questions posed in the Request for Comments, which are reproduced below in italics using the original numbering for convenience of reference.

Question 1: 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 believe that the application of the Instrument should either be restricted to transactions where there is an independent pricing mechanism or, alternatively, to transactions where a commission or fee is not only "charged" (as presently provided under section 2.1 of the Instrument and the corresponding section of the Policy), but can easily be broken out from the total transaction cost.

We are unsure as to whether the CSA intend the Instrument to be applicable to trades in fixed income securities, as it remains unclear whether the spread on a debt instrument or an embedded commission within the price of a fixed income security would constitute "brokerage commissions" within the meaning of section 2.1 of the Instrument. Similarly, it is unclear to us whether the Instrument is intended to apply to net-basis "basket trades", where a lump sum is paid all at once to a dealer in connection with a number of different trades. (Please refer to our response to Question 12 below for further discussions regarding this particular type of trades.)

We submit that the Instrument should not apply to trades in these securities, on the basis that it may be difficult, if not impossible, for an adviser to break out any commission amount from the total transaction cost in these situations. Additionally, given that the value of research and services other than pure execution provided in connection with principal-traded securities (such as fixed income securities) is significantly lower than in equity markets, we believe there would reside little to no value in requiring advisers to "unbundle" the cost of execution versus other services in these instances.

Question 2: What circumstances, if any, make it difficult for an adviser to determine that the amount of commissions paid is reasonable in relation to the value of goods and services received?

We would appreciate additional guidance as to the parameters that the CSA would expect advisers to refer to when determining the reasonableness of the actual amount paid with client commissions for a given service in light of the fact that, due to many factors including a lack of available documentation, it is extremely difficult for advisers to determine the portion of the commissions that should be allocated to execution-only costs and to other services. Broker-dealers would normally be in a better position to price these different components, whereas advisers must consider the total amounts of commissions paid in relation to the services rendered. Our view is that advisers are simply not in a position to unbundle commissions with any degree of accuracy or fairness.

Advisers would also face a very difficult task if they were required to evaluate the reasonableness of commissions paid in regard to any single client considering that, for example, a client who invests with any given adviser an amount that is double the amount invested by another client might end up incurring much higher trading fees and, thus, paying a lot more total commissions to benefit from the same research as the other client paying less.

Accordingly, while this is not specifically addressed in the Instrument nor in the Policy, we submit that advisers should be allowed to make that determination using the approach taken by the Securities and Exchange Commission (the "**SEC**") in its Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the *Securities Exchange Act of* 1934 dated July 24, 2006 (the "**2006 Release**"), by determining that the amount of commissions paid is reasonable in light of the research or services received in terms of either (i) a particular transaction or (ii) the manager's overall responsibilities for all discretionary accounts.

We further submit that the CSA could take comfort in the fact that investment performance acts as a key driver of an adviser's ultimate business success. We believe that there is an inherent incentive for advisers to be particularly sensitive to any costs that may affect their investors' returns even without rules requiring them to dissect every element in the packaged services offered by broker-dealers.

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".

We understand that participants in the industry generally consider "order management services" as an integral part of the order execution process and that the same "order management" systems generally perform all functions of order execution and order management. We believe that these systems improve order execution and are integral to the arranging of the securities transactions that generate the commissions, as contemplated in section 3.2(2) of the Policy.

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

We believe that post-trade analytics are a valuable tool helping advisers achieve best execution for their clients generally, although the temporal limitations inherent to the concept of "execution" will likely mean that they cannot be considered execution services. Accordingly, we submit that post-trade analytics should be eligible for payment with client commissions as "research", as appears to be implied by the SEC in the 2006 Release, to the extent that they are used by an adviser in making investment decisions (which would include, in our opinion, seeking best execution for its clients).

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.?

From the point of view of a financial institution that advises U.S. clients and competes with U.S. institutions, we believe that Canadian institutions might end up at a competitive disadvantage versus multi-national institutions if Canadian rules differed from those of the U.S. and U.K. We also believe that the compliance burden of Canadian institutions would be increased with no corresponding benefit to their clients if Canadian rules differed from U.S. standards to conform to the more rigid standards applied in certain areas under U.K. rules.

As an example, we note that the treatment of raw data under applicable legislation is notably more restrictive in the U.K than in the U.S. To illustrate our concern, if raw

market data were categorically excluded from the concept of "research" (as is the case in the U.K. on the basis that it lacks the necessary intellectual content or expression of thought), yet could be purchased with commission dollars in the form of other "research" if incorporated into an investment model, the odd result would be that raw data could be purchased with commission dollars as part of a third party's investment model, but could not be paid for with the same commission dollars by the adviser as a component of its own investment model. Please refer to our response to questions 9 and 10, below, for an additional considerations relating to this particular issue.

We believe that Canadian market participants (especially those who engage in cross-border activities) are more familiar and comfortable with U.S. standards and we submit that the SEC's approach, which is generally centered on how a given good or service is being used by the adviser (i.e., whether it is used in making investment decisions or not), constitutes a better and a more logical basis for determining eligibility for payment with soft dollars than the more detailed and complex categorization underlying the corresponding U.K. rules, because it is easier to apply consistently in a variety of circumstances.

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?

As mentioned in response to question 5 above, we believe that instead of categorizing data based on pre-defined characteristics, advisers should be able to rely on the same "usage" criterion as used by the SEC in the 2006 Release to determine whether they can purchase data as "research" and pay for it with client commissions. Accordingly, advisers should be able to purchase data (including raw data) provided they use it in developing their own research or in otherwise making investment decisions for the benefit of their clients.

Question 7: Do advisers currently use client brokerage commissions to pay for proxy-voting services? If so, what characteristics or functions of proxy-voting services could be considered research? Is further guidance needed in this area?

As stated previously, instead of focusing on the characteristics and functions of proxy-voting services, we would favor the SEC's approach, and submit that if proxy-voting services are used only for the purpose of voting securities, then they should not be paid for with client commissions. We understand that for most industry participants, this constitutes the primary use of proxy-voting services. However, if these services are used to obtain greater insight on a given company (i.e., to make better informed investment decisions, for example by better assessing the quality of an issuer's management team), then we submit that advisers ought to be able to purchase these services with client commissions. In circumstances where proxy-voting services are used by an adviser for both purposes, then we believe they should be treated as a "mixed-use" item and their cost allocated accordingly.

Question 8: To what extent do advisers currently use brokerage commissions as partial payment for mixed-use goods and services? When mixed-use goods and services are received, what circumstances, if any, make it difficult for an adviser to make reasonable allocations between the portion of mixed-use goods and services that are permissible and non-permissible (for example, for post-trade analytics, order management systems, or proxy-voting services)?

We would only consider using client commissions to pay for mixed-use items in circumstances where an objective allocation of costs can be achieved. The most significant mixed-use items used by CIBC are proxy-voting services, order management services and trade analytics. In our view the criteria determining whether a mixed-use item may or may not be paid for in part with client commissions should be simple and flexible enough to allow the adviser to make a reasonable determination as to whether a given item is being used to make investment decisions. Another example of mixed-use that we believe should be eligible for payment using client commissions is Bloomberg, which, although widely available, we view as a very focused and particularly helpful tool being used by traders and portfolio managers for order execution and research purposes; the information or data provided by Bloomberg data may include issuer financial information, information on commodities and interest rates, and other data to be incorporated as part of our proprietary investment models, which then become a significant tool used in making investment decisions. However, when Bloomberg is merely used for accounting or internal management purposes or as a source of publicly available information, we believe that it should not be paid for with client commissions.

As to the circumstances that make it difficult to make reasonable allocations, we note that it is often not possible for advisers to negotiate what they receive from broker-dealers as part of bundled packages in connection with a transaction. These bundles often include mixed-used items but, without a reliable mechanism (or clear regulatory guidance) for breaking down the costs of these items, advisers would be required to spend excessive amounts of time and resources to determine the value of these mixed-use items. Such items could not, in any event, be appraised with any degree of accuracy or fairness.

Question 9: Should mass-marketed or publicly-available information or publications be considered research? If so, what is the rationale?

We submit that the CSA should focus on a publication's targeted use or audience as opposed to its mere availability or distribution channels. Excluding "publicly-available information" at large, as suggested in section 3.5 of the Policy, may be over-reaching. For example, certain trade magazines, technical journals or industry-specific publications may be available to the public, yet remain particularly relevant for managers and traders conducting their own research in these fields.

As indicated above in our response to question 5, we fear that excluding mass-marketed and publicly available information from the field of eligible "research" may penalize advisers who conduct fundamental research or who develop their own proprietary investment models on the basis of such information. Limiting the definition of "research" to material containing original thought may have the undesired side-effect of favouring advisers who rely primarily on research and investment models developed by third parties, to the detriment of advisers who develop their own research and models based on various inputs, including raw data and other publicly available information, and also to the detriment of their clients.

We would prefer that the CSA follow the lines of the SEC's guidance, as expressed in the 2006 Release, and center its attention on the focus and intended audience of a given

publication, as opposed to its availability or method of distribution, to determine whether such publication constitutes eligible "research" under the Instrument.

Question 10*: Should other goods and services be included in the definitions of order execution services and research? Should any of those currently included be excluded?*

First, with respect to order execution services, we note that section 28(e)(3)(C) of the *Securities Exchange Act of* 1934 refers to:

> "[…] securities transactions and […] functions incidental thereto (such as clearance, settlement, and custody or required in connection therewith […]" [emphasis added],

while section 1.1(b) of the Instrument, as proposed, would restrict "order execution services" to:

> "other goods or services directly related to order execution." [emphasis added]

Similarly, we note that while section 28(e)(3)(A) of the *Securities Exchange Act of* 1934 expressly refers to advice relating to "the availability of securities or purchasers or sellers of securities" as examples of permissible "research services", these elements are not, at present, referred to in the proposed definition of "research" under sections 1.1(a) and (b) of the Instrument.

We submit that adopting these more restrictive standards for defining "order execution services" and "research" instead of age old and abundantly documented concepts already in use in the United States may create unnecessary confusion within the Canadian marketplace, to the detriment of Canadian advisers and their clients. Instead, as mentioned above, we believe that the convergence of North American rules relating to soft dollars would facilitate compliance by Canadian advisers and decrease compliance costs by allowing them to draw on the expertise and experience developed by many of them through their U.S. operations, which would ultimately benefit Canadian investors as well.

Questions 11, 12, 13 and 14: Should the form of disclosure be prescribed? If prescribed, which form would be most appropriate? Are the proposed disclosure requirements adequate and do they help ensure that meaningful information is provided to an adviser's clients? Is there any other additional disclosure that may be useful for clients? Should periodic disclosure be required on a more frequent basis than annually? What difficulties, if any, would an adviser face in making the disclosure under Part 4 of the Proposed Instrument?

While we would support the concept of disclosure that would be concise, informative and meaningful to our clients and feel it would be possible to comply with a majority of the requirements of section 4.1 of the Instrument as currently drafted, there remain certain general concerns regarding the disclosure requirements proposed under the Instrument. We commend the CSA for attempting to promote transparency, but we fear that the costs of implementing the measures contemplated in section 4 of the Instrument would ultimately outweigh the intended benefits to investors.

First, it appears that advisers would be required, pursuant to section 4.1(b) and (c) of the Instrument, to disclose the total brokerage commissions paid on behalf of each particular client on an account-by-account basis. We are of the view that it would be impossible to evaluate and track research and all execution services on that basis. While existing systems would allow us to keep track of commissions dollars generated by each

account, they would not allow us to keep track of the actual amounts of commissions paid out as soft dollars for a given service on behalf of each individual account or client. Accordingly, we do not support this approach and, as indicated in response to question 2 above, we submit that the only realistic standard for an adviser to evaluate whether the costs of a given research service is reasonable or not is the standard applied by the SEC in respect of the provisions of section 28(e) of the *Securities Exchange Act of* 1934, which allows an adviser to acquire research or other execution services using a client's commissions if the research or other services benefit either that client's account or the adviser's clients generally. Any other standard would require an adviser to ignore or unlearn the information or knowledge gathered through research acquired with one client's commissions for the purpose of making investment decisions on behalf of a second client, which cannot be achieved in practice.

Secondly, we note that advisers typically respond to their clients' specific information requests by providing them with disclosure about soft dollar practices on demand. We are questioning whether the benefit to clients of providing all of them with the disclosure required under section 4.1 of the Instrument every year will justify the significant cost increase to advisers (particularly in terms of record-keeping), since we believe that not all clients would request this information if given the option and neither would they welcome the increased costs associated with the measure.

Finally, we note that the proposed disclosure requirements, in their current form, are more stringent than those prevailing in the United States and, accordingly, we would not recommend adding any additional items of disclosure to those already proposed.

Question 15: Should there be specific disclosure for trades done on a "net" basis? If so, should the disclosure be limited to the percentage of total trading conducted on this basis (similar to the IMA's approach)? Alternatively, should the transaction fees embedded in the price be allocated to the disclosure categories set out in sub-section 4.1(c) of the Proposed Instrument, to the extent they can be reasonably estimated?

We understand that it is not a common practice to generate soft dollars in connection with net-basis trades and believe that disclosure would be advisable if soft dollars were used in connection with such trades.

Thank you for this opportunity to provide our comments. Please do not hesitate to communicate with the undersigned at the number appearing above should you have any questions regarding the foregoing or wish to discuss it further.

Yours truly,

(signed) Claude-Étienne Borduas
Claude-Étienne Borduas
Counsel, Legal Department