



CANADIAN BANKERS ASSOCIATION

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British Columbia Securities Commission  
Alberta Securities Commission  
Saskatchewan Securities Commission  
Manitoba Securities Commission  
Ontario Securities Commission  
New Brunswick Securities Commission  
Securities Office, Prince Edward Island  
Nova Scotia Securities Commission  
Securities Commission of Newfoundland and Labrador  
Registrar of Securities, Northwest Territories  
Registrar of Securities, Nunavut  
Registrar of Securities, Yukon Territory

c/o John Stevenson, Secretary  
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and to:

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Dear Sirs and Madames

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

We are pleased to submit our comments on proposed National Instrument 23-102, *Use of Client Brokerage Commissions as Payment for Order Execution Services or Research ("Soft Dollar" Arrangements)* (the "Proposed Instrument") and Companion Policy 23-102 CP.

In general, we are in favour of the implementation of a national instrument that would provide a specific framework for determining the appropriate use of client brokerage commissions. Greater clarity and guidance regarding the types of goods and services that may be acquired with client brokerage commissions, moreover, would level the playing field in Canada, as some firms may now use client brokerage commissions to an inappropriate advantage over others. In addition, this framework would allow for better fee competition, as it assures that firms would not unfairly support lower fees by aggressively using soft dollar arrangements.

Our comments, in response to some of the questions posed in your Request for Comments, are provided below for your consideration.

At this point, however, we would like to bring to your attention a concern that has been raised regarding the definition of “soft dollar arrangements”. To begin with, we believe that the term is not clearly defined in the Proposed Instrument and we also note that the term, as defined in Concept Paper 23-402 *Best execution of soft dollar arrangements* (the “Concept Paper”), is a clear departure from the industry understanding of the term. The Concept Paper definition has been greatly expanded to cover what has traditionally been considered soft dollar arrangements (i.e., “allocations by advisers of part of the commissions paid to dealers to third parties”) and also other arrangements, such as, “bundled services”, which have not been traditionally considered soft dollar arrangements. We believe that to combine the two arrangements under the same definition is confusing. In addition, the concept and practice of “best execution” is not directly referenced in the Proposed Instrument, which is peculiar given that the duty to seek the best execution that is reasonably available for customers’ orders is a core principle practised by the industry today.

**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?*

The application of the Proposed Instrument should be restricted to transactions where there is an independent pricing mechanism.

**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".*

Within the industry, the terms “order management” and “order execution” are often used interchangeably and normally, the same system provides both of these functions. We believe that separating the two functions would be difficult, if not impossible.

**Question 4:**

*Should post-trade analytics be considered order execution services? If so, why?*

No. Post-trade analytics should not be considered as order execution services.

**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.?*

Canadian market participants that engage in cross-border business will likely try to ensure that their business practices regarding the uses of client brokerage commissions comply in most respects with U.S. regulatory standards. However, some Canadian market participants have raised concerns about the use of client brokerage commissions to pay for Bloomberg terminals. Despite the fact that this type of arrangement is prohibited under U.S. regulatory standards, these market participants would like Canadian regulators to accommodate their continuing use of client brokerage commissions to pay for Bloomberg terminals. (Please see our comments on Bloomberg in our response to Question 8 below)

**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?*

In general, we believe that raw market data should not be considered as research under the Proposed Instrument. Notwithstanding the foregoing, please see our comments in response to Question 10 below.

**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?*

Typically, proxy-voting services include both an administrative service (voting execution) and research services. Although our members agree that the administrative service is one that should be paid by a firm using hard dollars, they are of the opinion that to the extent the proxy-voting services provide research services, which are used to assist in making investment making decision, the research services should be eligible to be paid by using client brokerage commissions. Research services include, among others, the provision of impartial analyses and research concerning corporate governance, objective voting recommendations and assessments of the impact of proxy proposals on shareholder value. This research assists firms in making an informed decision on how to vote proxies, which represents, we note, a significant part of investment management responsibilities to unitholders.

**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)?*

As discussed above, proxy-voting services are an example of a “mixed-use goods and service” that our members may acquire, in part, using client brokerage commissions. As highlighted above, we believe that the two components of proxy-voting services should receive differential treatment with the administrative service being paid by using hard dollars and the research services being eligible to be paid by using client brokerage commissions.

Another example of a “mixed-use goods and service” that our members may acquire, in part, by using client brokerage commissions is Bloomberg, as Bloomberg can be used for order execution purposes and research. Currently, some of our members use Bloomberg to process orders. In addition, many firms use a variety of information or data provided by Bloomberg, such as information or data concerning company financials, commodities and interest rates, to use in their own proprietary models, which then become a significant tool used in their investment making decision process. When Bloomberg is used for order execution purposes and/or research (as described above), our members believe that they should be permitted to pay for such services by using client brokerage commissions. When Bloomberg is not used for order execution purposes and/or research, such as when it is used as a pricing feed for fund accounting or as a source for looking up publicly available information, our members acknowledge that the costs should not be absorbed by brokerage client commissions.

**Question 9:**

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

If mass-marketed or publicly-available information or publications are not considered “research” for the purposes of the Proposed Instrument, we believe that firms that conduct fundamental research and analysis may be penalized, as these types of firms require various inputs to conduct their own research and analysis and to determine security selection for a portfolio. In addition, if permissibility is based on how widely available information is (i.e., if it is not widely available, it may be considered “research” under the Proposed Instrument), it may run up against issues concerning “insider” information.

**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?*

To limit the definition of “research” to research containing original thought would penalize those firms that devote a lot of time, effort and expense (mostly people costs) to conduct their own research and analysis and to reach their own conclusions on investing for client portfolios. These types of firms require various inputs to conduct their own research and analysis, some of

which is raw data, some of which is manipulated information or data and some of which is information or data containing original thought. Currently, the Proposed Instrument favours those firms that rely more on other peoples' written research and conclusions, which may result in lower value to clients.

**Question 12:**

*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?*

Although we support any form of disclosure that provides clients with meaningful information, we have concerns with respect to the disclosure requirements under the Proposed Instrument. In order for additional disclosure requirements to be warranted, they should be concise and valuable to the client. This would include, for example, the commission costs to the client for the reporting period. In general, however, we question whether the additional disclosure requirements will provide value to all clients. For example, for sophisticated clients who are primarily interested in the rate of return of their portfolio, which includes commission costs, the additional information required to be disclosed under the Proposed Instrument is unlikely to provide any value. Some of our members have suggested that if the additional disclosure information was information that their clients wanted, their clients would already be asking for it. Some of our members are concerned that the costs of disclosure under the Proposed Instrument will exceed any benefits received by clients and, accordingly, we suggest that the disclosure requirements under the Proposed Instrument be optional and the information required to be disclosed under the Proposed Instrument be available to clients upon request. (This would be similar to other continuous disclosure requirements, such as, those with respect to financial statements and management reports of fund performance.)

**Question 14:**

*What difficulties, if any, would an adviser face in making the disclosure under Part 4 of the Proposed Instrument?*

Section 4.1(c)(ii) requires disclosure of a reasonable estimate of the percentage of the brokerage commission amounts paid for trades "where order execution is bundled with other proprietary services by the dealer". We believe that the task of determining the value of bundled services will be very difficult. The assignment of a value to the services received from a broker, for example, would need to be provided by the brokers themselves and it would likely be a very arbitrary estimation since what is being paid for is really one service that might have various components, some of which may be used more or less depending on the date or the trade and would certainly vary over time. We note that pure order execution without any other services is not as common a practice anymore. With so many dealers available, firms generally trade with dealers that are going to add value by offering other services. In addition, the concept of defining what was purchased using these brokerage commissions should be less important to the client than the absolute cost of the trade to the client: consideration must be given to what is best execution, which goes well beyond commission amounts but, also includes being able to favourably secure the investment under the particular circumstances at the particular time.

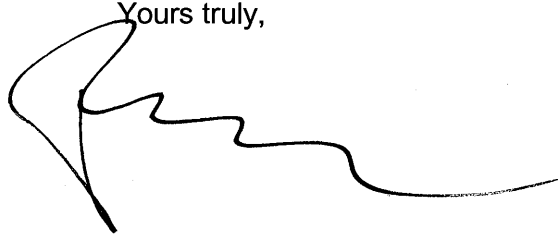
**Question 15:**

*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?*

"Net" trades do not usually involve a soft dollar component.

Thank you again for this opportunity to provide our comments. We would be pleased to answer any questions that you may have.

Yours truly,

A handwritten signature in black ink, consisting of a large, stylized initial 'W' followed by a series of connected loops and a long horizontal tail.

WL/DI/sh