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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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Madame Anne-Marie Beaudoin
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Dear Sirs and Mesdames:

Re: Request for Comments on Notice of Proposed National Instrument 23-102 Use of Client Brokerage Commissions as Payment for Order Execution Services or Research Services and Companion Policy 23-102CP (collectively, the "Proposed Instrument")

We are pleased to submit our response to the request for comments on the Canadian Securities Administrators ("CSA") Proposed Instrument regarding client brokerage commissions.

TD Asset Management Inc. ("TDAM") is a wholly owned subsidiary of The Toronto-Dominion Bank and is one of Canada's largest asset managers. As of March 31, 2008, TDAM managed approximately $133.1 billion for mutual funds, pooled funds and segregated accounts and provided investment advisory services to individual customers, pension funds, corporations, endowments, foundations and high net worth individuals. TDAM managed approximately $46.8 billion in retail mutual fund assets on behalf of more than 1.4 million investors at that date.

We are responding in our capacity as an investment adviser.

GENERAL COMMENTS

We commend the CSA for seeking to adopt principles-based regulations rather than prescriptive rules with respect to the use of client brokerage commissions for order execution services and research services. We welcome the CSA's efforts to harmonize requirements with those in the U.S. to the extent the CSA is of the view that it would be justifiable to do so.

We applaud the CSA for its responsiveness to public comments and recognize that the CSA has made significant strides and clarifications in the current proposal. Meanwhile, we believe that there are areas of the Proposed Instrument which require further clarifications or amendments, especially with respect to eligibility of direct telephone and dedicated connectivity lines, application to foreign advisers, broker-dealer reporting for good faith determination of value, and disclosure. Please find below our comments on these areas, and our responses to the questions specified in the CSA request for comments.

Eligibility of direct telephone and dedicated connectivity lines

TDAM is of the view that the provision of direct telephone and dedicated connectivity lines used solely for the purpose of order execution should be eligible services under the Proposed Instrument. These lines assist traders at adviser firms in timely and accurate order entry for the direct benefit of clients. They are generally located on the trading desks for use to place orders, only by traders. The order entry occurs after the investment decision is made and hence is part of the order execution process. The entry of a trade is the first step in executing the trade. Regardless of the means used to communicate the trade, electronic or oral, the communication is precisely and directly related to order execution.

We believe the key reason to treat direct telephone and dedicated connectivity lines differently from overhead type costs is the distinguishing feature of these lines being dedicated for order execution purposes only. Accordingly, no mixed use allocation or potential for an inappropriate allocation would exist. By way of contrast, computer hardware that might be used during the course of a trade is generally not dedicated and may also be used for other purposes.

In the U.S., the Securities Exchange Commission ("SEC") has made a distinction between direct telephone lines that are used for trading purposes only and overhead type costs. We strongly urge the CSA to make the same distinction. Adopting inconsistent treatment of goods and services would put Canadian advisers at a competitive disadvantage and create an un-level playing field. While U.S. advisers can use client commissions to pay for direct telephone and dedicated connectivity lines that are precisely related to order execution, Canadian advisers will have to pay for the same services using hard dollars. We respectfully request the CSA to include direct telephone and dedicated connectivity lines that are directly used for trading purposes only as eligible goods because they are an integral part of the order execution process.

Application to foreign advisers to Canadian mutual funds

Generally, as Canadian retail mutual funds increase their investments in international securities, Canadian advisers are increasingly engaging foreign advisers. We believe that when foreign advisers are used to manage Canadian mutual funds, different regulations could make it more onerous for them to comply with the Proposed Instrument. For example, foreign advisers may be forced to purchase and/or develop compliance systems in order to keep track of the defined services contained in the Proposed Instrument. This could lead to increased costs associated with the use of foreign advisers, and consequently increased management fees for clients. More generally, this could effectively reduce Canadian advisers' access to international expertise when it is most needed.

We recommend that in circumstances where Canadian advisers engage advisers in foreign jurisdictions to manage portfolios of Canadian mutual funds on their behalf, the CSA should allow advisers regulated by the SEC, the Financial Services Authority or another IOSCO regulatory body with substantially similar rules the flexibility to comply with their applicable client brokerage commission regulations with respect to permitted and non-permitted order execution and research services in lieu of complying with the Proposed Instrument. In these circumstances, regulatory harmony is particularly important.

Broker-dealer reporting for advisers' good faith determination

The current lack of broker-dealer information in transactions involving execution and research makes it difficult for advisers to track and place a value on the goods and services received. We therefore recommend that the CSA impose an obligation for broker-dealers to provide relevant information to permit advisers to fulfill their obligations including information regarding the nature of products or services provided to advisers.

Clarifications in the Proposed Instrument and Companion Policy

Application to Futures

The Proposed Instrument applies to trades in securities where there is an independent pricing mechanism in place that enables advisers to objectively determine commissions charged, but is silent on whether trades in futures are included. We request the CSA to clarify that exchange-traded derivatives such as futures are excluded from the scope of the Proposed Instrument. Considering trades in futures are excluded in other jurisdictions, including them in the scope of the Proposed Instrument would increase Canadian advisers' compliance costs in implementing specific processes and create an un-level playing field. In our view, client interests regarding exchange-traded derivative products is adequately addressed by the fact that advisers are subject to their general fiduciary obligations to deal fairly, honestly and in good faith with clients.

Definition of Research Services

In Section 1.1, the definition of "research services" currently contained in the Proposed Instrument provides in part "...or, economic or political factors and trends". Given the emerging focus on environmental, social and governance ("ESG") issues in incorporating ESG issues into the investment process and the Ontario Securities Commission's recent Staff Notice 51-716 - *Environmental Reporting*, we believe that the above definition should be revised to include the following language, "...or, economic, political, environmental, social or governance factors and trends".

Order Execution Services for Non-Discretionary Accounts

Section 2.1 of the Proposed Instrument provides that "this Instrument applies to advisers and registered dealers in relation to any trade in securities for an investment fund, a fully managed account, or any other account or portfolio over which an adviser exercises investment discretion..." Under the current wording, the Proposed Instrument would not apply to accounts where an adviser acts as a trader or in the capacity of investment counsel on the account without full discretionary authority in respect of investment decision-making. We are of the view that in these circumstances, an adviser should have the ability to use client commissions for payment of order execution services. Therefore, we recommend that the CSA clarify that in these circumstances, advisers can use client commission to pay for order execution services given they are for the clients' benefit.

Third Party Beneficiaries

In addition, we recommend that the CSA replace the term "third party beneficiaries" with "clients" in section 2.1. as certain clients may not be considered third party beneficiaries. This would also be consistent with use of the word "client" throughout the Proposed Instrument.

Alternative Order Execution Products & Services

In Section 3.2(1) of the Companion Policy, order execution means "the entry, handling or facilitation of an order whether by a dealer or by an adviser through direct market access…" We are of the view that alternative trading systems, electronic communication networks, algorithmic trading systems, etc. should qualify under the definition of order execution as they are used as an alternative mechanism for executing trades. As such, we recommend the CSA adjust the current wording to take into account such alternative order execution products and services. Like direct telephone and dedicated connectivity lines, these means of order input should definitely be considered part of the order execution process.

Pre-Trade Analytics

In Section 3.2(3) of the Companion Policy, order execution services may include trading advice, order management systems, algorithmic trading software, market data, etc. We suggest for purposes of clarification that pre-trade analytics be included in the wording. This would eliminate any potential ambiguity given that in the response to the 2006 request for comments, the CSA determined that pre-trade analytics constitutes order execution services to the extent that they are used to determine how, where and when to place an order or effect a trade.

Mixed-Use Items

Section 3.4 of the Companion Policy provides in part "Mixed-use items are those goods and services that contain some elements that may meet the definitions of order execution services or research services, and other elements that either would not meet the definitions or that would not meet the requirements of Part 3 of the Instrument." We believe that the CSA should clarify the above definition to cover both scenarios, and therefore propose that the CSA replace the wording with the following language:

> "Mixed-use items are (i) those goods and services that contain some elements that may meet the definitions of order execution services or research services and other elements that do not meet the definitions, or (ii) goods and services that meet the definitions of order execution services or research services but would not meet the other requirements of Part 3 of the Instrument."

Benefit to Clients Over Time

Section 4.1(3) of the Companion Policy provides guidance that advisers can use client brokerage commissions as payment for order execution or research services and that a "service may benefit more than one client and may not always directly benefit each particular client". We are of the view that the goods and services should be available to benefit clients over time. We believe that there may be a substantial burden for advisers to demonstrate a direct and immediate benefit to a specific client. Therefore, we suggest that the CSA add additional wording to clarify that the benefit to clients can occur "over time".

In subsection 4.1(4) of the Companion Policy, we request further clarification on the sentence "This determination can be made either with respect to a particular transaction or the adviser's overall responsibilities for client accounts." More specifically, we believe this should be clarified to state the overall responsibilities are in respect of "all client accounts over time".

In subsection 4.1(2) of the Companion Policy, we request that the CSA clarify the provision and add the words "or clients" in the sentence "In order to benefit a client or clients, the goods and services should be used in a manner that provides appropriate assistance to the adviser in making investment decisions, or in effecting securities transactions".

QUESTIONS SPECIFIED IN THE CSA REQUEST FOR COMMENTS

> ***Question 1: What difficulties might be caused by a temporal standard for order execution services that might differ from the standard applied by the SEC, especially in the absence of any detailed disclosure requirements in the U.S.? In the event difficulties might result, do these outweigh any benefit from having a temporal standard that results in consistent classification of goods and services based on use?***

In the absence of detailed disclosure requirements in the U.S. or future changes that would make the U.S. standard significantly different from the standard in the current proposal, we do not foresee any issues in applying a different temporal standard than that prescribed by the SEC. Our primary concern is the inconsistent treatment of the eligibility of goods and services. Please see our response in the general comments section.

> ***Question 2: What difficulties might be encountered by requiring the estimate of the aggregated commissions to be split between order execution and goods and services other than order execution? What difficulties might be encountered if instead the requirement was for the aggregate commissions to be split between research services and order execution services?***

We commend the CSA in streamlining the scope of the quantitative disclosure that was proposed in the CSA's 2006 proposal in response to public comments. We remain of the view that disclosure, quantitative or qualitative, should be meaningful and comprehensible to clients. In particular, we feel that numerous difficulties could arise from the requirement for advisers to estimate and split the aggregate commissions between order execution and research services or other goods and services.

Generally, splitting the estimate aggregate commissions between order execution and research services or other goods and services is based on subjective assumptions that can differ greatly among different reporting advisers. As previously stated in our response to the CSA's 2006 proposal, research, order execution and other goods and services may be

so inextricably intertwined that separating research and other goods and services from order execution cannot be effectively achieved by advisers with any precise degree of accuracy. In the absence of specific guidance, we believe attempting to split the estimate aggregate commissions between the above categories would result in the use of arbitrary assumptions by applying random methods. This inevitably would create a lack of consistency of disclosure practices from firm to firm, resulting in meaningless, non-comparable, disclosure that would cause further confusion among clients.

In lieu of the proposed requirements in the current proposal, we recommend that the CSA require advisers to disclose, in addition to the qualitative disclosure on types of non-execution services received, an investment fund or account's portfolio turnover rate and trading expense ratio, as currently required for investment funds under National Instrument 81-106, *Investment Fund Continuous Disclosure* ("NI 81-106").

We acknowledge the CSA's view that it may be beneficial to give clients a certain context of the relationship between commissions and research. However, we believe that mandating this form of quantitative disclosure will bring more confusion than clarity, especially in the absence of any regulatory guidance on the standard method to do so. Also, the currently proposed qualitative requirement most appropriately provides clients with the context to understand the relationship between commissions and research given the significant practical limitations of the quantitative alternative. In our view, the trading expense ratio and portfolio turnover rate would provide meaningful information on a client's trading costs, which would effectively supplement the relevant qualitative disclosure. Not only is this information more comparable from firm to firm, it is more relevant to the total cost structure of a fund or account, and would provide comprehensible information to clients.

> ***Question 3: As order execution services and research services are increasingly offered in a cross-border environment, should the Proposed Instrument allow an adviser the flexibility to follow the disclosure requirements of another regulatory jurisdiction in place of the proposed disclosure requirements, so long as the adviser can demonstrate that the requirements in that other jurisdiction are, at a minimum, similar to the requirements in the Proposed Instrument? If so, should this flexibility be solely limited to quantitative disclosure given that the issues associated with differences in quantitative disclosure requirements between regulatory jurisdictions are likely greater than the problems associated with differences in narrative disclosure requirements? In addition, should there be limitations on which regulatory jurisdictions an adviser may look to for purposes of identifying suitable alternative disclosure requirements and, if so, which jurisdictions should be considered eligible and why?***

We believe that the disclosure requirements across various jurisdictions may lack comparability due to differences in substantive requirements as well as reporting criteria. Allowing Canadian advisers the flexibility to follow the disclosure requirements of another jurisdiction may lead to inconsistent disclosure from firm to firm and may result in disclosures that are more difficult to comprehend for clients. While we believe that foreign advisers should have the flexibility to follow their local regulations pertaining to

brokerage commissions, Canadian advisers should still report based on CSA rules, otherwise, comparability of client disclosure information could be greatly compromised. To the extent that Canadian and U.S. rules are harmonized, comparability between U.S. and Canadian advisers will be less distorted.

> ***Question 4: Should a separate and longer transition period be applied to the disclosure requirements to allow time for implementation and consideration of any future developments in the U.S.? If so, how long should this separate transition period be?***

Yes, we believe a separate and longer transition period should be applied to the disclosure requirements to allow time for implementation and consideration of any future development in the U.S. We believe the transition period for the currently proposed disclosure requirements should apply to the first fiscal year end that commences at least six months after the effective date of any U.S. rule pertaining to client brokerage commission disclosure.

As for the other requirements in the Proposed Instrument, we believe the general transition period proposed by the CSA is reasonable, but should apply to the first fiscal year that commences at least six months after the effective date of the Proposed Instrument. Aligning the reporting period with the fiscal year will allow for better comparability across firms because advisers will initiate their reporting for a full fiscal period. Also, it will give advisers the option of mailing this information with other client reporting, potentially reducing costs. In our view, aligning the reporting timeframe with the fiscal year would result in more effective implementation of the Proposed Instrument.

CONCLUSION

TDAM is grateful to have had the opportunity to comment on the Proposed Instrument and praises the CSA for seeking to adopt a principles-based approach rather than prescriptive rules with respect to client brokerage commissions. While we largely support many of the CSA's modifications in the current proposal, which should lead to increased transparency and accountability in the Canadian investment industry, we believe there is still some room for further clarifications or amendments in the areas described above.

As advisers are increasingly establishing cross-border operations in the U.S. with respect to retail and institutional asset management as well as utilizing U.S. advisers on a larger scale, we believe that the convergence of Canadian rules with U.S. rules governing the use of client commissions is desirable and consistent with the CSA achieving its regulatory objectives.

We would be pleased to provide any further explanations or submissions with respect to matters described above and would make ourselves available at any time for further discussion.

Yours truly,

Barbara Palk
President