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Attn: John Stevenson, Secretary

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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 Services and Companion Policy 23-102 CP (1/11/08)

Ladies and Gentlemen:

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

In response to the comments received on earlier proposals (the "Comments"), the Proposed Instrument addresses certain changes to the legislation set forth in the 2006 Proposed Instrument. We support the CSA's proposals in large part and commend the CSA on its overall approach to soft dollar arrangements.

We comment below on the questions raised in the CSA's proposal:

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.?

We do not anticipate that any difficulties will arise from the fact that the temporal standard defining order execution services, as currently drafted, differs from that set forth in the SEC Release.[1] Whereas the temporal standard adopted by the U.S. Securities and Exchange Commission (the "SEC") is fixed to begin at the exact moment a communication occurs and to end on delivery or credit of requested funds or securities, Section 3.2(2) of the Proposed Instrument refers to goods and services provided or used between "the point at which an adviser makes an investment decision (i.e., the decision to buy or sell a security) and the point at which the resulting securities transaction is concluded." We appreciate the CSA's articulation of the temporal standard and view this standard as broader, and consequently more flexible, than the SEC's temporal standard, as the CSA's proposed time period allows for the application of more value-added services in soft dollar arrangements. We do not see any conflict, however, with the SEC's standard, as it remains generally compatible with the standard set forth in the Proposed Instrument. Among other things, Section 3.2(3) of the Policy Statement is consistent with the SEC's guidance that the temporal standard encompasses algorithmic and other "smart" order-routing engines that assist in the execution of trades.

<u>Question 2</u>: 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 appreciate the CSA's responsiveness to the Comments and its efforts to craft legislation that would remove potentially onerous requirements that advisers ensure, on a case-by-case basis, that research received adds value to investment or trading decisions. We would, however, like to express concern with provisions of the Proposed Instrument that would require a demarcation of goods and services based on whether they comprise order execution or other eligible forms of soft dollar items. We would also like to comment on (i) subsection 4.1(4) of CP 23-102, clarifying that the relevant measure for any good faith determination (set forth in paragraph 3.1(2)(b) of NI 23-102) is the reasonableness of the client brokerage commission paid in relation to goods and services received and used by the adviser, and (ii) subsection 3.4 of CP 23-102, indicating that where an adviser obtains "mixed-use" items with client brokerage commissions, the adviser must make a reasonable allocation of such client commissions in relation to the eligible portion of such mixed-use products or services.

We would respectfully suggest to the CSA that the aspects of these provisions that focus on the demarcation between research and execution services and between eligible and

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[1] SEC Release No. 34-54165 (July 18, 2006), available at: http://www.sec.gov/rules/interp/2006/34-54165.pdf, states that "brokerage begins when the money manager communicates with the broker-dealer for the purpose of transmitting an order for execution and ends when funds or securities are delivered or credited to the advised account of the account holder's agent."

ineligible services could prove particularly problematic. Information that brokers provide to buyers and sellers of securities as to the availability of counterparties, including invitations to participate in block transactions, are really both order execution services and research. This will increasingly be true as innovative technology melds research ideas and market analytics together to nourish order-routing systems. Attempts to draw a bright line distinction between order execution services and research will be increasingly arbitrary and not useful to investors or regulators.[2]

We fully support the CSA's determination to propose an overall definition of research that shifts from a characteristics-based test to a more use-based focus. In a field as dynamic as research, the CSA is indeed correct in underscoring the principle that the fund managers' use of the product or service should dictate its treatment. We further support the CSA's requirement that it is for the manager to be satisfied that he has paid an appropriate price for the research and/or execution value provided, and that it is the manager's obligation to determine the corresponding allocation.

It is very helpful that the CSA has clarified that analytical tools that assist the asset manager in formulating and implementing its own investment ideas and strategies are included within the definitions of "research" and "order execution services". The BLOOMBERG PROFESSIONAL service, for example, is an integrated tool for independent research, analysis and order execution. It provides over 14,000 complementary and integrated functions that empower investors to analyze and manipulate data. An intrinsic feature is the ability to help clients understand the markets by means of Bloomberg proprietary analytical tools. These tools are nourished by data, organized using a sophisticated methodology or derived from complex proprietary calculations or models.

We are concerned by the observations by some commenters that services offered by Bloomberg, or Reuters, are "mixed-use" data services.[3] It would be extremely difficult to apply a deconstructionist approach to an integrated research, analysis and execution service so as to know where eligible soft dollar services would start and stop. If such an approach on "mixed-use" is applied to the BLOOMBERG PROFESSIONAL service, then should the same approach not be taken with respect to a research report produced in-house by, e.g., an institutional brokerage firm? Many such traditional research reports have, in addition to analytical components that would qualify as research or execution, certain non-complying elements (e.g.,

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[2] The BLOOMBERG PROFESSIONAL service provides financial market information, data, news, analytics and multimedia reports to investment firms, institutional investors and other professionals via approximately 300,000 BLOOMBERG PROFESSIONAL service subscriptions worldwide. The BLOOMBERG PROFESSIONAL service is owned by Bloomberg Finance, L.P., and Bloomberg L.P. operates the BLOOMBERG PROFESSIONAL service on behalf of Bloomberg Finance L.P.

[3] We note that it is incorrect to characterize the BLOOMBERG PROFESSIONAL SERVICE as a "data service." As described in footnote 2, the BLOOMBERG PROFESSIONAL service includes a broad range of data, analytics, and other services.

publicly available information taken from public filings). Should that require cost apportionment or deconstruction on a mixed-use theory? We would suggest that this result is not administratively feasible and that this conundrum illustrates the difficulties in applying a "mixed-use" approach to integrated research services.

A more practical approach would be to focus on the characteristics of the person(s) using a service to determine whether the service is being used in connection with investment-related functions. For instance, by far the vast majority of BLOOMBERG PROFESSIONAL service subscriptions among buy-side firms reside on the desks of portfolio managers, research analysts and traders. They are used for investment decision-making and trading, not by back office personnel for recordkeeping or accounting. We respectfully suggest that the test should be, simply, whether a service is used by a portfolio manager, research analyst or trader in fulfilling their professional investment management or trade execution services. The fact that the service may have other incidental features (e.g., sports scores and restaurant reviews) should not disqualify it from being paid for with client commission or otherwise subject such service to heightened scrutiny provided the individual user's use of the research and/or execution functions is sufficient, in the judgment of the individual or firm (in light of their responsibilities to customers), to justify the payments made through client commission. We suggest, moreover, that the incidental items available on the BLOOMBERG PROFESSIONAL service are just that; no one would pay the $1,500 per month subscription fee to receive sports scores, restaurant reviews or other incidental data items that are available on the BLOOMBERG PROFESSIONAL service. In other words, there is no portion of the BLOOMBERG PROFESSIONAL monthly subscription fee that is reasonably attributable to its non-investment-related functions. If the non-eligible portion of a mixed-use item is effectively nominal or de minimis advisers should not have to make any such allocation.

The user-based approach we suggest would enable the CSA to distinguish between back office uses such as bookkeeping, recordkeeping and accounting and investment uses such as research, portfolio decision making and order execution. By looking to see whether a particular service, such as a computer system, is being used by back office personnel rather than portfolio managers, research analysts and traders, regulators can draw meaningful and practical distinctions as to what can and cannot properly be "softed".

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 welcome provisions that would allow advisers the flexibility to follow disclosure requirements of another regulatory jurisdiction so long as the adviser can demonstrate that such requirements are similar to the requirements in the Proposed Instrument. We would expect that a requirement for an adviser operating in multiple jurisdictions to establish a separate and distinct compliance regime for soft dollar arrangements in Canada would be significantly more cumbersome and costly than having a uniform approach. So long as the requirements in the foreign jurisdiction were similar to those in the Proposed Instrument, we do not see why the CSA would not allow the adviser to tailor its compliance regime to those requirements.

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?

We would recommend that a separate and longer transition period of up to one year apply to the disclosure requirements. The SEC has proposed for public comment new disclosure measures for investment advisers[4] and we think it would be useful for the CSA to delay adoption and effectiveness of disclosure measures in Canada until it evaluates what approaches the SEC finally takes on its current proposal.

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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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[4] *See* proposed amendments to Part II, Item 12, in *Amendments to Form ADV*, SEC Release No. IA-2711 (March 3, 2008), available at: http://www.sec.gov/rules/proposed/2008/ia-2711.pdf.