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Via Email

September 30, 2016

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Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Nova Scotia Securities Commission

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Re: Canadian Securities Administrators Consultation Paper 33-404 Proposals to Enhance the Obligations of Advisers, Dealers, and Representatives Toward Their Clients

This comment letter is being submitted on behalf of TD Bank Group. We are pleased to have the opportunity to provide comments on the Canadian Securities Administrators ("CSA") Consultation Paper 33-404 *Proposals to Enhance the Obligations of Advisers, Dealers, and Representatives Toward Their Clients* dated April 28, 2016 (the "Consultation Paper").

We welcome the CSA's efforts to improve the client experience and to enhance the relationship between clients and their advisers and dealers (collectively, "advisors"). We believe many of the reforms contained in the Consultation Paper are thoughtful and considered proposals which will achieve such goals. Furthermore, we agree with the CSA that the development and implementation of the reforms contained in the Consultation Paper require that a fair balance between investor protection and efficient capital markets be struck.

We agree with, and are committed to, the goals the CSA has articulated in the Consultation Paper. However, we have reservations as to whether certain aspects of the targeted reforms and the regulatory best interest standard are the appropriate means to achieve them. Aspects of several of the proposals create regulatory redundancy or are not readily applicable to certain business models. For example, in our comment letter, we point to many examples where the Consultation Paper's proposals overlap with rules already implemented by self-regulatory organizations ("SROs"), or where a blanket reform fails to account for disparities between different registrant categories. We urge the CSA to tailor the proposed amendments, where appropriate, by registrant category and/or business model, and to ensure harmonization of such tailored reforms with applicable SRO rules.

We indicate those aspects of the Consultation Paper's proposals we find vague, impracticable or unachievable and, which accordingly, result in an unacceptably high risk of liability. We also point out those elements of the proposed targeted reforms which are unduly burdensome or which unduly increase compliance costs, in each case without corresponding benefits to clients. We point to various examples where the CSA has proposed an obligation for advisors that may go beyond what the law requires of fiduciaries. In our view, it would be inappropriate that regulatory standards for advisors become more onerous than fiduciary obligations and we ask the CSA to re-consider the parameters of the targeted reforms through this lens.
Most significantly, we consider how investors' outcomes may be negatively impacted: through decreased choice as a result of potentially narrowed product shelves, exacerbation of clients' expectations gap, a potential reduction in the level of advisory services provided, and the risk of an advice gap to certain segments in the marketplace. In short, certain aspects of the proposed targeted reforms and the regulatory best interest standard do not appropriately advance investor protection or promote efficient capital markets.

We are pleased that the CSA has indicated it will proceed with a research project to measure the impact of recent reforms, such as phase 2 of the Client Relationship Model ("CRM2") and the Point of Sale Project ("POS"). We trust the CSA will examine the results of this research to inform upon the development of the targeted reforms and regulatory best interest standard, as well as, any additional regulatory changes.
We have provided our detailed comment letter in the attached Appendix A. We have organized our feedback by each of the ten areas of targeted reforms, including responses to specific questions raised in the CSA Consultation paper, and have also commented on the proposal regarding an over-arching regulatory best interest standard.

Summary of TD's key recommendations:

Conflicts of Interest:

- We are supportive of changes aimed at better management and mitigation of conflicts of interest. However, some of the CSA's proposals on this point are problematic:
  - The requirement to "prioritize clients' interest ahead" is too vague to provide a meaningful code of conduct. A better approach would be to require that firms respond to conflicts in a manner that is not detrimental to the client's interest.

- The requirement that representatives have a reasonable basis for believing a client fully understands the implications and consequences of a conflict goes too far. How can firms and representatives reasonably demonstrate that a client has fully understood all consequences of a conflict in each case?
- We believe written disclosure of conflicts should be the primary tool for responding to conflicts in all advisor-client relationships, provided that the conduct is not detrimental to the client's interest. We note that disclosure is the primary tool used in the fiduciary context. We ask the CSA to re-consider the desirability of imposing obligations upon advisors that may be more onerous than the responsibilities required of fiduciaries.
- The definition of Institutional Client should align with the definition of non-individual permitted client.

Know Your Client ("KYC"):

- While we agree with the CSA's goal of improving KYC practices, some of the proposed reforms regarding collection of information are too broad and do not appropriately align with proficiency requirements. In particular, the requirement to obtain information regarding all client assets and debts, interest rates on loans, tax position and spousal and dependents' status presents significant constraints and unduly increases potential liability for registrants.
  - Any requirement to gather information about a client's debts should be in the context of the determination of a client's net worth and liquidity needs. The CSA should amend the proposals regarding the gathering of debt information to this end. At a minimum, the CSA should specify the types of debt that need to be inquired about and include a materiality threshold.
  - While advisors are able to provide tax information relating to investment products, advisors are not tax advisors, nor are they generally qualified to be tax advisors. Accordingly, we recommend that the CSA either remove or clarify references to basic tax position and tax collection requirements under the proposed KYC reforms.

Know Your Product ("KYP"):

- We welcome regulatory guidance on, and clarification of, KYP obligations. However, many elements of the proposed KYP obligations, as currently contemplated, cannot be discharged with a reasonable degree of certainty.
- As currently proposed, the market investigation, product comparison and product list optimization processes required of firms with non-proprietary product shelves, would result in unacceptably high regulatory and litigation risk stemming from ambiguity and other factors.

  - If these processes become prescribed, significant amendment is required. As a starting point, we recommend their application be limited to non-proprietary mutual funds that are reporting issuers. As detailed in Appendix A, we also suggest substantial amendments to the market investigation and product comparison requirements.
  - Evaluation of product shelves should be based on whether available products are "likely to help meet" (rather than "most likely to meet", as currently proposed) a client's investment needs and objectives.
- The proposed KYP requirements may result in reduced product shelves or may create regulatory incentives to stop offering non-proprietary products, which would not be beneficial to investors.

Suitability:

- We recognize that robust suitability obligations are fundamental to investor protection. However, we caution the CSA against proceeding with enhancements to suitability that would result in fundamental and undesirable changes to certain business models.
- The requirement that advisors consider other financial strategies does not appropriately align with many current business models designed to meet clients' varied needs, and goes well beyond the scope of advisors' proficiency requirements. This may create a new expectations gap, where investors incorrectly rely on advisors for services not provided by certain business models and that advisors are not qualified to provide.
- The requirement that firms and representatives are to make investment decisions and select products that are "most likely to achieve" a client's investment needs and objectives cannot be met. When applied retrospectively, this requirement could result in a reverse onus where registrants will be required to justify a product recommendation in light of superior performance of alternative investments. This should be revised to "likely to help achieve."

Relationship Disclosure:

- Firms who are members of SROs are already subject to strict disclosure requirements. We urge the CSA to consider exempting these firms from the disclosure requirements proposed in the Consultation Paper.
- Any type of disclosure requirement should provide flexibility to tailor disclosure as necessary for accuracy.

Proficiency:

- Any enhancements to applicable proficiency requirements should be tailored by registration category. SROs should lead such amendments for their members.

Titles:

- We agree that some client-facing titles are misleading and problematic, and propose that regulatory guidelines regarding clear and accurate titles be provided. The proposed titles, however, could produce additional investor confusion as they are not sufficiently descriptive.

Designations:

- Monitoring and regulation of the use of designations falls more appropriately under the purview of the bodies which grant such designations. Securities rules requiring advisors to have policies regarding the use of designations could be helpful.

UDPs and CCOs:

- We suggest revisions to the proposal which would require UDPs to "ensure that material conflicts are avoided if they cannot be managed by disclosure and controls." The appropriate standard should be that UDPs are to "require" material conflicts be avoided or controlled.
- To avoid regulatory overlap, CCOs and UDPs currently subject to stringent SRO requirements regarding compliance systems and supervision should be exempt from the new requirements.

Statutory Fiduciary Duty:

- TD is supportive of a statutory fiduciary duty that enshrines the common law fiduciary duty in the case of discretionary managed accounts. However, we wish to see clarification as to how or whether this additional statutory fiduciary duty will differ from the common law fiduciary duty.

Regulatory Best Interest Standard:

- We are committed to reforms aimed at enhancing the client-advisor relationship. We believe the targeted reforms, in combination with existing regulatory requirements, will significantly enhance advisor standards and service models to advance clients' best interests, without the limitations that arise from a vague and unascertainable regulatory best interest standard.
- The over-arching regulatory best interest standard may be unachievable for certain business models (e.g. order execution services, firms with proprietary shelves and commission-based models). For example, where a firm provides order execution services only, what would be the purpose of a best interest standard in light of existing best execution obligations? Can a regulatory best interest standard co-exist with commission-based compensation?
- The proposed standard will also create significant legal and regulatory uncertainty due to:

  - limited Canadian precedent on the interpretation of any such standard,
  - the absence of substantive guidance on how the standard might interact with (or differ from) the common law fiduciary duty or the proposed statutory fiduciary duty, and
  - potential fragmented adoption or differing administration of the regulatory best interest standard amongst CSA jurisdictions.
- The result will likely be a reduction in product choice or business models, barriers to accessing financial advice for certain vulnerable investor groups, and increased compliance costs which will increase overall costs to clients.

TD appreciates the opportunity to provide comments on this proposal, including our constructive feedback in Appendix A. We believe the CSA has identified important investor protection goals in the Consultation Paper and we agree that there are opportunities to improve the current regime. However, we also believe deliberation and care should be taken to adequately evaluate the strength of the current regime, in light of recent reforms.

To this end, we look forward to learning of the results of the CSA's study of the CRM2 and POS initiatives. We believe Canada has a robust regulatory framework through the current standard of care, stringent SRO rules, CRM2 and POS. To the extent of any residual gaps, the enhancements proposed through the targeted reforms alone should appropriately address them. Consideration of an over-arching best interest standard should follow only after completion of the CSA's research project and implementation of the targeted reforms and an assessment of their impact.

Sincerely,

Leo Salom,
Executive Vice President, TD Wealth

APPENDIX A: DETAILED COMMENT LETTER

This Appendix A is divided into three sections. Section I includes our feedback on the ten targeted reforms and our responses to Questions the CSA has posed in the Consultation Paper. We have grouped our responses by topic. Section II sets forth our response to the CSA's proposal regarding a regulatory best interest standard. In Section III, we provide our concluding comments.

A NOTE REGARDING DEFINED TERMS

Where we use defined terms that are not defined within our comment letter, such terms bear the same meaning ascribed to them in the Consultation Paper, the *Securities Act* (Ontario) ("Securities Act"), or the rules of relevant SROs, as applicable.

SECTION I. TARGETED REFORMS

1. CONFLICTS OF INTEREST

We are supportive of the CSA's goal to provide an enhanced framework for managing and mitigating conflicts of interest. However, we believe additional clarification and/or revision of several aspects of the CSA's proposals are required. We identify our specific concerns below in our responses to the Questions the CSA has raised regarding the proposed amendments to the conflicts of interest provisions in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("NI 31-103"). Following the responses to the Questions, we provide additional feedback on certain aspects of Appendix A.

We respond to Questions 1, 2 and 3, together:

QUESTION 1: Is this general approach to regulating how registrants should respond to conflicts optimal? If not, what alternative approach would you recommend?

QUESTION 2: Is the requirement to respond to conflicts "in a manner that prioritizes the interest of the client ahead of the interests of the firm and/or representative" clear enough to provide a meaningful code of conduct? If not, how could the requirement be clarified?

QUESTION 3: Will this requirement present any particular challenges for specific registration categories or business models?

Response: Clarification of the following requirements of the proposed approach to conflicts of interest would be useful:

Prioritizing the client's interest ahead

We are unclear as to how registrants would demonstrably satisfy that they have "prioritized the interests of the client ahead of the interests of the firm and/or representative." In particular, we find the "prioritize [...] ahead" requirement to be vague and difficult to measure. How might registrants measure "ahead"? Moreover, if registrants are unable to ascertain or measure "ahead", how can they monitor the relevant activity to ensure compliance? For example, suppose a representative recommends a product that is suitable for the client and benefits the firm or representative. However, a similar and equal cost product that does not benefit the firm or representative is available. Does the representative's recommendation comply with the "prioritize [...] ahead" requirement?

We would suggest alternative approaches that require advisors to respond to conflicts of interest either: in a manner which is not detrimental to the client's interest; or so as not to disadvantage the client. Using this approach is consistent with fiduciary principles, protects client interests, and more appropriately applies to scenarios where there is no clear means to achieve a "prioritize [...] ahead" standard.

Materiality

A clear definition of 'material' would be required and guidance on the types of conflicts the CSA considers material would also be necessary.

The registrant's obligation to conclude that a client fully understands the implications and consequences of the conflict

We are concerned that the proposal in the Consultation Paper requiring firms and representatives to have a reasonable basis for concluding that a client fully understands the implications and consequences of the conflict, is unachievable and exceedingly complex, and may, accordingly, produce unintended consequences.

A first limitation with the CSA's proposal is a practical one: how can registrants be assured that clients have fully understood the implications and consequences of a conflict? Is disclosure sufficient or are additional steps required? By including the requirement to ascertain client understanding, we are concerned that the CSA generally considers disclosure to be an insufficient mitigation tool for conflicts of interest. The CSA's proposal may impose more stringent obligations upon registrants than those required of fiduciaries. We ask the CSA to re-consider the desirability of imposing obligations upon registrants that may be more onerous than the responsibilities required of fiduciaries.

A second difficulty is the potential complexity of conflicts. The types of conflicts that may need to be identified and explained could be numerous and, in some cases, highly complex. The CSA's proposal requires, not only the identification of all conflicts, but further, assurance that the client has understood the implications and consequences of them; the potential universe in any given scenario could be numerous, extremely complex, and/or remote. We question the utility of this information to clients and believe the primary focus should more appropriately be on whether the registrant has adequately mitigated or avoided the conflicts it has identified. We believe this requirement should be removed.

Finally, in light of the aforementioned concerns, we query whether an unintended consequence of this requirement will be a lack of advice for certain vulnerable investors. For example, certain investors who lack financial knowledge may be indifferent as to whether they fully understand the implications and consequences of a conflict of interest. These investors would, nevertheless, benefit significantly from financial advice. How might registrants establish a reasonable basis for concluding that such a client fully understands the implications and consequences that arise from a conflict? Would the registrant instead be required to avoid taking on such a client?

When is disclosure enough? Is consent always required?

Certain aspects of the guidance provided in Appendix A of the Consultation Paper will pose practical limitations for various business models. Appendix A states that conflicts of interest disclosure should be provided prior to entering into a transaction, and further, that registrants must obtain informed and specific consent from the client.

Investors are currently provided significant volumes of disclosure and documentation prior to and at the point of sale in light of the requirements set forth in the CRM2 and POS reforms. We believe that any benefit produced by inclusion of conflicts consent at the time of transaction is outweighed by the negative client experience and investor confusion brought about by an overloaded disclosure and documentation process at such time.

A transaction-level conflicts consent requirement is also impractical. For example, different conflicts may arise for different transactions. How will compliance of all such conflicts disclosure be monitored and documented? Will it be sufficient that firms train their representatives to verbally provide such disclosures and obtain the required consents? In the case of trades transacted via telephone and online, how might registrants demonstrate they have complied with these requirements? Do these requirements apply equally, irrespective of whether the transaction occurs through an advice channel versus an order execution channel? Similarly, will any distinctions be made for client-directed orders versus advisor-recommended orders? We submit that the pre-transaction disclosure and informed and specific consent requirements should be removed.

If the CSA chooses to maintain such requirements, further tailoring will be required, taking into account the differences between business models and channels through which transactions may be executed, and ensuring harmonization with applicable SRO rules and CRM2 and POS requirements. Please see our responses to Questions 44 and 45 for some examples of tailoring.

We respond to Questions 44 and 45, together:

QUESTION 44: Is it appropriate that disclosure by firms be the primary tool to respond to a conflict of interest between such firms and their institutional clients?

QUESTION 45: Are there other specific situations that should be identified where disclosure could be used as the primary tool by firms in responding to certain conflicts of interests?

RESPONSE: ***We note that disclosure is the primary tool used in the fiduciary context. Accordingly, we believe that written disclosure should also be the primary tool to respond to conflicts of interest in all advisor-client relationships.***

We respond to Questions 46 and 47, together:

QUESTION 46: Is this definition of "institutional client" appropriate for its proposed use in the Companion Policy? For example: (i) where financial thresholds are referenced, is $100 million an appropriate threshold?; (ii) is the differential treatment of institutional clients articulated in the Companion Policy appropriate?; and (iii) does the introduction of the "institutional client" concept, and associated differential treatment, create excessive complexity in the application and enforcement of the conflicts provisions under securities legislation? If not, please explain and, if applicable, provide alternative formulations.

QUESTION 47: Could institutional clients be defined as, or be replaced by, the concept of non-individual permitted clients?

RESPONSE: ***We believe that "institutional client" should be replaced with the concept of non-individual permitted client. Adding a net new "institutional client" investor class that is substantially similar to the existing "permitted client" category of investors is likely to produce significant confusion amongst registrants, without commensurate benefit to clients.***

<u>"Institutional Client" versus non-individual "Permitted Client"</u>

We would like to understand the rationale behind introducing a new category of high net worth/sophisticated investor. The current regulatory framework regarding a registrant's dealing or advising activities vis-a-vis high net worth/sophisticated investors is complex; a

registrant's obligations vary depending on whether the investor is an "accredited investor", a "permitted client", or a non-individual "permitted client". In practice, this makes for fragmented operations, as processes such as prospectus delivery, pre-trade disclosure and client reporting requirements apply in different ways depending on the types of sophisticated investor at hand. If the CSA proceeds with the "institutional client" category, the result will be added complexity, without, in our view, any commensurate benefit to investors.

As an example, we note that the CSA has increased the asset test from $25 million under the current non-individual permitted client definition in NI 31-103, to $100 million under the proposed "institutional client" definition. If the targeted reforms are enacted as proposed, consider the following anomalous result: A firm has two clients. The first is Company A with net financial assets of $85 million. The second is Company B with net financial assets of $105 million. Based on the proposals set forth in the Consultation Paper, the firm will be required to engage in robust conflict of interest and know your client procedures for Company A but not for Company B. However, in each case, the clients are sophisticated investors who are readily able to understand conflicts of interest and who are contracting for financial advice absent an inequality of bargaining power. There would be no benefit to such disparate treatment of similarly situated investors, but there would certainly be added cost and complexity for registrants. We question whether there is a systematic basis or justification for increasing the asset test from $25 million to $100 million, given $25 million is a substantial threshold.

We are concerned that the CSA is proposing an additional category of sophisticated investor when it has only very recently introduced the concept of non-individual permitted clients through the CRM2 reforms, an initiative which, similar to the Consultation Paper, sought to further investor protection. Alignment and consistency amongst compatible regulatory initiatives is a more effective approach to advancing investor protection while providing clarity and consistency for registrants and clients alike.

Amending the current definition of 'permitted client'

We ask the CSA to consider whether the 'permitted client' definition should generally be expanded to include a more comprehensive list of entities. In particular, we suggest the addition of the following categories of entities:

- *Health and welfare trusts (distinct entities under the Income Tax Act (Canada))*
- *Unions and union related benefit plans*
- *Multi-employer benefit plans*
- *foundations and registered charities*
- *overflow pension accounts (associated with pension plans, but not pension plans themselves)*
- *Supplemental employee retirement plans*
- *Disability plans*

- *First Nations trust vehicles (i.e. for government monies)*
- *Retirement compensation arrangement*

In each case, we submit the entity might appropriately be considered for inclusion in the "permitted client" definition because it meets other criteria common to "permitted clients" such as:

> ***(a) they are organizations with governance structures in place and have a fiduciary obligation to stakeholders;***
> ***(b) they are organizations with robust reporting processes in place; and***
> ***(c) there is no relative expectations or knowledge gap in the client-advisor relationship between these organizations and registrants.***

Accordingly, similar to those entities which currently fall under the "permitted client" definition, increased regulatory requirements governing the advisor-client relationship need not apply to the above list of entities.

We also ask the CSA to consider whether certain secondary institutions should be considered non-individual permitted clients, based on their relationship with an existing non-individual permitted client of a registered firm ("Existing Permitted Client"). Secondary institutions would include, for example, entities that are associates or affiliates (as such terms are defined in the Securities Act) of Existing Permitted Clients. Secondary institutions would not exist independently of Existing Permitted Clients, would only be accepted as clients of a registered firm at the request of an Existing Permitted Client, and are sophisticated clients with appropriate knowledge and understanding of the advisor-client relationship. By extending the relevant exemption to such secondary institutions, greater efficiencies in the advisor-client relationship could be achieved, without compromising investor protection.

<u>*Appendix A:*</u>

We would also like clarification on the guidance set forth in Appendix A. Appendix A provides that disclosure alone may be sufficient unless the interests of the registrant are <u>materially opposed</u> to the interests of the institutional client. We find the "materially opposed" criterion to be unhelpful given that, by definition, all conflicts of interest entail materially opposing interests. We suggest that a clearer approach would be to eliminate the reference to "materially opposed" and retain the guidance that in certain conflict of interest situations, avoidance may be the only reasonable approach.

<u>Feedback on certain aspects of Appendix A: Compensation, Sales Practices and Disclosure of Outside Business Activities</u>

We ask the CSA to revisit the guidance provided in Appendix A relating to compensation and sales practices and disclosure requirements of outside business activities. In particular, Appendix A states that registrants should consider whether its incentive practices and compensation grids increase the risk of making recommendations (or accepting client orders) that are unsuitable for the client, and of prioritizing the firm's interests ahead of the client's interests, respectively. We are of the view that the more relevant question is whether the firm has adequate controls with respect to such incentive practices and compensation grids (e.g. adequate tools and procedures for monitoring and controls on churning).

Similarly, the CSA has indicated that disclosure relating to conflicts of interest should include disclosure of "all outside business activities of the firm and applicable representatives." We find this disclosure requirement to be too broad, and suggest instead that disclosure should be limited to all *<u>relevant</u>* outside business activities of the firm and applicable representatives.

2. KNOW YOUR CLIENT

We agree with the CSA's goal of improving KYC practices in order to better serve clients, but have reservations regarding some of the measures introduced in the Consultation Paper. In this section, following our responses to the Questions, we include feedback on certain aspects of the proposed amendments to the KYC Requirements in NI 31-103 and the guidance set forth in Appendix B, which we find unclear or potentially unachievable.

We respond to Questions 4 and 54, together:

QUESTION 4: Do all registrants currently have the proficiency to understand their client's basic tax position? Would requiring collection of this information raise any issues or challenges for registrants or clients?

QUESTION 54: To what extent should the KYC obligation require registrants to collect tax information about the client? For example, what role should basic tax strategies have in respect of the suitability analysis conducted by registrants in respect of their clients?

RESPONSE: ***Generally, advisors provide clients with tax information regarding investment products (e.g. the tax features of a dividend stock and explaining tax free savings accounts relative to registered retirement savings plans as tax deferral vehicles, etc.). Nevertheless, advisors are not tax advisors, nor are they generally qualified to be tax advisors.***

We have serious reservations about the CSA's proposed tax position and collection requirements. What does the CSA mean by "basic tax position" and "basic tax strategies"? Will there be any distinction made for different business models, distribution channels and proficiency levels? How will the CSA distinguish between its tax collection requirements and

the type of planning engaged in by tax professionals? In our view, a securities law requirement to engage in tax analysis unduly increases: the risk of litigation, the potential for regulatory liability, and investors' reliance on their advisors. Given this undue potential liability for registrants who are not in the business of giving tax advice, we believe reference to a client's tax position should be removed.

If, however, the CSA determines that some type of tax requirement will form part of the KYC obligation, a clear and narrow definition of "basic tax position" and "basic tax strategies" will be required taking into account representatives' proficiency (and clients' desire to disclose all aspects of their tax position with the advisor). In addition, guidance that considers different requirements depending on business model and/or distribution channel will be required.

QUESTION 5: Should the CSA also codify the specific form of the document, or new account application form, that is used to collect the prescribed KYC content?

RESPONSE: *We do not believe the CSA should codify the specific form of KYC document. Currently, both the MFDA and IIROC have rules regarding KYC content. The addition of a CSA-prescribed form of document would be a significant change for many firms without corresponding benefit to investors. If, in any event, the CSA chooses to proceed with codification of specific requirements for a KYC form, such requirements should be harmonized with applicable SRO requirements and include flexibility for different business models and/or distribution channels.*

QUESTION 6: Should the KYC form also be signed by the representative's supervisor?

Response: *We believe the appropriate oversight mechanism is supervisor <u>approval</u> of KYC <u>documentation</u> rather than signature of a particular form. This approach provides greater flexibility depending on the needs of different business models and the availability of technology, and is consistent with SRO requirements.*

QUESTION 55: To what extent should a representative be allowed to open a new client account or move forward with a securities transaction if he or she is missing some or all of the client's KYC information? Should there be certain minimum elements of the KYC information that must be provided by the client without which a representative cannot open an account or process a securities transaction?

RESPONSE: *We agree that there should be certain minimum elements of KYC information that must be provided by a client before a representative may open an account or process a securities transaction. We note that MFDA Policy 2 sets out minimum KYC requirements and sets out rules regarding procedures to be followed when a new account application form (including KYC content) is incomplete. In addition, IIROC Dealer Member Rule 2500 sets forth KYC guidance on minimum client information required for trade execution and related procedures for incomplete information. We believe the existing SRO requirements provide* *adequate criteria for the minimum KYC information clients must provide for account opening and for trade execution; additional CSA requirements for SRO members are unnecessary. In any event, any additional CSA requirements for SRO members should be harmonized with applicable SRO rules.*

For non-SRO members, for account opening, clients should be required to provide sufficient KYC information for a representative to assess suitability. For securities transactions, clients should be required to provide a certain level of minimum KYC information before representatives may proceed with the transaction. In both instances, the onus should be on the client to provide the appropriate information.

QUESTION 56: Should additional guidance be provided in respect of risk profiles?

RESPONSE: *We believe clarification on the guidance the CSA has provided in respect of risk profiles is required.*

In particular, Appendix B provides that firms are to assess a client's capacity for loss. Measurements of loss are several: loss of income, loss of distributions, unrealized and realized capital losses are some examples. It would be extremely difficult to assess a client's overall capacity for loss given the numerous ways of measuring loss, and in some instances, it would be virtually impossible to be certain of the assessment. We suggest removal of the requirement that firms are to assess a client's capacity for loss. If the CSA decides to retain a loss assessment, a clear and narrow definition of 'loss' will be required.

The requirement that firms must "appropriately interpret client responses to questions and not attribute inappropriate weight to certain answers" could be made more clear by using a reasonableness standard, that is, by replacing 'appropriately' with 'reasonably' and by replacing 'inappropriate' with 'unreasonable'.

The requirement that firms should ensure that "tools, where used, are well designed to arrive at a meaningful risk profile for the client [...] and <u>any limitations recognized and mitigated</u>" should be amended to include a materiality qualifier (i.e. "[...] any <u>material</u> limitations recognized and mitigated").

In addition, the requirement that representatives must "avoid assisting clients [in responding] to questions that relate to [their] personal preferences [...] relating to risk" should also provide that representatives may, nevertheless, provide assistance where a client seeks clarification.

We also provide two general points of feedback on the risk profile requirements for the CSA's consideration: 1) Some of the factors in the risk profile section may not apply depending on client type (e.g. trusts, estates, corporate clients). We ask the CSA to consider adding guidance about the disparate applicability of certain aspects of the risk profile process depending on

client type. 2) What is the timeline for implementing the risk profile measures? Will the timeline be the same for new clients, as well as, existing clients? We note the latter would require that firms reach out to their existing client base, which will require additional time for compliance following enactment of any reform.

QUESTION 57: Are there circumstances where it may be appropriate for a representative to collect less detailed KYC information? If so, should there be additional guidance about whether more or less detailed KYC information may need to be collected, depending on the context?

RESPONSE: ***Yes, we believe it is appropriate that representatives advising or dealing in securities with respect to all non-individual permitted clients be exempt from the new KYC requirements, rather than carving out institutional clients only (as defined in the Consultation Paper). Consistent with our recommendation in our response to Questions 46 and 47 above, we are of the view that the definition of 'institutional client' should be replaced with the concept of a non-individual permitted client.***

Additional Commentary on the KYC Targeted Reform

Certain portions of the proposed amendments to the KYC requirements should be pared back and/or clarified. For example, the CSA proposes a requirement that registrants are to "ensure that the KYC process results in a thorough understanding of the client." We find this requirement to be vague. We wish to see additional guidance on what constitutes a thorough understanding of a client, taking into account that all of the information registrants rely upon as part of the KYC obligation is provided by the client. For example, is account opening documentation which appears to be complete and accurate sufficient to satisfy this requirement? Does the CSA believe additional steps may be required in certain circumstances? If so, what are these circumstances and additional steps? In addition to clarification on the concept of "thorough understanding", we propose amending the requirement to the following: "registrants must design a KYC process intended to result in a thorough understanding of the client."

Regarding gathering information relating to a client's financial circumstances, we raise two pieces of feedback for the CSA's consideration. First, advisors should only be required to gather such information as it relates to the particular client's status and needs. Second, extending the financial circumstances element to include spousal and dependents' information raises privacy considerations and incorrectly assumes such information will be readily disclosed. Reference to gathering spousal and dependents' information should be removed from the regulation. Third, we are of the view that the requirement to gather information about debts should be amended given the multiplicity of different types and potential amounts of debt. We believe the more appropriate approach to gathering a client's debt information is to include it in the following areas: determination of a client's net worth, and as part of the proposed companion policy content in Appendix B relating to a client's liquidity needs. At a minimum, the CSA should specify the types of debt that need to be inquired about and include a materiality threshold.

The elements of the KYC obligation which speak to updates to KYC information should also be revised. First, we submit that the requirement to refresh a client's KYC information at least once every 12 months may result in a negative client experience. In our experience, a client's KYC information rarely changes year over year, but rather, upon the occurrence of certain material events. Moreover, we have found that contacting clients with increased frequency between occurrences of such material events can often result in a negative client experience. Accordingly, we suggest that the proposed requirement be amended to instead require each firm to: (i) send reminder notices to clients, periodically (and, consistent with US securities laws, at least once every three years), to remind clients to inform the firm of any material updates, and (ii) make KYC updates upon a client's informing the firm of a material event. For some clients, this may mean regular updates depending on life events, but in other cases, the updates may be relatively infrequent. Such an approach allows firms the flexibility to provide a more client-friendly experience that is tailored to particular client needs and is better harmonized with applicable SRO rules. Secondly, we submit that the requirement to update the KYC information upon a material change should also be revised to clarify that these should be material changes "which the client makes known to the representative", as the onus should be on the client to inform the representative of such changes.

We are also of the view that the guidance in Appendix B relating to seeking information about an investor's applicable investment constraints and preferences should omit reference to subjective examples (i.e. remove reference to socially responsible investing and religious constraints), which can result in uncertainty and commensurate litigation risk. In our view, a clearer approach to investment constraints and preferences would be to require consideration of objective factors only (i.e. asset class, geography, etc.). Furthermore, the guidance provided in Appendix B which sets forth the type of advice (i.e. more savings or lowered expectations) that a representative should provide where there is an inconsistency between a client's risk capacity and investment needs and objectives appears to go beyond what should reasonably be required of mutual fund and investment dealer representatives. We are of the view that such representatives should not be required to explore re-arranging a client's affairs. Instead, they should be required to highlight and describe fundamental inconsistencies between a client's risk capacity and stated investment needs and objectives. If the CSA requires the provision of more generalized advice, the CSA should clearly and specifically identify the factors that need to be discussed, or prescribe what should be said. Finally, where the guidance in Appendix B imposes an obligation on the registered firm and representatives to confirm that the client has a reasonable understanding of the KYC form, including its completed content and the outcome of the KYC process, we are of the view that this cannot be measured or monitored in practice. This should be removed from the Appendix B guidance.

3. KNOW YOUR PRODUCT – REPRESENTATIVE AND FIRM

While we welcome regulatory guidance on KYP obligations, we are concerned with the framework proposed in the Consultation Paper. Before we consider the specific KYP proposals, we note that the Consultation Paper does not include a definition of "product". We are unclear as to whether "products" includes all securities and offerings, such as managed accounts that invest in a pre-determined group of securities, or whether it is intended to be limited to certain types of securities products and offerings. We are of the view that a definition of "product" that includes all securities and investment products is too broad in scope, and accordingly, introduces a high degree of uncertainty as to the appropriateness of the market investigation, product comparison and optimization processes. Our concerns are further articulated in our response to Questions 9 through 11, 59 and 61, below. For the CSA's consideration, we recommend that, for purposes of the market investigation, product comparison and optimization processes, the scope of products be narrowed and clarified to include only non-proprietary mutual funds that are reporting issuers.

In addition, we propose amending the definition of proprietary product to remove the exception for "managed account pooled funds". We are of the view that such investment funds should be considered proprietary under the following conditions: (i) the party that exercises mind, management and control of the investment fund is, or is an affiliate of, the relevant dealer or adviser; (ii) the investment objectives of the investment fund do not require the investment fund to invest in any funds where the mind, management and control of such funds resides in a party that is not an affiliate of the relevant dealer or adviser (an unrelated fund). Whether or not an investment fund is proprietary is a function of the relationship between the party that exercises mind, management and control of the investment fund and the relevant dealer or adviser, unless the investment fund necessarily provides exposure to one or more unrelated funds.

We provide our responses to some of the KYP-related Questions in the Consultation Paper below, and provide feedback on the guidance in Appendix D on information and economic barriers thereafter.

QUESTION 7: Is this general approach to regulating how representatives should meet their KYP obligation optimal? If not, what alternative approach would you recommend?

RESPONSE: ***We believe compliance with the requirement that representatives are to know the structure, features, strategy, costs and risks of every product their firm sells is likely not possible where a firm has an extensive product shelf or where a firm has multiple divisions, each with its own product shelf. The introduction of this requirement could result in firms or divisions reducing their product shelves.***

In addition, we do not support the requirement that representatives are to understand and consider product recommendations as against other products on the firm's product list. Operationally, it is not feasible for a representative of a dealer with a broad product shelf to compare products as against all other products on the firm's product list. For additional

support on this point, please see our next response. If representatives are unable to practically and meaningfully engage in product comparisons for all product categories, adequate supervision or monitoring, in turn, cannot be implemented. From a risk perspective, mandating such comparisons increases regulatory and litigation risk, as representatives could be held liable for inadequate, incomplete or seemingly incorrect comparisons. From an investor choice perspective, it is likely firms would respond by considerably narrowing their product shelves so representatives can provide the required comparisons, which may not be to the investor's interest. We are of the view that the KYP obligations currently proposed in the Consultation Paper can adequately protect investors without the comparison requirement. In any event, it should be made clear that, in the case of a firm with multiple divisions, the representative's product comparison requirement should be applied only to the relevant division rather than the firm as a whole.

We respond to Questions 9 through 11, 59 and 61, together:

QUESTION 9: Do you think that requiring mixed/non-proprietary firms to select the products they offer in the manner described will contribute to this outcome? If not, why not?

QUESTION 10: Are there other policy approaches that might better achieve this outcome?

QUESTION 11: Will this requirement raise challenges for firms in general or for specific registration categories or business models? If so, please describe the challenges.

QUESTION 59: Would additional guidance with respect to conducting a "fair and unbiased market investigation" be helpful or appreciated? If so, please provide any substantive suggestions you have in this regard.

QUESTION 61: Is the expectation that firms complete a market investigation, product comparison or product list optimization in a manner that is "most likely to meet the investment needs and objectives of its clients based on its client profiles" reasonable? If not, please explain your concern.

RESPONSE: ***We are concerned with several of the requirements the CSA has proposed under the market investigation and product comparison procedures. As currently contemplated, these requirements cannot be discharged with a reasonable degree of certainty, and would result in unacceptably high regulatory and litigation risk.***

<u>Market Investigation:</u>

The CSA's market investigation proposal provides, "mixed/non-proprietary firms would be required to select the products they offer in accordance with policies and procedures that include a fair and unbiased market investigation of a reasonable universe of products that the

firm is registered to advise on or trade in." We wish to see clarification that the market investigation requirement applies to a firm or applicable division of a firm. We also wish to see clarification that the reasonable universe of products to be investigated should be limited to the products offered by the firm or applicable division, rather than the entire universe of products the firm or applicable division is registered to advise on or trade in. For example, if a division of an investment dealer offers only mutual funds, its reasonable universe of products should not include derivatives. Lastly, if the CSA chooses not to limit the definition of "products" to non-proprietary investment funds, the market investigation obligation should be clarified to be limited to securities products only. Accordingly, we propose the requirement be amended as follows: "Mixed/non-proprietary firms would be required [...] of a reasonable universe of <u>securities</u> products the firm <u>or its applicable division offers.</u>"

<u>Product Comparison:</u>

The requirement to "conduct a product comparison to determine whether the products the firm offers are appropriately representative of the reasonable universe of products most likely to meet the investment needs and objectives of its clients" requires substantial clarification. As currently contemplated, the product comparison requirement cannot be met in certain circumstances and is generally vague, resulting in unacceptably high regulatory and litigation risk.

First, it is not feasible to conduct product comparisons for all products. If "products" is intended to include equities, for example, how would a firm ensure appropriate representation of a reasonable universe? Similarly, where there are "one-off products"(e.g. investment funds or private placements with very targeted or unique investment objectives and strategies), comparable products are not readily available. How would a product comparison be conducted in these instances? Even where there are two readily comparable products, we are unclear as to the criteria the CSA considers relevant for an apples-to-apples comparison. For investment funds, for example, do Sharpe ratios, total return, methodology (e.g. top-down versus bottom-up), investment strategy (e.g. value versus growth and target market cap(s)), investment restrictions (such as exposure to particular market sectors) or other measures factor into the representative universe? Similarly, how are arguably substitute products to be addressed (e.g. open-end mutual funds, closed-end funds, and active and passive exchange-traded funds)? In light of these limitations and uncertainties, how can firms support the adequacy and propriety of their product comparisons? To require product comparisons for all of a firm's products is extremely onerous, operationally impracticable, and unduly increases a firm's risk of liability.

Second, it is unclear how advisors might develop a "reasonable universe" of products that is most likely to meet client needs and objectives. Are firms with a broad and diversified client base effectively required to scan every available product on the market and ensure they have a representative sample of all such products in order to ensure they can meet their clients' varied needs and objectives?

We believe the product comparison requirement, as set forth in the Consultation Paper, is impossible to discharge in practice. As indicated above, if the CSA intends to retain this process, we recommend limiting its application to non-proprietary mutual funds that are reporting issuers. Even with this narrowed application, however, we point out that the foregoing concerns would only be reduced rather than eliminated if further clarification is not also provided.

<u>Most likely threshold:</u>

In addition, the "most likely" threshold which appears throughout the KYP targeted reforms and guidance is impossible to comply with, and accordingly, subjects firms to undue litigation and regulatory risk. When applied retrospectively, this requirement could result in a reverse onus where registrants will be required to justify a product recommendation in light of superior performance of alternative investments. We propose revising the threshold to require that the product recommendation is "likely to help meet the investment needs and objectives of its clients."

Appendix D Guidance:

We are similarly concerned with the guidance provided in Appendix D relating to market investigations and product comparisons. First, Appendix D articulates that mixed/non-proprietary firms may satisfy their obligations to conduct a fair and unbiased market investigation, product comparison and an optimization process based on clients' needs and objectives, by drawing on available KYC information about their clients at least once every 12 months. Given the aforementioned operational limitations that arise from having to conduct market investigations, product comparisons and optimization processes, we believe a 12 month timeframe would be extremely difficult for firms to operationalize. For firms that have a large and broadly diversified client base, in particular, we are unclear that this could be operationalized at all given potentially changing needs and objectives of a large group. We think reference to a 12 month timeframe should be removed. Second, Appendix D indicates that mixed/non-proprietary product lists "must be developed in accordance with policies and procedures that require a [...] market investigation, a product comparison and an optimization process <u>based on the investment needs and objectives of its clients</u>." However, for dealers offering execution order services only, Appendix D also acknowledges that such firms <u>"do not have information about the client's investment needs and objectives as they do not collect this information about clients."</u> It is unclear how the application of such guidance would result in meaningful market investigation, product comparison and optimization processes, given the acknowledged lack of significant client information. Third, the Consultation Paper indicates that firms may demonstrate they have conducted a meaningful market investigation by using external research reports. We query the logic of using external research reports as a proxy for a meaningful market investigation. We believe guidance as to meaningful market

investigations would be more helpful, rather than pointing to the use of external research reports, in particular, as meaningful.

We respond to questions 12 and 13, together:

QUESTION 12: Will this requirement cause any unintended consequences? For example, could this requirement result in firms offering fewer products? Could it result in firms offering more products?

QUESTION 13: Could these requirements create incentives for firms to stop offering non-proprietary products so that they can fit the definition of proprietary firm?

RESPONSE: ***We believe that the proposed KYP requirements will result in the following unintended consequences: fewer products offered to investors, increased costs for clients and firms, and increased regulatory risk and litigation risk.***

Mixed/non-proprietary firms may narrow their product shelves considerably given the increased regulatory burden of a large product shelf. Alternatively, the disparate regulatory treatment of firms offering proprietary versus non-proprietary products may incent non-proprietary firms to convert to proprietary product shelves or, at a minimum, reduce the shelf considerably. We do not believe either result would be beneficial to investors. Non-proprietary firms that do not have proprietary products and, hence do not have the option to convert to proprietary firms, might well be at a disadvantage to firms that are proprietary.

Complying with the proposed KYP requirements will come at significant cost to the firm, which may mean increased fees for investors or minimum asset levels to invest with non-proprietary firms. The result may be an inability for certain vulnerable investors to access a non-proprietary/mixed offering.

Lastly, we are concerned that UDPs and boards of directors are unduly exposed to legal and regulatory liability as a result of the proposed KYP requirements. Appendix D indicates that UDPs and boards of directors are required to approve written reports describing compliance with KYP reforms, which subjects such parties to potential liability in the event of an error or inaccuracy in the report. In practice, how will UDPs and boards be able to seek assurance as to the accuracy of such reports?

QUESTION 14: Should proprietary firms be required to engage in a market investigation and product comparison process or to offer non-proprietary products?

RESPONSE: ***Given the limitations with the market investigation and product comparison processes set forth above, we do not believe proprietary firms should be required to engage in such investigations, nor do we believe such firms should be required to offer non-proprietary***

products. We believe there is value in the availability of different business models to meet investor needs. However, we wish to see clarification on the guidance provided in Appendix D with respect to proprietary firms. Appendix D states that representatives of proprietary firms may consider non-proprietary securities without meeting the shelf development process if, for example, a client requests consideration of a particular security. We likewise wish to see explicit guidance that proprietary firms may continue to hold themselves out as such even if their representatives are called upon to consider non-proprietary securities from time to time.

QUESTION 58: Should we explicitly allow firms that do not have a product list to create a product review procedure instead of a shelf or would it be preferable to require such firms to create a product list?

RESPONSE: ***Yes, firms should be permitted to create a product review procedure absent a product list. We believe discretion to do so should be left to the firm.***

Additional Feedback: Appendix D - Information and Economic Barriers

We wish to see clarification in Appendix D that appropriate information and economic barriers refers to ethical walls, consistent with the guidance provided in the Conflicts of Interest Appendix of the Consultation Paper.

4. SUITABILITY

QUESTION 16: Do you agree with the requirement to consider other basic financial strategies?

RESPONSE: ***At TD, we offer an array of wealth services, ranging from order execution to full-service discretionary managed accounts, to help meet clients' varied investing needs. In each case, we strive to provide a level of wealth services that responds to investor needs and appropriately aligns with applicable proficiency levels, distribution channel constraints and business model considerations.***

The limitations with the CSA's proposal to require firms to consider other basic financial strategies are undue breadth and burden for certain business models. We point out that the primary purpose of an advisor is dealing in or advising with respect to, securities; the provision of financial advice, while certainly a necessary part of the business, is ancillary to this primary purpose and should be subject to reasonably precise regulation. Requiring the consideration of other basic financial strategies in the manner contemplated in the Consultation Paper essentially imposes a regulatory obligation to provide more generalized financial advice, regardless of business model, which would result in fundamental changes to certain business models. This also goes well beyond the scope of advisors' proficiency requirements. As an example, it would be inappropriate to require mutual fund dealer representatives to engage in an analysis of a client's debt profile or assess a client's holdings

at other institutions; they are simply not qualified, and should not be required, to conduct such an assessment. Similarly, in the case of discretionary managed accounts, representatives simply have authority over a particular account; they should not be required to manage or advise on all aspects of a client's financial affairs.

The proposed requirement could also have the effect of exacerbating one of the concerns the CSA has identified in the Consultation Paper: the expectations gap. By requiring the consideration of other basic financial strategies, the CSA is effectively creating a new expectations gap, where investors incorrectly rely on advisors for services not provided by certain business models and that advisors are not qualified to provide. Specifically, investors may mistakenly believe they are receiving financial planning advice or more generalized financial advice than they are in fact receiving.

We are of the view that any regulatory obligation to consider other basic financial strategies should be limited to pointing out fundamental inconsistencies, if any, between a client's desired investment strategies relative to their stated needs and objectives. If, in any event, the CSA proceeds with this aspect of the suitability requirement, the CSA should clearly and specifically identify those basic financial strategies that must be considered, taking into account differences in distribution channels and business models.

For the reasons provided above, we are also of the view that the guidance provided in Appendix E should likewise be amended to remove reference to consideration of other financial strategies. To this end, we point to the guidance which indicates that a representative may, in certain circumstances, advise that another financial product (such as an insurance product) is the preferred product or strategy. We believe this guidance should be removed; representatives who are not licensed to advise on certain product types should not be required to determine whether such other product types are more appropriate for a particular client.

QUESTION 17: Will there be challenges in complying with the requirement to ensure that a purchase, sale, hold or exchange of a product is the "most likely" to achieve the client's investment needs and objectives?

RESPONSE: *We find the "most likely" threshold to be problematic when looking at security level suitability. Whether a recommendation for a particular securities product is suitable should, where possible, be looked at in the context of the broader portfolio. We do not believe it is theoretically possible that a single security product can be deemed to "most likely" achieve a client's investment needs and objectives, and accordingly, results in undue litigation and regulatory risk. We likewise do not believe that firms are able to establish that they have identified and recommended the particular securities product that is "most likely" to achieve a client's investment needs and objective. As indicated in our response to Question 61 above, when applied retrospectively, this requirement could result in a registrant having a reverse*

onus to justify a recommendation in light of superior performance of alternative investments. We propose revising the standard to "likely to help achieve".

We respond to Questions 18, 22 and 62 together:

QUESTION 18: Should there be more specific requirements around what makes an investment "suitable"?

QUESTION 22: Will the requirement to perform a suitability review for a recommendation not to purchase, sell, hold or exchange a security be problematic for registrants?

QUESTION 62: What, if any, unintended consequences could result from setting an expectation in the context of the suitability obligation that registrants must identify products both that are suitable and that are the most likely to achieve the investment needs and objectives of the client? If unintended consequences exist, do the benefits of this proposal outweigh such consequences?

RESPONSE: ***Other than the change to the suitability requirements relating to hold scenarios, we do not think there is a need for more specific requirements about what makes an investment "suitable". We believe the existing requirements under Section 13.3 of NI 31-103 and the related companion policy, as well as, MFDA Rule 2.2.1, IIROC Rule 1300 and IIROC Rule Notice/Guidance Note 12-0109 provide sufficient guidance regarding applicable suitability requirements that appropriately aligns with different business models.***

In any event, if the CSA decides to proceed with the suitability proposals, we wish to see clarification and revision of the proposed requirements which are vague or which may be operationally unachievable.

First, we wish to see guidance or a definition on what is meant by a "basic asset allocation strategy" in the investment strategy suitability section. Second, as noted above in our responses to Questions 61 and 17 above, we believe that the "most likely" standard set forth in investment strategy suitability is an impossible standard. We propose a revision to, "designed to achieve" or "to help achieve". Third, we are concerned about the feasibility and desirability of identifying and assessing a target rate of return for the client. On the former point, how can one arrive at a target rate of return in those cases where a client's investment needs and objectives are not articulated in dollar terms? On the latter, we are concerned that requiring firms to identify and assess a target rate of return may have the unintended effect of influencing clients to increase their risk profile or may be incorrectly perceived by clients as a promised return. We believe the obligation should be to point to fundamental mismatches between a client's risk profile as against his or her investment needs and objectives.

Similarly, in the product selection suitability section, several requirements require clarification. First, the "most likely" requirement cannot be complied with and should be

revised to "likely to help achieve". Second, we think the requirement would read more clearly if pared back to remove reference to having to review the structure, features, product strategy, etc. of various products. Such an analysis on a product by product level would be impossible for firms to operationally administer. We are concerned that the CSA has created a suitability standard that goes well beyond what would be required of a fiduciary or even under a strict best interest standard. Accordingly, we propose the second portion of the product selection suitability requirement be amended as follows: "A registrant must ensure that [...] the purchase sale, hold or exchange of the security [...] is [...]: [...] likely to help achieve the client's investment needs and objectives, given the client's financial circumstance and risk profile." The guidance in Appendix E regarding "Product Selection Suitability" should likewise be amended to remove reference to the corresponding review procedures.

Lastly, we are of the view that the "General Suitability Guidance" section of Appendix E requires significant revision as it relies upon vague concepts and appears to effectively elevate the suitability standard to a best interest standard. For example, we are unclear as to the precise meaning of the concepts of "equally suitable and equally effective". Are two Canadian equity funds equally suitable and equally effective? For investment funds, do Sharpe ratios, total return, investment methodology (e.g. top-down versus bottom-up), investment strategy (e.g. value versus growth and target market cap(s)), investment restrictions (such as exposure to particular market sectors) or other measures factor into equally suitable and equally effective? What amount of due diligence is required to satisfy the "equally suitable and equally effective" requirement? We are concerned that the uncertainty produced by this criterion creates undue litigation risk. Similarly, the CSA indicates that a product recommendation is unsuitable where there is another "equally suitable" but less costly product available for the client. Again, we are unclear as to the definition of "equally suitable" in this instance, and as to why cost is not simply one of the factors in the "equally suitable" analysis. We believe reference to 'equally suitable and equally effective' should be removed from Appendix E, or clearly defined. Moreover, we believe the guidance provided relating to how registrants might establish a "reasonable basis" for their suitability analysis is far too cumbersome and would severely limit the amount of time that could be spent on actively engaging with a client.

QUESTION 20: Will the requirement to perform a suitability analysis at least once every 12 months raise challenges for specific registrant categories or business models? For example, a client may only have a transactional relationship with a firm. In such cases, what would be a reasonable approach to determining whether a firm should perform ongoing suitability assessments?

RESPONSE:

Consistent with the views set forth in our response to the KYC reforms, we believe a more appropriate approach to timely suitability assessments is one that is inquiries- and events-

based rather than interval-based. We are of the view that the former strikes the appropriate balance between serving and protecting client interests and maintaining efficient capital markets. By contrast, we believe that a requirement to perform a suitability assessment at least once every 12 months will pose significant challenges for all registrants and may result in a negative client experience. For example, for firms with large and diversified client bases, requiring suitability assessments at least once every 12 months where there have been no changes with respect to the client, will present significant operational and administrative difficulty for firms without benefit to the client. For smaller firms, the cost of compliance may be too high and such firms may leave the industry altogether. The result is decreased choice and reduced access to advice for investors. Moreover, in our experience, simply prescribing more frequent client touch points and analyses where there has been no triggering event, can hinder the overall client experience. We remind the CSA that the various events which trigger a suitability analysis may, in and of themselves, require regular and frequent suitability analyses, but at appropriate intervals. We recommend removal of the 12 month suitability assessment requirement. Instead, we submit that a better approach to suitability would be to require each firm to send reminder notices to clients, periodically (and, consistent with US securities laws, at least once every three years), to remind clients to inform the firm of any material updates, and to only require a complete suitability assessment upon the actual occurrence of certain events (e.g. account opening, transaction, material changes, etc.).

We seek clarification on certain aspects of the events which trigger a suitability analysis. First, when a suitability analysis is required as a result of material changes in the client's KYC information, reference to "reasonably should have known" should be removed, as it is unduly burdensome to require that advisors should objectively have known of such a change absent the client's explicitly informing them of such a change. Advisors should only be required to perform a suitability analysis based on material changes to a client's KYC information that they do know, as provided by the client. Similarly, the requirement to engage in a suitability analysis upon a "material change in the risk profile of an issuer..." is too broad and should be narrowed to "material change in the risk profile of an issuer <u>of which the registrant has knowledge</u> ...". On this same requirement, we seek clarification as to what is meant by "external risk assessment mechanisms." We wish to see a list of such mechanisms, or removal of this portion of the requirement.

We ask that the CSA clarifies what is meant by a "transactional relationship."

QUESTION 21: Should clients receive a copy of the representative's analysis regarding the client's target rate of return and his or her investment needs and objectives?

RESPONSE: *While we do not take issue with including a client's investment needs and objectives as part of the documentation process, we are of the view that any document to be provided to clients should omit reference to a "target rate of return" for the reasons set forth*

in our response to Questions 18, 22 and 62 above, in particular, due to the potential for investor confusion and increased liability for the firm and representative.

QUESTION 64: Should we provide further guidance on the frequency of the suitability analysis in connection with those registrant business models that may be based on one-time transactions? For example, when should a person or entity in such a relationship no longer be a client of the registrant for purposes of this ongoing obligation to conduct suitability reviews of the client's account?

RESPONSE: ***We ask that the CSA clarify what is meant by a 'one-time transaction.' For example, is the entering into of a periodic purchase plan considered a one-time transaction? Is the entering into of a distribution or dividend reinvestment plan considered a one-time transaction?***

5. RELATIONSHIP DISCLOSURE

We respond to Questions 23 and 25, together:

QUESTION 23: Do you agree with the proposed disclosure required for firms registered in restricted categories of registration? Why or why not?

QUESTION 25: Is the disclosure for restricted registration categories workable for all categories identified?

RESPONSE: ***We note that SRO members are currently subject to strict relationship disclosure requirements to provide clients with fulsome information regarding the advisor-client relationship. For example, IIROC Rule 3500 provides that members must provide clients with a description of the types of products and services offered, a description of the account relationship, as well as, a description of the process used to assess investment suitability. Similarly, MFDA Rule 2.2.5 requires MFDA Members to:***

- ***provide clients with descriptions of "the products and services offered by the Member";***
- ***describe "the Member's obligation to ensure that each order accepted or recommendation made for any account of a client is suitable for the client in accordance with Rule 2.2.1";***
- ***advise clients "when the Member will assess the suitability of the investments in the client's account"; and***
- ***"[define] the various terms with respect to the know-your-client information collected by the Member and [describe] how this information will be used in assessing investments in the account".***

Given the existing IIROC and MFDA requirements, and in light of the significant costs that would be incurred in connection with amending disclosures, we submit that IIROC and

MFDA firms registered in the restricted categories of registration should be exempt from the CSA's disclosure requirements.

QUESTION 24: Do you agree with the proposed disclosure required for firms that offer only proprietary products? Why or why not?

RESPONSE: ***For proprietary firms, we caution the CSA against prescribing specified disclosure without also permitting flexibility to tailor the disclosure in a manner that is more meaningful to clients. A limitation with the proposed disclosure is that it does not cover all scenarios. For example, where proprietary firms, in addition to offering only proprietary products, permit clients to trade in non-proprietary products, representatives may be specifically asked by clients about non-proprietary products. In this case, such representatives will assess suitability of the non-proprietary products. For such firms, it would be more accurate to have a more tailored form of the proposed disclosure that accurately reflects this type of firm's process. Therefore, we propose adding guidance that permits the tailoring of the recommended disclosure, as appropriate, to reflect a firm's processes.***

QUESTION 26: Should there be similar disclosure for investment dealers or portfolio managers?

RESPONSE: ***We are unclear as to what type of disclosure would be relevant and/or applicable to investment dealers or portfolio managers and their clients beyond the disclosure requirements proposed under 'General Nature of Relationship' in Appendix F and the existing requirements set forth in section 14.2 of NI 31-103. Can the CSA please elaborate as to how the proposed disclosure for restricted dealers might be relevant for investment dealers or portfolio managers?***

6. PROFICIENCY

QUESTION 28: To what extent should the CSA explicitly heighten the proficiency requirements set out under Canadian securities legislation?

RESPONSE: ***We believe any enhancements to proficiency requirements should be tailored by registration category. For SRO members, applicable enhancements are more appropriately led by the SROs.***

QUESTION 29: Should any heightening of the proficiency requirements for representatives be accompanied by a heightening of the proficiency requirements for CCOs and UDPs?

RESPONSE: ***We do not think heightening of the proficiency requirements for CCOs or UDPs are required, as the other targeted reforms (Conflicts of interest, Role of UDP and CCO) effectively increase the obligations and responsibilities required of CCOs and UDPs.***

7. TITLES

QUESTION 30: Will more strictly regulating titles raise any issues or challenges for registrants or clients?

QUESTION 31: Do you prefer any of the proposed alternatives or do you have another suggestion, other than the status quo, to address the concern with client confusion around representatives' roles and responsibilities?

RESPONSE: ***We agree with the CSA's concerns regarding the potential for client confusion due to misleading or inaccurate titles. However, we are concerned with the CSA's proposal to prescribe particular titles. We are of the view that the list of available titles is unduly restrictive, not meaningfully descriptive, and may, as a consequence, continue to produce investor confusion.***

In support of the foregoing, we note that the CSA's proposed titles do not appear to meaningfully relate to proficiency requirements. For example, in the CSA's proposed 4-title framework, the title of 'securities salesperson' is the only title available to representatives at firms with a proprietary shelf. On the other hand, firms with a non-proprietary/mixed shelf choose from the titles of 'restricted securities advisor', 'securities advisor' and 'securities advisor – portfolio management', depending on the level of service they are providing. There will be many instances where a 'securities salesperson' and a representative carrying an advisor title will, apart from the proprietary/non-proprietary distinction, have the same proficiency credentials and offer similar types and levels of service. However, representatives at proprietary firms are limited to a title that implies a lower degree of proficiency and a more limited service offering. Similarly, we note that none of the generic titles proposed in the Consultation Paper would appropriately describe representatives who specialize in particular types of services (e.g. retirement planning, succession planning, etc.). In our view, where investors are seeking representatives with certain specializations, it would be appropriate and helpful to be able to ascertain such expertise through meaningful and accurate titles.

Rather than standardizing a very narrow range of available titles, then, we propose the introduction of titling guidelines. Indeed, we note that the SROs already provide their own guidelines. For example, under MFDA rule 1.2.5, titles must be clear and cannot be misleading as to the nature of the registrant's role and the level of service/advice they are permitted to provide. Under IIROC Guidance Note 14-0073, titles may not deceive or mislead, or reasonably be expected to deceive or mislead and titles are required to be based on various criteria. Consultation among the CSA, SROs, and industry members could form the basis of new harmonized guidelines.

32) Should there be additional guidance regarding the use of titles by representatives who are "dually licensed" (or equivalent)?

RESPONSE: ***We are unclear as to what is meant by "dually licensed". Does this refer to representatives who are both insurance agents and dealer representatives, for example? What other types of dual licensing might be intended?***

8. DESIGNATIONS

33) Should we regulate the use of specific designations or create a requirement for firms to review and validate the designations used by their representatives?

RESPONSE: ***We respectfully submit that the securities regulatory authorities should refrain from directly regulating the use of designations granted by third parties. However, we are not opposed to a requirement for firms to have policies regarding the use of designations, which aligns with the approach taken by the SROs.***

9. ROLE OF UDP AND CCO

QUESTION 34: Are these proposed clarifying reforms consistent with typical current UDP and CCO practices? If not, please explain.

RESPONSE: ***While the clarifying reforms are generally consistent with typical current UDP and CCO practices, the requirement that UDPs must "<u>ensure</u> that material conflicts are avoided if they cannot be managed by disclosure and controls" goes too far. While the UDP can ensure certain policies and procedures are in place, they cannot reasonably ensure all material conflicts are avoided or controlled. We suggest revising 'ensure' to 'require.'***

In addition, as CCOs and UDPs are already subject to strict SRO requirements regarding compliance systems and supervision of certain key areas (e.g. conflicts of interest and suitability), we submit that registrants who are members of an SRO should be exempt from these reforms so long as they continue to retain such membership.

10. STATUTORY FIDUCIARY DUTY WHEN CLIENT GRANTS DISCRETIONARY AUTHORITY

QUESTION 35: Is there any reason not to introduce a statutory fiduciary duty on these terms?

RESPONSE: ***While we are not opposed to a statutory duty in the case of discretionary managed accounts as a codification of the existing common law requirement, we are concerned as to how the proposed statutory duty will interact with the common law duty, and query whether the resulting legal uncertainty is necessary.***

SECTION II. PROPOSED FRAMEWORK FOR A REGULATORY BEST INTEREST STANDARD

We answer the following questions together in our response below.

QUESTION 36: Please indicate whether a regulatory best interest standard would be required or beneficial, over and above the proposed targeted reforms, to address the identified regulatory concerns.

QUESTION 37: Please indicate whether you agree or disagree with any of the points raised in support of, or against, the introduction of a regulatory best interest standard and explain why.

QUESTION 38: Please indicate whether there are any other key arguments in support of, or against, the introduction of a regulatory best interest standard that have not been identified above.

QUESTION 40: What impact would the introduction of the proposed targeted reforms and/or a regulatory best interest standard have on outcomes for investors?

QUESTION 41: What challenges and opportunities could registrants face in operationalizing a regulatory best interest standard?

QUESTION 66: Do you believe that the Standard of Care is inconsistent with any current element of securities legislation? If so, please explain.

QUESTION 42: How might the proposals impact existing business models? If significant impact is predicted, will other (new or preexisting) business models gain more prominence?

QUESTION 43: Do the proposals go far enough in enhancing the obligations of dealers, advisers and their representatives toward their clients?

QUESTION 68: Do you think this expectation is appropriate when the level of sophistication of the firm and its clients is similar, such as when firms deal with institutional clients?

RESPONSE: ***At TD, we take the relationship between clients and their advisors very seriously and we are a leading proponent of regulatory advances to enhance investor protection. We are committed to reforms aimed at meaningfully and sensibly enhancing this relationship so investors are better able to meet their financial needs. With such commitment in mind, we share many of the concerns raised by the Jurisdictions with Concerns about a BIS regarding a regulatory best interest standard. We believe an over-arching regulatory best interest standard as proposed in the Consultation Paper is potentially unachievable for certain business models, and will result in significant uncertainty. We also query whether the introduction of the regulatory best interest standard will materially advance investor protection over and above the targeted reforms; indeed, it may be that the introduction of the regulatory best interest***

standard alongside the targeted reforms may result in unintended and undesirable consequences for investors and registrants alike.

We question whether a regulatory best interest standard that applies to all registered dealers and advisors regardless of business model is practical or desirable. For example, where a firm provides order execution services only, what would be the purpose of a best interest standard in light of existing best execution obligations? How can firms that offer proprietary products, only, demonstrate they have acted in a client's best interest given their limited product shelf? How would a best interest standard be applied if a client instructed a representative to proceed with a trade contrary to the representative's recommendation? Further, can a regulatory best interest standard co-exist with all compensation structures, or must certain types of compensation models (i.e. commission-based compensation) be avoided?

On this last question, above, due to inherent conflicts of interest, commission-based compensation presents significant complications in the context of a best interest standard. As the Jurisdictions with Concerns about a BIS point out:

> *Imposing a best interest standard that permits the existing restricted business models and conflicted compensation structures will create legal uncertainty. […] [It is unclear] how regulators or the courts will interpret a standard that on the one hand expressly requires conduct in the client's best interest and the avoidance of material conflicts, but in other cases permits conduct that may not be in the client's best interest as long as there is disclosure.*

Commission-based models are important business models for the affordable provision of advice to a variety of investor groups. Absent commission-based models, investors seeking advice-based services would be required to pay annual fees, which in many cases would be higher than commission payments. Fee-based accounts require minimum assets or minimum fees to offset costs and are, therefore, designed for investors with larger portfolios. Younger investors and investors with lower income and asset levels, in particular, as well as, infrequent traders, would be disproportionately negatively impacted. The result would be an inability for vulnerable investor groups to afford access to advice.

Additional concerns regarding legal and regulatory uncertainty abound. In the Consultation Paper, the BIS Consulting Jurisdictions take the view that the regulatory best interest standard is distinct from a fiduciary duty and does not automatically establish a fiduciary duty. However, there is no substantive guidance on how the regulatory best interest standard might interact with, and be considered different from, common law fiduciary duties or the statutory fiduciary duty that is proposed as one of the targeted reforms. There is likewise limited Canadian precedent to support the BIS Consulting Jurisdictions' position that courts might interpret the regulatory best interest standard as distinct from the common law fiduciary *standard, particularly when the phrase "best interest" has already been interpreted as a fiduciary duty under certain areas of Canadian securities and corporations laws.*[1] *Moreover, we are concerned that potential fragmented adoption or differing administration of the regulatory best interest standard amongst CSA jurisdictions may result in significant complexity. Should only certain CSA jurisdictions proceed with implementing the regulatory best interest standard, the result will be four standards of care: 1) a common law fiduciary duty in all jurisdictions for advisors who advise clients with discretionary accounts; 2) a statutory fiduciary duty in all jurisdictions for advisors who advise clients with discretionary accounts (assuming the statutory fiduciary duty targeted reform is enacted); 3) the regulatory best interest standard for advisors registered in jurisdictions that implement such a standard; and 4) the existing duty to act fairly, honestly and in good faith in all other jurisdictions. In our view, the potential for confusion, the compliance difficulties, incremental costs for firms that operate in multiple jurisdictions, and the risk of liability are significant and undue.*

The reasons provided by the BIS Consulting Jurisdictions in proposing a regulatory best interest standard over and above the targeted reforms include: closing the expectations gap and mitigation of the information gap between clients and advisors. However, there are strong indicators to support the view that Canada is already a leader in many of these areas. Advisors currently have a duty to deal fairly, honestly and in good faith with their clients and are subject to various regulatory requirements under NI 31-103 to ensure investor protection. Moreover, as noted throughout our response, many advisors are also subject to a host of regulatory obligations under SRO rules in many of the areas covered by the targeted reforms, including, for example, conflicts, KYC, suitability, and designations. Indeed, it is notable that SRO oversight, which forms a critical part of Canada's rigorous securities regime, is absent from the Australian or U.K. framework. In addition to these existing requirements, the CRM2 and POS initiatives have recently been finalized and should help investors better understand the costs of investing, investment returns, and their relationships with their advisors. The combination of these regulations, old and new, should help close the expectations gap and the information gap between clients and their advisors.

We are of the view that any additional enhancements the CSA hopes to achieve, over and above those produced by existing regulations and the targeted reforms, can be more effectively achieved once adequate assessment of these reforms has been completed and any persistent gaps identified. Any consideration of the introduction of a best interest standard should follow completion of the CSA's research project regarding the impact of CRM2 and POS, as well as, implementation of the targeted reforms and an assessment of their impact. We believe that the targeted reforms alone (albeit, with some amendments), will go a long way toward addressing residual gaps that might exist in the client-advisor relationship in spite of recent reforms. The

[1] (2016), 39 OSCB 3965. The BIS Consulting Jurisdictions cite sections 116 of the *Securities Act* (Ontario) and 159.3 of the *Securities Act* (Québec) and director duties under corporate law as instances where "best interest" has been interpreted as a fiduciary duty.

targeted reforms can provide appropriate enhancements to advisor standards and service models that advance clients' best interests, without the limitations that arise from a vague and unascertainable regulatory best interest standard. The targeted reforms, in combination with the existing duty of care, stringent SRO rules, CRM2 and POS represent a robust "made in Canada" solution that can effectively and appropriately address the concerns the BIS Consulting Jurisdictions have identified.

The experiences in the UK and Australia demonstrate the need for cautiously developing regulation so as not to create new market failures. In the UK, the reforms brought about by the 2012 Retail Distribution Review have led to an increase in compliance costs, an increased risk of potential liability, and as a result, increased costs for investors who wish to access advice. Early evidence indicates that investors with lower asset levels are having difficulty affording access to financial advice. For example:

- *In a 2016 survey, […] 69% of advisors said they had turned away potential clients over the last 12 months. The most common reason for this was affordability, with 43% of advisors turning away clients stating the advice services offered would not have been economical given the circumstances of those clients.*[2]
- *A survey of advice firms suggest that, over the last two years, the proportion of firms who ask for a minimum portfolio of more than £100,000 has more than doubled, from around 13% in 2013 to 32% in 2015. The FCA's recent survey of advisors also supports this, suggesting that 45% of firms very rarely advise clients on retirement income options, if those clients have small funds (i.e. less than £30,000) to invest.*[3]
- *Advisor numbers in the UK have declined in the period from 2011 to 2014, with the majority of advisors exiting the market during this period being those employed by banks and building societies (i.e. large advisory firms), which are more likely to service mass market customers with lower levels of wealth. According to the FCA survey of advisors, 27% of clients advised by medium or large advisory firms on retirement income had pension wealth of less than £30,000, compared to only 19% of clients advised by very small firms.*[4]
- *Smaller firms are likewise having difficulty serving retail customers: In a 2015 report, the Association of Professional Financial Advisers published findings that small and mid-sized firms are spending, on average, 12% of their income on direct and indirect regulatory costs. Due to the high costs associated with face-to-face advice, such firms consider it unprofitable to serve customers who have assets below a certain level.*[5]

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[2] Financial Conduct Authority and UK HM Treasury, Financial Advice Market Review, March 2016 at p. 6. http://www.fca.org.uk/static/documents/famr-cfi.pdf

[3] *Ibid.* at p. 19.

[4] *Ibid.* at p. 18.

[5] Association of Professional Financial Advisers: *The Cost of Regulation Report,* 2015.

Similarly, the Australian experience with a statutory best interest standard speaks to the harm that can result from open-ended regulation. In Australia, a statutory best interest standard was introduced with a catch-all safe harbor provision in 2013. As noted in the Consultation Paper, only a year later, the Australian government introduced a bill to remove open-ended elements from the safe harbor provision based on industry feedback regarding the difficulties that ensued and costs incurred when having to comply with open-ended regulation. We are concerned that the vagueness and breadth of the proposed regulatory best interest standard set forth in the Consultation Paper will be subject to similar subsequent review and amendment.

Canadian investors currently benefit from access to a broad array of business models to help meet their investment needs, from proprietary to non-proprietary models, and from execution-only services through to privately managed portfolios. Indeed, such variation in business models is fundamental to providing investors with greater choice and access, and is, at least in part, the result of regulations which recognize investor choice as an important component of investor protection. As we highlighted above, the introduction of the over-arching regulatory best interest standard raises important considerations about the viability of some of these business models and the potential creation of an advice gap. We urge the BIS Consulting Jurisdictions to consider these issues in assessing the desirability of the regulatory best interest standard proposed in the Consultation Paper.

QUESTION 65: Should the Standard of Care apply to unregistered firms (e.g., international advisers and international dealers) that are not required to be registered by reason of a statutory or discretionary exemption from registration, unless the Standard of Care is expressly waived by the regulator?

RESPONSE: ***Yes, any Standard of Care should apply to all firms participating in Canadian capital markets regardless of their registration status.***

SECTION III. CONCLUSION

TD appreciates the opportunity to provide comments on the Consultation Paper. We are strong proponents of initiatives to further investor protection. While we believe Canada has a comprehensive regulatory regime in this regard, we acknowledge that improvements can be made, and agree in principle with many of the proposals the CSA has identified to improve the current framework. However, as we have noted throughout our comment letter, we are concerned that certain aspects of the targeted reforms will produce negative and undesirable consequences. We ask the CSA to consider our feedback on those elements of the targeted reforms that we have identified as being likely to: limit access to financial advice, decrease product choice, negatively impact the client experience, increase client costs, create unacceptably high risks for firms and representatives, significantly increase compliance costs without commensurate benefit to investors, and produce regulatory inefficiencies and redundancy.

We also ask the CSA to consider whether investor protection goals such as reducing the expectations gap and ensuring better outcomes for investors can be more effectively addressed by supplementing the current regime with the targeted reforms alone, without the proposed regulatory best interest standard. To this end, as the international experience in the UK and Australia shows, regulation must be deliberate and measured, and must likewise be clear, specific and meaningfully tailored to its goals in order to avoid the creation of new market failures. We believe the regulatory best interest standard proposed in the Consultation Paper raises concerns around workability, legal certainty and the potential creation of an advice gap. We look forward to seeing the results of the CSA's research project on the impacts of CRM2 and POS, and believe the CSA should focus exclusively on the targeted reforms in developing a robust "made in Canada" solution that addresses any residual limitations that impede investor protection. Any consideration of the introduction of a best interest standard should, in our view, follow completion of the CSA's research project and implementation of the targeted reforms and an assessment of their impact.