5.1.2 NI 33-102 Regulation of Certain Registrant Activities

**NOTICE OF NATIONAL INSTRUMENT 33-102
REGULATION OF CERTAIN REGISTRANT ACTIVITIES
AND COMPANION POLICY 33-102CP**

Notice of Rule and Companion Policy

The Ontario Securities Commission (the "Commission") has, under section 143 of the *Securities Act* (Ontario) (the "Act") made National Instrument 33-102 Regulation of Certain Registrant Activities (the "National Instrument") as a rule under the Act. The Commission has also adopted Companion Policy 33-102.

The National Instrument and Companion Policy were delivered to the Minister of Finance on May 11, 2001. If the Minister does not approve, reject or return the National Instrument by July 10, 2001 or if the Minister approves the National Instrument, the National Instrument will come into force on August 1, 2001.

Background

The National Instrument is an initiative of the Canadian securities regulatory authorities. The Canadian securities regulatory authorities published a draft of the National Instrument on July 21, 2000 ("July 2000 Draft National Instrument") at (2000) 23 OSCB 4983 which was based on the following instruments:

Proposed National Instrument 33-102	Distribution of Securities at Financial Institutions
Companion Policy 33-102CP	Distribution of Securities at Financial Institutions
Proposed National Instrument 33-103	Distribution Networks
Proposed National Policy 33-201	Networking and Selling Arrangement Notices
Proposed National Instrument 33-104	Selling Arrangements
Companion Policy 33-104CP	Selling Arrangements

(collectively, "1997 Draft Instruments and Policies") along with notices that relate to each National Instrument.[1]

The 1997 Draft Instruments and Policies were based on *Principle of Regulation 1 - Re: Distribution of Mutual Funds by Financial Institutions, Principle of Regulation 2- Re: Full Service and Discount Brokerage Activities of Securities Dealers in Branches of Related Financial Institutions,* and *Principle of Regulation 3- Re: Activities of Registrants Related to Financial Institutions* (the "Principles of Regulation").

For further background, please see the notice published with the July 2000 Draft National Instrument and the 1997 Draft Instruments and Policies.

Purpose of the National Instrument and Companion Policy

The purpose of the National Instrument and Companion Policy is to ensure that clients dealing with registrants are provided with certain disclosure about the products they are purchasing and the risks that they face.

Summary of Written Comments Received

The Canadian securities regulatory authorities received five comment letters in response to the publication of the July 2000 Draft National Instrument. The Canadian securities regulatory authorities thank the commenters for providing their comments. For a detailed summary of the comments received, please see Appendix A.

In response to the comments, the Canadian securities regulatory authorities have made a number of changes to the National Instrument. As the changes made to the National Instrument are not considered by the Canadian securities regulatory authorities to be material, the National Instrument is not subject to a further comment period.

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1 In Ontario - (1997), 20 OSCB 6274, (1997), 20 OSCB 6285, (1997) 20 OSCB 6283, (1997) 20 OSCB 6289, (1997) 20 OSCB 6294, (1997) 20 OSCB 6293.

Changes to the National Instrument

1. Part 3 – Disclosure of Confidential Retail Client Information

i. Responses to Comments Received

In response to comments received, the Canadian securities regulatory authorities have

(a) amended section 3.1 (now section 3.2) to include a reference to circumstances "expressly permitted by law";
(b) allowed registrants to provide to a retail client a description of a class of third party in paragraph 3.2(a)(i);
(c) added section 3.4 which provides exemptions that no consent is necessary when confidential information is disclosed in certain circumstances; and
(d) clarified in the Companion Policy that registrants cannot use negative options to obtain consent for the disclosure of confidential client information.

ii. Non-Application of Part 3 in Québec

Part 3 of the National Instrument will not apply to registrants registered in Québec with respect to their dealings with retail clients in Québec because those registrants are subject to *An Act Respecting the Protection of Personal Information in the Private Sector* R.S.Q., c. P-39.1 ("Québec Protection of Personal Information Act"). Registrants in Québec must, with regard to the retention, use and communication of personal information, (a) ensure confidentiality of the personal information through security measures; (b) ensure that such information is accurate and up-to-date; (c) obtain the consent of the person concerned prior to using personal information when such use does not pertain to the purpose of the file or once the purpose of the personal information file has been accomplished; (d) obtain the consent of the person concerned before communicating personal information to third parties; and (e) ensure that the consent given for the use and communication is manifest, free, enlightened, and given for a specific purpose and limited time.[2]

Registrants in Québec may, exceptionally, communicate personal information without the consent of the person concerned in the case, for example, of information communicated to a third party for commercial prospecting purposes. The Québec Protection of Personal Information Act sets forth conditions for such communication. Further, it should be noted that the communication of personal information for study, research or statistical purposes without the consent of the person concerned is subject to the approval of the Commission d'accès à l'information du Québec (the «CAI»). In order for such approval to be granted, the CAI must be of the opinion that the intended use of the personal information is not frivolous and that such information will be used in a manner that will ensure its confidentiality.[3]

Registrants in Québec should also note that their authorized employees, mandataries or agents may have access to personal information without the consent of the person concerned only if the information is needed for the performance by these employees, mandataries and agents of their duties or the execution of their mandate. Finally, registrants in Québec should note that the Québec Protection of Personal Information Act sets forth certain conditions with regard to the communication outside Québec of personal information concerning their retail clients residing in Québec.[4]

The foregoing is not an exhaustive summary and registrants in Québec should address any questions the may have with respect to the protection of personal information of their retail clients to the CAI (1-888-528-7741, website: www.cai.gouv.qc.ca).

iii. Transitional Provision for Obtaining Consent from Existing Retail Clients

In section 4.4 of the Companion Policy, the Canadian securities regulatory authorities recognize that registrants have existing clients that have already provided consent for the disclosure of confidential information. Registrants who have obtained consent from existing retail clients to disclose confidential information do not have to get positive consent from those clients to continue to disclose that information. However, the registrant is required to send out a notice to all retail clients within 90 days of the implementation of the National Instrument that provides retail clients with the information set out in subsection 3.2(a) and notifies them of their right to withdraw their consent.

2. Part 6 – Distribution of Securities in a Financial Institution

The Canadian securities regulatory authorities have removed the requirement to provide certain disclosure in the promotional material of registrants that is distributed by or displayed in an office or branch of a Canadian financial institution. This section was deleted because it is the view of the Canadian securities regulatory authorities that the National Instrument does not generally deal with promotional material and that this disclosure is currently provided to clients in other documentation received, such as a mutual fund prospectus.

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[2] See sections 10 to 15 of the Québec Protection of Personal Information Act.
[3] See sections 18 and 21 of the Québec Protection of Personal Information Act.
[4] See sections 20 and 17 of the Québec Protection of Personal Information Act.

Networking Arrangement Notices

The securities regulatory authority in each of British Columbia, Ontario, Manitoba, Québec and Newfoundland intends to take the necessary actions to have the requirement to file notice of a networking arrangement in its regulation, rules or policies repealed or revoked. With ten years experience, registrants are able to determine what is and is not an acceptable networking arrangement through an examination of existing securities legislation and position papers.

For details about the specific steps taken by any province or territory and the timing of the actions to be taken, please contact staff in that jurisdiction listed below.

In Ontario and British Columbia, upon the implementation of the National Instrument, registrants will no longer have to file a notice of a networking arrangement.

Regulations to be Amended - Ontario

In Ontario, the Commission has made the following amendments to Regulation 1015 of the Revised Regulations of Ontario, 1990, (the "Regulation") in conjunction with the making of the National Instrument as a rule in Ontario. These amendments are advisable to effectively implement the National Instrument.

The amendments are subject to the approval of the Minister of Finance and will come into force upon the implementation of the National Instrument.

1. (1) Subsection 209 (1) of Regulation 1015 of the Revised Regulations of Ontario, 1990 is amended by adding "and" at the end of clause (h), striking out "and" at the end of clause (i) and revoking clause (j).

   (2) Clause 209 (10) (a) of the Regulation is amended by striking out "clauses (1) (a) to (j)" and substituting "clauses (1) (a) to (i)".

2. The definition of "networking arrangement" in subsection 219 (1) of the Regulation is revoked.

3. Section 229 of the Regulation is revoked.

4. This Regulation comes into force on the day that the rule made by the Ontario Securities Commission on May 4, 2001 entitled "National Instrument 33-102 *Regulation of Certain Registrant Activities*" comes into force.

Rescission of the Principles of Regulation

"Principle of Regulation 1 - Re: Distribution of Mutual Funds by Financial Institutions, Principle of Regulation 2- Re: Full Service and Discount Brokerage Activities of Securities Dealers in Branches of Related Financial Institutions, and *Principle of Regulation 3- Re: Activities of Registrants Related to Financial Institutions* are rescinded."

Questions

Questions may be referred to any of:

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The National Instrument

The text of the National Instrument and the Companion Policy follows.

May 11, 2001.

APPENDIX A

SUMMARY OF COMMENTS RECEIVED AND THE RESPONSE OF THE CANADIAN SECURITIES ADMINISTRATORS

NATIONAL INSTRUMENT 33-102
REGULATION OF CERTAIN REGISTRANT ACTIVITIES
AND COMPANION POLICY 33-102CP

DEFINITIONS (NI 33-102, Part 1)	
Definition of "Retail Client" (NI 33-102, section 1.1)	**IDA** - The commentator believes that a $5 million level appears unnecessarily high, considering current thresholds for sophisticated investors under securities legislation are considerably lower. The commentator would like to suggest that the threshold be lowered to the one or two million dollar level. *CSA Response: The CSA are of the view that the $5 million threshold is appropriate.*
LEVERAGE DISCLOSURE (NI 33-102, Part 2)	
Leverage disclosure too onerous (NI 33-102, section 2.1)	**Scotia McLeod** - The provision dealing with leverage disclosure as drafted will create significant practical administrative and evidentiary difficulties as it has the potential to lead to disputes and evidentiary problems in establishing what knowledge the dealer did or did not possess. In addition, the requirement would appear to necessitate establishment of extensive and costly distribution and tracking processes and systems. **IDA -** The commentator believes that the requirement to provide leverage disclosure to all clients when the registrant becomes aware that the client intends to borrow or purchase securities creates an onerous obligation on the part of the investment advisor to inquire as to how clients will fund a purchase of securities. *CSA Response: It is up to the registrant to determine how best to evidence the acknowledgement so that the registrant is satisfied that it has met the requirement. Since the registrant currently maintains files on clients and their transactions, maintaining evidence of the acknowledgement is not an administrative burden. In addition, in the opinion of the CSA, the registrant, as part of its duty to its client, should ascertain if the retail client is leveraging to purchase securities.*
Consistency with other requirements (NI 33-102, section 2.1)	IFIC - The leveraging disclosure requirements, as they apply to mutual fund dealers, will eventually be superseded by the MFDA requirements once it is a recognized SRO. Accordingly, the commentator believes some consideration should be given to ensuring consistency between the National Instrument requirements and any ultimately adopted by the MFDA in its proposed rules, regulations and by-laws. *CSA Response: The provision, as drafted, is consistent with the rules of the MFDA.*

One-time leverage disclosure (NI 33-102, section 2.1)	**Scotia McLeod** - The commentator believes that if the CSA continue to hold the view that specific leverage disclosure requirements are necessary, it should be a one-time disclosure made with the account opening documentation. **CBA** - The commentator believes that annual reminders are an acceptable alternative to the semi-annual requirement for leverage disclosure presently contemplated in the National Instrument. The commentator submits that an annual reminder would suffice, supplemented by additional disclosure of the risks of leveraging in marketing materials which promote leveraging. **IFIC** – The commentator proposes that leveraging disclosure be provided to clients at the time the client opens an account. This could be done as part of a routine mailing to clients or in a separate mailing. For new accounts, the commentator proposes that the National Instrument: 1. Require leveraging disclosure to be included in the account opening form with a client acknowledgement on that form; and 2. Require registrants to send an annual reminder to clients regarding leveraged transactions. The commentator feels that this would be a more consistent requirement for registrants to follow and would ensure that clients are getting this disclosure at least once a year. The current proposal to provide the disclosure within the six month period prior to making a leveraged purchase recommendation or becoming aware of the client's intention to make a leveraged investment may be difficult to monitor. A standardized annual mailing would ensure this information reaches the client regularly. *CSA Response: The CSA are of the view that one-time disclosure may not be sufficient given the lapse of time between opening the account and using leveraged monies to purchase securities. The CSA believe that a retail client should be reminded of the risks and obligations each time leverage is used.*
Clarification of language in leverage disclosure requirement (NI 33-102, subsection 2.1(1))	**CBA** – The commentator recommends that subsection 2.1(1) be amended to add the words "in the client's account" to clarify that transactions are those that involve leveraging by the client for the purpose of investment in the client's account with the registrant. Without this clarification, the subsection as drafted appears to capture also situations where the client is leveraging for the purposes of investment in other accounts. **IFIC –** The commentator suggests that subsection 2.1(1) be amended to add the words "in the client's account" after "…client's intent to employ leveraged monies for the purposes of investment" to ensure that the transactions subject to Part 2 are those that involve the client using leveraging for the purpose of investment in the client's account with the registrant. Otherwise, it appears to potentially capture situations where the client could be using leveraging for the purpose of investment in another account. *CSA Response: The CSA have amended subsection 2.1(1).*
Exemption ambiguous (NI 33-102, subsection 2.1(3))	**IDA** – The commentator believes that the language in the exemption contained in subsection 2.1(3) is unclear. There is some ambiguity as to whether the registrant must obtain an acknowledgement from the client in addition to providing the client with the written disclosure statement. *CSA Response: The CSA have clarified this subsection and indicated that the acknowledgement must also be received.*

Transition period for leverage disclosure	**CBA** - The commentator proposes that the CSA provide a six month period for registrants to amend their account opening forms to comply with the delivery of disclosure requirement. For accounts opened prior to the end of the transitional period, the commentator submits that registrants be given six months to deliver the disclosure statement to clients, without requiring an acknowledgement. **IDA** - As a result of the requirements in the National Instrument for written disclosure statements, client acknowledgements and consents, together with disclosures relating to promotional material, registrants will be required to reprint application forms and advertising material. Consequently, the commentator requests that a provision be included in the National Instrument to permit an effective date for registrant compliance that is six months to a year after the National Instrument comes into force. **IFIC** - The commentators suggest that the National Instrument include a transitional provision for accounts of clients opened prior to the effective date of the National Instrument. For those accounts, the commentator thinks it would be appropriate to require the leveraging disclosure to be made in a mailing to existing clients within six months of the enactment of the National Instrument. *CSA Response: The disclosure requirement does not prescribe the method of delivery of the disclosure. Upon the coming into force of the National Instrument, the disclosure must be given to all clients, whether included in the account opening form or provided as a separate document until such time as it can be included in the account opening form.*
DISCLOSURE OF CONFIDENTIAL RETAIL CLIENT INFORMATION (NI 33-102, Part 3)	
Personal Information Protection and Electronic Documents Act	**Scotia McLeod** - The commentator submits that the relevant provisions in the proposed National Instrument conflict with the Personal Information Protection and Electronic Documents Act. While the Personal Information Protection and Electronic Documents Act will initially apply to federally regulated financial entities, the commentator expects that at least some dealer subsidiaries of federally regulated financial institutions will also come into compliance with the Personal Information Protection and Electronic Documents Act. **IDA -** According to the commentator it would be beneficial if the National Instrument was harmonized with the Personal Information Protection and Electronic Documents Act particularly given the fact that Canadian financial institutions own many of the registrants and therefore, would have to implement two sets of potentially incompatible rules with which to work. *CSA Response: The CSA are of the view that the provisions of the National Instrument are consistent with the Personal Information Protection and Electronic Documents Act. The CSA will monitor the implementation of the Personal Information Protection and Electronic Documents Act and the application of provincial legislation to provincially regulated organizations. The CSA, however, are of the view that by including a reference to circumstances permitted by law in section 3.2, any exception to the requirement that is provided in federal or provincial legislation would be available to registrants.*

Exemption from the requirement to obtain consent (NI 33-102, part 3)	**Scotia McLeod** - The commentator is of the view that the consent requirements contained in the Principles of Regulation stating that no consent is necessary for information shared for internal audit, statistical or record keeping purposes are essential. **IDA -** The commentator is of the view that the consent requirements stating that no consent is necessary for information shared for internal audit, statistical or record keeping purposes was practical and necessary for large FI-related dealers who may integrate certain confidential information with their related financial institutions for purely audit or record-keeping purposes. The commentator recommends the addition of this exception in the National Instrument. **CBA -** The former Principles of Regulation did not require consent for these kinds of transfers of information, and the commentator submits that the same exemptions as were formerly in place need to be retained. *CSA Response: The CSA have included the exception that no consent is necessary when the information is disclosed for internal audit, statistical or record-keeping purposes and such information will not be used for any other purpose.*
Disclosure of confidential information too onerous (NI 33-102, part 3)	**Scotia McLeod** - The overall level of detail that is potentially required to be provided to clients may be so lengthy that it overwhelms clients, thereby materially detracting from attainment of the policy objectives of the consent process. **CBA** - It is the commentator's view that the provisions of Part 3 of the National Instrument regarding the disclosure of confidential retail client information are unnecessarily limiting upon the registrant. *CSA Response: The CSA are of the view that this information is necessary for the retail client to provide informed consent.*
Unknown third party	**Scotia McLeod** - The provision requires the client to be informed in advance of the name of the third party to which the information will be disclosed. In effect, any changes in the parties to which information is to be disclosed that occur subsequent to the time a consent is received would require an additional prior notice to be given to the client and a new consent obtained. That would result in significant cost and administrative burdens. The commentator believes that it should be permissible to provide a more generic description of the type of entity to which disclosures may be made. **IDA** – A question arises regarding the issue where the person is unknown at the time. **CBA** - Disclosing the name of the third party may be problematic if the list is long and particularly, if that person is unknown at the time. It will not always be possible to disclose the name in advance as when agents are replaced or new service providers are chosen. The commentator submits that it should be sufficient that at the time the client's account is set up, the registrant identify the classes of persons who might receive the client's information for necessary or administrative reasons i.e. its affiliates, agents, service providers, legal counsel, government agencies etc. At the time the account is set up, a separate broad generic disclosure about the types of affiliates to whom the dealer desires to disclose information for marketing reasons should also be made. *CSA Response: The CSA have amended the requirement to allow for including a description of a class of third party. The CSA note, however, that some provincial legislation has more onerous requirements in this regard.*

Public information	**CBA** - Not all information about retail clients is confidential. For example, public information such as telephone book information and information in public registries is not confidential. This section differs and is needlessly more restrictive than the Personal Information Protection and Electronic Documents Act which does recognize the existence of public information and does not require consent to disclose public information. **IDA** - Subsection 7(3) of the Personal Information Protection and Electronic Documents Act sets out numerous situations where organizations may disclose personal information without the knowledge or consent of the individual. It would be useful if the National Instrument specifically set out certain items that are permissible to disclose without consent. For example, under paragraph h.1 of sub-section 7(3) of the Personal Information Protection and Electronic Documents Act, publicly available information such as the retail client's telephone number would be permitted; however, under the National Instrument, the registrant would have to utilize section 3.2 and require the consent for any such disclosure. *CSA Response: The CSA recognize that the Personal Information Protection and Electronic Documents Act provides that no consent is necessary for the disclosure of information that is already publicly available and that is specified by the regulations made under that legislation. Currently, no regulations have been enacted.*
Disclosure limited to information that is "Reasonably Necessary" (NI 33-102, section 3.2)	**IDA** - This section is overly restrictive in that it permits a registrant to require a retail client to consent to the registrant disclosing confidential information where disclosure is "reasonably necessary" to provide a product that the client has requested. **IFIC** - The commentator believes the client's consent should generally cover the provision of information to the parties necessary to provide the product or service to the client, all of whom must observe the client's right to confidentiality. This approach is consistent with the federal privacy legislation. *CSA Response: The CSA are of the view that the standard is appropriate.*
"Required by Law" (NI 33-102, section 3.1)	**Scotia McLeod** - The commentator is unclear as to why consent is required for disclosure "except as required by law", and no provision is made for disclosure as permitted by law. **CBA** - Currently, common law permits disclosure without consent in a variety of instances. The *Personal Information Protection and Electronic Documents Act* also permits disclosure of client information without consent in a variety of instances. These exceptions are legal "permissions" not "requirements". There need to be instances set out in the National Instrument such as investigating a crime, where consent is not required. *CSA Response: The CSA have amended section 3.1 [now 3.2] to include a reference to circumstances "expressly permitted by law".*
ACKNOWLEDGEMENT	
Electronic disclosure (CP 33-102, section 1.4)	**IFIC** - The commentator suggests that the Companion Policy also be revised to confirm that registrants may provide disclosure to clients, or obtain acknowledgements from clients, electronically. **Scotia McLeod** - References to "written" disclosure seem to imply the use of paper documentation. The commentator suggests that drafting should reflect the ability of the dealer to provide disclosure, obtain consents and otherwise interact with clients through appropriate electronic means. *CSA Response: The CSA have clarified that registrants may provide disclosure electronically.*

Need for acknowledgement (NI 33-102, subsections 2.1(2) and 6.2(2))	**Scotia McLeod - The commentator does not believe that the disclosure contemplated is significantly more important than other disclosures provided to clients, and that it warrants the additional step of obtaining an acknowledgement from the client that the disclosure has been provided and read.** *CSA Response: The CSA are of the view that it is important for clients to understand the risks associated with leverage and that they also understand from whom they are purchasing products, especially where products of multiple entities are sold. Therefore, in the view of the CSA, it is appropriate to include the requirement for an acknowledgement*.
DISTRIBUTION OF SECURITIES IN A FINANCIAL INSTITUTION (NI 33-102, Part 6)	
Disclosure in promotional material too onerous (NI 33-102, section 6.3)	**Scotia McLeod** - The requirement to include the specified disclosures in all in-branch promotional materials is excessive and cumbersome. The commentator questions the necessity of such a requirement in addition to providing the disclosure at the time of account opening. In addition, the commentator is not convinced there is a policy basis for applying different leverage disclosure requirements to registrants based on where they conduct their activities. **IDA** - The commentator believes that the requirement to provide written disclosure of the information contained in sections 2.1 and 6.3 in all promotional material that is distributed or displayed in an office or branch of a financial institution is an onerous requirement. The commentator is of the view that the objective of this requirement would be adequately served by providing such disclosure in account opening documentation, where the client will acknowledge having read the disclosure. **IFIC** - Including this disclosure in all promotional material dilutes the effectiveness of the disclosure. If the CSA insist that promotional material include disclosure on leveraging, it would be preferable to require this disclosure to be made only on promotional material that specifically promotes leveraging as an investment strategy or option. The disclosure would then be directly relevant to the material and the transaction the client could be contemplating. *CSA Response: The CSA have amended the National Instrument to eliminate the requirement to disclose the information contained in section 2.1 and 6.2 in promotional materials distributed or displayed in an office or branch of a financial institution.*
Distinction between registrants in Canadian financial institution and other registrants (NI 33-102, section 6.3)	**CBA** - The commentator submits that the leverage disclosure requirement should be included in section 2.1 and not in Part 6 and thus be applicable to all registrants. The commentator submits that there is no reason to distinguish financial institution related registrants from other registrants for this purpose. **IFIC** - The commentator questions why the provision of this disclosure is limited to those who engage in securities-related activities through an office or branch of financial institution. As with the general requirements in Part 2, there should be a level playing field and these requirements should be applicable to all registrants. **IDA** - The commentator recommends that if the CSA elect to maintain the requirement to provide disclosure on promotional material, they recommend that a narrower approach be adopted with respect to the disclosure required. Promotional material specifically promoting the purchase of securities through leveraging should contain the disclosure. General product and services promotional material, which could also be used at a dealer branch, should not be caught by this requirement. *CSA Response: The CSA have amended the National Instrument to eliminate the requirement to disclose the information contained in section 2.1 and 6.2 in promotional materials distributed or displayed in an office or branch of a financial institution.*

Leverage disclosure only in promotional material (NI 33-102, section 6.3)	**Confédération des caisses populaires et d'économie Desjardins du Québec** -The commentator believes that the written statement relative to leverage should be limited to publicity material promoting only such types of operations: for example, during an RRSP campaign during which it is proposed to the client to borrow funds in order to contribute to his RRSP. **CBA** – The CBA submits that including the leverage disclosure should not be required to be included in all in-branch marketing materials as it is excessive and unnecessary. They recommend that the leveraging disclosure should only be made in marketing materials that recommend leveraging as an investment strategy. *CSA Response: The CSA have amended the National Instrument to eliminate the requirement to disclose the information contained in section 2.1 and 6.2 in promotional materials distributed or displayed in an office or branch of a financial institution.*
MISCELLANEOUS	
Disclosure in the *Financial Institutions Act* (British Columbia)	**CBA** - The commentator submits that financial institutions related registrants already provide much of the suggested disclosure and that additional disclosure provisions similar to the disclosure required under the *Financial Institutions Act* should not be imposed in the National Instrument. **IFIC** - The commentator queries what is added by requiring the following disclosure elements: 1. the nature and extent of any interest the financial institution has in the transaction, including any commission or other remuneration; 2. the identity of the person paying the commission or other remuneration; and 3. the prohibition against tied selling. In the commentator's view, these elements of disclosure are already adequately covered in the prospectus disclosure required under National Instrument 81-105 and under the federal *Competition Act*. *CSA Response: The CSA have decided not to incorporate the disclosure provisions set out in the Financial Institutions Act of British Columbia into the National Instrument.*
Use of Form 4 Instead of Form 4A	**CBA** - The commentator does not object to CSA's comment that the use of Form 4A will be discontinued, but they would like confirmation that registrants who have obtained registration using a Form 4A will not be required to complete a new Form 4 as a result of this change. **IFIC** - The commentator anticipates that registrations under Form 4A prior to the enactment of the National Instrument would be grandfathered and those registered under the Form 4A would not have to file a Form 4 upon renewal of their registration. The commentator suggests that this could be noted in the National Instrument. *CSA Response: Currently, registration will continue based on Form 4A in those jurisdictions that currently accept the Form. However, once NRD is implemented, the registrant will be required to complete all requisite NRD forms. There will be no abbreviated forms under the NRD system. It is anticipated that Québec will adopt the replacement NRD forms.*

NATIONAL INSTRUMENT 33-102
REGULATION OF CERTAIN REGISTRANT ACTIVITIES

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NATIONAL INSTRUMENT 33-102
REGULATION OF CERTAIN REGISTRANT ACTIVITIES

PART 1 DEFINITIONS

1.1 Definitions - In this Instrument,

(a) **"recognized SRO"** means an SRO that is recognized as a self-regulatory organization by the Canadian securities regulatory authority; and

(b) **"retail client"** means

i) an individual, unless the individual has a net worth exceeding $5 million, or

ii) a person or company, other than an individual, unless the person or company has total assets or annual revenues exceeding $10 million,

but does not include

iii) a Canadian financial institution, or

iv) a person or company registered under Canadian securities legislation.

PART 2 LEVERAGE DISCLOSURE

2.1 Leverage Disclosure

(1) When a registrant opens an account for a retail client or when a registrant makes a recommendation to a retail client to purchase securities using in whole or in part borrowed money, or otherwise becomes aware of a retail client's intent to purchase securities using in whole or in part borrowed money, the registrant shall deliver to the retail client, before the retail client purchases those securities, a written disclosure statement in substantially the following words:

> Using borrowed money to finance the purchase of securities involves greater risk than a purchase using cash resources only. If you borrow money to purchase securities, your responsibility to repay the loan and pay interest as required by its terms remains the same even if the value of the securities purchased declines.

(2) Before executing an order on behalf of a retail client purchasing securities who to the knowledge of the registrant is using in whole or in part borrowed money in connection with the purchase, the registrant shall obtain an acknowledgement from the retail client that specifically refers to the written disclosure statement required by subsection (1) and confirms that the retail client has read the written disclosure statement.

(3) A registrant is not required to comply with subsections (1) and (2) if:

(a) the registrant has delivered the written disclosure statement required by subsection (1) to the retail client and the client has delivered an acknowledgement within the six month period prior to the registrant making the recommendation for purchasing securities by using in whole or in part borrowed money, or otherwise becoming aware of a retail client's intent to purchase securities using in whole or in part borrowed money, or

(b) the registrant is subject to and complies with the leverage disclosure by-laws, rules, regulations or policies of a recognized SRO.

2.2 **Exemption for Margin Accounts** - Section 2.1 does not apply to purchases of securities by a retail client on margin if the client's margin account is maintained with a registrant that is a member of a recognized SRO and the margin account is operated in accordance with the by-laws, rules, regulations or policies of the recognized SRO.

PART 3 DISCLOSURE OF CONFIDENTIAL RETAIL CLIENT INFORMATION

3.1 **Application of this Part –** This Part does not apply to a registrant registered under securities legislation in Québec with respect to its dealings with retail clients in Québec.

3.2 **Consent Required -** A registrant shall hold all information about a retail client confidential and shall not disclose the information to any third party, except as expressly permitted or required by law or the by-laws, rules, regulations or policies of a recognized SRO, unless, before disclosing the information,

(a) the registrant provides at least the following information to the retail client to whom the information pertains:

(i) the name of the third party or a description of the class of third party to which the information will be disclosed;

(ii) the nature of the relationship between the registrant and the third party;

(iii) the nature of the information that will be disclosed;

(iv) the intended use of the information by the third party, including whether the third party will disclose the information to others;

(v) a statement that the retail client has the right to revoke the consent referred to in paragraph (b), and the effect of the revocation; and

(vi) a statement that the retail client's consent under paragraph (b) is not required as a condition of the registrant dealing with the retail client, except in circumstances described in section 3.3; and

(b) the retail client provides consent to the specified disclosure of the confidential client information.

3.3 **Prohibition to Require Consent as a Condition** - No registrant shall require a retail client to consent to the registrant disclosing confidential information regarding the retail client as a condition, or on terms that would appear to a reasonable person to be a condition, of supplying a product or service, unless the disclosure of the information is reasonably necessary to provide the specific product or service that the retail client has requested.

3.4 **Consent not Required** – Despite section 3.2, a registrant does not need to obtain retail client consent to disclose confidential retail client information

(a) for audit, statistical or record-keeping purposes;

(b) to a law enforcement agency, securities regulatory authority or self-regulatory organization;

(c) for the collection of a debt owed by the client; or

(d) to a barrister or solicitor for the purpose of obtaining legal advice.

PART 4 SETTLING SECURITIES TRANSACTIONS

4.1 **Settling Securities Transactions** - No registrant shall require a person or company to settle that person's or company's transaction with the registrant through that person's or company's account at a Canadian financial institution as a condition, or on terms that would appear to a reasonable person to be a condition, of supplying a product or service, unless this method of settlement is reasonably necessary to provide the specific product or service that the person or company has requested.

PART 5 TIED SELLING

5.1 **Tied Selling** - No person or company shall require another person or company

(a) to invest in particular securities, either as a condition or on terms that would appear to a reasonable person to be a condition, of supplying or continuing to supply products or services; or

(b) to purchase or use any products or services, either as a condition or on terms that would appear to a reasonable person to be a condition, of selling particular securities.

PART 6 DISCLOSURE IN RESPECT OF SECURITIES RELATED ACTIVITIES IN A CANADIAN FINANCIAL INSTITUTION

6.1 Application of Part 6 - This Part applies only to registrants conducting securities related activities in an office or branch of a Canadian financial institution.

6.2 Disclosure

(1) When a registrant opens an account for a retail client, a registrant shall deliver a written disclosure statement that the registrant is a separate entity from the Canadian financial institution and, unless otherwise advised by the registrant, securities purchased from or through the registrant

(a) are not insured by a government deposit insurer,

(b) are not guaranteed by a Canadian financial institution, and

(c) may fluctuate in value.

(2) At the time that the account is opened, the registrant shall obtain an acknowledgement from the retail client that specifically refers to the written disclosure statement required by subsection (1) and confirms that the retail client has read the written disclosure statement.

PART 7 EXEMPTION

7.1 Exemption

(1) The regulator or the securities regulatory authority may grant an exemption from this Instrument, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.

(2) Despite subsection (1), in Ontario, only the regulator may grant such an exemption.

PART 8 EFFECTIVE DATE

8.1 Effective Date - This Instrument comes into force on August 1, 2001.

COMPANION POLICY 33-102CP
REGULATION OF CERTAIN REGISTRANT ACTIVITIES

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COMPANION POLICY 33-102CP
REGULATION OF CERTAIN REGISTRANT ACTIVITIES

PART 1 DISCLOSURE

1.1 **Leverage Disclosure** - Registrants are reminded that leveraging is an important factor to consider when determining suitability and when fulfilling other obligations to clients. National Instrument 33-102 Regulation of Certain Registrant Activities (the "National Instrument") in no way implies that the provision of the leverage disclosure statement referred to in section 2.1 of the National Instrument fulfils the registrant's ongoing duties to its clients. There may be circumstances when a registrant, as part of the registrant's general responsibilities, should remind investors about the risks of purchasing securities using in whole or in part borrowed money.

1.2 **Borrowed Money -** Section 2.1 of the National Instrument requires that leverage disclosure be provided to a retail client when a registrant makes a recommendation to a retail client to purchase securities using in whole or in part borrowed money, or otherwise becomes aware of a retail client's intent to purchase securities using in whole or in part borrowed money. This requirement applies whether or not the borrowed money was specifically borrowed for the purpose of purchasing the securities.

1.3 **Client acknowledgement -** The acknowledgements of a retail client referred to in subsections 2.1(2) and 6.2(2) of the National Instrument may be obtained by a registrant in a number of ways, including requesting the retail client's signature, requesting that the retail client initial an initial box or requesting that the retail client place a check in a check-off box. It is the responsibility of the registrant to draw the client's attention to the disclosure. The acknowledgement must be specific to the information disclosed to the retail client (i.e. disclosure regarding the risks of using leverage to purchase securities or the description of the nature of securities) and must confirm that the retail client has read the relevant information.

1.4 **Exemption for Margin Accounts** - Section 2.2 of the National Instrument exempts registrants from the requirement to provide additional leverage disclosure to retail clients opening a margin account. The exemption is provided because the by-laws, rules, regulations or policies of an SRO may already require that clients with margin accounts acknowledge receipt of leverage disclosure in the account opening form.

1.5 **Electronic Means** – All disclosure or consents required by the National Instrument may be delivered by electronic means and are subject to the provisions of all applicable federal or provincial legislation governing the delivery of electronic documents. Reference should also be made to National Policy 11-201 Delivery of Documents by Electronic Means.

PART 2 COMPLIANCE AND SUPERVISORY ACTIVITIES

2.1 **Registrant Premises** - Securities legislation requires that a registrant designate one officer or partner, known as a compliance officer, to be responsible for ensuring compliance by the registrant and its registered personnel with securities legislation and the registrant's written procedures for dealing with its clients. Any office or branch office of the registrant may be designated by the registrant as its central location for a local jurisdiction.

2.2 **Registrant Responsibility to Prevent Client Confusion** - The registrant is responsible for ensuring that clients understand with which legal entity they are dealing, especially if more than one financial service firm is carrying on business in the same location, and the products being sold to them. The client may be informed through various methods, including signage and disclosure. Registrants are reminded of the obligation to carry on all registrable activities in the name of the registrant. Contracts, confirmations and account statements, among other documents, should contain the full legal name of the registrant.

2.3 **Supervision of Sub-branches** - The Canadian securities regulatory authorities permit the operation of sub-branch offices of registrants in certain circumstances. The activities of registrants operating within a sub-branch office are generally supervised by a branch manager in a location other than the sub-branch. The Canadian securities regulatory authorities are of the view that such supervision is appropriate in most circumstances. However, the Canadian securities regulatory authorities will consider the facts on a case-by-case basis to ensure that an appropriate level of supervision is in place.

PART 3 RECORD KEEPING

3.1 **Third Party Access to Information** - All registrants have a duty to maintain proper books and records and to ensure that there are proper safeguards in place to ensure that there is no unauthorized access to information, particularly confidential client information. If the registrant maintains books and records in a central location to which employees of a third party have access, the registrant should be particularly vigilant in ensuring these safeguards are implemented and effective.

PART 4 RETAIL CLIENT CONSENT

4.1 **Application of Part 3 of the National Instrument –** Part 3 of the National Instrument does not apply to a registrant registered under securities legislation in Québec with respect to its dealings with retail clients in Québec. These registrants must comply with *An Act Respecting the Protection of Personal Information in the Private Sector,* R.S.Q., c. P-39.1

regarding the protection of personal information of their clients.

4.2 Obtaining Retail Client Consent - The retail client consent referred to in paragraph 3.2(b) of the National Instrument may be obtained by a registrant in a number of ways, including requesting the retail client's signature, requesting that the retail client initial an initial box or requesting that the retail client place a check in a check-off box.

4.3 Providing Consent – Subsection 3.2(b) of the National Instrument states that the client must "provide consent" to the disclosure of the confidential information. It is the view of the Canadian securities regulatory authorities that a retail client provides consent if the retail client takes positive steps to provide the consent required. Upon implementation of the National Instrument, a registrant that uses a "negative option" to obtain consent to disclose the confidential information does not comply with the requirement to obtain consent. For example, a retail client who does not check a check-off box or initial an initial box cannot be presumed to "provide consent" to the transfer of the information to a third party.

4.4 Consent by Existing Retail Clients – The Canadian securities regulatory authorities recognize that registrants have existing clients that have already provided consent for the disclosure of confidential information. An existing retail client is considered to have provided consent under subsection 3.2(b) if the retail client:

(a) has provided consent, either positively or negatively, to the registrant to disclose confidential client information prior to the implementation of the National Instrument, and

(b) is provided with a notice that contains

(i) the disclosure required in subsection 3.2(a) of the National Instrument, and

(ii) a statement of the right of the retail client to withdraw his or her consent.

This notice should be provided to all existing retail clients within 90 days of the implementation of the National Instrument.

4.5 Timing of Retail Client Consent - Consent to the disclosure of confidential retail client information is to be obtained by the registrant when the information is collected (i.e. upon account opening). However, in certain circumstances, consent with respect to the disclosure of the information should be sought after the collection of the information if the registrant wants to provide the information to a third party not previously identified or if the use by the third party was not initially disclosed.

PART 5 PRODUCTS AND SERVICES

5.1 Opening an Account - The Canadian securities regulatory authorities note that the "products or services" referred to in section 3.3, section 4.1 and section 5.1 of the National Instrument include the opening of an account.

PART 6 RELATIONSHIP PRICING

6.1 Relationship Pricing - The Canadian securities regulatory authorities are aware that industry participants offer financial incentives or advantages to certain clients, a practice that is commonly referred to as relationship pricing. The tied selling provision in Part 5 of the National Instrument is intended to prevent certain abusive sales practices and is not intended to prohibit relationship pricing or other beneficial selling arrangements similar to relationship pricing. By way of example, the Canadian securities regulatory authorities are of the view that Part 5 of the National Instrument would not be contravened in a case where a financial institution offered to make a loan to a client on more favourable terms or conditions than the financial institution would otherwise offer to the client as a result of the client's agreement to acquire securities of mutual funds that are sponsored by the financial institution. They are of the view that Part 5 of the National Instrument would be contravened, however, if the financial institution refused to make the loan unless the client acquired securities of mutual funds that are sponsored by the financial institution, where the client otherwise met the financial institution's criteria for making loans.