

March 11, 2005

No. 2005-008

Suggested Routing: Trading, Legal & Compliance

NOTICE OF AMENDMENT APPROVAL

PROVISIONS RESPECTING IMPEDING OR OBSTRUCTING A MARKET REGULATOR

Summary

Effective March 11, 2005, the Alberta Securities Commission, British Columbia Securities Commission, Manitoba Securities Commission, Ontario Securities Commission and, in Quebec, the Autorité des marchés financiers (the “Recognizing Regulators”) approved amendments to the Universal Market Integrity Rules (“UMIR”) to:

- specifically provide that it is an offence to impede or obstruct a Market Regulator in an investigation, proceeding or the exercise of a power;
- provide that a person who is subject to the jurisdiction of UMIR (“Regulated Person”) shall respond to a request by a Market Regulator forthwith or not later than the date permitted by the Market Regulator as specified in its written request; and
- adopt a definition of “document” and clarify that records which must be provided by a Regulated Person during an investigation are not limited to “records” as contemplated by the audit trail and retention requirements.

Summary of Revisions to the Original Proposal

Based on comments received in response to the Request for Comment contained in Market Integrity Notice 2004-019 issued on August 13, 2004 and based on comments received from the Recognizing Regulators, RS revised the text of the amendments to:

- provide that the Market Regulator may, upon commencement of an investigation, provide written notice to the Regulated Person outlining the subject matter of the investigation and the period or periods of time which are covered by the investigation
- provide that the demand by a Market Regulator for the provision or inspection of information, documents or records shall be in the form of a written or electronic notice;
- provide that the time to respond to a demand by a Market Regulator shall be as specified by the Market Regulator (rather than being “forthwith”);

- specifically outline the ability of a Market Integrity Official to make a demand for the purposes of the exercise of a power under Rule 10.9;
- establish time periods for the retention of information, documents and records relevant to an exercise of a power or to an investigation; and
- make a number of minor editorial change to the drafting of the provisions.

Summary of the Amendments

Impeding or Obstructing a Market Regulator

The amendments provide that a Regulated Person may be disciplined if the Regulated Person knows or could have known after the exercise of reasonable diligence that their actions would impede or obstruct the ability of:

- the Market Regulator to conduct an investigation pursuant to Rule 10.2;
- the Market Regulator to conduct a hearing pursuant to Rule 10.6; or
- a Market Integrity Official to exercise a power under Rule 10.9 (being the general powers granted to govern the trading of securities on a marketplace).

A person would be considered to have impeded or obstructed, if the person, after becoming aware of the investigation, hearing or exercise of power:

- destroys or renders inaccessible any document in their possession or control that is relevant to the investigation, hearing or the exercise of power;
- provides any information in connection with the investigation or hearing or the exercise of power that is false or misleading; or
- persuades or attempts to persuade any person to destroy or render inaccessible any document or provide any information that is false and misleading.

A person would not be considered to have impeded or obstructed if:

- after reasonable due diligence, the person could not have known that the document was relevant to the investigation, hearing or exercise of power or that the information was misleading, false or that it omitted a material fact; or
- their actions were done in accordance with any available defence.

Response to a Request

Previously under Rule 10.2, a Regulated Person was required to respond “forthwith” to a request by a Market Regulator to provide information or records or to allow inspection of information or records or to provide a statement. In certain cases, it is not practical to expect that a person will be able to respond to a request “forthwith” either due to the complexity or scope of the matter that is under investigation. The amendment allows the Market Regulator to set a deadline for a response to a request by the Market Regulator. Under the amendment, the

deadline must be set out in the written or electronic notice that is delivered to the person. If the person fails to respond to the request, the person could be subject to disciplinary proceedings for failure to respond.

Inclusion of “Documents”

The amendment to Rule 1.1 incorporates directly into the Rules the definition of “document” previously found in Policy 10.8. Under that definition, a “document” includes a sound recording, videotape, film, photographs, chart, graph, map, plan, survey, book of account, and information recorded or stored by means of any device.” The amendment adds the word “document” to the investigation provisions and thereby clarifies that records which must be provided by a Regulated Person during an investigation are not limited to “records” as contemplated by the audit trail and retention requirements but rather includes the broad range of things covered by the definition of “document” that may be relevant to the investigation.

Powers of a Market Integrity Official

Rule 10.9 sets out the powers of a Market Integrity Official to govern trading in securities on a marketplace. In exercising those powers, a Market Integrity Official often made demands for the submission of information, documents or records or the ability to inspect such information, document or records. In making such demands, the Market Integrity Official had relied on the general powers of investigation provided under Rule 10.2. The amendments separate the “governing of trading” from the “investigation” function. (The distinction between the two functions became necessary in order to provide different requirements for the retention of documents and records as described below.) Rule 10.9 has been amended to specifically outline the ability of a Market Integrity Official to make demands for the provision or inspection of information, documents or records related to the on-going monitoring of trading.

Retention of Documents and Records

The amendments clarify that documents should be retained in accordance with the procedures established by the Participant or Access Person. In the exercise of a power by a Market Integrity Official, the Market Integrity Official may request, verbally, in writing or electronically, that any document be retained and such documents must be retained for a period of 30 days or such other period as may be permitted or directed by the Market Integrity Official. This retention requirement applies notwithstanding that the policies of the Participant or Access Person may otherwise permit the destruction of the document.

If, within the retention period specified by a Market Integrity Official, the Regulated Person receives notice from the Market Regulator of an investigation pursuant to Rule 10.2, the Regulated Person shall retain any document relevant to the investigation until the later of:

- the first date the document could be destroyed in accordance with the policies of the Participant or Access Person;

- the date on which an order of a Hearing Panel in respect of a hearing for which the document is relevant becomes final and may not be subject to any further review or appeal by any person, body or court; and
- 7 years following the date on which the document or record was created unless the Market Regulator notifies the Regulated Person in writing that no proceeding pursuant to Rule 10.5 shall be commenced by the Market Regulator.

Text of the Amendments

The amendments to the Rules and Policies respecting impeding or obstructing a Market Regulator are effective as of March 11, 2005. The text of the amendments is set out in Appendix "A".

Responses to the Request for Comments

RS received eight comment letters in response to the Request for Comments on the proposed amendments set out in Market Integrity Notice 2004-019. The comments and the response of RS are summarized in Appendix "B". Appendix "B" also contains the text of the relevant provisions of the Rules as the provisions read following the adoption of the amendments. This text has been marked to indicate changes from the original proposal set out in Market Integrity Notice 2004-019.

Questions

Questions concerning this notice may be directed to:

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Appendix “A”

Universal Market Integrity Rules

Amendments Related to Impeding or Obstructing a Market Regulator

The Universal Market Integrity Rules are amended as follows:

1. Rule 1.1 is amended by adding the following definition of “document”:

“**document**” includes a sound recording, videotape, film, photographs, chart, graph, map, plan, survey, book of account, and information recorded or stored by means of any device.
2. Rule 10.1 is amended by adding the following subsections:
 - (5) A Regulated Person shall not do any act that the Regulated Person knows or could have known after the exercise of reasonable diligence would impede or obstruct the ability of:
 - (a) the Market Regulator to conduct an investigation pursuant to Rule 10.2;
 - (b) the Market Regulator to conduct a hearing to make a determination pursuant to Rule 10.6; or
 - (c) a Market Integrity Official to exercise a power under Rule 10.9.
 - (6) Without limiting the generality of subsection (5), a Regulated Person shall be considered to have impeded or obstructed the ability of the Market Regulator to conduct an investigation or a hearing or a Market Integrity Official to exercise a power if the Regulated Person:
 - (a) destroys or renders inaccessible any document in the possession or control of the Regulated Person, whether or not the document is of the form or type that must be retained in accordance with Rule 10.12, that is relevant to the investigation or hearing or to the exercise of power;
 - (b) provides any information, document, record or statement to the Market Regulator in connection with the investigation or hearing or to a Market Integrity Official in connection with the exercise of a power that is misleading or untrue or does not state a fact that is

required to be stated or that is necessary to make the information, document, record or statement not misleading; or

- (c) persuades or attempts to persuade any person by whatever means to:
 - (i) destroy or render inaccessible any document in the possession or control of that other person relevant to the investigation or hearing or to the exercise of power, or
 - (ii) provide any information, document, record or statement to the Market Regulator in connection with the investigation or hearing or to a Market Integrity Official in connection with the exercise of a power that would be misleading or untrue or would not state a fact that is required to be stated or that is necessary to make the information, document, record or statement not misleading.

(7) Without limiting the availability of other defences, a Regulated Person shall not be considered to have breached subsection (5) or (6) if the Regulated Person did not know or could not have known after the exercise of reasonable diligence that:

- (a) the document was relevant to the investigation or hearing or the exercise of a power; or
- (b) the information, document, record or statement was or would be misleading or untrue or that it omitted to state a fact that was required to be stated or that was necessary to make the information, document, record or statement not misleading in light of the circumstance in which it was made or would be made.

3. Rule 10.2 is amended by:

- (a) adding at the end of subsection (1) the phrase “and upon the commencement of such investigation, the Market Regulator may provide written notice to the Regulated Person which outlines the subject matter of the investigation and the period or periods of time which are covered by the investigation”;
- (b) deleting in subsection (2) the phrase “Upon the request of the Market Regulator, any Regulated Person shall forthwith” and substituting the phrase “Upon the written or electronic request of the Market Regulator, a Regulated Person shall, within such time period specified by the Market Regulator”;
- (c) inserting in subsection (2) after each occurrence of the word “information” in clauses (a) and (b) the phrase “, document”; and
- (d) inserting the following as subsection (4):

- (4) If a Market Regulator has provided notice to a Regulated Person pursuant to subsection (1), the Regulated Person shall, notwithstanding any policy or procedure of the Regulated Person with respect to the retention of information, documents or records, retain any document or record in the possession or control of the Regulated Person that is relevant to the investigation by the Market Regulator until the later of:
 - (a) the first date the document could be destroyed in accordance with the policies of the Participant or Access Person;
 - (b) the date on which an order of a Hearing Panel in respect of a hearing for which the document is relevant becomes final and may not be subject to any further review or appeal by any person, body or court; and
 - (c) 7 years following the date on which the document or record was created unless the Market Regulator notifies the Regulated Person in writing that no proceeding pursuant to Rule 10.5 shall be commenced by the Market Regulator.

4. Rule 10.9 is amended by adding the following subsections:

- (3) In connection with the exercise of a power under this Rule, upon the verbal, written or electronic request of the Market Integrity Official, the Regulated Person shall, within the time period specified by the Market Integrity Official:
 - (a) provide any information, document or records in the possession or control of the person that the Market Regulator determines may be relevant to the exercise of a power by the Market Regulator and such information, document or records shall be provided in such manner and form, including electronically, as may be required by the Market Regulator; and
 - (b) allow the inspection of, and permit copies to be taken of, any information, document or records in the possession or control of the person that the Market Regulator determines may be relevant to the exercise of a power by the Market Regulator.
- (4) If a Market Integrity Official has provided notice to a Regulated Person pursuant to subsection (3), the Regulated Person shall, notwithstanding any policy or procedure of the Regulated Person with respect to the retention of information, documents or records,

retain any document or record in the possession or control of the Regulated Person that is relevant to the exercise of the power by the Market Integrity Official for a period of 30 days from the date of the notice or such other period as may be specified by the Market Regulator.

The Policies under the Universal Market Integrity Rules are amended as follows:

1. Section 1.1 of Policy 10.8 is amended by deleting the definition of “document”.

Appendix “B”

Universal Market Integrity Rules

Comments Received on Proposed Amendments Related to Impeding or Obstructing a Market Regulator

On August 13, 2004, RS issued Market Integrity Notice 2004-019 requesting comments on proposed amendments to UMIR related to impeding or obstructing a Market Regulator. In response to that Market Integrity Notice, RS received comments from the following persons:

BMO Nesbitt Burns (“BMO”)
 Global Securities Corporation (“Global”)
 Merrill Lynch Canada Inc. (“ML”)
 Scotia Capital Inc. (“Scotia”)
 RBC Financial Group (“RBC”)
 Simon Romano (“Romano”)
 Westwind Partners Inc. (“Westwind”)
 Joel Wiesenfeld (“Wiesenfeld”)

The following table presents a summary of the comments received together with the response of RS to those comments. Column 1 of the table is also marked to indicate the revisions to the amendments as published on August 13, 2004 as made by RS in response to the comments. Additions are indicated in “red” font and the added text is underlined while deletions from the August 13, 2004 proposal are indicated in “blue” font and the deleted text is struck out.

Text of Provisions Following Adoption of Proposed Amendments As Revised	Commentator and Summary of Comment	Response to Comment
1.1 Definitions “document” includes a sound recording, videotape, film, photographs, chart, graph, map, plan, survey, book of account, and information recorded or stored by means of any device.	BMO – Suggests that the scope of the documents, information and records that may be subject to sanctions imposed pursuant to the Proposed Rules should be limited to documents, information and records that a Participant is required to create and maintain pursuant to UMIR 10.11, Part 11 of the Trading Rules and UMIR 10.12.	Information which is relevant to an investigation or proceeding will not be limited to the “record” required to be maintained by a Participant for the purposes of the audit trail. UMIR already provides a retention requirement in respect of such records.

Text of Provisions Following Adoption of Proposed Amendments As Revised	Commentator and Summary of Comment	Response to Comment
	<p>ML – Concerned that this expansive definition encompasses far more than Regulated Persons are required to retain under applicable laws and regulations.</p>	<p>The obligation to retain a document in addition to those required as part of the audit trail arises only at the time of the commencement of the investigation. This ensures that relevant documents are not destroyed during the time period that the investigation is being conducted and any disciplinary proceedings are undertaken. Documents which have been destroyed in the ordinary course in accordance with the policies of the Participant prior to the commencement of the investigation would not constitute a breach of the proposed rule. RS has revised the amendments to clarify the difference in obligations with respect to the retention of documents based on the exercise of a power under Rule 10.9 and the conduct of an investigation or proceeding under Rule 10.2.</p>
	<p>RBC - Recommends that proposed amendments be amended to limit documents that must be provided to the records required to be maintained under audit and retention requirements under UMIR 10.12 (or, in the alternative, UMIR should set out specifically what documents are to be provided).</p>	<p>The purpose of the rule is not to set out an exhaustive list of the types of documents that must be retained “just in case” the Market Regulator wants to commence an investigation or disciplinary proceedings. The obligation to retain “relevant” documents only arises once an investigation or proceeding is commenced.</p>
	<p>Scotia – Concerned about the inclusion of “document” definition, particularly as it relates to sound recordings of telephone conversation by traders. States that the proposed amendment appears to create a requirement to maintain sound recordings for a period of not less than seven years, pursuant to Rule 10.12. Concerned that, in practice, such sound recordings are currently maintained for a period of approximately 18 months due to limitations of existing technology. Requests clarification that the proposed amendment to the definition of “document” will not result in the imposition of a seven year record retention requirement for such sound recordings. Concerned about apparent inconsistency between the definitions and rules governing record retention requirements issued by the IDA and the proposed UMIR amendments. Notes that IDA By-law 29.7 requires Members to maintain all advertisements, sales literature and client correspondence, whether by</p>	<p>The definition of “document” is taken from the current policy dealing with practice and procedure in a disciplinary hearing. These are the types of “things” for which the Market Regulator must provide disclosure. See response to ML on the definition of “document” above.</p> <p>Each regulator and self-regulatory organization will establish its own standards and time periods for record retention. The time periods envisaged by UMIR are drawn from the CSA Trading Rules with respect to the audit trail. Those records which must be maintained for seven years are specified in Rule 10.11.</p> <p>Under the UMIR provision, the obligation to retain the document for periods longer than required by the policies and procedures of the Participant or other regulatory requirements, only arises upon an investigation or</p>

Text of Provisions Following Adoption of Proposed Amendments As Revised	Commentator and Summary of Comment	Response to Comment
	<p>written or electronic means for a period of five years from the date of creation. Concerned that the proposed definition of “document” appears to encompass, but is not limited to, the materials subject to IDA By-law 29.7. Concerned that proposed amendments change the IDA requirements by extending the record retention period for certain types of materials from five years to seven years. Recommends that RS reconsider its proposed amendments to be consistent with document retention requirements and time periods set out in IDA By-law 29.7.</p>	<p>hearing. In these circumstances, the obligation only extends to documents which are relevant to the hearing or investigation.</p> <p>On a practical basis, if a portion of a sound recording is relevant to an investigation, the Regulated Person may provide RS with an extract of the relevant portion or RS may make a copy of that portion pursuant to the exercise of its powers under Rule 10.2(2)(b). If the parties agree that the extract is a true copy of the relevant portion of any tape, the balance of the sound recording may be disposed of by the Regulated Person in the ordinary course.</p>
<p>10.1 Compliance Requirement</p> <p>(5) A Regulated Person shall not, without legal justification, do any act that the Regulated Person knows or could have known after the exercise of reasonable diligence would impede or obstruct the ability of:</p> <p>(a) the Market Regulator to conduct an investigation pursuant to Rule 10.2;</p> <p>(b) the Market Regulator to conduct a hearing to make a determination pursuant to Rule 10.6; or</p> <p>(c) a Market Integrity Official to exercise a power under Rule 10.9.</p> <p>(6) Without limiting the generality of subsection (5), a Regulated Person shall be considered to have impeded or obstructed the ability of the Market Regulator to conduct an investigation or a hearing or a Market Integrity Official to exercise a power if the Regulated Person:</p> <p>(a) destroys or renders inaccessible any document in the possession or control of the Regulated Person, whether or not the</p>	<p>BMO – States that if Regulated Persons have obligations under proposed UMIR 10.1(5) and (6), RS must provide sufficient details to the Regulated Person to determine whether the Regulated Person, an employee or a client is under investigation, what is the issue under investigation, what documents and records are considered to be relevant to such investigation, when such investigation has been completed and normal documentation retention procedures can resume, whether the matter under consideration is in the exercise of power by a Market Integrity Official pursuant to UMIR 10.9 and what documents, records or information are considered to be relevant to the exercise of such power. Requests liability should be limited to cases where there is an absence of good faith. Requests additional guidance on what RS considers to be “legal justification” under proposed UMIR 10.1(5) and in particular, asks that an explicit inclusion be made for relevance, privilege, jurisdictional challenge to authority of RS to compel documents, or allegation by Participant that the timeline is unreasonable or a abuse of process. Requests that 10.1(5) and (7) use the language of “knew or ought reasonably to have known” to be consistent with other recent proposed amendments to UMIR and requests guidance as to when a Regulated Person “ought reasonably to have known”.</p> <p>Suggests that liability should not arise unless a Regulated</p>	<p>RS has revised the amendments to specifically separate the provisions related to the exercise of a power by a Market Integrity Official (under Rule 10.9) from the provisions related specifically to an investigation and disciplinary proceeding (Rule 10.2).</p> <p>The concept of “legal justification” was simply a restatement of the “defences available” under subsection (7). The statement was intended to be broad and inclusive as the “defences” that are available to a Regulated Person may vary from jurisdiction to jurisdiction. To avoid confusion and to more closely parallel the drafting structure of section 122 of the <i>Securities Act</i> (Ontario) and comparable provisions in other jurisdictions, RS would propose to delete the phrase “without legal justification”.</p> <p>The test used in section 122 of the <i>Securities Act</i> (Ontario) and comparable provisions in other jurisdictions is based on “the exercise of reasonable diligence”. For this reason, the UMIR provision adopts that language and test rather than the “ought reasonably to have known” language which is used in other Rules.</p>

Text of Provisions Following Adoption of Proposed Amendments As Revised	Commentator and Summary of Comment	Response to Comment
<p>document is of the form or type that must be retained in accordance with Rule 10.12, that is relevant to the investigation or hearing or to the exercise of power;</p> <p>(b) provides any information, document, record or statement to the Market Regulator in connection with the investigation or hearing or to a Market Integrity Official in connection with the exercise of a power that is misleading, untrue or does not state a fact that is required to be stated or that is necessary to make the information, document, record or statement not misleading; or</p> <p>(c) persuades or attempts to persuade any person by whatever means to:</p> <p>(i) destroy or render inaccessible any document in the possession or control of that other person relevant to the investigation or hearing or to the exercise of power, or</p> <p>(ii) provide any information, document, record or statement to the Market Regulator in connection with the investigation or hearing or to a Market Integrity Official in connection with the exercise of a power that would be misleading or untrue or would not state a fact that is required to be stated or that is necessary to make the information, document, record or statement not misleading.</p> <p>(7) Without limiting the availability of other defences, a Regulated Person shall not be considered to have breached subsection (5) or (6) if the Regulated Person did not know or</p>	<p>Person acts intentionally to obstruct RS or with a reckless disregard for whether their conduct would impede RS or in a manner that demonstrates a lack of good faith.</p> <p>Global – Suggests that “legal justification” in proposed rule 10.1(5) be modified to expressly include “legal advice”. Concerned that a Regulated Person, acting in good faith and on the basis of legal advice may nevertheless later be found by a hearing panel to have acted with no “legal justification” if the hearing panel disagrees with the legal advice that the Regulated Person relied upon in good faith. Also concerned with the defence created by proposed rule 10.1(7) which applies to Regulated Persons who did not know that the document was relevant to the investigation. States that RS often does not inform Regulated Persons with particulars regarding what the investigation concerns (e.g. RS letter simply states that there is an investigation related to trading in a certain security for a certain period of time). As such, RS does not provide much needed assistance in determining what is relevant to the investigation. Requirements for RS to provide this assistance should be implemented in UMIR.</p> <p>RBC – States that in Market Integrity Notice 2004-019, RS’s summary of proposed 10.1(5) and (6) expressly provided that the offence of impeding or obstructing an investigation, etc. is only applicable in the event that a Regulated Person has been notified by a Market Regulator that an investigation, hearing, etc. is ongoing or pending. Notes that proposed 10.1(5) and (6) do not themselves expressly provide for notice and recommends that they be amended to do so. Notes that the notice from a Market Regulator must have sufficient specificity to allow the Regulated Person to assess whether a particular piece of information is relevant. Notes that the proposed amendments do not provide guidance as to what constitutes an “investigation”. Notes that RS staff routinely contacts Regulated Persons with general inquiries (e.g. trade desk review or market surveillance inquiries). Recommends that proposed prohibited activities should</p>	<p></p> <p>While acting on legal advice is evidence of “good faith” and “due diligence”, the simple act of obtaining legal advice should not act as an absolute insulator. Every court case is evidence of at least two different legal interpretations of the same facts.</p> <p>By its nature, the notice of the investigation can not specify all of the documents which may be relevant to the investigation. The Regulated Person can, however, make the determination as to which documents in its possession relate to trading of the particular security during the period in question. A Regulated Person would not be liable if they could show that they did not know or could not have known after reasonable diligence that the document was relevant to the hearing or investigation.</p> <p>Subsection (5) provides that a Regulated Person shall not due various things if they “did know or could have known after reasonable diligence” that the document was relevant to the investigation or hearing”. This structure requires knowledge which in the ordinary course would come based on notice of the investigation from the Market Regulator. RS is proposing to revise the proposal to specifically provide written notice to any Regulated Person who is under investigation pursuant to Rule 10.2 and to provide written notice to the Regulated Person on the conclusion of the investigation if RS determines not to pursue disciplinary proceedings as against the Regulated Person. RS has revised the amendment to separate requirements related to the exercise of a power by a Market Integrity Official in the administration of the marketplace from the requirements related to an investigation or hearing.</p>

Text of Provisions Following Adoption of Proposed Amendments As Revised	Commentator and Summary of Comment	Response to Comment
<p>could not have known after the exercise of reasonable diligence that:</p> <p>(a) the document was relevant to the investigation or hearing or the exercise of a power; or</p> <p>(b) the information, document, record or statement was or would be misleading or untrue or that it omitted to state a fact that was required to be stated or that was necessary to make the information, document, record or statement not misleading in light of the circumstance in which it was made or would be made.</p>	<p>apply only upon being notified in writing by a Market Regulator that a specific investigation has commenced or is pending. Requests that RS adopt the practice of providing written notice to Regulated Persons when an investigation has been completed. Recommends that Regulated Persons who cooperate in good faith and for whom there is no evidence of a deliberate intent to obstruct or impede a market regulator or of reckless and wanton disregard for the completeness of information should not be subject to disciplinary proceedings. Concerned that 10.1(7) requires a Regulate Person to conduct reasonable diligence on every document within its organization and across all business units prior to destruction. Concerned that this will result in onerous internal controls, administrative burdens and compliance costs. Suggests that proposed amendments be amended to require Regulated Persons to conduct reasonable diligence only on documents that could reasonably be expected to be relevant to an investigation, hearing, etc. Requests clarification of the term “legal justification” and suggests that a claim by a Regulated Person of any type of privilege recognized in law should not constitute an offence under UMIR.</p> <p>Scotia - Notes that proposed Rule 10.2(2)(a) requires a Regulated Person only to “provide any information, [document] or record in the possession or control of the person...” and recommends that such clarification or defence be incorporated into subsection 7 of Rule 10.1.</p>	<p>The defence which is provided requires only “reasonable” diligence. To be able to claim the protection of the defence, the Regulated Person would not have to demonstrate an exhaustive search within the organization and between business units. One would expect that a search would be conducted of the “likely” places where such relevant information would be maintained.</p> <p>The defence has been cast broadly. It does not require that the Regulated Person prove that the document was outside its possession or control. Instead the offence requires RS to show that the document was within the possession or control of the Regulated Person.</p>
<p>10.2 Investigations</p> <p>(1) The Market Regulator may, at any time, whether or not on the basis of a complaint or other communication in the nature of a complaint, investigate the conduct of a Regulated Person other than an Exchange or QTRS <u>and upon the commencement of such investigation, the Market Regulator may provide written notice to the Regulated Person which outlines the subject matter of</u></p>	<p>BMO – Notes that in a Participant's day-to-day contact with RS (e.g. where RS telephones Participant staff directly for details about a particular trade) , it is difficult to ascertain whether information requests are requests for voluntary production of information or whether they are pursuant to RS's authority to conduct an investigation under 10.2. If the proposed rules are to impose regulatory liability for their conduct in relation to day-to-day telephone requests from RS, then RS must clarify the nature of its requests and state that such day-to-day requests are</p>	<p>See response to BMO comment on Rule 10.1.</p> <p>RS attempts to set deadlines which are reasonable in the circumstances. If RS and the Regulated Person disagree fundamentally on what period should have been given to respond to a request and the Regulated Person is subsequently charged under this Rule, RS would have to convince a Hearing Panel that there has been a violation of this Rule and the Hearing Panel would review the circumstances of the request.</p>

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<p><u>the investigation and the period or periods of time which are covered by the investigation.</u></p> <p>(2) Upon the <u>written or electronic</u> request of the Market Regulator, a <u>any</u> Regulated Person shall, <u>within such time period specified forthwith or not later than the date permitted by the Market Regulator as specified in the written request by the Market Regulator:</u></p> <p>(a) provide any information, document or records in the possession or control of the person that the Market Regulator determines may be relevant to a matter under investigation and such information, document or records shall be provided in such manner and form, including electronically, as may be required by the Market Regulator;</p> <p>(b) allow the inspection of, and permit copies to be taken of, any information, document or records in the possession or control of the person that the Market Regulator determines may be relevant to a matter under investigation; and</p> <p>(c) provide a statement, in such form and manner and at a time and place specified by the Market Regulator on such issues as the Market Regulator determines may be relevant to a matter under investigation provided that in the case of a person other than an individual, the statement shall be made by an appropriate officer, director, partner or employee or other individual associated with the person as is acceptable to the Market Regulator.</p> <p>---</p>	<p>requests under 10.2 Further suggests that 10.2 should limit investigations to situations where RS has reasonable ground to believe that a violation of UMIR has occurred or is about to occur. Notes that classifying day-to-day requests this way is actually undesirable as will slow down the process of resolving day-to-day matters. Suggests an interim measure where for 2 years RS provides written notice if it is considering taking action under proposed rules. Notes that Participant staff regularly interacts with RS under 10.9 under extreme time pressure and suggests that it is unfair to extend proposed liability to these discussions where there is no intent to mislead. Requests clarification as to whether proposed amendments apply to requests for information under trade desk reviews, as such requests do not reference any authority under UMIR. Notes that powers under 10.2 should not be used by RS to compel responses to RS surveys by unreasonable deadlines (e.g. MIN 2004-011). RS's power to make requests should be limited to situations where it is necessary for RS to obtain the information in order to carry out regulatory responsibilities under UMIR 10.2, 10.6 and 10.9.</p> <p>ML – Suggests that RS specify how it will determine what constitutes a reasonable deadline for information requests. RS must make this clear as failure to comply could result in disciplinary sanction.</p> <p>RBC – Suggests that proposed 10.2(2) be amended to provide that all requests by a market regulator be reasonable and that a Regulated Person has the ability to seek an extension within the timeframe specified in the market regulator's request upon reasonable grounds.</p> <p>Romano – Suggests that the Rule should explicitly state that the date specified must be reasonable in the circumstances, as RS Staff have on occasion set unreasonable deadlines. Further suggests that it should be explicitly provided that legally privileged documents are not required to be disclosed.</p>	<p></p> <p>See response to BMO comment on Rule 10.2.</p> <p>See response to BMO comment on Rule 10.2.</p> <p>See response to BMO comment on Rule 10.2.</p>

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<p><u>(4) If a Market Regulator has provided notice to a Regulated Person pursuant to subsection (1), the Regulated Person shall, notwithstanding any policy or procedure of the Regulated Person with respect to the retention of information, documents or records, retain any document or record in the possession or control of the Regulated Person that is relevant to the investigation by the Market Regulator until the later of:</u></p> <p><u>(a) the first date the document could be destroyed in accordance with the policies of the Participant or Access Person;</u></p> <p><u>(b) the date on which an order of a Hearing Panel in respect of a hearing for which the document is relevant becomes final and may not be subject to any further review or appeal by any person, body or court; and</u></p> <p><u>(c) 7 years following the date on which the document or record was created unless the Market Regulator notifies the Regulated Person in writing that no proceeding pursuant to Rule 10.5 shall be commenced by the Market Regulator.</u></p>	<p>Scotia - Seeks clarification of Rule 10.2 where a document has been inadvertently lost due to human error. States that a Regulated Person should not be subject to discipline because a particular document cannot be produced in circumstances where there is no intention on the part of the Regulated Person, or individual employee, to impede or obstruct the Market Regulator.</p> <p>Westwind – Suggests that RS should clarify that the rule applies to intentional delays and destructions and not to delays in delivery outside the control of the Regulated Person (e.g. problems with storage firms). Notes that previously standard response time given to TSE members to respond to inquiries by the regulation division at TSE was 10 business days, while now response times requested by RS are commonly 1-5 business days. States that this shortening of response time does not recognize the difficulty and resources needed to pull together the large quantity of information that RS typically requests. Recommends that RS publish a response time schedule which is based upon the age and quantity of the information requested. Notes that information subject to this rule should be clearly outlined in writing and a deadline given such that information subject to a request is not kept for an indefinite period of time. States that this should not be added to standard RS information request letters and should only be used in a limited number of situations with a maximum hold period of 6 months to 1 year. Notes that the rules make almost all forms of communication or firm assets subject to the rule. Suggests that there should be limits placed on what is included and what is relevant otherwise violation is virtually guaranteed.</p>	<p>The burden is on RS to show that a document is in the possession or control of the Regulated Person when the Regulated Person fails to produce the document or destroys the document. RS must also be able to show that the Regulated Person knew or could reasonably have known after reasonable diligence that the document was relevant to the investigation or hearing.</p> <p>See response to RBC comment on Rule 10.1.</p>
<p>10.9 Power of Market Integrity Officials</p> <p><u>(3) In connection with the exercise of a power under this Rule, upon the verbal, written or electronic request of the Market Integrity Official, the Regulated Person shall, within</u></p>		

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<p><u>the time period specified by the Market Integrity Official:</u></p> <p><u>(a) provide any information, document or records in the possession or control of the person that the Market Regulator determines may be relevant to the exercise of a power by the Market Regulator and such information, document or records shall be provided in such manner and form, including electronically, as may be required by the Market Regulator; and</u></p> <p><u>(b) allow the inspection of, and permit copies to be taken of, any information, document or records in the possession or control of the person that the Market Regulator determines may be relevant to the exercise of a power by the Market Regulator.</u></p> <p><u>(4) If a Market Integrity Official has provided notice to a Regulated Person pursuant to subsection (3), the Regulated Person shall, notwithstanding any policy or procedure of the Regulated Person with respect to the retention of information, documents or records, retain any document or record in the possession or control of the Regulated Person that is relevant to the exercise of the power by the Market Integrity Official for a period of 30 days from the date of the notice or such other period as may be specified by the Market Regulator.</u></p>		
<p>General Comments</p>	<p>BMO – Suggests that, where regulatory sanctions may result for failure to meet a deadline for the production of documents, records, information, or statements pursuant to UMIR 10.2, or as the result of other legitimate disputes regarding the provision of information, records, etc. by a Regulated Person to RS, there should be an alternative</p>	<p>To date, there have been relatively few instances of a Regulated Person failing to respond. RS does not believe that a more extensive review structure is warranted. Both RS and the Regulated Person must recognize that they would have to defend their position before a Hearing Panel. As such, RS must act</p>

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	<p>mechanism to resolve disagreements between RS and Regulated Persons without necessarily resorting to formal discipline proceedings or the threat thereof.</p>	<p>reasonably and the Regulated Person must respond in a reasonable manner.</p>
	<p>Westwind – Does not object to the purpose of the rule, but wants to ensure that it is used by RS only in cases of intentional delay or destruction of requested material and not as a tool to threaten Regulated Person staff.</p>	<p>See response to the general comment of BMO above.</p>
	<p>Wiesenfeld – Notes that, in their dealings, RS and Regulated Persons may have differences regarding documents that are/may be privileged, not relevant or not within the jurisdiction of RS to require (e.g. documents generated by a bank's compliance or internal audit function that primarily deal with its dealer subsidiary). Further, RS and Regulated Persons may have differences regarding timelines, with RS failing to have sufficient patience for the circumstances of the Regulated Person (e.g. records in storage, personnel unavailable, requests very extensive). Suggests that such issues regarding obligation to produce documents in the context of an investigation that arise between RS and Regulated Persons should be resolved at first instance by an interim non-disciplinary proceeding. States that only a failure by a Regulated Person to abide by the ruling of a non-disciplinary adjudicator should be grounds for a disciplinary proceeding for impeding or obstructing to be instituted against the Regulated Person.</p>	<p>See response to the general comment of BMO above.</p>