



**BY EMAIL**

June 4, 2012

The Secretary of the Commission  
Ontario Securities Commission  
20 Queen Street West  
Suite 1900, Box 55  
Toronto, Ontario M5H 3S8

Email: [comments@osc.gov.on.ca](mailto:comments@osc.gov.on.ca)

Dear Sir:

**RE: PROPOSED MAPLE RECOGNITION ORDERS**

We are responding to the OSC's notice and request for comment (the "Notice") on the proposed recognition orders for Maple Group Acquisition Corporation ("Maple"), TMX Group, TSX and CDS ("Proposed Orders"). It is evident that a significant amount of consideration was given to the terms and conditions in the Proposed Orders and we appreciate the opportunity to comment.

***General Comments***

*Vertical clearing model.* While we understand that the Proposed Orders were drafted in response to an application, and that the issues were raised in the course of the Commission's review of Maple's proposal, it is our view that the merits of moving from a cost-recovery clearing model to a vertically integrated monopoly were never meaningfully debated. Instead, many terms and conditions have been proposed to deal with the impact of this change. The lack of a focused debate is unfortunate, as the adoption of the vertical clearing model is one of the most critical market structure issues that the Canadian securities industry has faced, and there are examples from a number of other jurisdictions of the chill on competition created by vertical clearing. We have avoided these problems in Canada and yet are choosing to replicate the model in an environment where there are no competitive forces to lessen the potential for abuse. Oversight, no matter how strong, is not as effective as the absence of the incentives for anti-competitive behavior. Without using rules or fees as barriers, a clearing agency could simply prioritize its owners' needs over those of competitors, and impact competition by decreasing efficiency in the provision of its services. While there may

have been extensive discussion about these issues within the OSC it is not reflected in the Notice and draft CDS order.

Impact on competition. Although the OSC has attempted to address concerns related to the ability of the Maple shareholders to affect the competitive balance in the provision of trading, listing, clearing and market information services, we remain of the view that the Proposed Orders provide them scope to unduly influence business outcomes. Through individual or collective decisions related to market access for discount, retail and institutional clients, and decisions related to products listed on competing market venues, the Maple shareholders possess the ability to dictate winners and losers in the market, and can and have done so without express agreements or arrangements. A review of the various marketplace offerings since the advent of multiple markets demonstrates the role that ownership has played in determining success or failure. Meaningful focus on the above-noted types of decisions will be needed or the multiple layers of enhanced oversight will be rendered ineffective.

Cross-margining. As a final general note, we appreciate the overall completeness of the summary of comments, but raise one objection. The response to why common ownership of CDS and CDCC is critical to achieving cross-margining efficiencies was superficial, surprisingly, as it is such a key point. We continue to believe that such efficiencies would be available under the current model. Regardless, we hope that – assuming the transaction is ultimately approved – they do materialize, since in our view they would be the only benefit to the capital markets of the inclusion of CDS in Maple.

### ***Specific Comments on Terms and Conditions***

#### **1. Governance and other conflicts of interest-related criteria**

“Original Maple shareholder” definition and application. Many governance and conflicts-related provisions throughout the Proposed Orders incorporate this concept. Some, alternatively, use “significant Maple shareholder”. While there may be certain provisions that should only be binding on existing shareholders, we do not understand why items put in place to deal with governance and conflicts should be limited to a point in time. If an entity was to take a 5% position in Maple (an obvious candidate would be an Alpha shareholder that is not currently a Maple shareholder), the conflicts would be no different than with the original Maple shareholders. Examples of the application of the definition are the terms and conditions about identifying and managing conflicts relating to the ownership of Maple; prohibiting agreements or arrangements regarding the coordination of order routing activity; independent dealer representation; and disclosure to clients about routing to a Maple marketplace or when acting as underwriter in connection with securities to be listed on a Maple-owned exchange.

Listings-related conflicts. Aside from the disclosure requirement for underwriters, there are no terms and conditions relating to non-preferencing by Maple shareholders in relation to listings. Since the Maple shareholders can heavily influence and/or determine where a company or fund seeks a listing, there should at the very least be prohibitions on

Maple shareholders regarding these activities similar to those relating to coordination of routing activity.

Commission resources. The extensive work on feedback tools and approvals is commendable, but it is resource intensive at both the staff and Commission levels. All of these mechanisms are important to deal with the actual and perceived conflicts going forward, but the enhanced oversight could impact the Commission's responsiveness – not just to Maple but also to other regulated entities. We urge the Commission to ensure that this is carefully considered.

Ability to monitor and enforce. Associated with the issue of resource intensiveness is the fact that conflicts-related concepts are often subjective and many of the restrictions (such as reliance on best execution principles and not ownership to guide routing, and the prohibition against entering into preferencing arrangements, etc.) will be very difficult to monitor and enforce. This does not only impact the Commission and staff, but also raises the effectiveness of the certification requirement at the exchange level. Not only are we concerned about the ability of the Commission and staff to monitor and enforce compliance with the terms of the Proposed Orders, but, at a practical level, wonder how the CEO and general counsel would be in a position to ensure that individuals employed by shareholders, such as senior personnel at banks or pension funds, are meeting their obligations, as set out in the Maple, TMX Group, TSX recognition order. Further, there are obligations in Schedule 4, the terms and conditions for TMX Group, which require its regulated marketplaces to carry out compliance reviews of Maple dealers and their affiliates. Is it contemplated that TMX Group exchanges will again perform desk reviews or is it expected that IIROC will take on this responsibility? In either case, what is the remedy if there are deficiencies? How would TMX Group be expected to sanction such dealers?

Nominations. We appreciate the thoughtful construction of the framework for nominations but note two concerns. First, it appears from Schedule 1 that regardless of the terms and conditions to ensure independence and diversity, Maple shareholders still retain the ability to nominate almost all of the directors of the various subsidiaries, in addition to controlling the voting. Together, these could negate some of the impact of the proposed controls. Second, we applaud the inclusion of a nominee from an unaffiliated marketplace, but are concerned that one nomination to be agreed upon among all unaffiliated debt and equity marketplaces will pose challenges, especially when some of the issues could impact various entities very differently (debt versus equity, exchange versus ATS). Perhaps an additional seat or some ability to influence the choice of independent directors could be contemplated.

Maple marketplaces/trading facility. As a practical matter, we note that the definitions of "Maple marketplace" and "Maple trading facility" may be too broad, since it is possible for a Maple affiliated entity to own part of an unaffiliated marketplace.

Conflicts and confidentiality. The TSX draft recognition order in Schedule 5 and terms and conditions applicable to original Maple shareholders in Schedule 6 contain restrictions on the use of information gained through management or oversight of

exchange operations. A significant or original Maple shareholder may also be an important customer of an unaffiliated marketplace who may wish to hold discussions with users to help form strategies for new products. There should therefore be an onus on TSX and on Maple shareholders to ensure that TSX's competitors' information obtained as a user of those competitors' services is not shared with TSX.

## **2. Fees and Fee Models**

*Fee setting/cost allocations, etc.* Further to the above note on Commission resources, prior approval of new fees and fee models for all Maple entities would require the Commission to enhance its expertise in the area of fee setting versus the status quo of satisfying itself that the fees are fair and do not create barriers to access. Similarly, reviews of cost allocation and transfer pricing are have not traditionally been the purview of securities commissions and will pose challenges from a resource perspective.

## **3. Other Resource Intensive Terms and Conditions**

As noted above, the Proposed Orders would require Maple and its affiliates and subsidiaries to meet numerous review and reporting obligations. In addition to those above regarding governance, there is reporting by various committees, such as the Regulatory Oversight Committee and MPACs, provision of minutes of meetings, annual reporting by TMX Group on compliance reviews and deficiencies, an annual requirement on CDS to report on its risk assessment against IOSCO-CPSS principles, a requirement on CDS to hire an independent third party every four years to review and prepare a report on CDS' risk model, and many others. We include this partial list to reinforce our concern that although the enhanced oversight model is needed it will put an unprecedented burden on the OSC and its staff.

In summary, we continue to have concerns about the impact of the Maple acquisition on competition in the Canadian capital markets, but once again commend Commission staff for their efforts in working through the many details, and the Commission's interest and focus on these very important issues.

Yours truly,



Cindy Petlock  
General Counsel & Corporate Secretary

cc: Richard Carleton, CEO  
Rob Cook, President  
Mark Faulkner, Vice President, Listings & Regulation