

B.11

SROs, Marketplaces, Clearing Agencies and Trade Repositories

B.11.2 Marketplaces

B.11.2.1 Aequitas Innovations, Inc. and Neo Exchange, Inc. – Application by Aequitas Innovations, Inc. and Neo Exchange, Inc. for Variation of Recognition Order Reflecting Acquisition by Cboe Canada Holdings, ULC – Notice of Commission Approval and Variation of Recognition Order

NOTICE OF COMMISSION APPROVAL AND VARIATION OF RECOGNITION ORDER

APPLICATION BY AEQUITAS INNOVATIONS, INC. AND NEO EXCHANGE, INC. FOR VARIATION OF RECOGNITION ORDER REFLECTING ACQUISITION BY CBOE CANADA HOLDINGS, ULC

On May 27, 2022, the Ontario Securities Commission approved the acquisition (the **Acquisition**) of Aequitas Innovations, Inc. (**Aequitas**) by Cboe Canada Holdings, ULC, a Canadian subsidiary of Cboe Global Markets, Inc. (**Cboe Global**) and issued an order under section 144 of the *Securities Act* (Ontario) varying the decision of the Commission to recognize Aequitas and Neo Exchange, Inc. (**Neo Exchange**) as exchanges (the **Recognition Order**) to reflect the structure of the new entities under the Acquisition. The order varying the Recognition Order took effect on June 1, 2022.

Notice of the application by Aequitas and Neo Exchange to approve the Acquisition and to vary the Recognition Order, together with the proposed terms and conditions of exchange recognition, was published for comment in the OSC Bulletin on April 7, 2022, at (2022), 45 OSCB 3845 (the **Notice**).

The Commission received two comments in response to the Notice. A summary of the comments received and the responses to the comments, prepared by Aequitas and Neo Exchange, is published together with this notice and the Recognition Order.

Staff notes that Cboe Global, the ultimate parent company of Aequitas and Neo Exchange, was not required to be recognized as an exchange, although it is subject to certain terms and conditions of the Recognition Order. Generally, the Commission's approach to the recognition of exchanges is that the Commission will seek to recognize any entity that carries on exchange-like functions, whether or not the entity actually operates an exchange. The consequence to this approach is that in some cases, the Commission has recognized an ultimate parent company of an exchange operator as an exchange because the entity carried out exchange functions. Based on Staff's review of the application of Aequitas and Neo Exchange and the representations made therein, Cboe Global does not carry out exchange activities in respect of Aequitas and Neo Exchange that would warrant recognition as an exchange.

SUMMARY OF COMMENTS AND RESPONSES

Note: The responses to the comments reflect the views of Aequitas Innovations Inc. (**Aequitas**) and Neo Exchange Inc. (**Neo**) and do not necessarily reflect the views of the Ontario Securities Commission (**OSC**).

The following is a summary of comments received in response to the Notice and Request for Comment regarding the application by Aequitas and Neo for an order varying the decision of the OSC to recognize Aequitas and Neo as exchanges to reflect the proposed acquisition by Cboe Canada Holdings, ULC. (**Notice**), published on April 7, 2022, and the responses thereto.

Two comment letters were received in response to the Notice from the following industry stakeholders:

- Toronto Futures Options Exchange, Inc. (**tFOSE**); and
- TMX Group Limited (**TMX Group**).

General Comment	Aequitas and Neo Response
<p>Level Playing Field – Regulatory Regime</p> <p>There should be equivalence in the manner in which TMX Group Limited (TMX Group) and Cboe Global Markets, Inc. (Cboe) are regulated, as owners of Canadian exchange operations (<i>TMX Group</i>).</p>	<p>The terms and conditions included in the recognition orders of Nasdaq CXC Limited (Nasdaq Canada) and Ensoleillement Inc., CNSX Markets Inc. (CNSX), and Neo and Aequitas, under their current form, are in fact all different to those included in the TMX Group recognition order.</p> <p>This variation in terms and conditions is supported by the fact that, unlike the TMX Group, none of these exchanges own or control in Canada a derivatives market, derivatives and securities clearing and settlement infrastructure or a transfer agent, nor do they represent the same market dominance or pricing power across their various business lines.</p> <p>Variation in terms and conditions set forth in exchange recognition orders may also evolve as a result of changing circumstances. The most notable variations resulting from changing circumstances were in relation to the TMX Group: following its demutualization, in 2022; following the acquisition of the Montreal Exchange, in 2008; and following the Maple transaction, in 2012.</p> <p>In the case of Aequitas and Neo, the proposed terms and conditions:</p> <ul style="list-style-type: none"> • meet the OSC’s exchange recognition criteria; • are consistent, where appropriate, with recognition orders of comparable Canadian exchanges; and • balance investor protection and efficient markets, while accommodating innovation and competition that foster liquid markets and capital formation in Canada.

<p>Level Playing Field – Fairness</p> <p>There should not be differences in recognition orders that hinder competition (<i>TMX Group</i>).</p>	<p>The claim that all exchanges should have identical regulatory requirements to ensure fair competition assumes that a one size fits all approach is appropriate. However, a one size fits all approach ignores key differences between exchanges.</p> <p>Moreover, recognition order terms and conditions are, in fact, largely consistent amongst the various Canadian exchanges that do not have a dominant market position. In the case of the TMX Group, the terms and conditions imposed on it not only reflect the need to ensure proper oversight, but also seek to address competition concerns by restricting the exchange from using its dominant market position anti-competitively.</p> <p>Many of the terms and conditions applicable to the TMX Group were the result of the Maple transaction. The Maple transaction caused the TMX Group to represent the vast majority of issuers listed in Canada, 85% of all trading in Canadian listed securities, 100% of all trading in Canadian listed derivatives, all exchange traded securities and derivatives clearing and settlement operations, while also holding a virtual monopoly for Canadian market data products. Considering this level of market dominance, and potential resulting anti-competitive behaviour, the terms and conditions imposed on the TMX Group are, in our view, appropriate.</p> <p>Aequitas' and NEO's application are only proposing to support its existing business lines, none of which enjoy a position of market dominance. We acknowledge that expanding our service offerings and/or achieving market dominance in certain business lines could lead to a variation of our recognition order.</p> <p>We also wish to note that Cboe is subject to significant regulatory requirements in the U.S. and that any comparison of the regulatory burdens between the TMX Group and Cboe should consider the entire suite of obligations they are both subject to.</p> <p>With respect to the proposal of the Chair of the Neo board not being an independent and the absence of independent dealer representation on the Neo board, both of which the TMX Group assert are inconsistent with the principle of a level playing field, we note the following:</p> <ul style="list-style-type: none"> • As discussed in our application letter, any public interest concerns that may arise from the Chair of the NEO Board being a non-independent director are addressed by the appointment of an independent lead director. In its comment letter, tFOSE supports and acknowledges the merits, of this proposed approach. • With respect to independent dealer representation on the TMX Group board, we note that this was the consequence of the Maple transaction and, in particular, the strong representation of significant capital markets participants on the TMX Board. The term and condition seeks to ensure that independent dealers would have representation and that their voice could be heard. We additionally note that Aequitas and Neo are not currently required to include representatives of independent dealers on their boards.
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	<p>It is not clear why their acquisition by Cboe should change this.</p>
<p>Governance, reporting and certification</p> <p>Cboe should be subject to the same requirements as the TMX Group (<i>TMX Group</i>)</p>	<p>Unlike TMX Group, whose business is principally conducted in Canada, Neo is one of multiple businesses and marketplaces operated by Cboe globally.</p> <p>Under the proposed recognition order, Cboe must ensure that Aequitas and Neo conduct their business in a manner that is consistent with the public interest, facilitate the allocation of sufficient financial and non-financial resources, and provide the OSC with all information in its custody or control related to the business of Neo or Aequitas upon request. Taken together, these terms and conditions appropriately support the protection of the Canadian public interest and that the OSC is able to request and review information it deems necessary to conduct its oversight responsibilities.</p>
<p>Listing of shares of significant shareholders, their affiliates or competitors</p> <p>Neo should be subject to same requirements with respect to conflicts of interests, including with respect to policies and procedures, including prior approval by the OSC in case of any changes, as the TSX (<i>TMX Group</i>)</p>	<p>Neo is, and will continue to be, subject to the requirement to establish, maintain and require compliance with policies and procedures that identify and manage conflicts of interest or potential conflicts of interest arising from the listing of the shares of any significant shareholder or an affiliate of a significant shareholder of Neo. This requirement is substantially the same as the requirements imposed on Nasdaq Canada and CNSX under their recognition order. The prior notice requirement imposed on the TMX Group may be explained by its dominant market position and its ownership structure.</p> <p>With respect to listing of competitors, Neo is subject to requirements that are more onerous than what is required under the Nasdaq Canada and CNSX recognition orders. The framework applicable to the TMX Group in respect of competitor listings is quite different. This difference is, again, explained by the TMX Group's dominant market position and ownership structure. Moreover, the TMX Group's recognition order does not impose any requirement for it to form a Conflicts Committee, or to impose any of the other requirements it describes in its comment letter (competitor can request that a matter be referred to the Conflicts Committee; TSX is required to refer certain competitor listing-related matters to the OSC). These are, in our view, measures that the TMX Group has, in consultation with the OSC, determined are advisable in order to address the listing related conflicts of interest that result from its dominant market position and ownership structure.</p>

Fees, Fee Models, Incentives and Routing

There should be additional restrictions applied on Neo to eliminate the risk of tied-selling or coordinated order routing connected to Cboe's other international markets (*TMX Group*).

In respect of order routing, Neo will be subject to a requirement in its recognition order not to support, encourage or incent, either through fee incentives **or otherwise**, Neo marketplace participants, **Cboe affiliated entities or significant shareholders** to coordinate the routing of their orders to Neo Exchange.

In respect of tied selling, Neo will be subject to a requirement not to, through any fee schedule, any fee model or any contract, agreement or other arrangement with any marketplace participant **or any other person or company**, provide any discount, rebate, allowance, price concession or other similar arrangement for any service or product offered by Neo **or Cboe and its affiliated entities and significant shareholders** that is conditional upon: (A) the requirement to have Neo be set as the default or first marketplace a marketplace participant routes to, or (B) the router of Neo being used as the marketplace participant's primary router.

The other tied selling restrictive provisions included in section 12 of Section 2, and section 29 of Schedule 3, to Neo's recognition order are similarly broadly drafted and extend to Cboe affiliates and significant shareholders.

Accordingly, TMX Group's concerns regarding the recognition order's tied selling and order routing provisions appear to be misplaced.