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October 14, 1999

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Securities Commission
Manitoba Securities Commission
Ontario Securities Commission
Office of the Administrator, New Brunswick
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland
Securities Registry, Government of the Northwest Territories
Registrar of Securities, Government of the Yukon Territory

c/o Daniel P. Iggers, Secretary
Ontario Securities Commission
Suite 800, Box 55, 20 Queen Street West
Toronto, ON M5H 3S8

- and to -

Claude St. Pierre, Secretary
Commission des valeurs mobilières du Québec
800 Victoria Square
Stock Exchange Tower, P.O. Box 246, 17th Floor
Montreal, Quebec H4Z 1G3

Dear Sirs/Mesdames:

Re: Comments on Proposed National Instrument 21-101 Marketplace Operation and Proposed Companion Policy 21-101CP Released July 2, 1999

We are responding to the request for comments on Proposed National Instrument 21-101 - Marketplace Operation ("NI 21-101") and Proposed Companion Policy 21-101CP ("21-101CP") which were released by the Canadian Securities Administrators ("CSA") for comment on July 2, 1999.

As a general comment, the CSA's initiative regarding Alternative Trading Systems ("ATSs") is timely and we support the move to deal with ATSs on a comprehensive basis. Having said this, the CSA's intention should be the promotion of creative and innovative trading for different investors with different needs. The CSA's goal should be to strengthen Canadian markets while maintaining visibility and fair access. The burden of excessive rules increases costs and hinders creativity and innovation; market forces should determine costs, not rules.

The general approach of NI 21-101 is to essentially require that an ATS:

- be regulated as an exchange
- become a member of an existing exchange
- be registered as a dealer that is a member of the Investment Dealers Association of Canada (the "IDA") (although in theory membership in another SRO is possible, at this time no alternative to the IDA exists in Canada)

Given that regulation as an exchange may not be feasible for an ATS in light of the significant costs involved and other considerations, membership in an existing exchange or the IDA may be the only viable alternative for many ATSs. However, this may raise concerns from a conflict of interest perspective. In other words, these organizations may, unconsciously or otherwise, discourage competition that would challenge their existing franchises or that of their members. This could, of course, be accomplished either by refusing membership to a particular ATS or by imposing conditions that are impractical. As a result, any regulatory system established for ATSs should address this potential problem, perhaps by either:

- ensuring that regulation as an exchange is a viable and economic option or
- by requiring that the membership categories and rules established by the exchanges or the IDA are reasonable and designed to foster competition and not as a barrier to entry.

Dealing with the series of questions raised in the CSA's notice, we would comment as follows:

Question 1:

Is 40 percent of the average daily dollar value of the trading volume in any type of security traded in Canada an appropriate threshold or should it be lower (for example, 10 percent or 20 percent)?

Question 2:

Should the CSA retain the second volume threshold set out in paragraph 6.5(1)(b) of the Instrument relating to 50 percent of the average daily dollar value of the trading volume in any security *and* 5 percent of the average daily dollar value of the trading volume in any type of security trading in Canada?

Questions 1 and 2:

The threshold question is whether there is any need for a notification requirement such as this. The regulatory regime being proposed requires that an ATS be regulated and this notification requirement is designed to give the CSA the option of requiring an ATS to be regulated as an exchange when certain volume thresholds are reached. If an ATS is not being regulated as an exchange, by definition NI 21-101 would require its activities to be overseen by an exchange or the IDA. The CSA should be keeping in touch with the exchanges and the IDA on an ongoing basis to determine whether the existing regulatory requirements a particular ATS is required to meet are adequate rather than imposing an obligation on the ATS to notify the CSA when certain thresholds are met.

If these notification requirements are retained, any percentage chosen as the threshold for giving notice to allow the CSA to consider whether an ATS should be regulated as an exchange is necessarily arbitrary and certainly the levels should not be lower than those proposed in NI 21-101. Having said this, it is important that any potential for overlap or duplication in regulation be avoided. In other words, any ATS regulated on an appropriate basis under an equivalent and credible regulatory regime in another jurisdiction should not be subject to additional requirements in this country.

Question 3:

Is it feasible to require ATSs to calculate the volume threshold when dealing with foreign markets?

It is probably feasible to calculate this threshold but, as noted above, it may not be necessary given that it is questionable whether a notification requirement concerning volume is desirable.

Question 4:

Should trading of securities of reporting issuers on an ATS be limited to securities that are listed on a recognized exchange?

No. It would be beneficial to have an alternative for trading securities not listed on traditional exchanges, such as the Canadian Dealer Network.

Question 5:

Which foreign markets should be included in the Appendix to the Instrument?

ATSs should not be restricted to trading in securities on the four foreign markets listed in Appendix A. All foreign markets should be included.

Question 6:

Should there be a *de minimis* exemption for principal trading in order to encourage dealers to invest in ATSs?

Brokers who wish to participate should be allowed to do so as principal, which will add liquidity. Market forces will weed out those who cannot satisfy clients.

Question 7:

What type of activities should lead the CSA to the conclusion that an ATS is carrying on business in a jurisdiction?

Question 8:

What limitations should be placed on the ATS' activities in a dealers' jurisdiction if the CSA adopts the Home Jurisdiction Approach?

Question 9:

Are there any alternative approaches that should be considered by the CSA?

Question 10:

Should the foreign ATSs be required to be a regulated entity in its home jurisdiction? If so, must it be regulated under the securities laws of the home jurisdiction?

Question 11:

Should access to the foreign ATS be through a Canadian dealer contacting a dealer that is regulated in the foreign jurisdiction (home jurisdiction of the foreign ATS)?

Question 12:

Should this approach be limited to acceptable home jurisdictions, and if so what jurisdictions should be approved as acceptable?

Question 13:

Should the availability of the Home Jurisdiction Approach depend on the activities of the registered dealer in the jurisdiction where the investor is located?

Question 14:

Should the answer to the above question depend upon whether the home jurisdiction is another Canadian jurisdiction or a foreign jurisdiction?

Question 15:

Should the availability of the Home Jurisdiction Approach depend on whether the Canadian registered dealer is an affiliate of the ATS?

Question 16:

Should remote access be limited to dealers which are members of a self-regulatory organization?

Questions 7 to 16:

We agree that the key factor in determining whether an ATS is carrying on business in a jurisdiction is dependent on the nature of the contact with individual investors in that jurisdiction. The crucial issue is what flows from that contact. NI 21-101, in essence, proposes that where an ATS deals with investors directly in a jurisdiction, the CSA member in that jurisdiction must regulate it directly. If, however, an ATS deals only with dealers (and not with investors directly), a "home jurisdiction" approach will be adopted (in other words, the ATS will be required to be regulated by the jurisdiction where its head office is located).

The "home jurisdiction approach" makes sense, but the scope should be broader. It should apply not only where the ATS deals only with dealers, but with institutional investors as well (at least those meeting certain criteria as to size and sophistication). In other words, the key factor in determining whether a jurisdiction will regulate an ATS directly is whether the ATS is dealing with retail investors in that jurisdiction. This approach will give institutional investors better market access while still preserving investor protection. Further, the "home jurisdiction approach" should not be limited to ATSs regulated elsewhere in Canada but to ATSs regulated in any foreign jurisdiction, at least those that have a credible regulatory system.

Question 17:

Should ATSs be allowed to trade outside the closing bid-ask of the principal market or should they be required to trade within the closing bid-ask on the principal market?

Should this change if the exchanges extend trading to include evening hours?

Question 18:

Should ATSs operate in the pre-opening period of the principal market or should there be a no-trade time period until the principal market has opened for trading?

Questions 17 and 18:

Yes, to offer Investors a greater choice. However, if a regulator (for example the NYSE) decides to halt a stock for the dissemination of information, the ATS's should halt that stock too.

Question 19:

Should the display of data include the volume at each price level for the best five prices on the bid and offer for each participant system?

No. The display of pre-trade information is solely at the client's discretion. Clients own their orders. Only once a trade happens does the information become public information posted on a consolidated tape. Clients come to ATSs for anonymity. Further, traditional brokers do not show their "upstairs" order to the floor.

Question 20:

Should an ATS have to contract with the exchange on which a security is listed or should it still be able to choose the exchanges that will perform the market regulation function? This question should be considered from both of the following perspectives: pre-exchange restructuring and post-exchange restructuring.

Question 21:

If an ATS is going to trade all listed equities (senior and junior) should it be required to contract with both exchanges for oversight or with only one? This question should be considered from both of the following perspectives: pre-exchange restructuring and post-exchange restructuring.

Questions 20 and 21:

No. ATS's should not be required to contract with an exchange in order to list a security- exchanges compete with ATSs. Instead, the focus should be on ensuring that an ATS is subject to an appropriate level of oversight in its home jurisdiction.

Question 22:

Should any restrictions be placed upon an ATS when there is a regulatory halt imposed by the market where the security is listed or quoted? Should it matter if a halt is imposed by a recognized quotation and trade reporting system?

Yes. If a trading halt is imposed by any market on which a security trades, for example pending dissemination of information, trading on all other trading systems should be halted as well.

We appreciate the opportunity of commenting on this instrument. If you have any questions about our comments please do not hesitate to contact the undersigned or David Cheop at (204) 956-8444.

Yours truly,

W. T. Wright, Q.C.

WTW/jb