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NEWS

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The 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
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Registrar of Securities, Nunavut
c/o John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario
M5H 3S8

Claude St. Pierre, Secretary
Commission des valeurs mobilières du Québec
800 Victoria Square
Stock Exchange Tower
P.O. Box 246, 22nd Floor
Montréal, Québec
H4Z I G3

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Dear Sirs/Mesdames:

Re: Proposed National Instrument 21-101 Marketplace Operation and Companion Policy 21-101 CP Market Place Operation; and National Instrument 23-101 Trading Rules and Companion Policy 23-101 CP Trading Rules

Bloomberg L.P.[1] appreciates the opportunity to comment on the Notice of Proposed National Instruments and Companion Policies (collectively, the "ATS Proposal") published by the

[1] Bloomberg is engaged in the business of providing its customers with financial market information, news and analytics via its worldwide electronic network (the "BLOOMBERG PROFESSIONAL service"). Bloomberg also services its broker-dealer and institutional customers' communications needs and facilitates their transaction of business by offering various additional services, including electronic messaging, non-anonymous offerings, bids wanted and equity order-routing and indications of interest, and linkages to certain exchanges within and outside the United States, e.g. the Arizona Stock Exchange and Tradepoint Investment Exchange. More than one and a half million text messages and several billions of dollars of securities transaction messages are sent and received by Bloomberg customers across the BLOOMBERG PROFESSIONAL service every business day.

Canadian Securities Administrators (the "CSA"). The intent of the ATS Proposal is to allow new trading forums, such as "alternative trading systems" ("ATSs"), to operate effectively in Canada and to provide a regulatory framework for their oversight.

The ATS Proposal would affect the business of Bloomberg's wholly owned subsidiary, Bloomberg Tradebook LLC ("Tradebook"). Through Tradebook, Bloomberg offers its institutional and broker-dealer customers, and other broker-dealers that access the Tradebook system via Nasdaq's SelectNet, the opportunity to buy and sell U.S. equity securities via the BLOOMBERG service. Tradebook is considered an ATS by the U.S. Securities and Exchange Commission (the "SEC") and is regulated pursuant to Regulation ATS as an alternative trading system that is not required to register as an exchange. Regulation ATS requires that Tradebook file an initial report on Form ATS with the SEC and certain quarterly reports. Tradebook's ATS is also operated as an electronic communications network ("ECN") in compliance with the SEC's Order Execution Rules, Rules 11Ac1-1 and 11Ac1-4 under the U. S. Securities Exchange Act of 1934 (the "Exchange Act"). Tradebook has received a no-action letter from the staff of the SEC's Division of Market Regulation with respect to such compliance.[2]

Tradebook currently holds a license as an International Dealer with the Ontario Securities Commission and provides access to its ATS within the limits of that registration to participants in Ontario and provides similar access on an exempt basis to participants in certain other provinces. Tradebook is currently applying for a dealer license in British Columbia.

Definitions and exclusions: "marketplace" and "exchanges"

The Regulation of ATSs in Canada and the United States

Vendors of market data and financial information, such as Bloomberg, provide a wide variety of financial market data, news and analytics and communication services to its subscribers. Subscribers, such as brokers and their customers, use these services to communicate with each other. Such services include electronic bulletin boards which list information on current markets or prices and on which certain dealers post quotations. The customers of those dealers can view prices and either telephone or e-mail the dealer that posted the quotation if they wish either to purchase or to sell the security at the quoted price or to negotiate a price. These communications services also include order-routing services such as the Direct Order Turnaround system ("DOT") used by the New York Stock

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[2] See Letter from Dr. Richard R. Lindsey to Roger D. Blanc (January 17, 1997), SEC No-Action Letter, 1997 SEC No-Act LEXIS 55 (the "Tradebook ECN No-Action Letter"). The Tradebook ECN No-Action Letter was subsequently extended and remains in effect.

Exchange (the "NYSE"). There also are services that display the quotations of a single dealer and allow the customers of a single dealer to enter orders for execution against the bids and offers of that dealer.

The growth in these kinds of services raises fundamental questions for securities regulators. Such services increase competition between markets and spur the introduction and growth of new technologies. Securities regulators in many jurisdictions are working to reshape their securities regulations to accommodate traditional markets, encourage the growth of new markets and promote fairness, efficiency and transparency. The United States has addressed these issues with Regulation ATS and Canada is addressing substantially the same issues with its ATS Proposal.

Bloomberg notes that the ATS Proposal published by the CSA has been modeled on Rule 3b-16 and Regulation ATS under the Exchange Act. Rule 3b-16 defines terms used in the definition of "exchange" under the Exchange Act. Regulation ATS provides the framework for the regulation of "alternative trading systems" in the United States. Under Rule 3b-16, a system is deemed to be an exchange only if it both (a) brings together the orders of multiple buyers and sellers and (b) uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other and under which the parties entering orders on the system agree to the terms of a trade. The ATS Proposal uses nearly the identical language in its definition of a marketplace and, by extension, its definition of an exchange, but as noted below does not incorporate into the National Instrument, which forms part of the ATS Proposal, the carefully designed, express exclusions from the definition in Rule 3b-16.

Exclusions from the definition of "marketplace": single-dealer and order-routing systems

In fashioning Rule 3b-16, the U.S. Securities and Exchange Commission (the "SEC") excluded three kinds of systems from its definition of an exchange: order-routing systems; single-dealer quotation systems; and systems that automate the activities of registered market makers. The SEC also excluded from the definition electronic bulletin boards, that is, systems that merely provide information to subscribers about other subscribers' trading interest but do not also provide facilities for execution. In addition, the SEC provided in Rule 3a1-1 under the Exchange Act that a system that complies with Regulation ATS is exempt from the definition of "exchange".

Accordingly, a system that might fit the definition of an exchange in Rule 3b-16 but that also would qualify as an ATS can elect whether to register as an exchange or instead to file Form ATS and be regulated under Regulation ATS. Indeed, Bloomberg Tradebook, Instinet and several other ATSs have elected to be regulated under Regulation ATS while Island and Archipelago elected to apply for registration as exchanges. (Since making that decision, Archipelago then entered into arrangements with the Pacific Stock Exchange that effectively supersede its application for registration, we understand.)

Like the SEC's Rule 3b-16, the Companion Policy expresses the CSA view that order-routing systems and electronic bulletin boards are not "marketplaces" for purposes of the ATS Proposal. Unlike the SEC's Rule 3b-16, however, single-dealer quotation systems are not excluded from the proposed definition of "marketplace" in the ATS Proposal. As a result, it appears that these types of systems would be subject to the requirements of the National Instrument. For purposes of clarity, Bloomberg respectfully suggests that it might be preferable to incorporate all exclusions directly into the National Instrument, rather than divide the definition and the exclusions into two separate instruments and include among those exclusions an express exclusion for single-dealer quotation systems.

In explaining its exclusion of single-dealer systems, the SEC noted that single dealer systems should not be considered exchanges because such systems "merely provide more efficient means of executing the trading interest of separate customers with one dealer."[3] In other words, the SEC viewed single-dealer systems as simply an outgrowth of an already regulated activity, dealer interaction with customers. Bloomberg urges the CSA to take a similar approach and to exclude single-dealer quotation systems from the definition of a "marketplace". The CSA members already have jurisdiction over dealers and little if any additional regulatory purpose would be served by regulating single-dealer systems also as marketplaces. In cases where vendors are supplying hardware and/or software to dealers for use in their single-dealer systems, it would make even less sense to regulate the vendors. In this respect, vendors' electronic facilities are essentially similar in operation to telephone, telefax, courier services and other means of communication. The vendor of such services is not more than a supplier of products and services to the entity, a dealer, that is itself subject to the full panoply of dealer regulation under Canadian securities laws.

With respect to order-routing systems, Bloomberg notes that Companion Policy 21-101CP at 2.1(5)2 confirms that a system that merely routes orders for execution to a facility where the orders are executed is not a "marketplace" for the purposes of National Instrument 21-101. Section 2.1(6) of Companion Policy 21-101CP, however, suggests that an order-routing service might require registration as a dealer under applicable securities legislation. In Bloomberg's view, it would be helpful and appropriate for the CSA to provide additional guidance on the circumstances in which order-routing facilities will require registration as a dealer. Order-routing systems that merely permit an institutional investor to transmit an order through an information and communication system (such as Bloomberg) in circumstances where the order will ultimately be routed to the floor of a stock exchange for execution or routed to a registered dealer for execution, should not raise any securities law regulatory concerns and should not require the imposition of a dealer registration requirement.

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[3] Securities Exchange Act Release No. 40760 (December 8, 1998).

Bloomberg believes, moreover, that communications between dealers and customers should not be regulated. Order-routing services, like the telephone, the mail or electronic communications providers, should not be regulated as part of the securities business.

The definition of "established non-discretionary methods"

The definition of "marketplace" in National Instrument 21-101 is modeled in significant part on the definition of an exchange in the SEC's Rule 3b-16. The further explication of "marketplace" in Part 2 of Companion Policy 21-101CP, however, raises a question regarding the scope of the definition of "marketplace" and its application. Section 2.1 states that two of the characteristics of a "marketplace" are that it brings together orders for securities of multiple buyers and sellers and it uses established, non-discretionary methods under which the orders interact with one another, both of which tests track Rule 3b-16. The latter part of Section 2.1(4) states, however, that common examples of "established, non-discretionary methods" include "a computer system ... through which orders interact, or any other trading mechanism that provides a means or location for the bringing together and execution of orders." The language "through which orders interact" is so broad, Bloomberg respectfully suggests, as to swallow the key element in the definition of a marketplace contained in Section 2.1(2)(b), that the orders interact through the use of established, non-discretionary methods. Bloomberg recommends that this possibly unintended result be cured by adding the following language to the end of the penultimate sentence of Section 2.1(4) to read ", in each case that sets rules dictating the interaction of orders entered into the system, including trading procedures and priorities."

Market Regulation

The notice that accompanies National Instrument 21-101 discusses the possibility that market regulation of ATSs could be performed by a separate division or subsidiary of an exchange. Bloomberg is of the view that the question of separating market regulation from market operations is a complex one. The NYSE, for example, believes that its regulatory activities are an important part of its brand and an important element of what attracts listed companies to its market. At the same time, at the urging of the SEC, the National Association of Securities Dealers, Inc. is in the process of separating its regulatory function from its market operations. Bloomberg thinks that there is no obvious or self-evident answer to this question for the Canadian markets.

Trading Rules and Disclosure and Display Requirements

Best Execution Requirements

Section 5.1 of National Instrument 23-101 Trading Rules would impose a best execution requirement on dealer acting as agents for customers. Bloomberg is concerned that such an obligation is not appropriate for ATSs. As an ATS under U.S. law, the Tradebook system is operated

by a broker-dealer, Tradebook. Tradebook, however, does not act as a traditional broker-dealer in its operation of the ATS.

ATSs are essentially passive vehicles that do not undertake any duty to "find" the best market by routing orders to other liquidity pools. Institutional and broker-dealer participants of the Tradebook system and other ATSs do not expect an ATS to access external liquidity pools or to search for best execution. The role of an ATS is to provide innovative technology so that its clients can determine their individual trading strategies for obtaining best execution on each security traded. The ATS does not provide brokerage services in the traditional sense of intermediating between the investor and the marketplace. Some ATSs, however, such as the Tradebook system, may link to one another to provide users with access to multiple liquidity pools. ATSs are one of the tools which participants can use to search for best execution. Market participants have access to many different tools in the market, including telephones, direct links to brokers and ATSs. ATSs do not assume traditional agency roles in secondary markets. Responsibility for best execution should rest with a user of an ATS who effects or performs a customer order, not with the ATS itself.

Although there is no explicit statutory exemption in the United States pursuant to which ATSs are not subject to the active responsibilities of traditional broker-dealers and therefore of best execution, this view is understood and accepted by regulators and market participants in the United States. This view is necessary for ATSs to function as ATSs, given that ATSs are not traditional broker-dealers. ATSs have benefited investors and the market by introducing trading innovations. To encourage ATSs to continue to offer these advantages to the Canadian market, we believe the CSA should also articulate a standard of best execution that takes into account these facts and acknowledges that a duty of best execution should not attach to ATSs and similar electronic trading systems or their operators.

Short Selling Rule

Section 3.1 of National Instrument 23-101 Trading Rules prohibits the short sale of an equity security, except under certain limited conditions. The SEC has questioned the continuing utility of its own short sale rule in a context in which U.S. securities markets are rapidly moving to a decimal pricing environment where the minimum trading increment will be reduced from one-sixteenth to one penny.[4] Given that Canadian markets are also likely to introduce decimal pricing, Bloomberg respectfully suggests that the CSA defer imposing the proposed short sale rule at this time.

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[4] *See* Securities Exchange Act Release No. 42037 (October 20, 1999).

"Trade Through" Rule

Section 5.1(2) of National Instrument 23-101 Trading Rules would impose a trade through rule that, in concept, makes sense for retail orders. Bloomberg respectfully suggests, however, that the CSA consider providing an exception for block-sized orders, such as Cdn$100,000 in the case of equities and 100 contracts in the case of options, in view of the need to accommodate the relatively more complex best execution considerations and trading techniques involved in the handling of such orders.

Risk Disclosure

Section 6.8 of National Instrument 21-101 requires an ATS to provide disclosure to its subscribers that securities traded through the ATS may not be securities listed on a Canadian exchange or may not be securities of a reporting issuer in Canada. In addition, an ATS must obtain an acknowledgement from each subscriber that it has received the required disclosure before any order for a security that is not traded on a Canadian exchange is entered onto the ATS by the subscriber. While the proposed risk disclosure requirements might be appropriate if an ATS were open to retail users, subscribers to the Tradebook system are broker-dealers and institutional investors that are sophisticated and do not require repeated reminders on this matter. If necessary with respect to non-retail investors, Bloomberg believes that this disclosure should be required only at the time that a customer becomes a subscriber of the ATS. In addition, even if technically feasible, providing this disclosure and obtaining an acknowledgement before each order for a non-exchange traded security is entered onto the ATS would impose a heavy administrative and systems burden on the trading procedures.

Trade Reporting

Form 21-101F3 indicates that an ATS will have to provide quarterly trading information with respect to all Canadian and foreign securities traded on its system. Bloomberg believes that, as proposed, this trade reporting provision is over-inclusive and that a more focused reporting requirement would be more appropriate. For example, the country of the principal exchange on which a security is traded ought to have primary jurisdiction over trade reporting in that security. We respectfully urge that the CSA limit the reporting requirement to transactions in securities where either the issuer is organized in Canada and has a trading market for its securities in Canada or the particular trade occurs on a Canadian exchange and the Canadian exchange is the principal market for the security.

Display Requirements

The notice that accompanies National Instrument 21-101 states that the CSA are of the view that displaying customer limit orders that improve the bid or offer of the market maker's orders increases competition which, in turn, increases price discovery. Section 6.1 of National Instrument 23-101 Trading Rules would require a marketplace participant to disclose to its marketplace the price and

size of customer orders below Cdn$100,000 for equities and 100 contracts for options. Bloomberg respectfully recommends that the CSA incorporate into that requirement a "Display Alternative" modeled on the alternative in paragraph (c)(5) of Rule 11Acl-4 under the Exchange Act.

The SEC's Rule 11Ac1-4 requires market makers to make publicly available any superior prices that the dealer quotes through a private system, including an ATS. A market maker may comply with Rule 11Ac1-4 by changing its quotation on the Nasdaq montage to reflect the superior price or it may deliver its better priced orders to an ECN, provided that the ECN complies with the "Display Alternative" in paragraph (c)(5) of Rule 11Ac1-4. Under the Display Alternative, a market maker that is displaying a better priced order in an ECN than its quotation on Nasdaq need not update its quotation in Nasdaq if the ECN disseminates to Nasdaq its "top of the file", i.e., the best bid and offer in the ECN, for display under the ECN's name in the Nasdaq montage and provides equal execution access to that quotation to any registered NASD broker-dealer. Under the Display Alternative, customer limit orders that provide superior prices are integrated into the public quotation stream. At the same time, trading anonymity is preserved because an ECN, in complying with the public display requirement, identifies itself, rather than the subscriber that placed the order.

Bloomberg notes that in some cases anonymity serves an important function within the pricing mechanism of the markets, especially for large orders. Also, it may be important as a trading strategy for a dealer to trade anonymously for its own interest or the interest of a customer and it can do that through an ECN. This trading technique works well in the United States and is beneficial to the market at large. Bloomberg urges the CSA to permit market participants to comply with their customer limit order display requirement through a similar display alternative mechanism.

Jurisdiction and Extraterritorial Application

Jurisdiction

Section 14.1 of National Instrument 21-101 states that if an ATS is registered as a dealer in a jurisdiction in Canada and is providing access only to registered dealers in a local jurisdiction, the ATS is exempt from the requirement to be recognized as an exchange or registered as a dealer in the local jurisdiction. Bloomberg believes that the scope of Section 14.1 should be expanded so that an ATS would not have to register as a dealer in a local jurisdiction if it were providing access only to registered dealers *and prescribed institutional investors*. A list of appropriate institutional investors can be readily established from existing securities law rules.[5] If an offering were so limited, it would not

[5] For these purposes the permitted category of institutions might be the entities meeting the definition of a "designated institution" in the Ontario Securities Act. A "designated institution" in Ontario means: (1) a

(Footnote continued)

appear necessary that the offering party would have to obtain a separate dealer license to provide access for the ATS to this list of subscribers.

In addition, Bloomberg believes that a clarification of Section 14.1 would be helpful. As drafted, it is not clear whether an ATS is exempt from the requirement of being recognized as an exchange or registering as a dealer in a local jurisdiction when the ATS is registered in one jurisdiction in Canada and is providing access only to registered dealers and, under the proposed expansion of the

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(Continued footnote)

financial intermediary; (2) the Federal Business Development Bank; (3) a subsidiary of any company referred to in subparagraph (1) or (2), where the company beneficially owns all of the voting securities of the subsidiary; (4) the Government of Canada or any province or territory of Canada; (5) any municipal corporation or public board or commission in Canada; (6) a mutual fund, other than a private mutual fund, having net assets of at least $5,000,000; (7) a trusteed pension plan or fund sponsored by an employer for the benefit of its employees and having net assets of at least $5,000,000; (8) a registered dealer; and (9) a company or person, other than an individual, recognized by the Commission as an exempt purchaser. Where a portfolio manager or financial intermediary, acting as a trustee or agent for a person or company whose account is fully managed by it, purchases or sells securities on behalf of the person or company, the person or company shall be deemed to be a designated institution.

Alternatively, the permitted category of institutions might be the entities meeting the definition of a "qualified institutional buyer" ("QIB") given in Rule 144A under the U.S. Securities Act of 1933 (the "Securities Act"). Under that rule, there are three broad categories of QIBs: institutional investors that, to be qualified, must meet a $100 million portfolio requirement; banks and savings and loans which must, in addition to the $100 million requirement, meet a $25 million net asset requirement; and securities dealers registered under the Exchange Act that need to meet only a $10 million portfolio requirement or, alternatively, can rely on Rule 144A in connection with certain riskless transactions with a qualified institutional buyer. There are also separate provisions relating to the calculation of the $100 million portfolio by a family of investment companies and a holding company and its constituents. Finally, an entity wholly owned by qualified institutional buyers other than banks or an insurance company is also a qualified institutional buyer.

The following is a list of entities in the first category of qualified buyer that must meet the $100 million dollar requirement: (1) an insurance company as defined by the Securities Act; (2) a registered investment company or a business development company as defined by the Investment Company Act; (3) a Small Business Investment Company licensed by the Small Business Administration; (4) any employee benefit plan established by a state, or its political subdivision, or any agency of the state or political subdivision; (5) any employee benefit plan defined by Title I of ERISA; (6) certain collective and master trusts used for employee benefit plans; (7) any business development company as defined under the Investment Advisers Act; (8) any investment adviser registered under the Investment Advisers Act; (9) any organization described in Section 501(c)(3) of the Internal Revenue Code, any corporation, Massachusetts or similar business trust, or partnership.

provision, prescribed institutional investors in a local jurisdiction. It would seem that the rule should also exclude the ATS from having to register as an ATS in the local jurisdiction. That is, recognition as an ATS by any one province of Canada should function much as a European Union ISD (Investment Services Directive) passport does among member countries of the European Economic Area.

Regulatory Trading Halts

Part 8 of National Instrument 23-101 states that if a decision has been made to prohibit trading in a particular security, no marketplace shall permit trading in that security during the relevant time period. While Bloomberg generally supports this requirement, some additional refinement will be required with respect to multiply-listed securities where trading is not halted on all exchanges. Bloomberg respectfully suggests that a market center that is not the principal market for a security should not impose a worldwide halt on an ATS's trading such security. It would be reasonable, though, for Canadian regulators to prohibit Canadian customers from trading in a certain stock, if a trading halt were being imposed. It may be, moreover, that a more coordinated approach among regulators of different market centers would provide a more useful long-term solution to the problem of trading halts in multiply-listed securities.

Extraterritoriality

Bloomberg recommends that the proposed National Instrument clearly articulate the extent, if any, to which the rules and principles incorporated therein are meant to apply outside Canada or to securities of non-Canadian issuers. For example, are the display requirements in Parts 10 and 11 of the Companion Policy 212-101CP Marketplace Operation intended to apply to (a) quotations in non-Canadian securities, (b) orders received outside Canada from (i) Canadians or (ii) non-Canadians, (c) transactions in Canadian securities effected outside Canada, or (d) transactions in non-Canadian securities effected on a Canadian market? Similar questions may arise with respect to certain other provisions.

A general provision on intended extraterritorial application would help to clarify this matter. It may be that specific extraterritoriality issues should also be addressed in the context of individual rules.

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We appreciate the opportunity to make our views known to the Canadian Securities Administrators and members of their staffs and we hope our letter is helpful. If we may be of further assistance in these matters, please let us know.

Yours very truly,

(Signed) Kevin M. Foley