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Alberta Securities Commission
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Department of Justice, Government of the Northwest Territories
Nova Scotia Securities Commission
Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut
Ontario Securities Commission
Prince Edward Island Securities Office
Saskatchewan Securities Commission
Registrar of Securities, Government of Yukon

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Dear Sirs/Mesdames:

Re: Request for Comments on joint Canadian Securities Administrators ("CSA") and Market Regulation Services Inc. ("RS") notice in respect of Trade-Through Protection, Best Execution and Access To Marketplaces, and Request for Comments on CSA Staff Notice 21-306

We are pleased to respond to the joint request for comments on the CSA's proposed amendments to NI 21-101 *Marketplace Operation*, NI 23-101 *Trading Rules* and the related companion policies (together the "ATS Rules"), and RS's proposed amendments to the Universal Market Integrity Rules ("UMIR").

TD Asset Management Inc. ("TDAM") is a wholly owned subsidiary of The Toronto-Dominion Bank and is one of Canada's largest asset managers. As of June 30, 2007, TDAM managed approximately $132 billion for mutual funds, pooled funds and segregated accounts and provided investment advisory services to individual customers, pension funds, corporations, endowments, foundations and high net worth individuals. TDAM managed approximately $45 billion in retail mutual fund assets on behalf of more than 1.4 million investors at that date.

We are responding in our capacity as an investment adviser.

GENERAL COMMENTS

We generally support the CSA's proposal on trade-through protection and agree that the principal obligation to establish, maintain and enforce written policies and procedures to prevent trade-throughs should reside with the marketplaces. However, we believe marketplace participants should not be imposed with the obligation to address trade-through implications with respect to securities inter-listed on a foreign marketplace for the reasons noted below.

The incremental benefit of imposing the obligation on marketplace participants is unclear. Also, the costs of implementing systems and processes (including systems to factor in the exchange rate impact and implementing monitoring/enforcement processes) for marketplace participants would be significant and would be borne indirectly by investors or clients. The extra costs would apply throughout the market rather than at relatively few marketplaces.

In our view, the more the trade-through obligation is applied to marketplace participants, the higher the aggregate implementation costs, which would ultimately pose a barrier to entry and stifle competition for marketplace participants. Therefore, any such obligation should only be placed on marketplaces, and not on marketplace participants.

Regarding Direct Market Access ("DMA"), we believe DMA clients, whether foreign or domestic, and Alternative Trading System ("ATS") subscribers should adhere to general market integrity rules on the following: just and equitable principles, prohibition of manipulative or deceptive trading methods, and improper orders and trades (the "Relevant Trading Rules"). Our view is that the DMA sponsor or ATS should be responsible for all other regulatory and compliance requirements besides the Relevant Trading Rules including training provision, trade-through protection, and ongoing compliance monitoring for reasons further described below.

We strongly oppose requiring DMA clients to enter into an agreement with the regulation services provider or subjecting DMA clients to other regulations beyond the Relevant Trading Rules. We understand that the U.S. does not have similar regulations for DMA clients regarding access to marketplaces, which would place domestic firms at a competitive disadvantage and would motivate domestic DMA clients to trade inter-listed securities in foreign marketplaces, thereby promoting regulatory arbitrage.

TDAM strongly opposes providing any exemptions to foreign DMA clients. Specifically, implementing different requirements would create an unlevel playing field and place Canadian domestic DMA clients at a competitive disadvantage relative to foreign DMA clients, particularly given there are no similar requirements in the U.S. To ensure fairness and similar to the general approach in the U.S., we suggest the onus of ensuring compliance with applicable market integrity rules and providing user training should be placed on the sponsor, which may be clarified contractually through user agreements between the sponsor and the user as appropriate, given such access is provided by the sponsor.

We have responded to certain specific questions.

SPECIFIC COMMENTS

Trade-Through Protection

The CSA are proposing that a general obligation be placed on each marketplace to establish, maintain and enforce written policies and procedures that are reasonably designed to prevent trade-throughs. This proposal is premised on the promotion of price discovery, competition and fairness, which seeks to prevent better priced visible orders being traded through a marketplace, whether domestic or foreign.

> ***Question 1: In addition to imposing a general obligation on marketplaces to establish, maintain and enforce written policies and procedures to prevent trade-throughs, would it also be necessary to place an obligation on marketplace participants to address trade execution on a foreign market?***

No. Marketplace participants should not be placed with an obligation to prevent trade-throughs on a foreign marketplace. In our view, this would be highly undesirable because the incremental benefit of imposing the obligation on marketplace participants is unclear. As stated in our general comments, the costs involved in implementing systems and processes to access quotes on foreign marketplaces (factoring in real time foreign exchange rates, and monitoring/enforcement processes) would be significant and would be borne indirectly by investors or clients. Therefore, we believe the costs would likely outweigh any incremental benefit to investors or clients. Additionally, higher implementation costs would pose a barrier to entry and stifle competition for marketplace participants.

> ***Question 4: Should trade-through protection apply only during "regular trading hours"? If so, what is the appropriate definition of "regular trading hours"?***

Trade-through protection for visible non-exempt order-types should apply at all times so that there would not be any scope for liquidity to migrate to hours when trade-through obligations do not apply.

> ***Question 5: Should the consolidated feed (and, by extension, trade-through obligations) be limited to the top five levels? Would another number of levels (for example, top-of-book) be more appropriate for trade-through purposes? What is the impact of the absence of an information processor to provide centralized order and trade information?***

No. We believe trade-through obligations should apply to the full depth-of-book since the existing and proposed marketplaces in Canada are fully automated and there are generally no manual marketplaces. Therefore, the incremental cost of implementing the depth-of-book approach is not expected to be significant.

In the absence of an information processor, marketplaces would likely incur significant incremental costs to aggregate order and trade information. As well, it would be cumbersome for marketplaces and the regulatory authorities to monitor compliance.

> ***Question 6: Should there be a limit on the fees charged on a trade-by-trade basis to access an order on a marketplace for trade-through purposes?***

Yes. The fees charged by marketplaces to access quotes of each other should be market-driven subject to a cap. Imposing a maximum amount that a visible marketplace can charge for accessing a quote would ensure that investors or clients would not have to indirectly bear a disproportionate amount of the costs for accessing quotes under the trade-through obligations.

> ***Question 7: Should the CSA establish a threshold that would require an ATS to permit access to all groups of marketplace participants? If so, what is the appropriate threshold?***

Yes. The CSA should establish a threshold that would require an ATS to permit access to all groups of marketplace participants because it would be good for the market to promote price discovery.

In the U.S., Regulation NMS recently reduced a similar threshold for fair access from 20% to 5%. Given the size of the Canadian marketplace, we do not expect to see the same degree of fragmentation as that of the U.S. Therefore, we believe 10% would be a reasonable threshold for the Canadian marketplace.

> ***Question 8: Should it be a requirement that specialized marketplaces not prohibit access to non-members so they can access, through a member (or subscriber), immediately accessible, visible limit orders to satisfy the trade-through obligation?***
>
> - ***Should an ATS be required to provide direct order execution access if no subscriber will provide this service?***
> - ***Is this solution practical?***

- ***Should there be a certain percentage threshold for specialized marketplaces below which a trade-through obligation would not apply to orders and/or trades on that marketplace?***

Yes. Specialized marketplaces should not be allowed to discriminate against non-members by restricting access to better-priced visible orders on their book. Trade-through obligation is a duty owed by all marketplace participants to the capital markets in general, and therefore all marketplace participants having such obligation should have fair access to all better-priced visible orders.

- Yes. An ATS should be required to provide direct order execution access if no subscriber will provide this service.
- Yes. We believe this solution would be practical.
- No. Trade-through protection should always apply.

Question 9: Are there any types of special terms orders that should not be exempt from trade-through obligations?

In our opinion, the current list of special terms orders that are exempt from trade-through obligations appears to be reasonable.

Question 12: Should this exception only be applicable for trades that must occur at a specific marketplace's closing price? Are there any issues of fairness if there is no reciprocal treatment for orders on another marketplace exempting them from having to execute at the closing price in a special facility if that price is better?

Yes. We believe the exception should only apply for Market-On-Close ("MOC") trades in any marketplace. Besides MOC trades, other orders in an after-hours trading session should not be exempt from the trade-through obligation even if such orders are meant to be executed at the closing price.

Question 13: Should a last sale price order facility exception be limited to any residual volume of a trade or should it apply for any amount between the two original parties to a trade? What is the appropriate time limit?

Please see our response to Question 12.

Question 14: Should trade-throughs be allowed in any other circumstances? For example, are there specific types or characteristics of orders that should be subject to an exemption from the trade-through obligation?

No. Trade-throughs should not be allowed in any circumstance other than those listed in the joint notice.

<u>Best Execution</u>

The CSA are proposing the following definition of best execution: "the most advantageous execution terms reasonably available under the circumstances" with the clarification that its application will vary depending on the specific circumstances, and on who is responsible for obtaining best execution. In assessing the most advantageous execution terms reasonably available under the circumstances, the key elements identified (i.e., price, speed of execution, certainty of execution and overall cost of the transaction) are relevant. These key elements encompass more specific considerations such as liquidity, market impact or opportunity costs.

Question 15: Are there other considerations that are relevant?

Yes. We believe the following considerations are relevant to an adviser:

i. Investment decision-making services (research) or order execution services utilized by the adviser.
ii. Regulatory restrictions relating to transacting with affiliates[1]

Additionally, we would like to provide our comments on the definition of best execution and request clarification on bundled commission rates.

Definition of Best Execution

We agree with the CSA that the expanded definition of best execution contained in NI 23-101 Companion Policy ("CP") materially captures the relevant considerations for trade execution for broker-dealers and appreciate the clarifications in the CP for advisers; however, we are of the view that the best execution definition does not adequately reflect other considerations relevant to an adviser. Additionally, we understand the clarification in the proposed CP notes that best execution is a process, and believe it should be further clarified. Therefore, we suggest the following:

1) best execution be defined in the CP as the "process that seeks to achieve the most advantageous execution terms over time…"; and

2) expand the definition in section 1.1.1 of the CP to include the wording in the Markets in Financial Instruments Directive (MiFID)[2] such as "or any other consideration relevant to the execution of the order" as a fifth element in the definition to capture any relevant considerations for advisers who have a portfolio management focus to maximize portfolio values over time on an overall

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[1] TDAM is prohibited from transacting with affiliates in certain circumstances, thus, potentially limiting our ability to achieve best execution by accessing all the available liquidity sources.

[2] Markets in Financial Instruments Directive (MiFID) DIRECTIVE 2004/39/EC, Article 21 "Obligation to execute orders on terms most favourable to the client" states, "1. Member States shall require that investment firms take all reasonable steps to obtain, when executing orders, the best possible result for their clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature *or any other consideration relevant to the execution of the order*. Nevertheless, whenever there is a specific instruction from the client the investment firm shall execute the order following the specific instruction."

portfolio basis as clarified in the CFAI Trade Management Guidelines[3] and further described in our response to Question 17 below.

Clarifications on Bundled Commission Rates

We request clarifications regarding best execution in the CP on the bundled commission rates that encompass investment decision-making services utilized by an adviser with the objective to maximize a client's portfolio value in view of best execution.

In the CP, the CSA noted that "for advisers, the commission fees charged by a dealer would be a cost of the transaction" under the elements of best execution defined in the CP. Our view is while the bundled commission rate matter is implicitly addressed in the overall *cost* of the transaction in the CP, it does not address the investment decision-making *benefits* to clients.

We think there should be more clarifications on commission rates (included within the fourth element of the best execution definition that is the "total costs of the transaction"), which should include fees to address the benefits of permitted investment decision-making services (research).

> ***Question 17: Should the best execution obligation be the same for an adviser as a dealer where the adviser retains control over trading decisions or should the focus remain on the performance of the portfolio? Under what circumstances should the best execution obligation be different?***

No. We believe the best execution obligation for an adviser should always remain on a portfolio basis, regardless of whether an adviser controls the trading decision method via direct access. As an adviser, TDAM has a fiduciary duty to act in the best interest of our clients. We act with reasonable care and exercise prudent judgement in managing our clients' accounts, focusing on the overall portfolios rather than on an individual security.

Irrespective of whether an adviser uses an agent for trading, its obligation to satisfy its fiduciary duty to act in the best interest of clients would not change. As such, the focus should remain on the performance of a portfolio because it is better aligned with an adviser's objective, which is to maximize clients' overall portfolio value. As such, we strongly feel that it should not be changed to that of a broker-dealer's obligation, which is on a trade-by-trade basis.

Access to Marketplaces

The CSA are proposing a new definition of a "dealer-sponsored participant" under NI 23-101, such that a dealer-sponsored participant is defined, in relevant part, as "a person or

[3] The Trade Management Guidelines set out by the CFA Institute assist investment management firms in meeting their best execution obligations. The guidelines describe best execution as a *process* that investment management firms apply to *seek to maximize the value of a client's portfolio* within the client's stated investment objectives and constraints.

company who has dealer-sponsored access to a marketplace and is an 'Institutional Customer' as defined by IDA Policy No. 4…and includes the representatives of the person or company." Further, the CSA are proposing to impose compliance obligations on the exchanges and ATS, among other things, to monitor and enforce requirements with respect to the trading of dealer-sponsored participants, in addition to imposing certain training requirements applicable to dealer-sponsored participants.

> ***Question 24: Should DMA clients be subject to the same requirements as subscribers before being permitted access to a marketplace?***

We believe that DMA clients, whether foreign or domestic, and ATS subscribers should adhere to the Relevant Trading Rules.

We suggest that the CSA formalize the Relevant Trading Rules into the National Instruments because it could be effective in providing for consistent regulation. Additionally, it would establish regulatory jurisdiction over both DMA clients and ATS subscribers, which would alleviate the need for them to enter into separate agreements with the regulation services provider.

TDAM is of the view that the DMA sponsor or ATS should be responsible for all other regulatory and compliance requirements beyond the Relevant Trading Rules, including training provision, trade-through protection, and ongoing compliance monitoring for the following reasons:

1) Given DMA access or ATS subscription is provided by the sponsor or ATS, it would be more efficient and effective for the DMA sponsor or the ATS to provide compliance monitoring and training to their clients or subscribers; and

2) Any perceived regulatory burden on DMA clients or ATS subscribers could deter advisers from furthering their best execution processes, such as adopting electronic execution venues and tools to lower trading costs.

We strongly oppose requiring DMA clients to enter into an agreement with the regulation services provider or subjecting DMA clients to other regulations beyond the Relevant Trading Rules. We understand that the U.S. does not have similar regulations for DMA clients regarding access to marketplaces, which would place domestic firms at a competitive disadvantage and would motivate domestic DMA clients to trade inter-listed securities in foreign marketplaces.

> ***Question 25: Should the requirements regarding dealer-sponsored participants apply when the products traded are fixed income securities? Derivatives? Why or why not?***

No. The requirements should not apply to fixed income or derivatives at this stage because the perceived regulatory burden could potentially discourage usage by dealer-sponsored participants at a time when transparency and the use of electronic means of trading in the over-the-counter markets is still developing in Canada. Furthermore, it could stifle innovation in these marketplaces and put Canadian markets at a competitive

disadvantage compared to the U.S., as there are no similar regulatory requirements in that marketplace.

Question 26: Would your view about the jurisdiction of a regulation services provider (such as RS for ATS subscribers or an exchange for DMA clients) depend on whether it was limited to certain circumstances? For example, if for violations relating to manipulation and fraud, the securities commissions would be the applicable regulatory authorities for enforcement purposes?

Our view is marketplace participants should be subject to a consistent set of regulations enforced by a single regulatory authority with respect to trading operations. This would maximize efficiencies and minimize costs for marketplace participants and regulatory authorities. Please see our response to Question 24 for additional information.

Question 27: Could the proposed amendments lead dealer-sponsored participants to choose alternative ways to access the market such as using more traditional access (for example, by telephone), using foreign markets (for inter-listed securities) or creating multiple levels of DMA (for example, a DMA client providing access to other persons)?

Yes. It is likely that the proposed amendments could lead dealer-sponsored participants to choose alternative ways to access the markets such as those listed above.

Question 28: Should there be an exemption for foreign clients who are dealer-sponsored participants from the requirements to enter into an agreement with the exchange or regulations services provider? If so, why and under what circumstances?

We are of the view that under no circumstances should the requirements for domestic and foreign clients differ. Applying a different standard to foreign clients would create a competitive disadvantage and reduce fairness. We are cognizant of the potential overall adverse effect on the marketplace if users of direct access systems cease to use these systems due to increased regulatory burden. However, we strongly feel that this should not be the reason to create an unlevel playing field and put domestic dealer-sponsored participants at a competitive disadvantage to foreign clients.

Generally, we believe dealer-sponsored participants, whether domestic or foreign, should not be required to enter into an agreement with an exchange or regulations service provider. We believe the primary obligation for compliance monitoring and training should rest with the sponsor.

CSA Request for Comments: Consolidation of Data

We are responding to the CSA's request for comments on the questions outlined in the CSA Staff Notice 21-306 in respect of information processors. We recognize that the comment period has expired, and respectfully request your consideration of our responses. Generally,

we support information processors that create and disseminate standardized and consolidated display of data because it promotes transparency and price discovery.

> ***Question 3: Should an information processor be required to create and disseminate a standardized, consolidated display of data? Alternatively, should the information processor disseminate consolidated data feeds that may be accessed by market participants to create their own displays?***

Yes. An information processor should be required to create and disseminate a standardized, consolidated display of data because fragmented data could mean that market participants would need to create their own display. This would not be cost-effective for the marketplace and the higher cost structures would be borne indirectly by investors or clients.

> ***Question 4: What would be the advantages and disadvantages of having one versus multiple information processors? For example, how would each alternative impact market participants' ability to achieve best execution or comply with trade-through or other obligations? Should the information processors for the fixed income and equity markets be different?***

There is a cost advantage to having multiple competing information processors as long as each processor provides complete standardized reporting. We do not see any clear advantages to having different information processors for fixed income and equities.

<u>RS Request for Comments - UMIR / Marketplace Rules for Direct Market Access</u>

RS is proposing to amend certain rules and policies under the UMIR as a consequence of the CSAs proposed amendments to NI 23-101 in respect of "dealer-sponsored access" to a marketplace and the obligations of an ATS to monitor trading by subscribers and persons with "dealer-sponsored access". Specifically, RS is proposing to define "dealer-sponsored access", extend the definitions of an "access person" and "participant", and establish certain requirements, standards and obligations for participants and ATSs to adhere to.

> ***Question 1: Should UMIR establish uniform criteria for the granting of access to any marketplace subject to UMIR or should an Exchange or QTRS be able to continue to establish rules regarding the grant of Direct Market Access?***

We do not have any preference as to whether RS, the exchanges or QTRS establish DMA rules, as long as they are consistent.

> ***Question 2: Should an ATS be able to establish criteria for the granting of access to its marketplace in the contract between the ATS and any Participant that is a subscriber to the ATS?***

Yes, as long as the criteria are fair and consistent.

> ***Question 3: If training requirements are adopted for each Representative of an Access Person should marketplaces be relieved on any further training obligations in respect of Access Persons or should the requirement be continued in lieu of "continuing education requirements" for Representatives?***

Our view is that a dealer participant or an ATS should be responsible for providing training to its clients for whom it has granted or sponsored access to the marketplace.

> ***Question 4: Should there be an exemption from the requirement for a foreign DMA Client to enter into an agreement directly with RS? If so, why and under what circumstances should such an exemption be available?***

As stated above, we are of the view that under no circumstances should that exemption be available to foreign clients. Applying a different standard to foreign clients would create a competitive disadvantage and reduce fairness.

Generally, we believe dealer-sponsored participants, whether domestic or foreign, should not be required to enter into an agreement with an exchange or regulations service provider. We believe the primary obligation for compliance monitoring and training should rest with the sponsor. However, if the requirement for a DMA client to enter into an agreement directly with RS should apply, then it should apply to all DMA clients irrespective of whether they are domestic or foreign clients.

We are cognizant of the potential overall adverse effect on the marketplace if users of direct access systems cease to use these systems due to increased regulatory burden. However, we strongly feel that this should not be the reason to create an unlevel playing field and put domestic dealer-sponsored participants at a competitive disadvantage to foreign clients.

> ***Question 5: If a DMA Client is exempted from executing an agreement with RS, should the Participant accept a higher level of responsibility for the conduct of the foreign DMA client?***

Please see our response to Question 4.

CONCLUSION

TDAM is grateful to have had the opportunity to comment on the proposed amendments to the ATS Rules and RS's proposed amendments to the UMIR for further addressing the initiative to promote competitive markets, trading that is fair and efficient as well as to promote increased transparency. While we support the CSA's view that the principal obligation to establish, maintain and enforce written policies to prevent trade-throughs rests with the marketplaces, we wish to stress that market participants should not be imposed with the obligation to address trade-through implications with respect to securities inter-listed on any marketplace, whether domestic or foreign.

We are further of the view that DMA clients, whether foreign or domestic, and ATS subscribers should adhere to the Relevant Trading Rules and not be responsible for all other regulatory and compliance requirements. Moreover, we strongly oppose requiring DMA clients to enter into an agreement with an exchange or a regulation services provider, or subjecting DMA clients to regulations other than the Relevant Trading Rules. Requiring such an agreement, in addition to providing exemptions to foreign DMA clients, would put domestic firms at a competitive disadvantage, create an unlevel playing field and would encourage regulatory arbitrage.

We would be pleased to provide any further explanations or submissions with respect to matters discussed above and would make ourselves available at any time for further discussion.

Yours truly,

Barbara F. Palk
President