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Dear Sirs and Mesdames:

**Re: Trade-Through Protection, Best Execution and Access to Marketplaces**

Merrill Lynch Canada Inc. (“Merrill Lynch”) appreciates the opportunity to comment on the proposed amendments to National Instrument 21-101 Marketplace Operation and National Instrument 23-101 Trading Rules and Related Universal Market Integrity Rules. The proposed rules address trade-throughs, best execution and access to marketplaces.

Merrill Lynch is one of the world's leading wealth management, capital markets and advisory companies with offices in 37 countries and territories and total client assets of approximately \$1.6 trillion. As an investment bank, it is a leading global trader and underwriter of securities and derivatives across a broad range of asset classes and serves

as a strategic advisor to corporations, governments, institutions and individuals worldwide. Merrill Lynch owns approximately half of BlackRock, one of the world's largest publicly traded investment management companies with more than \$1 trillion in assets under management. For more information on Merrill Lynch, please visit [www.ml.com](http://www.ml.com).

## **Trade-Through Obligations**

General commentary relating to market access:

If market participants have fair and non-discriminatory access to trading centers, we believe trading will gravitate to the market that best suits the needs of investors. Trading centers will compete in all areas relevant to order routing determinations, e.g. price, speed and certainty of execution, liquidity, product offering, cost, etc. Trading centers would compete not only on their levels of automation, but on other services as well, such as transaction fees and fees for viewing limit orders away from the best bids and offers.

Competition also would promote innovation and ensure greater responsiveness to the needs of market participants. Trading centers that don't provide a competitive execution platform in terms of price, liquidity and speed would be "disciplined" as broker-dealers, guided by their best execution obligations, would elect to first access other trading centers that consistently provide executions and efficient, immediate access to the best bids and offers. Accordingly Merrill Lynch supports a competitive model for the development of trading centers, data feeds and smart routing.

### **CSA Questions:**

***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?***

We are not supportive of trade through obligations extending to executions on foreign markets. We believe that competitive market forces and arbitrage activities are generally effective in minimizing pricing discrepancies among multiple markets. We further believe that existing best execution obligations provide sufficient protections to clients in the event that an executing broker-dealer accesses liquidity in a foreign market. It would also possibly be counterproductive to best execution in that there are technical limitations on capturing the appropriate FX rate in a timely manner.

***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 should only apply during regular trading. We suggest that the regular trading hours should correspond to existing historical Canadian and U.S. market

hours. We are not in favor of any mandated change to such hours which would effectively represent a regulatory extension of firms' operating hours.

**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?***

Trade through protection for the top five levels would be an onerous requirement not only from an execution standpoint but from a programming and implementation standpoint, particularly in a "fast" market.

We note that depth of book protection was discussed by the SEC in the context of proposing Reg. NMS, but was not ultimately adopted. We concur with the approach taken in the US and believe that the trade through protection should extend solely to top of book quotations displayed by trading centers.

**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?***

With respect to access fees, Merrill Lynch favors a complete ban as they are an impediment to an efficient market. If access fees are permitted in some form, the fees should be capped at a minimal and reasonable level.

**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?***

If an ATS executes a substantial portion of volume in a security (e.g., 5%) on an ongoing basis, the ATS should be accessible by all market participants on fair terms so that market participants are able to satisfy their best execution obligations by transacting on such ATS.

**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?***

DMA clients should be allowed to access liquidity in an ATS if a broker-dealer (which is itself a subscriber to the ATS) elects to provide sponsored access.

**9. Are there any types of special terms orders that should not be exempt from trade through obligations?**

The exemption of special terms orders (all-or-none, minimum quantity, special settlement, odd lots etc.) is appropriate. The regulations, where appropriate, should include exemptions similar to the Reg. NMS exemptions (such as benchmark trades, VWAP and contingent trades) explained in greater detail at <http://www.sec.gov/spotlight/regnms.htm>

**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?**

We support the proposal that trade-through obligations only apply during regular trading hours.

**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?**

As noted above, special terms orders should be exempt from prescriptive trade through requirements. In the case of all-or-none and minimum size orders, the trade through obligation should not apply to orders that are already in the special terms book where the trade is triggered by the marketplace algorithm. In such cases there may be an unintentional trade through of orders on another visible marketplace. See the Reg. NMS exceptions: <http://www.sec.gov/spotlight/regnms.htm> for more detail on analogous exemptions.

Other specific situations to consider include stop orders, short orders where pricing is managed by an exchange, and any terms order that crosses in the board lot book.

**Best Execution - CSA Questions:**

**15. Are there other considerations that are relevant?**

We are supportive of the IIAC position that the CSA and RS should focus on a principle based rules for best execution where dealers can demonstrate with consistent policies, procedures and practices that the objectives of their clients are being met in similar context as other regulatory obligations, such as suitability.

**19. Please comment on whether the proposed reporting requirements for marketplaces and dealers would provide useful information. Is there other information that would be useful? Are there differences between the US and Canadian markets that make this information less useful in Canada?**

We are also supportive of the IIAC position that additional reporting requirements be deferred until the market has been operating in the context of the proposed regulations for a reasonable amount of time and careful study is undertaken to determine whether additional reporting would satisfy a compelling regulatory need.

**20. *Should trades executed on a foreign market or over-the-counter be included in the data reported by dealers?***

Given the potential cost, and the lack of tangible benefits, we do not support such a requirement.

**21. *Should dealers report information about orders that are routed due to trade through obligations?***

See answer to 19. above.

**22. *Should information reported by a marketplace include spread-based statistics?***

No. There are difficulties in setting objective standards so that everyone reports in the same way and the statistics could be manipulated by selectively including/omitting execution data.

### **C. Direct Access Issues - CSA Questions**

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

No. Merrill Lynch does not support the concept that DMA clients should be required to meet the same requirements as trading center subscribers. Ultimate responsibility (compliance and supervision) for DMA clients should remain with subscribers who are best situated to contractually impose standards, including training requirements, on their DMA clients and to monitor and oversee the trading activity of their DMA clients.

**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?***

We are supportive of RS having jurisdiction over its members. We are not supportive of RS having jurisdiction over DMA clients that are not members. The provincial securities regulator is the appropriate legislative body for regulating DMA clients and other non IDA or non-exchange members.

**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)?**

Based on our global experience, the imposition of any direct requirements on DMA clients will lead them to find alternative ways to access Canadian markets. To reiterate, any regulatory concern can be dealt with at the marketplace or participating organization level.

**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?**

As noted above, we are not supportive of DMA clients (domestic or foreign) entering into direct agreements with the exchange or regulation service providers.

**29. Please provide the advantages and disadvantages of a new category of member of an exchange that would have direct access to exchanges without the involvement of a dealer (assuming clearing and settlement could continue to be through a participant of the clearing agency).**

There would be no advantage to a new category of member, since presumably such category would have the exact same regulatory obligations, responsibilities and exposures as existing members. We are not supportive of a member category with different regulatory obligations – all members should be subject to the same regulatory oversight.

Thank you for this opportunity to comment. If you have any questions or comments related to our response, please do not hesitate to contact me.

Sincerely,



Mark Dickerson  
First Vice President