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TRADEBOOK
CANADA COMPANY

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British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Securities Commission
Manitoba Securities Commission
Securities Commission of Newfoundland and Labrador

New Brunswick Securities Commission
Securities Office, Prince Edwards Island
Nova Scotia Securities Commission
Registrar of Securities, NorthwestTerritories
Registrar of Securities, Yukon Territory
Registrar of Securities, Nunavit

Re: Proposed Amendments to National Instrument 21-101 and National Instrument 23-101 regarding (1) best execution and access to a marketplace, (2) consequential amendments to the Universal Market Integrity Rules ("UMIR") and (3) proposal for discussion on trade-through protection;

Ladies and Gentlemen:

We appreciate the opportunity to respond to the publication by the Canadian Securities Administrators ("CSA") and Market Regulation Services Inc. ("RS") of proposed amendments to National Instrument 21-101 ("NI 21-101") and National Instrument 23-101 ("NI 23-101") regarding best execution, access to a marketplace and an outline of consequential amendments to the UMIR (the "Joint Notice"). We also appreciate the CSA's and RS's invitation to discuss further certain proposals set forth on trade-through protection in the Joint Notice.

Bloomberg Tradebook Canada Company ("Tradebook Canada") is registered as an investment dealer with the securities regulatory authorities in Alberta, British Columbia,

Manitoba, Ontario and Quebec. Tradebook Canada also is a member of the Investment Dealers Association of Canada, is licensed by the Ontario Securities Commission ("OSC") as a Futures Commission Merchant and has received approval to act as an alternative trading system ("ATS") pursuant to NI 21-101.

We comment below on some of the questions raised in the Joint Notice:

Question 1: In addition to imposing a general obligation on marketplaces to establish 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?

As the Joint Notice points out, the U.S. Securities and Exchange Commission's Regulation NMS does not impose an obligation on U.S. participants to review trade execution on foreign markets. While we appreciate the premise that Canadian securities may be more heavily traded in non-Canadian markets than is the case for U.S. securities, we recommend that any trade-through provisions follow the U.S. model by not extending trade-through obligations to non-Canadian markets (referred to below as "foreign markets").

Requiring marketplace participants to seek best prices on foreign markets raises several significant logistical and jurisdictional issues. First, not all market participants will be able to trade readily on foreign markets. Accordingly, it is unclear how such participants could comply without unreasonable expense with a trade-through obligation if it were extended to foreign markets. Second, we respectfully suggest that subjecting participants to trade conditions with varying currencies as well as differences in clearing and settlement practices will be practicably unfeasible for many market participants. The necessity of making currency conversions and calculating the impact of different settlement times would itself make cross-border price comparisons unwieldy in many cases. Third, the benefit of including foreign markets in a trade-through obligation is unclear since there would be little overlap among the trading hours of Canadian marketplaces and marketplaces located in Europe or Asia. A market participant cannot access an order on closed exchanges and the reported prices on such exchanges will likely be stale. The foreign markets open at the same time as Canadian marketplaces and poised to handle comparable price and volume orders for securities would likely be located in the U.S. Accordingly, extending a trade-through obligation to foreign markets may result in funneling certain orders from Canadian to U.S. marketplaces.

For these reasons we respectfully request that, if the CSA decides to introduce trade-through obligations, such obligations not extend to trade execution on foreign markets. Nevertheless, if participants would be required to look to foreign markets in satisfying any trade-through requirements, we would advise the CSA to craft certain exceptions and modifications to address logistical issues that will necessarily arise due to the differences in currency as well as clearing and settlement procedures between Canadian and non-Canadian marketplaces. In light of these discrepancies, participants should only be required to avoid trade-throughs only with respect to Canadian markets that can settle and clear executed orders in a timely and expeditious manner. We also suggest that if participants are required to assess trading conditions for a

security in foreign markets, that such obligations apply only to securities for companies that are inter-listed on Canadian and U.S. stock exchanges and that the obligations apply only to trade-throughs on such markets. Even as so limited, we further advise, such a requirement would present complicated issues if the Canadian and U.S. dollar experience significant intra-day fluctuations.

In our view, the best-execution obligation should reside with both brokers and investment managers. Investment managers, if they delegate trade execution to a broker, should have a clear duty to monitor how the broker is doing. Competing marketplaces should not have an obligation to enforce best execution. The securities professionals should bear this responsibility and not rely on market places to do it for them.

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

Yes, we recommend that any trade-through protections apply only during "regular trading hours". We respectfully refer the CSA to Regulation NMS which applies trade-through protections to orders entered from 9:30 A.M. through 4:00 P.M, U.S. Eastern Time.

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?

Electronic trading may well have been an additional cause of that loss of transparency and liquidity. We believe that the top five levels is not an appropriate scope of information of a consolidated feed for trade-through purposes. Consideration should be given to the complexity participants would face if required to assess numerous levels of order information in complying with a trade-through prohibition. The difficulty in creating algorithms capable of processing multi-tiered quantities of information presents obstacles that could lower trading efficiencies and stifle innovation. Rather, we believe that any trade-through information should be limited to top-of-file data, thereby allowing for more facile execution of large orders in the marketplace. Moreover, we note that the Canadian marketplace currently lacks a national information processor and market centers are not required to time order and quotation entry by a common atomic clock. It is advisable that an information processor gather top-of-file information before managing the difficulties inherent to processing five levels of information in a regime with three market centers.

We think market participants should publish their books to augment the disclosed liquidity today. If the liquidity and transparency that were lost when markets went to decimalized pricing with a one-cent minimum increment are to be restored, it will be necessary to require transparency at least five or six levels deep. We argued in the United States for a trade-through rule beyond the NBBO and we think the Trade Through Light the SEC adopted is

at best a half-way measure. The current SEC rule really accomplishes little. The absence of liquidity at the NBBO may well explain the rapid expansion of dark pools, about which the SEC has expressed concern.[1]

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?

At the very least we suggest that the Commission place a limit on fees for access to orders. While we applaud the CSA's effort to place limits on access fees, we would rather see them eliminated entirely for all quotations. Access fees, even if limited, can harm markets and create a monopoly advantage since dealers seeking to discharge their duties of best execution must take into consideration the best prices available. The harm done by access fees to the markets occurs in three ways. First, the U.S. experience has demonstrated that access fees lead to locked markets. Second, access fees perpetuate rebates of various kinds, including payment for order flow. Third, access fees reward "slow" market behavior, that is, delaying the display and/or routing of customer market orders so as to internalize the trade and capture/save the access fee or fees. Moreover, access fees compromise the transparency of market financing because they are not accounted for in a published price. In this context, access fees are directly related to best execution. While best price would not be dispositive in satisfying one's duty of best execution as contemplated in the Joint Notice, it nevertheless remains a material consideration. Trading venues could leverage the importance of best price information and charge monopolistic rents for such information. Such information would not be available by other vendors and, consequently, competition would not cure excessive pricing. Accordingly, while we support a limit on fees charged on a trade-by-trade basis, we caution that even with limits, access fees are at odds with the policy objectives in a trade-through protection regime as well as satisfying best execution and other regulatory requirements.

If the CSA does choose to propose a limit to access fees, we respectfully suggest that such limit on fees not be confined to the top-of-file information but should extend to quotations beyond the top-of-file.

Question 8: Should it be a requirement that specialized marketplaces not prohibit access to nonmembers so they can access, through a member (or subscriber), immediately accessible, visible limit orders to satisfy the trade-through obligation?

We respectfully suggest that the CSA should allow specialized marketplaces to prohibit access to nonmembers seeking to interact with visible limited orders.

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[1] *See*, e.g., Aaron Lucchetti, *Shares Bought in the Dark, As Large Institutional Investors Use Anonymous Trading, Regulators and Small Investors Worry about Pricing, Disclosure*, Wall St J., Jan. 9, 2007, at C1; Nina Mehta, *SEC New Market Reg Chief has Dark Pools in Focus*, Traders Magazine, Oct. 30, 2006 (Quoting Dr. Erik Sirri, Director of the SEC's Division of Market Regulation).

- **Should an ATS be required to provide direct order execution access if no subscriber will provide this service?**

For the reasons stated above, we do not support granting nonmembers of an ATS access to visible limit orders.

- **Is this solution practical?**

Allowing non-members to access specialized marketplaces to satisfy certain trade-through obligations would present several obstacles. An environment in which non-members have to go through members to obtain access mitigates the credit risks that would attend direct, unlimited access by non-members. We think this is an appropriate result.

Question 15: Are there other considerations that are relevant?

As the CSA and RS have recognized, the recent dramatic shifts in market structure and trading patterns have ushered in many considerations beyond best price that inform a dealer's decision in making the most advantageous execution decision on behalf of its client. In addition, professional investment managers have the same issues to confront. Accordingly, we commend the CSA and RS amendments to the National Instrument 23-101, in particular section 4.2 of NI 23-101 and the corresponding UMIR provisions as these proposals recognize the several factors that are considered when executing an order.

As articulated in the Joint Notice, there is no objective definition of best execution and several factors beyond best price are considered in discharging a duty of best execution. The CSA identified several key elements including: 1) price; 2) speed of execution; 3) certainty of execution; and 4) total transaction cost. In addition to these considerations, however, we believe the best-execution regulatory regime should distinguish among traditional investment firms, exchanges and ATSs on the basis of the distinct role each type of entity performs in the securities markets. In discussing best execution, it is important to differentiate between the duties that apply in the context of small orders and the duties that apply in handling orders large enough to require some judgment in how to present them to the market.

Also, we respectfully refer the CSA and RS to Article 21(1) of the implementing directive of the Markets in Financial Information Directive 2004/39/EC ("MiFID"). Article 21(1) sets forth factors to be considered in executing an order that are similar to the proposals made by the CSA. Article 21(1), however, explicitly provides that an investment firm shall execute an order pursuant to a client's specific instruction. We suggest that the CSA consider including a similar provision in its best execution regime such that following a client's specific instruction with respect to an order would be dispositive as to whether a broker-dealer has satisfied its duty of best execution. While we support the CSA's decision to broaden the scope of factors that may be used in connection with executing an order, such discretionary considerations should yield where a client has mandated the specific execution of a certain order.

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

As a general matter, we support CSA's and RS's objective to ensure that rules and regulations apply equally to market participants regardless of the manner in which they access marketplaces. However, we have significant concerns about the manner in which CSA and RS have proposed to level the playing field between DMA clients and ATS subscribers.

We are particularly concerned that the proposal to classify DMA clients that are dealers as "participants" and their clients as "access persons" and to require such access persons to sign an agreement directly with RS could be a significant impediment for certain types of clients, particularly foreign clients. Subjecting foreign dealers and clients to direct regulatory oversight of a Canadian SRO may lead such dealers and/or their clients to avoid trading on Canadian marketplaces with consequent adverse implications for Canadian capital markets and Canadian market participants. We are not aware of any precedent in the rules and regulations of other jurisdictions for direct SRO oversight of foreign dealers and their clients accessing markets through locally registered broker-dealers.

We are also concerned with the proposed requirement that representatives of DMA clients pass a standardized trader training course as a requirement to provide adequate training. Many DMA clients will have access to many marketplaces around the world such that it would be an impediment if each jurisdiction imposed a specific trader training course requirement for access to local marketplaces in that jurisdiction. We believe that the current TSX and TSX Venture DMA rules requiring the dealer to provide training and regulatory updates is the appropriate way to ensure that DMA clients are properly trained for purposes of trading on local marketplaces. If a trader training course requirement is imposed, we submit that there should be an exemption for foreign DMA clients.

Finally, we submit that the responsibility for supervision and monitoring of DMA client trading activity is best left with the marketplace participants who control and develop the technology to access the marketplaces and are in the best position to ensure that trading is compliant with UMIR and marketplace rules.

Question 27: Could the proposed amendments lead dealer-sponsored participants to choose alternative ways or 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?)

As previously stated, subjecting foreign dealers and clients to direct regulatory oversight of a Canadian SRO may lead such dealers and/or their clients to avoid trading on Canadian marketplaces with consequent adverse implications for Canadian capital markets and Canadian market participants. We also note the sensitivity that certain dealers and hedge funds might have towards any proposals that would require the surrender of information relating to trading strategies or working of orders. While we do not believe that the Joint Notice

contemplates such disclosure, we respectfully submit that requirements of this nature would have the effect of directing order flow away from Canadian marketplaces.

If the CSA, RS or any of their respective members would like to discuss these issues with us, we would be pleased to make ourselves available for that purpose.

Respectfully submitted,

Kim Bang by R.D.B.