



January 15, 2009

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Registrar of Securities, Department of Justice, Northwest Territories
Registrar of Securities, Government of Yukon Territory
Registrar of Securities, Legal Registries Division, Department of Justice, Nunavut
Registrar of Securities, Prince Edward Island
Saskatchewan Financial Services Commission
Superintendent of Securities, Newfoundland and Labrador
Ontario Securities Commission

c/o John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario M5H 3S8
e-mail: jstevenson@osc.gov.on.ca

and

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal, Québec H4Z 1G3
e-mail: consultation-en-cours@lautorite.qc.ca

Re: Comments on CSA Proposed Amendments to National Instruments 21-101 and 23 - 101, October 17, 2008 ("Proposed Amendments")

The Proposed Amendments focus on the important issues of trade through, or best price, best execution and on operational issues such as access to and reliability of technology for alternative trading systems and information processors. Alpha ATS commends the CSA for its efforts to bring finality on issues that have been outstanding for a long time.

The proposal indicates that the CSA's approach has been guided by its interests in promoting investor confidence and fairness where there is a high degree of retail participation by implementing trade through protection. Alpha supports the principal of trade through protection, where appropriate and practical. So while Alpha agrees with the CSA objectives, it notes that there is a need to balance the interests of all participants in the marketplace including investors (institutional as well as retail) and intermediaries such as dealers and marketplaces. If the cost or burden of implementing the requirements is too high, then liquidity in the Canadian capital market may be lost to other jurisdictions. For example, if the impact of implementation is to significantly increase latency in the trade execution process, investors requiring speed will go to other marketplaces. Implementation of requirements in stages should be considered so that the costs and benefits can be properly measured. For example, the CSA could implement the trade through requirement for the top five price levels first and evaluate whether that would address most concerns or whether more levels of depth are needed.

Alpha believes the new requirements should be evaluated in light of the variety of investor trading objectives as well as the impact and costs to our markets. In addition there should be flexibility in implementation so that competition and innovation are not stifled.

General Comments

1. **Scope of requirements and method of implementation will have an effect on the competitiveness and attractiveness of the Canadian capital markets.** Given the limitations of technology, eliminating trade throughs completely is not a feasible objective. A number of factors such as flickering quotes or latency within technology systems means that there will always be some trade throughs. The scope of the requirements and how they are implemented must be carefully considered in order to promote the right values without imposing burdens that will inappropriately affect the liquidity in our marketplaces. The Proposed Amendments appear to be more restrictive than the requirements that exist in other jurisdictions outside of Canada. As an example, the Proposed Amendments have higher requirements regarding full depth of book and the application to all marketplaces no matter what the volume of trading on that marketplace than exist in the United States. By requiring entities utilizing the order routing necessary to comply with the requirements to consume and process the full depth of book on all marketplaces, considerable latency will be introduced into the systems. This will make Canada unattractive to high frequency traders and others requiring low latency. Alpha encourages the CSA and IIROC to consider excluding, from the application of the rule, any marketplace that does not have at least 5% of the trading volume, in Canada, of at least one security. Also Alpha's own analysis suggests that protection of the full depth of book will not provide substantial, meaningful protection to orders in the book the CSA should consider the potential impact on technology latency and that the appropriate level of depth should be limited to five price levels.
2. **Relationship between a dealer and its client is an important part of the integrity and liquidity of the capital markets.** Common law and statutory

principles of fiduciary duty as well as the best execution obligations owed by a dealer to its client should be encouraged and strengthened rather than weakened. By placing the obligation on the marketplace and not allowing the marketplace to implement its obligations by placing conditions on its participants (generally dealers), the marketplace will be assuming responsibility for order routing decisions even though it does not have a relationship with the underlying customer. It has been the observation of Alpha through its recent experiences, that the Canadian dealers are currently very motivated to get the “best fills” even when there may not be a “best price” obligation. We have observed this in the context of their participation in our opening and closing auctions as well as in the odd lot execution context. Therefore any requirement that weakens that motivation is not in the interest of investors.

Currently, pursuant to their “best execution” obligations, dealers have a fiduciary obligation to ensure that their clients achieve best execution. The Proposed Amendments may create a situation where a marketplace may be required to take an action which may have the impact of contradicting a decision made by the dealer with the purpose of complying with their fiduciary obligation. This imposition of obligations on both the dealer and the marketplace will likely lead to issues regarding fulfilling investors interests. We support the action the CSA has taken to reinforce the best execution obligation through the new reporting requirements; and encourage the CSA to carefully consider any action that could undermine a dealer’s obligations to its clients.

Alpha believes that the dealer community is better suited to determine how a trade is to be executed to achieve the best interests of their clients. By imposing the trade through protection obligation on marketplaces, without allowing them to delegate such responsibility to dealers, routing decisions will be made without knowledge or understanding of a client’s execution priorities, knowledge that is the possession of the dealers. In addition, unless there is a preclusion on intentionally locking/crossing markets, marketplaces will have a difficult time implementing technology systems to comply with trade through prevention requirements where locked/crossed markets exist.

3. Ability to monitor and enforce requirements is essential to regulatory integrity.

Consistent enforcement of requirements is key to the integrity of the capital markets. In order to achieve that goal the following must occur: (1) requirements and obligations must be both clear and appropriate, (2) monitoring of compliance with requirements must be practical in the circumstances, (3) there needs to be resources trained and dedicated to following-up on violations, and (4) responsibility for monitoring and enforcement should be clear without duplicating efforts. The CSA should consider whether the industry is currently able to comply with the proposed requirements and, if not, whether additional time to develop the appropriate tools will cure their lack of ability to comply. In addition, Alpha believes that, in order to properly monitor the proposed requirements, it is necessary to have a recognized standardized consolidated feed which is acceptable to the

industry. While the CSA proposal sets out the requirements imposed on marketplaces, it does not state how the responsibility for monitoring violations of trade through will be allocated among the CSA, IIROC and the marketplaces. Moreover, alternative trading systems are not supposed to be monitoring or enforcing any rules against its participants. These issues should be addressed before the rules are finalized.

Specific Comments

1. Basic Requirement – Each marketplace must establish, maintain and enforce policies and procedures that are reasonably designed to prevent trade throughs.

Policies and Procedures. The current proposal creates an obligation on marketplaces to prevent trade throughs and represents a shift from the existing obligation imposed on dealers under the best price obligations in the Universal Market Integrity Rules (“UMIR”).

While there are some advantages in shifting the obligation for prevention of trade throughs, such as the efficiencies created by focusing on marketplaces which can act as hubs among multiple participants, some of these efficiencies are reduced by prescribing how it can be done (see answer to question 1). Alpha accepts that the obligation for the prevention of trade throughs should reside with the marketplaces, as a requirement; however, marketplaces should be entitled to delegate such responsibility to dealers. This would allow marketplaces and dealers to determine the appropriate method of ensuring compliance based on the interests of the dealer’s clients and the resources available to each party.

With respect to obligations imposed on the marketplaces, the requirements should be limited to procedures without determining how the marketplace can approach its obligations. Determining a method of complying with requirements can be very complex due to the various trade execution methodologies, different trading styles and priorities, number and type of marketplace participants (service providers, data vendors, etc). Flexibility in implementation is needed to accommodate the various interests and levels of sophistication.

The CSA Proposal also requires that all policies and procedures relating to prevention of trade throughs and any material changes therein must be filed with the applicable regulatory authority at least 45 days prior to implementation. This requirement would significantly decrease the flexibility of a marketplace to adapt to events as they occur. It is not clear why these policies and procedures should be treated any differently than any other policies or procedures.

Question 1 – Alpha believes that the CSA should take a similar approach as that in the U.S. which allows the marketplace to pass on part or the entire obligation and responsibility to marketplace participants that are dealers. Canada, as a smaller capital market, should not have stricter requirements which may adversely affect our market’s ability to remain

competitive in a global environment. In addition, the complexity of the marketplace structures requires as much flexibility as possible when considering the relative needs and resources of the dealer and the marketplace.

Application to active and passive orders not clear. While it is not clear, Alpha is concerned that the proposed amendments do not make it clear whether the obligation applies to both active orders, as they come in, as well as to passive orders sitting in the book. If the obligation is on passive orders, marketplaces will have to become order management systems which will be a duplication of services that already exist and will add unwanted latency and complexity. This issue was raised in Alpha's comment letter to IIROC 's MIN 2008- 09 (Request for Comments - Provisions Respecting the "Best Price" Obligation). In response, IIROC has indicated that it did not intend to apply the obligation to passive orders.¹

The definition of "protected order" excludes special terms orders if passive. The policy reason for excluding special terms orders is that they are subject to non-standard terms that differentiate them from regular limit orders and therefore do not have the same value to the price discovery process. As the value of special terms orders is different than the value of trades executed on standard terms, there is no reason for the distinction between passive and active and all special terms trades should be excluded from the definition of a "protected order".

Full depth of book. The Alpha Group provides an order router which consolidates data and routes orders to marketplaces with the best displayed prices. As part of its process of establishing functional requirements for the router, we did some analysis of order executions and found that in the vast majority of cases where an order trades at a price outside of the published bid-ask spread, at the time the order is entered, such a trade moved the market a maximum of 2 to 3 price levels. This analysis considered the liquidity of the stock. Therefore, requiring full depth of book is excessive and will only add latency. Alpha believes that the CSA should consider the U.S. approach of top of the book or at the most five price levels of depth. Applying the trade through protection to an excessive number of price levels will saddle the industry with additional processing costs and result in increased technological latency which will place the industry at a competitive disadvantage, discourage foreign entities from trading in Canada, raise market integrity issues and force liquidity to foreign marketplaces.

2. Permitted trade throughs/ exceptions: failure or malfunction of a marketplace, intermarket sweep orders, flickering quotes, non-standard orders, and calculated price orders

Alpha supports all of the exceptions identified by the CSA. However Alpha notes that in the U.S., the SEC trade through interpretation guidance has implemented an additional 17 exceptions. Since the CSA has based much of its proposal on the approach taken in the

¹ Alpha notes that the comments to the IIROC proposal which covered many of the same topics were not presented or appear to be considered in the CSA proposal.

U.S., they should indicate whether they have considered these additional exceptions and/or why these exceptions have been rejected.

Clarification of current proposed exceptions. The CSA proposal notes that the majority of comment letters supported the U.S. approach which only requires the application of the trade through protection rule during regular trading hours. Alpha also believes that the application of the trade-through protection should be required either: (1) during defined regular trading hours of 9:30 a.m. and 4:00 p.m.; or (2) during such period of time when more than one marketplace operating a transparent continuous order book is open for trading.

Additional Exemptions.

Question 3 – additional exemptions.

- Consideration should be given to how block trades may be executed in light of the proposed requirements. The SEC has provided guidance on four fact situations involving block trades.²
- Trades which, by their nature, may be executed at a price which is smaller than the price increments set out in UMIR.³
- Routing ISOs after cancellations, short sales and odd lot.
- A trade executed in a security that is, at the time of the trade execution, subject to a locked or crossed market⁴.
- Situations where the marketplace on which the trade was executed had displayed, immediately before the execution of the transaction that constituted the trade through, a protected order that was equal to or better than the best price of all other protected orders.
- The definition of a Calculated Price Order should be expanded to include “basket trades” where parties to a transaction agree to a price for a basket of securities where no single security makes up a substantial proportion of the basket.
- Amendments to existing orders where the amendment involves an amendment to the size of the order.

3. Trading fees limited to minimum increments

Questions 5 – should the CSA set an upper limit on trading fees?

² See Parts 3.02, 3.03, 3.05, 3.23 of SEC FAQs (2007)

³ 3.13 of SEC FAQs (2007)

⁴ Currently the exemption is limited to crossed markets.

Alpha supports the CSA proposal to prohibit a marketplace from having fees which have the effect of unfairly discriminating between trades or orders which result from orders routed to the executing marketplace for the purpose of complying with obligations to prevent trade throughs and trades or orders that were routed to a marketplace directly. Alpha proposes that marketplaces should not be entitled to charge a higher trading fee in relation to orders routed to satisfy trade through protection obligations as that marketplace would have charged in relation to a comparable order entered on that marketplace.

Alpha believes that regulators should avoid setting fees or imposing fee caps which could have non-intended consequences of causing marketplaces to shift fees from one type to another to avoid the restriction (for example from trading fees to routing fees). Alpha does however believe that the CSA must adopt procedures to prevent marketplaces from establishing fee models which take advantage of the trade through protection requirements by paying large credits for liquidity with the intention of charging high fees for orders routed pursuant to the trade through obligation.

4. Locked Markets

Question 6 - Alpha supports the CSA efforts to address the problem of locked markets; however we question whether this rule should be part of a national instrument. For purposes of effective enforcement, we would encourage the CSA to take the approach in the U.S. which is to have the self-regulatory organizations regulate and enforce this subject matter. It should be noted that, as indicated above, Alpha believes that an exemption from the general rule should be applied where the particular security is subject to a locked or crossed market at the time the trade is executed. Such an exemption will limit the incentive to intentionally create such a locked or crossed market.

5. Best execution reporting requirements

Alpha considers the best execution requirements to be fundamental to the relationship between a dealer and its clients as well as the key to addressing any issues relating to fragmentation. For that reason, Alpha supports CSA's efforts to require best execution reporting by dealers and the imposition of requirements on marketplaces to provide data to support such dealer reporting. However, it notes that the implementation of such requirements will involve significant effort and therefore suggests that the CSA consider a phased-in approach to allow marketplaces to implement in an orderly way and to provide time to receive feedback on the usefulness of the reports. Therefore, Alpha suggests that the CSA initially implement very basic reporting requirements.

Alpha also believes that the obligations on marketplaces should be restricted to providing the data necessary, in relation to their marketplace, to allow dealers to complete the analysis that the dealer believes is necessary to evaluate best execution obligations. To this end Alpha would suggest:

- For the purposes of subsection 11.1.1(a) and 11.1.1(i), the marketplaces should be responsible for reporting on orders that, at the time they were entered, were at or

within the best bid price and best ask price on the reporting marketplace rather than within the best bid price and best ask price on the consolidated feed. This would allow dealers to better evaluate orders entered on each particular marketplace, including marketplaces which do not provide pre-trade transparency.

- The requirement for marketplaces to provide the share-weighted average effective spread and the share-weighted average realized spread for order executions for each security, as well as a wide range of other valuable data, can be derived from the data that the marketplaces provide under this section. Alpha supports the concept of requiring marketplaces to provide sufficient data to allow dealer's to evaluate best execution, however the obligation to analyze such data should remain with each dealer. In addition the calculation of share-weighted spreads can be very complex. Alpha questions whether it is necessary to have these types of measurements.

Alpha proposes that initially, the liquidity measurement section in subsection 11.1.1(a) be limited to the number of orders received, cancelled, executed, routed at or within the best bid and offer on the marketplace; as well as the average volume of all orders executed.

Question 7 – Alpha believes that each dealer will wish to customize their analysis but that the CSA should initially focus on orders and not on units of securities traded.

Additional clarification should be provided on which order types are excluded from the statistics. For example, is all or any part of the iceberg orders excluded? In addition, it should be made clear that the report need only include information related to orders which are subject to the trade through obligations.

Question 8 – Alpha supports the CSA's approach of excluding special types of orders. Reporting should be based on the basic market and limit order types without separate reporting for specific order types.

Question 9 – Alpha supports using cumulative number of shares at least during the initial implementation of these requirements. We believe that any analysis of liquidity must take into account volumes to be meaningful.

Question 10 – The utility of reporting on hidden liquidity must be considered in light of the purpose of the reporting as well as whether such reporting would have a negative impact on the value of such execution styles. The decision on whether to requiring marketplaces to provide reports related to hidden liquidity is difficult as the CSA must balance the desire to maintain confidentiality with the dealers need to analyze all execution venues to achieve best execution. Alpha believes that the provision of aggregated data related to trading could be provided regardless of the nature of the marketplaces. With respect to order data our position would be similar. While we believe that it would be necessary to exclude order data that could provide information relating to confidential trading strategies, generally aggregated information should be provided.

6. Additional technology systems requirements and removal of thresholds for technology systems reviews

The proposed amendments broaden the requirements for a marketplace to develop and maintain systems, and for an independent review through more comprehensive concepts of a system of internal control. While Alpha acknowledges that the integrity of its technology is key to its operations, it notes that it is true of any intermediary including dealers. The level of requirements should be related to the complexity of the business and reliance by others on the system (how many entities rely on the system or what percentage of the industry rely). For example, new businesses or businesses with a small part of the trading may not need the same controls or requirements as businesses that are a core part of the capital markets.

The CSA has not indicated any particular problems that have caused it to increase the requirements nor has it indicated why marketplaces, particularly in a multi-marketplace environment, should be treated differently than other dealers or other key service providers. In years past, when exchanges were monopolistic utilities, it was necessary to maintain strict controls over exchange operations, including technology systems. In the new competitive environment market forces should dictate requirements for technology systems. We have found that our subscribers through their own commercial interests provide the right incentives for marketplaces and other service providers to take the appropriate action to maintain system capacity and redundancy.

The current requirements on providing technology standards and testing facilities are too prescriptive and do not take into consideration the fact that flexibility is required or that IIROC can step in when a registrant is creating risk for itself or others. Requirements regarding time periods should not be prescribed but should be stated in terms of what is reasonable or appropriate under the circumstances.

7. Information Processor

Question 15 – Alpha believes that there should be an approved consolidated feed which publishes the best bid and offer for all marketplaces as well as trade information. The required price level should be top of the book or at most five levels.

The approval of an entity as an information processor will have significant impact on the efficient operation of the Canadian capital markets. Therefore any decision in that regards should be transparent in terms of identifying the key objectives, success factors and how the various applicants meet those criteria.

It is Alpha's view that the key objectives should be as follows:

- The Information Processor should create a consolidated feed that will be a recognized benchmark for all participants in the Canadian capital markets, established to support their regulatory and business operations;
- The Information Processor should focus on the interests of the Canadian capital markets as a whole and not the interests of any individual or group of stakeholders;

- The Information Processor should have total freedom in choosing the right technology solutions that ensure reliability and support current trading needs such as low latency;
- Consolidating the data and distributing it to marketplace participants should be cost effective by utilizing economies of scale;
- Considering the urgency of some of the issues that need to be addressed, time to market of the Information Processor should be kept to a minimum;
- The Information Processor should ensure fairness towards those who provide the data as well towards those who want to access the data; and
- The Information processor should have processes and structures in place allowing it to rapidly identify and address any potential conflicts and issues.

The key success factors are:

- Independence of the Information Processor from any one market participant through governance and ownership structure;
- Clear and transparent requirements regarding scope of the data consolidated, technology protocols and service level objectives; and
- A revenue model that promotes fairness and price discovery.

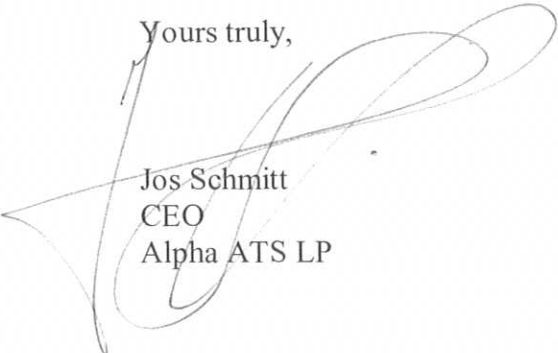
8. Revision of definition of significant change

Part 6 of 21-101CP has revised the definition of significant change so that it appears that no changes can be made without 45 days prior notice. Alpha is concerned with the lack of clarity around these increasingly strict requirements. In addition, Alpha believes that any such requirement, whether material or not, should provide for a process for allowing immediate implementation or expedited implementation of changes where the 45 day period is impractical or will interfere with changes made in response to customer requests or experiences of the particular marketplace where there is no impact on market integrity, for example, changes in trading schedule.

No explanation has been given for these changes or what concerns have arisen. All marketplaces, including exchanges, should have the flexibility to make changes that do not effect market integrity or do not impact third parties.

Alpha thanks the CSA for this opportunity to provide comments and would be happy to provide any additional information.

Yours truly,



Jos Schmitt
CEO
Alpha ATS LP