TriAct® CANADA MARKETPLACE

January 21, 2009

Alberta Securities Commission
Autorite des marches 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 ON M5H 3S8

and

c/o Me. Anne-Marie Beaudoin
Corporate Secretary
Autorite des marches financiers
800, square Victoria, 22e etage
C.P. 246, tour de la Bourse
Montreal, Quebec H4Z 1G3

BY E-MAIL

RE: Notice of Proposed Amendments to National Instrument 21-101 Marketplace Operation and National Instrument 23-101 Trading Rules (the "Proposed Amendments")

Dear Sirs / Mesdames:

TriAct Canada Marketplace (a wholly-owned subsidiary of ITG Canada Corp.) appreciates this opportunity to respond to the above-noted request for comments. Although we differ in some cases with the direction taken, we commend the CSA on a thoughtful, comprehensive proposal.

Trade-through Protection

TriAct is an ATS that offers price improvement over the Canadian Best Bid / Offer (CBBO) to every participant on every trade. As such we inherently comply with the aspects of the Proposed Amendments dealing with trade-throughs; our comments are therefore provided from a purely objective point of view. We were one of the main drivers of and early contributors to the design of smart routers in Canada, and have been actively involved in the development of industry rules and systems.

We understand the objectives of the Proposed Amendments, but recommend that careful consideration be given to the practical implications of such a significant change in direction at this point in time – over 3 years into the evolution and adoption of industry systems based on the assumption that trade-through protection is a dealer responsibility.

Comments received on the 2005 Discussion Paper and 2007 Joint Notice were without the benefit of "hands-on" industry experience. Since that time, much has changed. We believe that the CSA's Cost Benefit Analysis does not reflect current reality, and that **the Proposed Amendments could be more effective if they were to better leverage the building blocks that have already been put in place**.

Most dealers, large and small (representing a significant proportion of total equity trading activity) are well on their way to implementing and/or using smart order routing systems across their trading desks to avoid trade-throughs and deliver best execution. While a few have proprietary systems, most have engaged third-party vendors to provide the service. Customer demands have naturally resulted in fee competition among vendors, the result being that affordable solutions are available to even the smallest dealer. Proprietary and third-party clearing and settlement systems have also been modified to a great extent to accommodate multi-market trading through dealer-driven systems. **Dealers have taken these steps, not just for regulatory compliance with the UMIR Best Price rule, but also as a means of competitive differentiation. Several dealers have indicated that they plan to continue maintaining control of their own order flow rather than rely on a "generic" marketplace solution.**

Some dealers have not fully embraced smart routing and trade-through prevention, in large part because the regulatory environment has been in flux, providing temporary leeway for those that are more cost-sensitive than others. But, **given a clear regulatory imperative, the necessary solutions are readily available** to them.

While many marketplaces already (or plan to) offer trade-through prevention and more as a value-added service, others have not taken that route. **Imposing a marketplace obligation would only add to total industry effort and cost** by entailing:

- the introduction of the service by all (remaining and future) markets;

- downstream impacts on other industry systems and significant implementation issues (see Question 4 below);

- conversion by some dealers from current third-party implementations to marketplace solutions; and

- economic impact on established system vendors due to increased competition from marketplaces / reduced market opportunity.

Furthermore, there is no guarantee that marketplaces will offer trade-through protection for free, and dealers will still need their vendors to supply access from the vendors' trading applications to at least one marketplace. In order to rely on a marketplace for trade-through protection, many dealers would have to pay *both* a third-party vendor *and* a marketplace.

Finally, we support the proposal that non-dealer participants should be subject to the same regulatory requirements as dealers, but disagree that they would have to *build* systems to avoid trade-throughs. Just as most dealers have not built their own systems, non-dealer participants typically use third-party systems to access the markets and, if necessary, could look to their vendors to avoid trade-throughs. Alternatively, those marketplaces with non-dealer subscribers might be pressured to design their systems to help their customers comply with regulations and remain relevant.

In summary, **we support the move of trade-through regulation from UMIR to the CSA level in order to encompass the appropriate scope, but submit that a more practical approach at this point would be to implement a solution that acknowledges current practices and therefore minimizes industry disruption, yet addresses any shortcomings in the existing regime**. With that in mind, we offer our comments below on some of the CSA's specific questions.

Question 1: Should marketplaces be permitted to pass on the trade-through protection obligation to their marketplace participants? If so, in what circumstances? Please provide comment on the practical implications if this were permitted.

If the intention of the Proposed Amendments is for marketplaces to be the sole bearers of the regulatory obligation for trade-through prevention, then allowing them to pass the obligation back to dealers would contradict that objective. However, as noted above, it is generally known that *many* dealers *will* elect to manage their own routing (using the ISO marker), possibly resulting in the majority of order flow being out of the marketplaces' control. Yet the Proposed Amendments are unclear as to who bears the regulatory burden; in this case it could only be the dealers. We urge the CSA to consider clarifying this so as to avoid regulatory "gaps" and ensure that regulators have the appropriate regulatory recourse. U.S. Regulation NMS does include provisions and regulatory requirements for dealers that assume responsibility. Please see Questions 4 & 6 below for additional examples requiring dealer responsibility.

Question 4: Please comment on the various alternatives available to a marketplace to route orders to another marketplace.

Marketplaces could establish dealer entities that become subscribers to all other protected marketplaces; however the cost of establishing these dealer entities (including staffing, systems and operations to comply with Canadian account-handling regulations) and the downstream impacts on other industry systems (e.g. clearing & settlement) to avoid duplicate reporting and

streamline back-office processing would surely be significant relative to the small portion of activity relying on marketplaces for trade-through prevention.

Alternatively, marketplaces could simply pass orders to other marketplaces "as is" on behalf of the executing dealer, as third-party vendors do today. For this approach to work, each dealer would still be required to subscribe to each protected marketplace, or have a jitney arrangement in place, as they would under a dealer obligation. Otherwise, a given dealer's orders would be rejected back to the originating marketplace, then sent to another marketplace, possibly causing a trade-through. In this case, only the dealer could be held responsible.

We see no implementation solution under the marketplace obligation scenario that (a) is feasible at a reasonable cost relative to the net benefit achieved or (b) does not lead back to the necessity for a dealer-level obligation.

Question 6: Should there be a prohibition against intentionally creating a "locked market"?

Yes, there should be such a prohibition. As written, the Proposed Amendments put the onus on participants to avoid locked markets, which is inconsistent with the overall goal of a marketplace obligation as it requires dealers to have in place virtually the same systems needed for full trade-through prevention and to bear a similar burden. However, as outlined above, many dealers *will* assume the responsibility for trade-through prevention, and those same dealers will also want to direct their own locked market prevention, even if the regulatory onus is on marketplaces, as these two goals are closely tied. Regulatory accountability under this scenario can only rest at the dealer level. Also, the ISO marker or something similar will be necessary for passive (booked) orders if markets are responsible instead of / in addition to dealers.

Taking all this into consideration, **the Proposed Amendments are effectively a "hybrid" solution, giving dealers the option to take over responsibility from the marketplaces.** We recommend either:

- formalizing this concept by including explicit provisions for optional dealer responsibility in the National Instrument(s), or
- moving full regulatory responsibility to dealer and non-dealer participants (understanding that marketplaces *may* compete with third-party vendors for the provision of smart-routing services to enable their customers' regulatory compliance).

Reporting Requirements for Marketplaces and Dealers

TriAct supports marketplace reporting requirements to allow market participants to compare the relative performance and value of each marketplace, and to guide dealers' routing decisions. However, it is critical that marketplace statistics be based on identical, appropriate standards to allow for fair comparisons among marketplaces, and that the scope be clearly defined in order to avoid "creative interpretation" by individual marketplaces.

We also support the requirement for dealers to disclose their order routing practices. We strongly recommend that, at a minimum, dealers should be required to develop and publish order handling and execution policies, including an explicit list of those markets to which the dealer subscribes and routes clients' orders. This type of disclosure would provide investors with transparency as to how orders are handled in a clear and understandable manner rather than having clients try to interpret statistics without appropriate information to explain why certain routing decisions were made.

If the calculation and reporting of the proposed (or any other) statistics would be fraught with complexity and/or subject to misinterpretation by recipients, we would support the elimination of the statistical reporting requirement so long as the disclosure of order routing policies (as recommended above) is a requirement.

Question 7: Should the marketplace statistics focus on units of securities traded instead of orders and number of trades?

Statistics dealing with speed and certainty of execution are best reported on the basis of orders and trades, as proposed. General trading statistics should cover volume, dollar value and trades. The arithmetic mean and median *dollar value* of trades should be reported, as trade size alone does not provide sufficient information (e.g. markets that predominately trade penny stocks could have a much higher average trade size than those that trade large cap stocks).

Question 8: Should the marketplace statistics require separate reporting on specific order types that would include market orders, intentional crosses, and prearranged trades?

All statistics should exclude intentional crosses in order to provide a true "apples to apples" comparison among markets based on value-added, fee-liable trading activity. The definition of "calculated price orders" should be restricted to orders that are not immediately executable. With this more precise definition, and with calculated price orders excluded from the reporting requirements, marketplace statistics would apply to all active / immediately executable orders, including those that may receive price improvement from partially- or fully-hidden passive orders.

Question 9: Should the focus of the liquidity measures be the number of orders or the cumulative number of shares?

Liquidity is most often equated with the number of shares at a price point, and should be measured that way. Use of the term "at or within" the best bid and ask should be refined to clarify that liquidity measures apply only to immediately executable orders and not to passive orders, which may not execute for some time (e.g. buys that join / improve the bid).

Question 10: Would it be useful to have information about partially or fully hidden liquidity that is available on certain marketplaces? If so, what measures of that liquidity would be most informative?

Requiring information on dark liquidity could unintentionally undermine the value propositions of markets offering this alternative. Statistical reporting requirements should not have the effect of influencing market structure.

Question 11: Would it be useful to include reporting similar to the near-the-quote orders required by the SEC in the United States? What price increment away from the quote would be appropriate to use for the Canadian market?

Any reporting of orders relative to the CBBO would require complex tracking by marketplaces at every tick change on every market, and voluminous storage of this tick-by-tick data. We recommend refraining from moving in this direction until experience has been gained by both marketplaces and participants with the base proposed statistics.

Question 12: Are statistics regarding average realized and effective spreads useful without a consolidated best bid and offer?

No. For comparison reasons it is essential that all statistics are based on the same benchmark.

Question 13: Are the time frames used to assess speed and certainty of execution on a marketplace in section 11.1.1 of NI 21-101 appropriate? If not, what time frames should be used?

Most dealers and sophisticated institutional clients measure execution speed in milliseconds (or even microseconds). Appropriate time frames (in milliseconds) should be addressed by the proposed industry working group.

Question 14: In addition to the proposed reporting requirements for marketplaces, would other information, such as the following, be useful to dealers or advisors to assess best execution:

(a) a breakdown of the information by order size (i.e. 100-499 shares, 500-1999 shares, 2000-4999 shares, 5000 or more);

Further segmenting the information reported by marketplaces would likely result in added complexity for questionable benefit. We would suggest starting with simple, basic statistics as proposed, then adding to or altering the reporting requirements over time as experience is gained.

(b) the proportion of time that a marketplace had orders that were at the best bid or the best ask;

Please see our response to Question 11 above.

(c) the proportion of trades (in number of shares or number of trades based on our decision) executed inside the best bid and ask price?

Yes, however this should exclude intentional crosses.

Marketplace Systems

We commend the CSA on its efforts to incorporate lessons learned from the introduction of new marketplaces over the past few years into the regulatory framework. We recommend the following minor refinements to the requirements:

- Where a marketplace has published its technology requirements prior to beginning operations, then subsequently discovers that the system does not operate as per the requirements (i.e. a bug fix is required in order to comply with the published spec), the pre-operations timeframe should either re-start or be extended to give participants and vendors adequate time to re-test with the modified marketplace system.

- For operating marketplaces, emergency releases are sometimes necessary to correct critical system errors. The regulatory framework should provide leeway to allow for these emergency releases even where they are considered to be "material" changes.

Conclusion

We appreciate the opportunity to comment on this important regulatory instrument and look forward to participating in the working group to assist in identifying and resolving implementation issues. If you have any questions or comments, please do not hesitate to call.

Sincerely,

W. Rudd

Wendy Rudd
Chief Executive Officer

cc: Nick Thadaney, CEO, ITG Canada Corp.
Ian Camacho, President & COO, ITG Canada Corp.
Torstein Braaten, CCO, TriAct Canada Marketplace LP