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VIA E-MAIL

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Superintendent of Securities, Department of Justice, Government of Northwest Territories
Superintendent of Securities, Yukon
Superintendent of Securities, Nunavut
Superintendent of Securities, Consumer, Corporate and Insurance Services, Office of the Attorney General, Prince Edward Island
Saskatchewan Financial Services Commission
Superintendent of Securities, Government Services of 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

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

Re: Request for Comments - National Instrument 23-103 Electronic Trading and Direct Electronic Access to Marketplaces

Dear Sirs/Mesdames:

I am writing with respect to one particular aspect of the subject Request for Comments, namely the implications for foreign broker-dealers who engage in direct electronic access (DEA) if those foreign broker-dealers also happen to be registered in Canada as an exempt market dealer.

The following comments are those of the writer, not of Blakes as a whole nor any of our clients in particular.

As it currently stands, proposed section 6(2) does not allow a participant dealer to provide DEA to a registrant unless the registrant is itself a participant dealer or a portfolio manager.

Proposed section 11(2) only allows DEA clients to trade for the accounts of their clients if the DEA client is (a) a participant dealer, (b) a portfolio manager or (c) "an entity that is authorized in a category analogous to the entities referred to in paragraphs (a) and (b) in a foreign jurisdiction that is a signatory to the International Organization of Securities Commissions' Multilateral Memorandum of Understanding."

Canadian investment dealers currently provide DEA access to foreign broker-dealers who would qualify under proposed section 11(2)(c).

However, many of these US broker-dealers are also registered in Canada as exempt market dealers, in order to facilitate a portion of their practice in Canada. In such a situation, proposed section 6(2) would prohibit such US broker-dealers from being a DEA client. They therefore could no longer pr is engage in the trading and provide the service to their clients which would otherwise be allowed pursuant to section 11(2)(c).

US broker-dealers typically provide trading services to their own US or other international clients to facilitate access for those clients to trade on the Toronto Stock Exchange and other Canadian marketplaces, through the DEA link provided by a Canadian investment dealer. Sometimes the Canadian investment dealer is an affiliate of the US broker-dealer and sometimes it is not an affiliate.

The registration of a US broker-dealer as an exempt market dealer is often completely unrelated to this other trading business. The trades that flow through the DEA gateway to the Canadian marketplaces include largely foreign trades, i.e. by clients that are not in Canada. No Canadian dealer registration is required by the US broker dealer for dealing with those foreign clients.

In some cases a US broker-dealer that is registered as an exempt market dealer will receive trade orders from a Canadian client that includes both foreign and Canadian securities. Foreign trade orders can be submitted to the relevant foreign marketplaces, while the orders for Canadian securities will be routed to Canadian marketplaces through these various DEA gateway arrangements.

The exempt market dealer registration was arranged to facilitate other trading with Canadian accredited investors that was beyond the scope of that permitted by the international dealer exemption in section 8.18 of National Instrument 31-103, but otherwise is within the scope of trading permitted to exempt market dealers as specified in section 7.1(2)(d) of National Instrument 31-103.

It seems anomalous to prohibit a foreign broker-dealer from being a DEA client of any Canadian investment dealer (whether or not it is affiliated with the foreign broker-dealer) simply because the foreign broker-dealer has, in another area of its business, complied with Canadian regulatory requirements for dealing with Canadian accredited investors. The prohibition would apply even for trades being made by the foreign broker-dealer on behalf of foreign clients.

Such prohibition therefore would have the result of restricting access to the Canadian marketplaces from these foreign DEA orders and forcing the foreign clients of those brokers to either have their orders submitted on a non-DEA basis, with the added latency, risk and resulting loss of liquidity in Canadian marketplaces, or to move their trading account to a foreign broker that is not also registered as an exempt market dealer in Canada.

There are numerous foreign broker-dealers who are registered as exempt market dealers for a portion of their business, while they also trade with Canadian clients in foreign securities pursuant to the international dealer registration exemption in section 8.18 of National Instrument 31-103.

This dichotomy has been expressly recognized by the CSA. I noted that in the draft amendments to National Instrument 31-103, as published in June 25, 2010, the CSA stated that they "propose to clarify, in a new subsection 8.18(8) of NI 31-103, our intent that if a person or company relies on the registration exemption in section 8.18 for trades with permitted clients, but is also registered to conduct other activities in Canada, requirements applicable to its registration do not apply where it acts in reliance on the exemption." However, in the final version of the amended National instrument 31-103, as published on April 15, 2011, draft subsection 8.18(8) was no longer included. The implication of this change is unclear, since there was no commentary to mention nor explain the change. Given that the proposed change was described as a clarification, meaning to confirm what the CSA had already intended by the rule, it is presumed that the principle remains, that a foreign broker-dealer relying upon the international dealer exemption, but also registered as an exempt market dealer, is exempt from the registration requirements applicable to the exempt market dealer registration for that portion of its business that conducted in reliance upon other exemptions, including the portion of its business that does not require any exemption in Canada since it deals only with foreign clients.

The proposed section 6(2) has the opposite effect, since it prohibits the foreign broker-dealers from being a DEA client of an investment dealer even for trading that does not require the exempt market dealer registration.

Accordingly, to resolve this discrepancy, I suggest that section 6(2) should have the same three exceptions as section 11(2), so that a registrant that is analogous to a participant dealer in a foreign jurisdiction, as specified in section 11(2)(c), is eligible to be a DEA client and therefore able to trade on its own behalf and for the accounts of its clients.

Yours very truly,

Ross McKee

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