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ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÉRES

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July 8, 2011

Dear Sir / Madam:

Re: Proposed National Instrument 23-103 *Electronic Trading and Direct Electronic Access to Marketplaces* (the "Proposed Instrument")

Thank you for providing us with the opportunity to comment on the Proposed Instrument. The Investment Industry Association of Canada ("IIAC" or the "Association") agrees that, given the evolution of the industry, the creation of regulation that sets out the framework and expectations in respect of electronic trading and direct electronic access is appropriate.

Our specific comments on the Proposed Instrument are as follows:

Definitions and Interpretation

Definitions

We seek clarification on the scope of what is intended by the definition of Direct Electronic Access. In particular, it is unclear what constitutes "additional order management by the participant dealer". We question whether functions such as the use of a participant dealer's algorithm which only determines the marketplace on which the order will execute will constitute "additional order management." The result of such an interpretation would be that any order that executes through a firm's proprietary, or a third party smart order router will be outside of the DEA definition.

Additional guidance as to what would be considered additional order management would be helpful, in particular, does the degree of control or "touch" determine whether additional order management has taken place?

Requirements Applicable to Marketplace Participants

Risk Management and Supervisory Controls, Policies and Procedures (the "Policies and Procedures")

The Association supports the requirement that all electronic trading be subject to pre-trade controls and post-trade monitoring, regardless whether it is performed by the marketplace participant or DEA client. This requirement will promote the maintenance of fair and orderly markets, and reduce the likelihood of problem trades, by imposing similar requirements on all parties that trade.

In respect of the Policies and Procedures, it should be made clear that the marketplace participant can only be responsible for monitoring and controlling whether the DEA client exceeds credit, capital, price or size parameters in respect of the trading done through that particular marketplace participant. It is foreseeable that a DEA client may conduct trading through multiple marketplace participants, and as such, may without the knowledge of a particular marketplace participant, exceed restrictions on an aggregate basis. If the objective of the requirement is to ensure suitable risk management, we note that there are many counterparties that contribute to the risk, such as:

1. the client, who creates the risk and has the best perspective of the degree of such risk;
2. the executing broker;
3. the marketplace; and
4. the clearing broker, who ultimately bears the credit risk.

The Proposed Instrument focuses primarily on the executing broker, perhaps without due consideration of these other parties.

We seek clarification about the intent of section 3(a) in respect of non DEA trading, in respect of the types of thresholds for dealer trading that is envisioned by the regulation.

We are concerned about the wording of several provisions of this section that require that a marketplace participant "ensure" certain actions will or will not occur. This is particularly impractical in respect of DEA client trading. It is unreasonable to expect that

Policies and Procedures enacted by the marketplace participant can categorically prevent all potential intentional and unintentional violations of the regulations. For instance, given the volume of individual orders, it is impractical to monitor every single order to ensure compliance with the criteria set out in 3(b). It is however, appropriate to expect that such Policies and Procedures are designed to reasonably ensure that the regulatory requirements will be met on a systematic basis, through pre and post monitoring, and timely intervention and correction when problems are discovered. In addition, the responsibilities described in 3(b)(iv) should be consistent with section 11 of NI 31-103, such that the supervisory activities related to these functions be conducted by a "supervisor".

We seek clarification as to what is intended in section 4, in respect of the requirement that the Policies and Procedures provided by a third party be "under the direct and exclusive control of the marketplace participant". Guidance as to the role of the third party and what type of permissible actions they may undertake under what circumstances would be useful.

We also seek further guidance as to what is intended under section 5, in respect of the requirement that a third party that provides Policies and Procedures to a marketplace participant must be "independent from each DEA client of that marketplace participant." While we understand the general intent of this provision, we note that this may inadvertently cause problems in the case of marketplace participants that operate globally. Specifically, such a firm may use Policies and Procedures from one of their affiliates, which may also be a DEA client. Clarification of how this provision would apply in such cases would be helpful.

Allocation of Control over Risk Management and Supervisory Controls, Policies and Procedures

We would appreciate further clarification on the distinction between "participant dealer" and "investment dealer" in this section. The definition section describes a participant dealer as an investment dealer, so the use of both terms in the section appears circular and is confusing in that it does not clearly describe the parties to which the paragraph applies, and who has ultimate responsibility for trading in this situation. We question whether this is meant to describe an outsourcing arrangement or some other structure. It would be helpful to provide an example of what situation this is intended to address.

Requirements Applicable to Participant Dealers Providing Direct Electronic Access

Provision of Direct Electronic Access

We are concerned that the provision restricting participant dealers from providing DEA to registrants that are not participant dealers or portfolio managers may be drafted in a way that is too restrictive and may have consequences extending beyond what was intended. While it may be appropriate to prevent certain EMDs from using a DEA arrangement to avoid registration, the scope of the provision is potentially much more broad. For instance, many larger and global firms may have affiliates that are exempt market dealers and DEA clients. This structure currently allows such affiliates of such firms to access the marketplaces using their affiliated participant dealers. In these circumstances, the affiliate EMDs open accounts with clients and execute trades through

the affiliated participant dealer. This structure is also common with banks with foreign affiliates that execute trades through their Canadian dealer. It appears the existing wording of the Proposed Instrument may prevent such arrangements, such that those affiliates would be required to do business with a competitor rather than with their Canadian affiliate. Given the number of Canadian dealers that have US affiliates, and the significant number of these types of cross border transactions, this restriction will have a material detrimental effect on this important aspect of business. While we agree with the policy intent to prevent regulatory arbitrage, this section should be amended to exclude foreign and domestic EMDs that are affiliates of investment dealers when they execute as DEA clients through their affiliate investment dealer.

Members are also concerned that section 11(2) may be too limiting, as DEA clients may be non registrants in both Canada and other jurisdictions, while they may meet requirements to be an Institutional Customer. Clarification of whether the section is intended to be limiting would be helpful.

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In addition, given that DEA clients may have multiple categories of registration, we question the policy objective of disallowing DEA to be provided to DEA clients with multiple registration categories. It is foreseeable that many DEA clients have both an Investment Counsel/ Portfolio Management designation, and an EMD registration. The wording of the Proposed Instrument would prevent the provision of DEA services to such a client. It is important that the scope of the regulation be specifically confined to specific circumstances where regulatory arbitrage is a concern, as broader application will curtail legitimate and important transactions.

Written Agreement

Section 8(d) of this section, which requires that the DEA client agree to fully cooperate with the participant dealer in connection with any investigation or proceeding by any regulatory agency or marketplace and provide access to such information that is deemed necessary for the investigation or proceeding is likely to create problems in respect of certain privacy laws and information sharing procedures of various jurisdictions. In many cases, the information referred to, may not be permitted to be released unless ordered by the local regulatory authorities, under currently established procedures. By putting these provisions in a contract between the participant dealer and the DEA client, it may place the signatories in a position where they are contracting to violate certain privacy laws. Especially in the case where the end client is required to be disclosed, this will ultimately likely prevent DEA clients from other jurisdictions from working with Canadian dealers.

We recommend that this provision be removed, and that existing agreements and MOUs between Canadian regulatory authorities and other jurisdictions be relied upon if further information is required from foreign DEA clients. The signatories to the existing interservice agreements between regulators as referred to in section 11(2)(c) (IOSCO Multilateral Memorandum of Understanding) should be sufficient to form the basis for which jurisdictions can be offered DEA without explicit provisions included in the written agreement between the participant dealer and the DEA client.

In respect of section 8(e), we agree that the participant dealer should have the right to reject an order for any reason, and also have the right to correct an order in certain circumstances, such as where the order is changed from a market order to a limit order,

or where the order is sent in without a fixed price, and the participant dealer subsequently puts in a price range. However, we are concerned with allowing the participant dealer to vary or cancel any trade made by the client for any reason. Not all participant dealers put limits on orders, as some are of the view that it requires too many decisions to be made by the participant dealer, which may be inappropriate in certain situations. For instance, the participant dealer may be required to determine what securities should be subject to limits. This is a risk that should be borne by the DEA client, and should not be subject to authority granted to the participant dealer. We suggest changes to orders not be a required term of the agreement, but be optional and subject to negotiation between the parties.

Trading by DEA Clients

We are concerned that in the case of DEA clients that are affiliates of the participant dealer, the additional requirement in section 3 which requires that DEA clients using DEA access to trade for the accounts of clients must have their clients' orders flow through the systems of the DEA client before being entered on a marketplace directly or indirectly through a participant dealer may be over-regulation.

We also reiterate our concern above, relating to the word "ensure" in respect of a participant dealer's ability to determine whether a DEA client has established and in particular, maintains appropriate risk management and supervisory controls policies and procedures. As noted, we believe this wording should be changed to impose a reasonability standard.

DEA Client Identifier

Although we agree that a DEA client identifier should be assigned to the client and disclosed to the relevant regulators, we do not believe that it is appropriate to disclose this information to exchanges or quotation and trade reporting systems. Such information should only be required to be reported to IIROC. There is no business reason for marketplaces to know the identity of participant dealers' DEA clients. As such, information provided to the marketplaces should be restricted to the client ID, the name and phone number of a contact person for the ID (which could possibly be the registered trader). In situations where such information is required pursuant to an investigation by such marketplace, where necessary, the information can be accessed through IIROC.

Clearly Erroneous Trades

Our comments in respect of section 8(e)(ii) regarding the ability to cancel or vary trades is also applicable in the case of marketplaces. This function should be subject to the direction of the regulation service provider other than the marketplaces to undertake this function.

Effective Date

We note that in order to comply with the provisions of the Proposed Instrument, firms will have to develop significant new technological, systems and compliance structures. As

such, we recommend that the industry be consulted in determining what transition period is appropriate, once the provisions of the Instrument are finalized.

Thank you for considering our comments. If you have questions or comments, please do not hesitate to contact me.

Yours sincerely,

Susan Copland