BY EMAIL

July 13, 2011

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission
Saskatchewan Financial Services Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut
Superintendent of Securities, Prince Edward Island
Superintendent of Securities, Yukon

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 -

M^{e} Anne-Marie Beaudoin, Corporate Secretary
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Dear Mesdames/Sirs:

RE: PROPOSED NATIONAL INSTRUMENT 23-103 *Electronic Trading and Direct Electronic Access to Marketplaces* ("NI 23-103")

CNSX Markets Inc. (CNSX Markets) is pleased to respond to the CSA's request for comments in its Notice of Proposed National Instrument 23-103 (the "Notice"). We understand the intention behind the proposed rule and are aware of the history of the

access proposals in Canada and the current focus on these issues around the world. Our comments fall into two main categories: requests for clarity, and areas where we see the possibility of unintended consequences. We provide specifics below.

Proposed Rule

1. Pre-trade controls

To reinforce the general perceptions of fair and efficient markets, an emphasis on pre-trade controls is undeniably important and there are certainly some protections that can be programmed into an order entry system. However, when looking at the practical implementation of such controls, the ability to provide such protections for all outcomes is questionable in an environment where orders may be entered by a client through multiple accounts at multiple dealers. In some cases, no one dealer would have the entire picture, and if the trend of separating execution from clearing continues, this will become more prevalent. It would be helpful if the CSA could clarify its expectations in this area, especially given the language in the Notice referencing "ensuring" compliance.

2. Allocation of Control over Controls

One of the main changes in the proposal from today's framework for direct market access ("DMA") and sponsored access ("SA") is the removal of the dealer's option to rely on controls provided by a third party – whether those of a client or a service provider. We are aware of the challenges that have faced regulators and the concerns that not all dealers have been holding clients to appropriate standards. We submit, however, that it is not the reliance on a sophisticated third party risk management system that is the problem, but a failure in both compliance and demonstrating compliance and, as a result, enforcement. We ask the CSA to consider whether, in the cases where the dealer is able to assess third party systems and demonstrate the effectiveness of their combined procedures (as well as maintaining appropriate agreements), the option should still be available.

In respect of the allocation of risk management/supervisory controls to another investment dealer, a similar question arises: beyond allocation by contract, how would the CSA expect the dealer to reasonably assess the effectiveness of another dealer's systems and processes? Related to this are issues around understanding all automated order systems in use (including the clients' systems). Understanding the types of automated orders in use is clearly necessary and appropriate, but in-depth access being afforded a dealer is not likely feasible. We again ask that the CSA consider providing examples of the types of procedures being considered.

3. Provision of DEA

The wording of this section of the Notice is a bit unclear but we understand the proposal to be that a registrant that is not a "participant dealer" or a "portfolio manager" may not

be provided with DEA. We support the basic premise that a dealer in the business of trading on equity marketplaces should be subject to UMIR. We note, though, that this is an area of potential unintended consequences. For example, it is our understanding that the exempt market dealer ("EMD") category now includes the previous international dealers. Foreign entities that have obtained registrations for a purpose other than access to equity marketplaces, that are currently eligible clients under DMA rules, would not be eligible under NI 23-103. Foreign affiliates of Canadian participating dealers would likewise be ineligible even if they became EMDs for reasons unrelated to public equity market trading.

We also note that it is possible that there may be other categories of buyside registrants in the future, so it might be preferable to set the requirement more broadly as opposed to referencing portfolio managers specifically.

On the point of whether individuals should be eligible, we have no objection to individuals with appropriate trading knowledge and proficiency, integrity and financial resources to be eligible for DEA, so long as IIROC carries out meaningful reviews and dealers are held to a high standard in demonstrating the policies and procedures for allowing such access, unlike the practices around the accredited investor category for exempt financings that have been causing concern.

4. Minimum Standards

We see the benefits of moving to minimum standards instead of an eligible client list, especially given the length of time it would take to change the list once it is in a national instrument. The only issue we see in this change is that, at present, with one consistent list of eligible clients, the documentation is simplified and there is clarity. For investors who use more than one dealer, there could be unintended consequences – confusion at the very least and pressure on dealers to lower standards if other dealers accept them as DEA-eligible.

5. Client Identifiers

We are supportive of the concept of unique identifiers for DEA clients to facilitate monitoring, but the Notice is a bit confusing on this point. For example, it is not clear what is meant by the statement that "…the participant dealer would work with the various marketplaces to obtain these identifiers…" We believe it is simply intended that each dealer would assign each DEA client an ID that would be unique among that dealer's DEA clients. Please clarify if this is not the case.

6. Requirements Applicable to Marketplaces

The requirements on marketplaces relating to access to order and trade information, supporting DEA client IDs and ability and authority to terminate access reinforce current widespread practices. On the other hand, additional requirements to regularly assess and

document whether any risk management or supervisory controls, polices and procedures are required to "ensure fair and orderly trading" and regularly assess and document their adequacy and effectiveness appear to set significantly different standards, even for exchanges that have always had a public interest mandate.

We should emphasize that we do not object to specific obligations in this area; however, this and other references to "ensuring" compliance and "ensuring" fair and orderly markets imply that these are absolute standards (see Part 2, Section 3, especially (3)(a)-(e)). "Fair and orderly markets" is a concept that has not, to our knowledge, been applied in practice and cannot in any case be *ensured*, nor can compliance by third parties with "applicable marketplace and regulatory requirements". To be more specific: the language used throughout this part of the Notice and in the proposed rule is a significant departure from similar oversight obligations relating to controls, policies and procedures, as the latter have generally acknowledged that marketplaces can only *seek to ensure* such outcomes through reasonable efforts. We hope that a reasonability element was intended and will be made more clear in the final rule, and ask for consideration of the compliance challenges to marketplaces (and regulators) if it is not.

7. Marketplace Thresholds

As we have submitted previously, we do not believe in a one-size-fits-all approach to thresholds. The interaction between the various tools in place should be carefully analyzed, but the discretion to set appropriate thresholds should not be removed from marketplaces and assigned to the regulation services provider.

8. Clearly Erroneous Trades

The proposed requirements regarding clearly erroneous trades are very similar to current practices, which we view to be effective. The regulation services provider is in the best position to deal with errors and the impact of any remedial actions on the overall market.

Summary

The general themes in proposed NI 23-103 appear to be in step with the international regulatory direction regarding DEA and add some important risk management measures that were not previously explicit. Our comments above centre on the feasibility of some of the requirements and, in a few cases, result from concerns about clarity regarding the CSA's expectations. Robust risk management and supervisory controls that are clearly documented and demonstrably effective are certainly appropriate regulatory objectives, but we hope that before excluding options such as reliance on third party risk management and marketplace specific thresholds, consideration will be given to a broader approach, supported by monitoring and enforcement. Further, we ask that the proposed rule be reviewed to determine whether it was intended that requirements relating to general concepts such as compliance with marketplace and regulatory requirements and fair and orderly markets be absolute standards, or qualified by reasonable efforts.

Yours truly,

Cindy Petlock
General Counsel & Corporate Secretary

cc: Richard Carleton, Interim CEO
Rob Cook, President
Mark Faulkner, Vice President – Listings & Regulation