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Alberta Securities Commission
Authorite des marches financiers
British Columbia Securities Commission
Manitoba Securities Commission
Ontario Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Saskatchewan Financial Services Commission
Superintendent of Securities, Department of Justice, Government of Northwest Territories
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut
Superintendent of Securities, Consumer, Corproate and Insurance Services, Office of the attorney General, Prince Edward Island
Superintendent of Securities, Government Services of Newfoundland and Labrador

c/o John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
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-and-

Anne-Marie Beaudoin
Secrétaire de l'Autorité des marches financiers
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Dear Sirs / Mesdames,

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

We submit the following comments in response to the Notice and Request for Comments published by the Canadian Securities Administrators (the "**CSA**") on April 8, 2011 ((2011) 34 OSCB 4133) with respect to proposed NI 23-103.

Thank you for the opportunity to comment on these proposals. This letter represents the general comments of certain individual members of our securities practice group (and not those of the firm generally or any client of the firm) and are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client.

We generally support the broader regime for direct electronic access (DEA) that is proposed under NI 23-103. The proposal represents a significant improvement over the current regulatory environment applicable to DEA (or direct market access (DMA)/dealer sponsored access) which is fragmented, overly restrictive, and inconsistent with global standards to which marketplaces outside of Canada are subject. In addition to expressing our overall support for these proposals, we submit the following comments and concerns regarding specific aspects of the proposed Instrument.

Definitions

1. The definition of "direct electronic access" requires further clarification as it is not clear what is intended by "additional order management" by a participating dealer. The Proposed Companion Policy to NI 23-103 only clarifies that DEA orders are orders that are not re-routed to a trading desk of a participant dealer for manual order management by a trader or for re-entry by the participant dealer. Given the wide range of trading options available (technological and otherwise, including dealer-sponsored options), and given the broad range in level of involvement a dealer may have or functions it may provide, the CSA should provide more specific guidance on what is intended to be caught as "direct electronic access".

Risk Management and Supervisory Controls, Policies and Procedures

2. Marketplace participants should not be expected to "ensure" compliance with risk management and supervisory controls, policies and procedures, etc. In our view it would more appropriate to require that marketplace participants be required to establish and maintain appropriate controls, policies and procedures to a reasonable assurance standard (this comment applies to sections 3(1) and (2), 3(3)(b) and (e) and 10(3)).

3. We are concerned that the requirement for marketplace participants providing DEA to impose or implement automated pre-trade controls, and direct and exclusive control at the marketplace participant level, may adversely affect liquidity and interfere with both client access and client operations. DEA clients often rely on or use proprietary technology in order to implement a wide range of trading strategies. These requirements may also give rise to significant technology and intellectual property issues given that marketplace participants may need to have access (and in some cases control) over their clients' proprietary systems and technologies in order to implement the controls currently envisioned by the proposed Instrument (the intellectual property concern applies both to section 3(4) and to section

5(2)(a), as the level or knowledge and understanding required by the latter may also violate intellectual property restrictions). This may be particularly exacerbated in the case of foreign clients. As an alternative, in our view it should be sufficient to impose an obligation on the marketplace participant (or registrant-client) to have reviewed and established that its client has reasonable internal controls in place and is able to monitor and halt or limit trading by that client as may be required. In fact, these may be more effective especially when a DEA client trades through more than one marketplace participant.

4. While the Instrument contemplates the use of third party technology to provide risk management and supervisory controls, policies and procedures, it does not explicitly contemplate such controls, policies and procedures being provided by the DEA client itself (or its affiliates). Some DEA clients may, in some cases, have the best software and technology available and may themselves be able to implement the best controls. Under such circumstances, it does not seem reasonable to allow third party software/technology to be used to the exclusion of the client's (or its affiliates') own better software/technology (section 3(5)).

Requirements Applicable to Participant Dealers Providing Direct Electronic Access

5. We do not agree with the statement that provision of DEA triggers registration requirements as stated in the notice and request for comments and the proposed Companion Policy to the Instrument. In our view, this would result in an overly broad application or interpretation of the registration requirements, especially given the breadth of technological options or arrangements that are available for providing access, including technological options provided by non-dealer registrants (such as the recent availability of the NYSE Euronext facilities in Canada and market to market routing). In our view, the provision of technological solutions or access should be properly viewed as the provision of administrative services or facilities, and not the type of substantive service that would give rise to registration requirements. In addition, given that a Canadian investment dealer is required in order to access the TSX and most other Canadian marketplaces, the statement that provision of DEA triggers registration requirements is also unnecessary given that only registered investment dealers would likely be able to provide such access. Similarly, if the restriction in section 11(2) limiting the ability of those other than domestic or foreign registrant DEA clients from trading for the accounts of their clients is intended as an extension of this view (that providing DEA access triggers registration requirements), in our view the restriction is unwarranted given that a foreign DEA client could trade for the account of its own foreign client under circumstances where the foreign DEA client is not "in the business of trading" in Canada under securities laws (reflecting constitutional limitations).

6. Similarly, we do not agree that DEA should be limited, in the case of registrants, to those who are participant dealers or portfolio managers. This would unfairly disadvantage both Canadian and non-Canadian exempt market dealers given that non-registrants could readily be given DEA. Although the CSA cite "regulatory arbitrage" as the reason for this prohibition it is unclear what regulatory arbitrage this exclusion would prevent. Preventing access for exempt market dealers and for individual registered personnel of investment dealers, advisers and others also unfairly disadvantages these domestic participants against their foreign counterparts, who could also readily be given access. The requirement could also be circumvented by an exempt market dealer establishing an unregistered affiliate to whom access could be granted (section 6(2)) or simply establishing an electronic link which does not fall within the definition of direct electronic access (see comment 1 above). Exempt market dealers should also not be prohibited from trading for the accounts of their clients under section 11. This restriction also seems ambiguous in cases of multiple registration categories (such as a registrant that is a portfolio manager and exempt market dealer). Furthermore, the CSA has implemented National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations* which permits an exempt market dealer to trade in Canadian securities with accredited investor clients. To the extent that the CSA wish to restrict or clarify what activities may be undertaken by exempt market dealers, this should be done in an open and transparent process under the registration requirements and registration rules, and not in connection with a trading access rule. We also note that the use of the term "registrant" in Part 3 may be problematic given the term is defined in securities legislation to include a "person or company registered or required to be registered" and creates ambiguity as to whether a person or company that is relying upon a registration exemption is intended to be caught when the term "registrant" is used. In our view, a person or company that is relying upon a registration exemption should not be caught where the term registrant is used in Part 3.

7. While it may be appropriate for standards applicable to individual DEA clients to be higher in certain regards, they would need to be appropriately modified in other regards (and not necessarily higher), such as minimum thresholds relating to financial resources and trading volumes. The language used in the Instrument and Companion Policy seems to imply that the standards may need to be higher in all regards, which would unduly disadvantage individual clients in favour of institutional clients.

8. The prohibition against providing access or passing on direct electronic access under section 11(5) is unduly restrictive as it may be construed so as to limit the ability of institutional clients to give access to their personnel, which appears to be clearly contemplated by section 7(2)(b).

9. We raise the question as to whether the requirement under section 8(d) in respect of the written agreement would require breaches of foreign laws.

10. The client name associated with a DEA client identifier should only be available to the regulatory entities identified in section 10 (2). Other market participants generally should not have access to or be able to determine the client name associated with a particular client identifier on account of both confidentiality and competitive concerns.

Requirements Applicable to Marketplaces

11. We support giving marketplaces the ability to cancel, vary or correct clearly erroneous trades. Previously prohibited in our experience, this is a welcome change that should enable marketplaces to maintain quality of executions. We suggest that section 16 of the Instrument be clarified to allow for consent under section 16(2) to be provided under standard contract terms among the marketplace and its participants. We further suggest that such clearly erroneous trade policies and procedures adopted by marketplaces should be publicized and made readily available by the applicable marketplace. Of course, decisions could be subject to IIROC review.

12. Finally, we note that a reasonable transitional period would be necessary in order to permit compliance with these new requirements.

Thank you for the opportunity to comment on these proposals.

Regards,

Simon Romano
Terence W. Doherty