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VIA EMAIL: comments@osc.gov.on.ca; consultation-en-cours@lautorite.qc.ca

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Nova Scotia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Office of the Attorney General, Prince Edward Island
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Yukon
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

RE: Proposed National Instrument 24-102 *Clearing Agency Requirements* and Related Companion Policy 24-102CP

Dear Sirs/Madames:

TMX Group Limited ("TMX Group") welcomes the opportunity to comment on Proposed National Instrument 24-102 *Clearing Agency Requirements* and Related Companion Policy 24-102CP ("NI 24-102" or the "Instrument") published by the Canadian Securities Administrators (the "CSA") on November 27, 2014. TMX Group is very supportive of the revised approach to this rule relative to its earlier iteration in the form of local rule 24-503 *Clearing Agency Requirements* ("Local Rule 24-503"). In particular, we are extremely pleased that the proposed rule is now a uniform rule across provinces and with the clarity of how this rule differs from the original Committee on Payments and Market Infrastructures and the International Organization of Securities Commissions ("CPMI-IOSCO") Principles for financial market infrastructures ("PFMIs"). We are appreciative of the significant work and collaboration among all Canadian securities regulatory authorities that went into revisions to these rules in response to industry comments. The revised format of these rules better aligns the Canadian approach to the approach taken in other foreign jurisdictions and makes compliance more manageable. We still, however, have

significant concerns with this Instrument as we believe that the CSA must, consistent with the PFMIs, take a more flexible and principles-based approach to clearing agency requirements and must apply these requirements in a manner that allows for a level playing field as between domestic and foreign clearing agencies operating in Canada. We have raised a number of more specific concerns below, but these themes generally appear throughout.

1. General Approach

TMX Group believes that in setting out requirements for clearing agencies carrying on business in Canada, it is very important for Canadian regulators to:

(a) take a principles-based approach to these regulations in a manner that is consistent with the intentions of the PFMIs; and
(b) administer the regime in a consistent way to apply such approach consistently to foreign clearing agencies carrying on business in a Canadian jurisdiction to ensure a level playing field approach that ensures fair and competitive regulation/markets.

(a) Principles-based approach

In explaining why regulators are incorporating the PFMIs into the Instrument, the Notice to NI 24-102 (the "Notice") states that "[r]equiring clearing agencies to implement rules, procedures, policies or operations to meet or exceed the Standards is consistent with a flexible and principles-based approach to regulation. Among other reasons, a principles-based approach anticipates that a clearing agency's rules, procedures, policies and operations will need to evolve over time so that it can adequately respond to changes in technology, legal requirements, the needs of its participants and their customers, trading volumes, trading practices, linkages between financial markets, and the financial instruments traded in the markets that a clearing agency serves."[1] TMX Group supports this approach to incorporating the PFMIs into local laws and this approach to clearing agency regulation generally. We note, however, that while this approach may be evident in Part 3 of the Instrument, ensuring appropriate flexibility and a principles-based approach is not evident through the additional requirements set out under sections 2.2, 2.5 and Part 4 of the Instrument (the "Additional Requirements"). These requirements, in contrast to the intentions of the CSA as expressed above and the approach taken to these issues in the PFMIs and other jurisdictions, are highly prescriptive and appear, on their face, to be inflexible. They would make it challenging for clearing agency businesses to evolve in a timely manner and be appropriately responsive to industry changes and participant needs. This is also detrimental to Canadian participants who rely upon the services of Canadian clearing agencies. Their own ability to innovate, adapt to market changes, manage risk and operate in a competitive marketplace may be restricted in many ways through the restrictions imposed upon their clearing agencies.

Further supporting the CSA's view that clearing agency requirements should apply a principles-based approach, the CSA also noted that "[e]stablishing rules that are consistent with current practice and

[1] Part 3(i) of the Notice.

international standards provides a good starting point for promoting appropriate risk management practices."[2] Canadian clearing agencies operate in an international marketplace and in order to effectively provide a level of service and responsiveness that is comparable to that offered by their international peers, must be subject to a regulatory regime that is comparable to those of their international peers. Canadian regulators appear to have already demonstrated confidence that the standards imposed in such jurisdictions provide sufficient market protection and oversight as the responses to Local Rule 24-503 comments set out in NI 24-102 (the "Responses") state that foreign clearing agencies, including recognized systemically important clearing agencies, will generally be exempted from all of the Additional Requirements because they are sufficiently regulated in their home jurisdictions. The PFMIs already impose comprehensive requirements upon clearing agencies in all of the areas covered in the Additional Requirements, but impose them in a manner that allows room for regulatory flexibility to account for differences that may exist due to business models, nature of certain products or markets (i.e., securities, derivatives, commodities, etc.) and other relevant factors. As we have further detailed throughout this letter, we believe that many of the Additional Requirements are inconsistent with international standards and not in the best interests of the public markets.

(b) Level Playing Field

NI 24-102 is an opportunity to streamline regulations, avoid duplication between regulations and recognition and exemption orders, and create a level playing field as between domestic and foreign clearing agencies operating in Canada. In the Notice, the CSA expressed a similar desire to promote consistency and streamlining in the regulation of clearing agencies across Canada, stating that: "[t]he CSA considered, as general alternatives, adopting the Principles and Key Considerations in a policy, or including them on a case-by-case basis as terms and conditions to a recognition order of a clearing agency. The CSA decided against these alternatives because they believe the PFMIs should be contained in a rule to provide for greater transparency of clearing agency requirements and to promote consistency across all recognized clearing agencies that operate as a CCP, CSD or SSS in carrying on business in a jurisdiction in Canada."[3]

In spite of the CSA's clear expressed intention, however, the Responses make clear that all foreign clearing agencies, including systemically important recognized clearing agencies, will likely be exempted from the Additional Requirements of NI 24-102. This creates an unlevel playing field in the clearing agency realm as (i) in Canada, regulators consistently hold foreign based clearing agencies to a lower standard than domestically based clearing agencies; and (ii) abroad, foreign regulators (e.g., the CFTC) hold foreign (non-US) clearing agencies to the same standards as local clearing agencies.[4]

Subjecting foreign clearing agencies to a different standard than domestic clearing agencies will lead to a market where clearing participants based in Canada may choose their clearing agency, at least in part,

[2] Section VIII (Anticipated Costs and Benefits) of the Notice.
[3] Section VI of the Notice.
[4] For example, pursuant to CFTC rules, foreign derivatives clearing agencies have no alternative but to seek registration as derivatives clearing organizations and be directly held to the same standards as locally based derivatives clearing agencies.

on the basis of the clearing agency's home jurisdiction as clearing agencies located in a foreign jurisdiction may be better able to respond to participant needs due to their more flexible regulatory regime, rather than other factors within a clearing agency's control. We would submit that this creates a form of regulatory arbitrage rather than an efficient and fair capital market where participants choose a clearing agency on the basis of business strengths such as service, pricing, risk management, etc.

Further, subjecting recognized domestic clearing agencies to Canadian standards while exempting (both recognized and exempt) foreign clearing agencies from a range of these standards because such standards are in excess of the foreign clearing agency's home jurisdiction's standards dilutes the meaning of "recognized clearing agency" and confuses investors. Further, it is counter to the CSA's expressed intentions that NI 24-102 provide consistency and transparency with respect to clearing agency regulation across Canada. Market participants will likely assume that clearing agencies operating in Canada are subject to NI 24-102 and that they may rely upon regulators monitoring compliance with this Instrument. Throughout the letter we have detailed specific examples of where NI 24-102 standards differ substantially from the international standards to which the CSA has suggested foreign clearing agencies may be held.

While we will not repeat these comments below, level playing field issues arise in connection with most of the points discussed below.

2. Material Changes

TMX Group believes that the requirements under section 2.2 of the Instrument relating to approvals, notifications and the definition of "material change" must be amended. The definition of material change is extremely broad and requiring approval of all such issues will slow all aspects of a domestic clearing agency's business including its ability to adapt to market conditions (including changes to market risks) and respond to participants. Such far-reaching oversight will also tie up substantial clearing agency and regulatory resources and pull businesses and regulators away from other more material and important matters. Regulators should implement a self-certification process for material changes and pare down the definition of material change such that it only includes changes that are material enough to warrant immediate regulatory review.

(a) Fee and Rule Changes

The advanced approval requirements for material changes and advanced notification requirements regarding fee changes set out under section 2.2 of NI 24-102 are excessive and more stringent than many comparable international regulations and exchange regulations. The proposed rules put domestic clearing agencies on an unlevel playing field relative to foreign-based clearing agencies which may process such changes substantially more quickly. By way of example, pursuant to Commodity Futures Trading Commission ("CFTC") rule 39.4 *Procedures for implementing derivatives clearing organization rules and clearing new products,* a proposed new or amended rule of a Derivatives Clearing Organization ("DCO") must be submitted to the CFTC with a certification that such rule is in compliance with the Commodity Exchange Act. Only if the DCO voluntarily chooses would a rule be submitted to the CFTC to

await approval. Self-certified rule changes must be submitted to the CFTC 10 business days in advance of their effectiveness.[5]

This results in the general level playing field concerns raised earlier in the letter as domestic clearing agencies will be more restricted in their ability to operate their businesses. Foreign clearing agencies operating in Canada will be able to adapt to market changes to introduce new products, engage in new business activities and amend their rules (including fees) in a significantly more timely manner. In comparison, Canadian clearing agencies will be required to wait an unspecified period of time for regulatory reviews and approvals, putting them in a constant position of lagging behind the business practices of the international market.

This is of particular concern to Natural Gas Exchange Inc. ("NGX"), which clears energy derivative products and operates in a seamless cross-border market. The restrictions imposed by this section are a substantial departure from its current regulatory regime and the regime to which its competitors are subject. Such restrictions are likely to materially impact NGX's ability to compete and to remain viable as a going concern. NGX is subject to the CFTC DCO standards and, with respect to many of its products, operates in direct competition with substantially larger US-based clearing agencies regulated by the CFTC. An unlevel playing field puts NGX at a significant disadvantage. There are no barriers to restrict foreign based derivatives clearing agencies from offering competing products to Canadian participants and responsiveness to participant needs is essential for success in this market. NGX's exchange services are also competitive with bilateral trading which is not regulated in this manner. Creating a regulatory regime that pushes participants to use foreign clearing agencies and bilateral trading to avoid the consequences of such regulation is not in the best interests of the Canadian marketplace as it is both commercially destructive to Canadian clearing agency businesses and entirely fails to protect market participants who can easily switch to unregulated or significantly less regulated alternatives to conduct the same activities. Further, derivatives clearing agencies must often make changes to risk related rules and requirements on very short notice in order to effectively manage clearing agency risks. A self-certification regime is critical to allow clearing agency's to manage such risks in an appropriate and timely manner.

We urge the CSA to adopt a self-certification process similar to the CFTC's so that the Canadian marketplace and Canadian securities regulators can operate in a commercially efficient manner. Clearing agencies are already subject to extensive operational principles pursuant to the PFMIs and the other requirements of NI 24-102 and any material changes to their business must always be in compliance with such requirements. Self-certification would strike the right balance between: (i) ensuring regulators have all information related to a material change necessary for evaluation, (ii) allowing clearing agencies to operate responsively, efficiently and competitively; (iii) allowing regulators to raise concerns during the self-certification period (or any time after if further time is needed); and (iv) allowing regulators to

[5] CFTC rule 40.6(b).
Further, certain specialized or less material rule changes do not even require self-certification or notice to the CFTC if: (i) the clearing agency maintains documentation regarding all changes to rules; and (ii) the rule governs certain subject matter, including fees (other than fees associated with market making or trading incentive programs) that (a) are less than $1.00 or (b) relate to matters such as dues. (CFTC rule 40.6(d)(3))

flexibly review and address material changes such that those that are most material can receive greater priority. Regulators would continue to provide a high level of oversight without unduly impeding commercial activity.

(b) Other Changes

TMX Group would submit that the term "material change" is overly broad. Given the substantial impact section 2.2 will have upon the ability of clearing agencies to manage their businesses efficiently and effectively, we submit the definition of "material change" should be reconsidered and restructured and that only those issues that truly require review and approval in order to protect the Canadian marketplace from material risks should fall under the definition of "material change".

The following should not fall under the definition of material change:

(i) Immaterial changes to board or board committee charters which would currently fall under the unnecessarily broad term "corporate governance".

(ii) New businesses that do not involve FMI-related services (e.g. clearing, settling or depository) that would currently fall under "a new type of business activity." Only new services that would have spill-over risk onto an FMI-type service should potentially be subject to mandatory notification or approval of some form and then only to the extent that the spill-over risk has a material impact on the firm's PFMI Disclosure Framework Document.

(iii) The following documents and changes which would not even require CFTC notification pursuant to CFTC rules including:

- amendments to user guides or manuals;
- amendments to certain operating procedures (particularly for procedures that are entirely internal, this seems inappropriate);
- many material changes to the design, operation or functionality of the clearing agency's operations or services (this may include even the algorithms applied by a clearing agency which goes significantly beyond what regulators would normally review); and
- the establishment or removal of a link (where this requires a rule change, this could arguably be considered a material change, but approval regarding the establishment of any link seems excessive).

Requiring advance approval for each of these substantially slows the ability of the clearing agency business to operate and these do not create market risk requiring immediate review. All such material changes will still need to be made in compliance with the PFMIs.

3. Letters of Credit

In its comment letter regarding Local Rule 24-503, TMX Group requested clarity that letters of credit be considered collateral and a qualifying liquid resource as this approach would be consistent with market

and international practice and provides a cost effective means of meeting collateral requirements for commercial entities. In the United States, pursuant to the CFTC's DCO regulations, letters of credit are explicitly permitted to be used as collateral and qualifying liquid resources. We again request that the CSA provide clarity that the use of letters of credit is permitted. We have provided further background as to how this issue has been addressed in the United States to demonstrate that letters of credit provide the necessary payment certainty and that by not allowing use of letters of credit, Canadian clearing agencies would be put at a competitive disadvantage relative to their foreign competitors.

In response to TMX Group's comment that suggested that the Canadian regulators clarify that "letters of credit be perceived as permitted collateral, notwithstanding that the wording of the provision does not specifically suggest otherwise," the CSA took the opposite position that "[c]onsistent with footnote 63 of the PFMI report, in general we do not believe that letters of credit or other forms of guarantees are acceptable collateral." That conclusion is an unnecessarily narrow reading of the language of footnote 63 and is contrary to the more nuanced approach taken by other international regulators to the issue of guarantees generally, and letters of credit specifically. Letters of credit are a standardized financial instrument which constitute a committed credit facility, are widely accepted and provide substantially lower credit risk than general guarantees. The PFMI rules do not exclude letters of credit as acceptable collateral or financial resources, but rather specify the attributes of acceptable collateral as those assets "…with low credit, liquidity, and market risks." Such requirements are in alignment with the attributes of letters of credit as outlined below.

The credit risk of a letter of credit is a function of the risk the letter of credit will be called and the credit worthiness of the issuer. First, the credit worthiness of the issue can be determined by accepting letters of credit only from highly rated banks. For example, NGX accepts only letters of credit issued by banks with at least an A rating.[6] Moreover, the credit risk of letters of credit in part can be addressed through concentration requirements which limit the reliance on any particular issuing bank. The form of letters of credit makes such requirements readily enforceable. Letters of credit are standardized instruments with common features and characteristics that are consistent across the industry.[7] Because letters of credit are standardized, it is easier to aggregate and monitor an issuer's total outstanding letters of credit. For example, in the United States, FDIC-insured banks are required to disclose quarterly the total face value of all outstanding letters of credit. *See* Schedule RC-L of FFIEC 031. Such disclosures enable regulators and letter of credit beneficiaries to monitor an issuer's letter of credit activity and adjust their practices accordingly. In contrast, guarantees are over the counter products crafted on a case-by-case basis through private negotiations. There is no such similar disclosure requirement for guarantees.[8]

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[6] See NGX's Margin Methodology Guide, p.8.

[7] The Uniform Customs and Practice for Documentary Credits (UCP) is a set of rules on the issuance and use of letters of credit. The UCP is utilized by bankers and commercial parties in more than 175 countries in trade finance. Some 11-15% of international trade utilizes letters of credit, totaling over a trillion dollars (US) each year.

[8] In fact, while U.S. national banks have broad authority to issue letters of credit their ability to issue guarantees is very narrowly constrained. *See* 12 C.F.R. § 7.1016 and 12 C.F.R. § 7.1017.

Further, the letters of credit themselves possess little, if any market risk; the face value of a letter of credit does not fluctuate, keeping its value consistent and predictable. Banks issuing letters of credit are subject to regulatory capital reserve requirements which ensure that assets are maintained to mitigate the risk of default[9]. Issuers may address the market risk of letters of credit by being restricted from issuing letters of credit to be used as collateral in markets to which the issuers have material market exposure such as energy commodities. The above characteristics readily support a determination why letters of credit, with proper regulatory requirements, could meet the requirement of Principle 5, that collateral have "low credit, liquidity, and market risks."

Against this backdrop, the CFTC has permitted the use of letters of credit under its Rule 39.13(g)(10) in connection with the initial margin of futures and options. CFTC Rule 39.13(g)(10) provides that:

> 10) *Types of assets.* A derivatives clearing organization shall limit the assets it accepts as initial margin to those that have minimal credit, market, and liquidity risks. A derivatives clearing organization may take into account the specific risk-reducing properties that particular assets have in a particular portfolio. A derivatives clearing organization may accept letters of credit as initial margin for futures and options on futures but shall not accept letters of credit as initial margin for swaps.

The goal of PFMI Principle 5 is to mitigate counterparty credit risk through the use of collateral with low credit, liquidity, and market risks. The CFTC noted that in the context of futures and options, letters of credit has such a low risks, and determined to permit the use of letters of credit saying that it was "taking into account the strong track record of letters of credit in connection with cleared futures and options on futures."[10]

Based upon the successful historical use of letters of credit as initial margin in certain markets, including requirements relating to the rating of the issuing bank and concentration limits by issuer, we believe that the CSA should reexamine its rejection of letters of credit and accept their use as collateral subject to specified conditions. Moreover, we further urge the CSA to distinguish that letters of credit are also used by clearing houses as part of meeting their own liquidity and financial resource requirement and that this use of letters of credit is unaffected by the discussion of NI 24-102 relating to Principle 5.

4. Use of Own Capital

We would submit that this is a very complicated issue and that at this stage it would be very inappropriate to address this in the Instrument. We strongly believe that section 4.5 of NI 24-102 must be removed for the following reasons: (1) skin-in-the-game is not a PFMI requirement (as acknowledged by the CSA in the Notice); (2) skin-in-the-game is still an ongoing and unresolved global debate on rationale, structure, size, timing and related matters; and (3) skin-in-the-game would be more appropriately handled by the Bank of Canada/provincial regulators through their guidance on recovery

[9] For example, in the United States, Basel III capital requirements generally require banks to apply a 50% credit conversion factor to transaction-related contingent items such as performance standby letters of credit. See e.g. 12 C.F.R. 3.33(b)(3)(ii).

[10] See 76 Fed. Reg. 69,334, 69,393 (November 8, 2011).

tools which they are expected to publish later in 2015. Regulators should engage in further discussions with impacted parties to come up with a sensible solution to the skin-in-the-game question before incorporating this concept into clearing agency regulations.

Moreover, there is a strong and important relationship between the capital placed at risk by a clearing house, the manner in which its fees are risk adjusted and adjusted for the cost of that capital, the risk design of the risk model to effectively protect that capital and the design of the participant access criteria/rules that govern who can expose the capital to loss. To regulate in this one area without considering those related factors and, indeed, to prescribe independent approval or regulatory processes for each of these factors, serves to limit the ability of a clearing house to manage these complex interrelationships and is not in the interests of preserving the long term viability of our clearing houses. Ultimately this is not in the public interest.

5. Governance

(a) Chief Compliance Officer

The requirement for clearing agencies to designate a chief compliance officer ("CCO") and the very broad mandate that section 4.3 sets creates standards that are excessively high and inconsistent with the principles-based approach to compliance taken in the PFMIs which recognizes that different compliance programs will be appropriate for different clearing agencies. With respect to section 4.3(3)(a), we would submit that policies and procedures can reasonably be designed to ensure that a clearing agency complies with securities legislation although they cannot in themselves ensure compliance. With respect to section 4.3(3)(b), it is our view that a sound compliance framework requires the participation of all the key business units of a clearing agency and that its implementation should be an enterprise-wide responsibility. Furthermore, such requirement does not take into consideration the existence of different structures in a group where the designation of a CCO for each entity may not in itself be warranted.

Further, we note that section 4.3(3)(c), which requires the CCO to report to the Board upon becoming aware of any circumstances indicating that possible non-compliance by the clearing agency with securities legislation may create a risk of harm to a participant or to the broader financial system, is overly broad and should at least incorporate a materiality qualifier. Similarly, s. 4.3(3)(e), which requires that a CCO report any conflict of interest that creates a risk of harm to a participant or to the capital markets, should also include a materiality qualifier as it should not be necessary to report in cases where the likelihood and possible magnitude of harm is small.

Moreover, The Canadian Depository for Securities Limited ("CDS"), through its CEO and general counsel, is already required to annually certify their compliance with its recognition orders. We question the need for a blanket requirement that all clearing agencies must put in place a CCO to address these matters.

(b) Independence

Relative to what is practically speaking necessary and what is required by other comparable regulations, we would submit that the definition of independence pursuant to NI 24-102 is too narrow and granular and is inconsistent with the approach taken by international and Canadian regulators to clearing agency director independence. Further, nothing in the PFMIs suggests that such a substantial deviation from a flexible approach to PFMI implementation would be warranted with respect to board independence. It is unclear why a Canadian clearing agency needs even stronger independence requirements than those that currently exist in Canada, those that are required by the PFMIs, those that exist abroad and those applied to public companies.

The definition is significantly more narrow and granular than the definition of independence applied to subpart C DCOs in the United States which requires that independent directors are not executives, officers or employees of the DCO or an affiliate.[11] This definition is also significantly narrower than the definition of independence currently applied to clearing agencies in their existing recognition orders.[12] This definition is even narrower than the definition set out in National Instrument 52-110 *Audit Committee* which applies to public companies as even this rule does not require a three year cooling off period for employees or executive officers of affiliates of a clearing agency. The definition is also narrower than the definition proposed in proposed Local Rules 24-503.[13]

The Canadian clearing agency business is a relatively small market with a relatively small pool of qualified candidates. Applying such a strict definition of independence may result in less qualified candidates whose guidance may not be helpful without any real benefits to the public market.

(c) Compensation Committee

We would submit that the institution of a compensation committee should not be strictly required. The PFMIs permit a greater degree of flexibility around the use of a compensation committee than permitted in NI 24-102 and do not strictly require their use. Rather, they leave some room for flexibility with respect to how or whether they are used and how compensation matters are addressed. Existing

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[11] CFTC rule 1.64(b)(1). Subpart C DCOs are required to comply with PFMIs).

[12] Pursuant to the CDS (OSC) and CDCC (AMF) recognition orders, a director is independent if the director is not (i) an [associate (in the case of CDS)], partner, director, officer or employee of a significant Maple shareholder,
(ii) an [associate], partner, director, officer or employee of a Participant of the recognized clearing agency or such Participant's affiliated entities or an associate of such director, partner, officer or employee,
(iii) an [associate], partner, director, officer or employee of a marketplace or such marketplace's affiliated entities or an associate of such partner, director, officer or employee, or
(iv) an officer or employee of the recognized clearing agency or its affiliated entities or an associate of such officer or employee;

[13] OSC Rule 24-503 Companion Policy s. 3.2(4) stated that the OSC typically views individuals as independent if they have no direct or indirect material relationships with the clearing agency (for example, clearing members), its officers or employees, its shareholders who hold a significant interest in the clearing agency and those with cross-directorships. While generally excluded, parties with significant business relationship with the clearing agency may, depending on the circumstances, be considered independent. Members should be able to exercise objective and independent judgment after fair consideration of all relevant information and views and without undue influence from internal or external parties or interests.

recognition orders for clearing agencies also do not require them. There is no clear public interest reason to mandate their use and more flexibility would allow clearing agencies that are part of bigger organizations to use expertise and resources of the larger enterprise to optimally address compensation issues. In some cases, a compensation committee may be more conflicted and less able to exercise the necessary objective judgment to perform this function.

6. Access Requirements and Due Process

Section 4.11 of NI 24-102 is drafted very broadly and would materially impact all aspect of a clearing agency's business. This is a significant departure from the PFMIs and could restrain a clearing agency's ability to effectively manage its risks and develop its business in a fair and competitive manner. We would submit that these requirements should only be applied to a clearing agency's key clearing and settlement services. Regulating services under this national instrument that are not key to clearing and settlement activities of a clearing agency or that are ancillary to those services goes beyond the scope of the intent of the PFMIs and beyond the scope of appropriate or necessary regulation. We have set out specific concerns below.

With respect to s. 4.11(1)(b), clearing agencies do not control or have the ability to control the extent to which a participant may discriminate among its own customers. Clearing agencies do not have visibility generally into the interactions between participants and their customers. We would thus submit that "or the customers of its participants" be removed from this section. Furthermore, we believe that generally certain forms of discrimination are the basis of sound risk management principles applied by a clearing agency. The clearing agency rules must be fair and transparent, but they must also protect the clearing agency and its participants from other participants who operate under a jurisdiction or legal regime which could impede or threaten the clearing agency operation.

With respect to s. 4.11(1)(c), matters relating to competition are already addressed through the *Competition Act* and monitored and enforced by the Competition Bureau. We believe that the most appropriate way to address competition matters is through this legislation and this government body which has been mandated with the responsibility of monitoring and prohibiting various forms of anti-competitive activities.

We note that the language provided by 4.11(2) is very broad. As laid out under its rules, a clearing agency may routinely make decisions that adversely affect their participants. Hearing and due process should strictly be limited to suspension or termination of membership decision so as to ensure that every decision made by a clearing agency as part of its daily operation is not the object of constant challenge by its participants.

7. Carrying on Business

We would submit that the guidance regarding the concept of "carrying on business" should include a materiality threshold to allow for greater regulatory flexibility and account for commercial realities. Section 2.0 of the Companion Policy to the Instrument states that "a foreign-based clearing agency that provides or will provide its services or facilities to a person or company resident in a jurisdiction would

be considered to be carrying on business in that jurisdiction." Applying for recognition or exemption in a jurisdiction is a major undertaking and generally multiple obligations follow from the order granted. For example, a clearing agency providing services or facilities to only a very small number of participants, all of whom are highly sophisticated, or doing only a very small volume of business in a jurisdiction should not be deemed to be carrying on business in a jurisdiction. Without such a qualifier, it may not make commercial sense for a business to operate in certain jurisdictions as the costs of application and ongoing compliance and monitoring may outweigh the benefits obtained through such a small volume of business. From the perspective of regulators, however, little risk to the jurisdiction exists in a situation where a participant is highly sophisticated and little business is being transacted.

8. Operational Risk

The requirements set out under sections 4.6 to 4.10 are very prescriptive and these issues should generally be regulated through a principles-based approach that can allow for flexibility in complying with related PFMI requirements. TMX Group would appreciate clarity on the following issues:

(a) With respect to s. 4.6(c) there is a requirement to notify the regulator or, in Quebec, the securities regulatory authority. We assume that in each province, a notification to the regulator means a notification to the securities regulator. As such, the special reference to securities regulator, as opposed to the general regulator in Quebec in confusing. Please clarify that "regulator" refers to the securities regulator in the province in which a clearing agency is recognized.

(b) With respect to s. 4.8(1), there should be a materiality threshold such that the section reads: "A recognized clearing agency must make publicly available, in their final form, general technology requirements regarding interfacing with or accessing the clearing agency…" The clearing agency must make available the technology requirements that participants need in order to interface with the clearing agency, but it should not be necessary to make information publically available if it is not materially necessary. Such technology requirements are sensitive information and making it public could potentially expose the clearing agencies system to malicious internet attacks.

(c) With respect to testing facilities referred to in s. 4.8, participants test the technology as appropriate for themselves and clearing agencies provide the necessary guidance and assistance to ensure that participants can make use of the system. Although this requirement may be relevant to marketplace and trade repository regulation, it is not relevant to the clearing agency world. Clearing agencies already have a strong motivation to ensure that participants can utilize the system properly as if participants cannot use the systems, they will not continue to do business with the clearing agency. In CDS' case, effective dialogue between CDS and participants by way of participant committees ensures that technological requirements are not only communicated to participants but that they are given sufficient time to anticipate and implement those changes.

(d) With respect to references to independent review in s.4.7(1) and 4.10(f), we would seek further clarity with respect to the meaning of "independent review" and clarity that

such a review by an affiliate should suffice. Requiring a third party entity to conduct such an audit would increase costs significantly, particularly for smaller clearing agencies, and should not be necessary.

9. Systemic Importance Determination

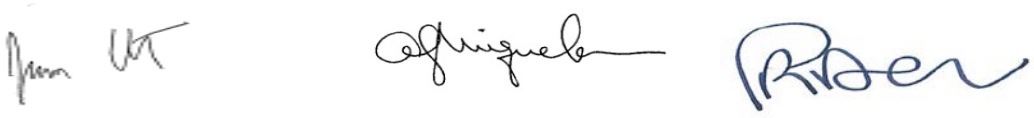
We note that the list of relevant factors set out in s. 2.0(2) of the Companion Policy to NI 24-102 regarding the systemic importance determination is very broad, but would submit that in addition to the factors listed, regulators should consider not just the centrality or importance of the clearing agency to the market it serves, but also the size of that market relative to the overall Canadian market. For example, if the market such clearing agency serves (a more specific example might be the natural gas market) represents only a very small percentage of the Canadian economy, regardless of how central such clearing agency may be to its market, it may not make sense to deem such entity to be systemically important.

10. PFMI Disclosure Framework Document

The PFMI Disclosure Framework Document is referenced throughout NI 24-102. We note that discussions with Canadian securities regulators regarding the format of this document are still ongoing. We would respectfully request that the effectiveness of requirements relating to these sections be delayed until discussions are finalized and regulatory expectations with respect to the format, content and level of detail required are clear. We expect that this is likely in line with CSA intentions as expressed in the commentary to NI 24-102 as the CSA has noted that it is proposing longer transition periods for implementing certain standards.

TMX Group appreciates the opportunity to provide comments with respect to NI 24-102 and looks forward to further dialogue on clearing agency requirements generally. We hope that you will consider our concerns and suggestions and would be happy to discuss these at greater length. Please feel free to contact Jennifer Oosterbaan, Legal Counsel, TMX Group at jeoosterbaan@cds.ca if you have any questions regarding our comments.

Respectfully submitted,



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