



Canadian Foundation *for*
Advancement *of* Investor Rights
Fondation canadienne *pour* l'avancement
des droits *des* investisseurs

July 6, 2016

The Secretary
Ontario Securities Commission
20 Queen Street West, Suite 1903, Box 55
Toronto, ON M5H 3S8
Sent via e-mail to: comments@osc.gov.on.ca

Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22^e étage
C.P. 246, tour de la Bourse
Montréal, QB H4Z 1G3
Sent via email to: consultation-en-cours@lautorite.qc.ca

RE: CSA Notice and Request for Comment: Proposed Amendments to National Instrument 23-101 Trading Rules and CSA Notice of Approval re Amendments to National Instrument 23-101 Trading Rules and Companion Policy 23-101CP

FAIR Canada is pleased to offer comments in respect of issues arising from the CSA Notice and Request for Comment on the Proposed Amendments to National Instrument ("NI") 23-101 Trading Rules dated April 7, 2016 ("Request for Comment") and the CSA Notice of Approval of certain amendments to NI 23-101 and its Companion Policy 23-101CP, also dated April 7, 2016 ("2016 Notice").

FAIR Canada is a national, charitable organization dedicated to putting investors first. As a voice for Canadian investors, FAIR Canada is committed to advocating for stronger investor protections in securities regulation. Visit www.faircanada.ca for more information.

1. Executive Summary

- 1.1. FAIR Canada would like to see the CSA take specific steps to address the issue of fees charged for market data to non-professional users, including retail investors, and the issue of data access. FAIR Canada recommends that the CSA carry out, and publish the results of, a survey to measure what market data retail investors have access to and the cost of that data. The survey should look at retail investors who use order execution only brokerages (discount brokerages or "OEO firms") as well as those retail investors who execute trades through their investment dealers/financial advisors.
- 1.2. FAIR Canada recommends that the CSA try to identify the scope of market information that

investors currently have access to in practice in order to identify the extent to which it is “partial information”. In doing so, the CSA should assess how big or small the gap is between access to complete information and the current level of access in order to determine if the gap is material and to assess whether the impact on trading decisions and investment results is significant.

- 1.3. FAIR Canada recommends that the CSA assess whether Canadian investors and/or their advisors currently have access to a sufficient level of real-time market data (including data on previous trades and current bid-ask quotations) to make informed trading decisions.
- 1.4. FAIR Canada recommends that the CSA should publish data on the costs to retail investors for the data, as compared to other jurisdictions such as the U.S., as well as whether retail investors in other jurisdictions obtain bid-ask quotes for all marketplaces.
- 1.5. FAIR Canada recommends that the CSA, working with market participants, examine not only the current level of access to market data and its costs, but also the likely needs of investors and intermediaries in the future based on the changing competitive landscape in Canada and in light of the multiple marketplace structures present in Canada. To that end, the CSA needs to consider the future needs of all users and their level of access to market data and its costs, in addition to their current needs.
- 1.6. FAIR Canada proposes that this review be carried out within the next year and consider the impact that changes in competition and market share in trading services, as well as listings of securities, will have on data users. Upon completion of the review, the CSA should publish the nature of the review and its findings, along with a notice and request for comments on any changes that are proposed for the Canadian market data system in order to address any issues identified.
- 1.7. In the interim, FAIR Canada proposes that the CSA require registered investment dealers to disclose the sources of the different types of market data available at OEO firms and through their financial advisors, and that the consequences of any limitations be brought to the attention of their clients. Such disclosure should clearly identify, in plain language, the nature of the gaps between full access to the consolidated market data for all marketplaces and the level of access of data provided by the dealer.
- 1.8. FAIR Canada has expressed a number of concerns related to the integrity, fairness and quality of today's equity markets, including concerns relating to the maker-taker fee model and fragmentation of orders. FAIR Canada recommends that the CSA consider a pilot study prohibiting the payment of rebates by marketplaces to be run in Canada at the same time as the pilot study being considered in the U.S. (if it occurs) so that the impact on our market can be assessed at the same time as the impact is assessed in the US equity market by their study. The two should be carried out in parallel and should apply to the same interlisted stocks on both sides of the border.

2. Access to Market Data for Retail Investors and Market Data Fees for Retail Investors

- 2.1. In 2014, the CSA stated they were concerned about the level of real-time market data fees charged by marketplaces to non-professional data users (including retail investors) in Canada.

The CSA indicated that they were considering either a cap on retail data fees or developing a methodology similar to the one applied to professional data users.¹ In the 2016 Notice the CSA indicates it "...will continue to monitor any developments in relation to the market data fees charged to non-professional users and will consider whether any action is necessary in the future."²

- 2.2. Aequis, in their position paper "Breaking the Virtual Canadian Market Data Monopoly" ("Position Paper"), raised concerns about the level of market data that retail investors and investment advisors (on behalf of their clients) see before they make trading decisions.³ Aequis' Position Paper raises the issue of whether the majority of retail investors only see TSX and TSXV reported data prior to making their trading decision through OEO firms.⁴ It also asserts that many Canadian dealers do not provide consolidated market data to their investment advisors.⁵
- 2.3. The TMX has responded to the Aequis claims in a document they issued called The Truth.⁶ The TMX's position is that their market data fees for Canadian retail investors are reasonable and competitive by international standards, including compared to fees in the US. In addition, the TMX takes the position that options exist in the Canadian market to "pick and pay" and investors have access to the data of one or many Canadian markets as well as a range of consolidated services. The TMX has a CSA-authorized TMX Information Processor which offers both Level 1 (last sale and quote) and Level 2 (all committed orders and trades) information for all Canadian marketplaces that can be purchased through a data vendor
- 2.4. FAIR Canada's understanding is that at least some OEO firms only display bid-ask quotes for the TSX/TSXV and show size at the Best Bid Offer ("BBO"). Retail investors who pay a fee or who are active traders and/or have a certain level of assets under management will have access to level 1 and 2 quotes for all major Canadian and US exchanges. We have no specific information on what market data investment advisors have access to before making trades on behalf of their clients, but we are concerned that trading decisions are possibly being made based on limited data.
- 2.5. FAIR Canada would like to see the CSA take more specific steps to address the issue of fees charged for market data to non-professional users including retail investors and the issue of data access. FAIR Canada recommends that the CSA carry out, and publish the results of, a survey to measure what market data retail investors have access to and the cost of that data.

¹ CSA Notice and Request for Comment – Propose Amendments to National Instrument 23-101 Trading Rules (May 15, 2014) at 4901, available online at: http://www.osc.gov.on.ca/documents/en/Securities-Category2/csa_20140515_23-101_rfc-pro-amd.pdf

² CSA Notice of Approval of Amendments to National Instrument 23-101 Trading Rules and Companion Policy 23-202CP to National Instrument 23-101 Trading Rules, (April 7, 2016), at 3244, available online at: https://www.osc.gov.on.ca/documents/en/Securities-Category2/csa_20160407_23-101_noa-amendments-trading-rules.pdf

³ Aequis, "Breaking the Virtual Canadian Market Data Monopoly: A Position Paper by Aequis Innovations Inc", (December 2015) at page 10.

⁴ Aequis estimates, based on a survey it conducted, which it does not publicly disclose, that "close to zero percent of retail investors using direct investing platforms have access to consolidated market data"; Position Paper at page 10.

⁵ Aequis estimates, based on a survey amongst Canadian dealers with a significant number of affiliated investment advisors, that between 2-5% of Canadian investment advisors have access to consolidated market data for TSX or TSXV-listed securities. Position Paper at page 10.

⁶ TMX, The Truth, available online at <http://www.tmxinfoservices.com/resource/en/326/the-truth.pdf>.

The survey should look at retail investors who use order execution only brokerages (discount brokerages or “OEO firms”) as well as those who execute trades through their investment dealers/financial advisors.

- 2.6. If retail investors only have access to partial market information, they may make less informed trading decisions or they might make different trading decisions than they would in light of complete information. In particular, if a better bid or ask price is available on a market that is not reflected in the quotation data feed, then an investor would not know that and might enter a different order than he or she otherwise would have, or might decide not to trade. It might affect the price at which a limit order is entered, or a decision to enter a market order. In addition, investors may not see full information about the size at bid/offer, to the extent that markets not included in the data feed subscribed to may be contributing to market depth in the security in question. The impact on investors would depend on the degree to which full information is not available.
- 2.7. Furthermore, to the extent that investors, intermediaries and other participants are viewing incomplete information about bid and offer sizes, market depth and trading activity, they will not see the full picture of the market’s liquidity and activity levels. This would particularly be the case if viewing data on trading in securities where markets not included in the data feed have captured significant market share.
- 2.8. FAIR Canada recommends that the CSA try to identify the scope of market information that Canadian investors currently have access to in practice. This should be done to identify the extent to which their access is “partial information” only, and to assess how big or small the gap is between access to complete information and the current level of access. From there, the CSA should determine if the gap is material and its impact on trading decisions and investment results.
- 2.9. For example, if a retail investor at an OEO firm only obtains bid-ask quotes from the TSX/TSXV, and if a better bid or ask price is available on another market, the investor would not know that and might enter a limit order at a different price than he or she otherwise would have. This would also be the case if an advisor does not specifically ask for a consolidated quote before making a trading recommendation to his or her client. We do not know how large this gap is but it may get larger if other marketplaces gain market share from the TMX’s exchanges.
- 2.10. The Investment Industry Regulatory Organization of Canada (“IIROC”), in a survey published in March 2014 on best execution, voiced its “...concern that firms engaged in the on-line retail trading business that provide limited market data may not be clearly describing the scope of the market data offered. Clients unaware of the offered data’s limitations may make uninformed and therefore sub-optimal order entry decisions.”⁷ Aequitas voices its concern that investment advisors may also be unaware of the information gap.⁸
- 2.11. FAIR Canada recommends that the CSA assess whether Canadian investors and/or their advisors currently have access to a sufficient level of real-time market data (including data on

⁷ IIROC Notice 14-0082 “Best Execution Survey Results” (dated March 28, 2014), at page 18, available online at http://www.iiroc.ca/Documents/2014/61ec2e27-7e15-4a42-9adc-5c7895d16c81_en.pdf.

⁸ Aequitas Position Paper at page 10.

previous trades and current bid-ask quotations) to make informed trading decisions.

- 2.12. In addition, the CSA should publish information on the costs to retail investors for the data in Canada as compared to other jurisdictions such as the U.S. as well as whether retail investors in other jurisdictions obtain bid-ask quotes for all marketplaces.
- 2.13. In addition, FAIR Canada recommends that the CSA consider whether the current level of access provided will be sufficient to allow investors to make informed investment decisions and meet their needs into the future, given competitive forces that may alter market share of the exchanges over time. Reliance on TSX and TSXV quote information to represent the current market for a security may only be practical as long as the TSX and TSXV maintain a dominant position in the market, as well as in listings of securities. As of Q1 2016, the TSX accounted for 57.1% of value, 49.1% of volume and 54% of all trades reported in Canada.⁹ At what point do the TSX and TSXV cease to be, on their own, reliable indicators of Canadian equity quotes and trades?
- 2.14. Therefore, in order to serve the interests of retail investors and other consumers of Canadian market data, markets and regulators should consider how, in the near future, investors and the industry can be offered improved access to market data reflecting information from multiple markets, including current quotes as well as trades.
- 2.15. Any solution may require a new approach to the aggregation, sale and distribution of market data. Arriving at such a solution must take into account the legitimate interests of all stakeholders in the outcomes, including retail investors, intermediaries, issuers and marketplaces.
- 2.16. FAIR Canada proposes that this review be carried out within the next year and consider the impact on data users of changes in competition and market share in trading services, as well as listings of securities. Upon completion of the review, the CSA should publish the nature of the review and its findings, along with a notice and request for comments on any changes that are proposed for the Canadian market data system in order to address any issues identified.
- 2.17. In the interim, FAIR Canada proposes that the CSA require registered investment dealers to disclose to their clients (a) the sources of the different types of market data available at OEO firms and through their financial advisors, and (b) the consequences of any limitations in the data. Such disclosure should clearly identify, in plain language, the nature of the gaps between full access to the consolidated market data for all marketplaces and the level of access of data provided by the dealer.

3. FAIR Canada's Comments on the Maker-Taker Fee Model

- 3.1. FAIR Canada has expressed a number of concerns related to the integrity, fairness and quality of today's equity markets, including concerns relating to the maker-taker fee model and

⁹ IIROC's Report of Marketshare by Marketplace Statistics Report, available online at <http://www.iiroc.ca/industry/marketmonitoringanalysis/Pages/StatisticsInformation.aspx>.

fragmentation of orders.¹⁰

3.2. As noted by the TMX in its paper “Taking Action to Optimize Maker-Taker Fees”:

“Maker-taker fees resulted in many benefits to the market and investors. Incentives spurred competition at the quote, bringing additional liquidity to Canada, lowering volatility, tightening spreads and improving prices for investors. However, over time concerns developed that the model increased transactional costs for liquidity takers, fuelled unnecessary intermediation, created potential conflicts of interest for dealers managing client flow, and contributed to fragmentation through the proliferation of trading venues competing solely on fees.

Subsequent changes to market structure, increased competition and enhanced trading capabilities led to participants developing more sophisticated trading strategies, resulting in reduced reliance on incenting liquidity through rebates. This has created opportunities to address concerns associated with the maker-taker model, without compromising liquidity, efficiency and spreads. In fact, in 2013, we chose to eliminate the maker-taker fee model on securities trading under \$1.00 on Toronto Stock Exchange (TSX) and TSX Venture Exchange (TSXV), and introduced an inverted fee model on TMX Select. These changes were welcomed and supported by the industry, however the maker-taker model remained the prevalent fee model for securities trading above \$1.00.

Increasingly, industry professionals in Canada and the U.S. have been re-evaluating the impact of current fee models on the efficiency, fairness and quality of markets. A number of proposals have recently been put forward that contemplate drastic reductions or an outright ban on rebates either through pilots or permanent policy changes.

We believe it is the right time to lower maker-taker rates, but it is imperative that we take a thoughtful, measured approach to determine the appropriate fee levels that will deliver benefits to market participants. ...”¹¹

3.3. Similarly, as noted in a recent memo penned at the SEC:

“Specifically, some believe the maker-taker model is an important competitive tool for exchanges and directly or indirectly can provide better prices for retail investors. On the other hand, some believe it may exacerbate conflicts of interest between brokers and their customers, contribute to market fragmentation and market complexity through the proliferation of new exchange order types, and undermine price transparency.”¹²

3.4. FAIR Canada supports the general trend towards reduced maker-taker fees given the following

¹⁰ Letter from FAIR Canada to OSC dated October 18, 2013, available online at <http://faircanada.ca/wp-content/uploads/2013/10/131018-final-submission-re-Aequitas.pdf>

¹¹ TMX Paper, May 2015, “Taking Action to Optimize Maker-Taker Fees”, available online at <https://www.tsx.com/resource/en/1115>.

¹² Memo to the SEC Market Structure Advisory Committee from the Securities And Exchange Commission (SEC) Division of Trading and Markets, (October 20, 2015) at page 1, available online at: <https://www.sec.gov/spotlight/emsac/memo-maker-taker-fees-on-equities-exchanges.pdf>.

benefits, which should flow from such changes:

- Lower costs for investment dealers to execute active client orders;
- Reduced distortions in order flow and routing practices based on incentives created by maker-taker fee programs;
- Reduced potential for conflicts of interest between dealers and clients in the routing and execution of orders; and
- Reduced potential for market fragmentation and complexity in market structure.

3.5. The CSA earlier indicated it would consider a pilot study prohibiting the payment of rebates by marketplaces. In the Request for Comment, the CSA indicates: "We continue to believe that a pilot examining the impact of a prohibition on the payment of rebates would be an informative study; however, given concerns about the potential loss or migration of liquidity that might occur for securities that are inter-listed in the U.S., we have deferred further consideration for now."¹³

3.6. FAIR Canada recommends that the CSA consider a pilot study to be run in Canada at the same time as the pilot study being considered in the U.S. (if it occurs) so that the impact on our market can be assessed at the same time as the impact is assessed in the US equity market by their study. The two should be carried out in parallel and should apply to the same interlisted stocks on both sides of the border.

We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting and would be pleased to discuss this letter with you at your convenience. Feel free to contact Neil Gross at 416-214-3408/neil.gross@faircanada.ca or Marian Passmore at 416-214-3441/marian.passmore@faircanada.ca.

Sincerely,



Canadian Foundation for Advancement of Investor Rights

CC: British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador

¹³ CSA Request for Comment – Proposed Amendments to National Instrument 23-101 Trading Rules, (April 7, 2016) at 3359.

Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut