Deanna Dobrowsky
Vice President, Regulatory
Office of the General Counsel
300-100 Adelaide Street West
Toronto, Ontario M5H 1S3
T (416) 365-8130
F (416) 947-4461
deanna.dobrowsky@tmx.com

March 1, 2019

VIA EMAIL

Susan Greenglass
Director, Market Regulation
Ontario Securities Commission
20 Queen Street West, 22nd Floor
Toronto, Ontario M5H 3S8
sgreenglass@osc.gov.on.ca

Dear Susan:

RE: Processes Related to CSA Staff Notice and Request for Comment 23-323 ("2018 RFC")

On behalf of TMX Group Limited (**"TMX Group"**), I would like to thank you for accepting and acting on the concerns we shared with you in our letter dated January 9, 2019 regarding the length of the initial comment period (**"January Letter"**). Today TMX Group has also filed our submission dated March 1, 2019 providing responses to the questions posed in the 2018 RFC concerning the proposed Trading Fee Rebate Pilot Study (**"Proposed Pilot"**) published on December 18, 2018.

In this letter we address two main issues. First, we are concerned that the CSA has not meaningfully addressed any of the issues and comments submitted by marketplace participants in response to the CSA's initial notice that explored the possibility of proceeding with a rebate pilot. Second, we are concerned that the implementation of the Proposed Pilot has circumvented the established process for imposing new obligations and rules on marketplaces.

Lack of Meaningful Consultation

In May of 2014, the CSA published for comment proposed amendments to National Instrument 23-101 Trading Rules (**"NI 23-101"**) in relation to the order protection rule (**"OPR"**) and also included as part of that notice a discussion of possible actions that the CSA could take in respect of rebates (**"2014 RFC"**). In it, the CSA proposed conducting a pilot study on rebates and posed 6 direct questions to the industry on the viability and relevance of conducting a rebate fee pilot, including soliciting feedback on whether action with respect to rebates is even necessary. Of the 27 comment letters received in response to the 2014 RFC, 20 provided direct and detailed responses to the 6 questions related to rebates.

In 2016, the CSA published its Notice of Approval of Amendments to NI 23-101 and Companion Policy 23-101CP (the **"2016 Notice"**). This is the only CSA notice that references the comments

received in response to the 2014 RFC. The 2016 Notice summarizes the responses to the trading fee questions from all 20 letters received in just 7 general sentences. It does not meaningfully respond to the issues and concerns raised in these 20 letters. Rather, the Notice simply reads:

> *As noted, we are not proceeding with any action on rebates at this time. Although we are still supportive of a pilot study, we do not believe that meaningful results can be obtained from a study that does not include Inter-Listed Securities. We will continue to liaise with our regulatory counterparts in the U.S and will consider a joint pilot study in the future if an opportunity arises.*

Notwithstanding the fact that the CSA and the Ontario Securities Commission (the **"Commission"**) have been considering, as acknowledged in the 2018 RFC, a pilot study on rebates for many years, neither has, as of yet, meaningfully responded to, nor even acknowledged the feedback received from the industry on what action should be taken on the payment of rebates. Despite this deviation from the accepted, expected, and in fact, mandated, rule making process that calls on the Commission to conduct meaningful and clear public consultations on proposed rules, the Commission and the CSA, in this case, appear to have unilaterally decided to proceed with the Proposed Pilot. The 2018 RFC presents the Proposed Pilot as a foregone conclusion and shifts the discussion from whether a study should proceed, to the design and implementation of a study that has never been subject to a complete public consultation process. We would also note that during the most recent public panel on the Proposed Pilot[1], panelists were explicitly instructed that discussion was to be limited to the design of the Proposed Pilot, and that questions and comments pertaining to the merits of proceeding with the study were out of scope.

The Proposed Pilot is a de facto Rule

In addition to our concerns with the lack of a proper consultation process, we would like to reiterate our concerns with the manner in which the Commission is proceeding with the Proposed Pilot that we briefly remarked on in our January Letter.

We understand that the Commission intends to implement the Proposed Pilot by issuing numerous orders under certain public interest provisions of the *Securities Act* (Ontario) (the **"*Act*"**), specifically under section 21(5)/s.21.0.1 (**"s.21 Orders"**). These s. 21 Orders would mandate industry-wide participation for all marketplaces and marketplace participants with no 'opt-out' provisions. A failure to comply with these orders could result in enforcement action and substantive penalties. These orders would prohibit marketplaces from paying rebates on a mandatory set of securities selected by the Commission. It is indisputable that such a prohibition could, in some manner, impact the issuers of the securities selected for a rebate ban, yet these issuers will, despite not being subject to the issued s. 21 Orders, not be able to 'opt-out' of their securities being selected for the no rebate bucket of the Proposed Pilot.

Taking a step back, we would note that following the Ainsley decision[2], a subsequent task force report, public consultation and the resultant *Securities Amendment Act, 1995*, the Commission is authorized to make rules and to adopt policies under s. 143.8 of the *Act.* The difference between rules and policies, according to the Commission's document "Rule-making in Ontario" is that rules are of a "binding nature" and a "person or a company that contravenes a rule may be subject to

---

[1] Capital Markets Institute Panel: Canadian Securities Administrators Trading Fee Rebate Pilot Study hosted by Rotman School of Management on September 12, 2018 (https://visitor.eliteemail.net/CapitalMarketsInstitute/viewonweb?cid=574f22c7-821f-4415-b569-627c412a70ff&sid=104798f7-354d-4110-998b-ad0670ddad8e)

[2] *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1994), 121 D.L.R. (4th) 79 (Ont. C.A.) at 83

enforcement action". In this case, a marketplace that contravenes the s.21 Order may face enforcement action. Unlike rules, policies "may not be prohibitive or mandatory in character". Therefore, while rules mandate, policies inform. Policies can, for example, "inform market participants of (a) how the Commission may exercise its discretionary authority, (b) how the Commission interprets Ontario securities law, and (c) the practices followed by the Commission in performing its duties under the Act."[3] By contrast, rules would have the effect of mandating these same actions. Clearly, the mandatory, prohibitive nature of the Proposed Pilot does not lend itself to classification as a policy.

We continue to believe that by issuing s.21 Orders to all regulated marketplaces and alternative trading systems, the Commission will in fact be imposing a market wide structural change that would have the effect of substantively altering National Instruments 21-101 and 23-101. As these s. 21 Orders will be binding and prohibitive in nature and will contain no "opt-out" provisions, we submit that the orders are a de facto rule change.

In addition, under s. 143.11 of the *Act,* the Commission is prohibited from making "any orders or rulings of a general application". Rather, matters of general application must proceed through the mandated rule-making legislative process. The Commission should not be able to issue multiple identical orders to all members of a particular group of marketplace participants in order to avoid the prohibition on blanket orders and circumvent the formal rule-making process that would be otherwise required for imposing an industry-wide ban with the potential of enforcement action and penalties for non-compliance. We do however recognize the value of the flexibility of using s. 21 Orders to enact the substance of the Proposed Pilot after appropriate rule-related processes have been followed. Therefore, we submit that the Commission may, and in fact, should, choose to incorporate the use of s. 21 Orders following the completion of the rule-making process as their use would allow the Commission to quickly amend or rescind the Proposed Pilot.

Notice and Comment Process for New Rules

The *Act* sets out the details of the requisite notice and comment process for any new rules proposed by the Commission in s.143.2(1). Given the breadth and significance of the changes required to implement the Proposed Pilot, we believe that it is of the magnitude of a new rule and should be treated as such. Therefore, in addition to other requirements, the Commission should publish a notice that sets out, among other things, an analysis of the anticipated costs and benefits of the proposed rule (**"CBA"**)[4] and invites the public to make representations[5]. The Commission must also publish any changes to the initial proposed rule[6] and invite additional representations on those changes[7]. To our earlier point about the lack of meaningful industry consultation, under the *Act* the Commission may only make a rule "after considering all representations made as a result"[8] of the mandated notice and comment process and must publish a "statement of the Commission setting out its response to the significant issues and concerns brought to the attention of the Commission during the comment periods". As already noted, no meaningful response has ever been made to public comments on the Proposed Pilot.

The CSA has already set the precedent for requiring that changes to marketplaces fees imposed by regulators be subject to the rigorous s. 143 process for introducing new rules. On April 7, 2016, the CSA published for comment Proposed Amendments to NI 23-101 for a 90 day comment

[3] https://www.osc.gov.on.ca/documents/en/Securities-Category0/backgrounder_rule_making.pdf
[4] Securities Act, RSO 1990, c S.5, s.143.2(2)7
[5] *Ibid*, s.143.2 (4)
[6] *Ibid*, s.143.2 (7)
[7] *Ibid*, s.143.2 (9)
[8] *Ibid*, s.143.2 (10)

period seeking to lower the active trading fee cap by approximately 40% for exchange-traded funds and non-interlisted equities. That notice included the required CBA. The CSA received 6 comment letters in response and published its final amendments in a notice on January 26, 2017 and included detailed summaries of, responses to, and changes made because of, the comments received about the proposed reduction. That notice was then submitted for approval to the Minister of Finance as required under s. 143.3 of the *Act*. A Notice of Ministerial Approval was published on March 30, 2017. Considering that the fee cap represented a 40% reduction to fees while the Proposed Pilot introduces a 100% reduction to rebates, there is no reason why the amendments required to implement the Proposed Pilot should not be subject to the same rigorous review and approval process as the relatively minor changes, by comparison, that were imposed on marketplaces in 2017.

In addition to failing to follow the established public notice and comment process over the course of the evolution of the Proposed Pilot, we would also note that the Commission has failed to provide a detailed CBA. Neither the 2014 RFC nor the 2018 RFC included any CBA undertaken by the Commission in advance of deciding to proceed with the Proposed Pilot. As a CBA was not included in the notices published by the Commission, industry participants were not able to properly assess the impact that the study would have on the market. Consequently, the Commission has not had the benefit of public comments on the possible costs and benefits of selecting a Proposed Pilot as the preferred course of action on marketplace rebates. Further, a detailed CBA becomes even more significant in light of the temporary nature of the Proposed Pilot which will impose industry wide changes that marketplaces will be expected to not only implement but also reverse/decommission within a relatively short period of time. As the requisite amendments are not permanent, it is vitally important for the industry to understand the complete costs associated with implementing transient changes which is particularly challenging without some semblance of a CBA.

In light of all of the above, we urge the Commission to review its 2018 RFC taking into consideration the requirements of s. 143 of the *Act* that should otherwise be applied, and publish a revised notice that includes, among other things, a meaningful discussion of the issues and concerns that industry participants had initially expressed with proceeding with a Proposed Pilot, including a detailed cost benefit analysis of the Proposed Pilot.

Respectfully submitted,

Deanna Dobrowsky

cc: Maureen Jensen, Chair and CEO, OSC
Grant Vingoe, Vice-Chair, OSC
Tim Moseley, Vice-Chair, OSC
Jim Sinclair, General Counsel, OSC
Lawrence Haber, Lead Director, OSC
Mark Wang, Director, Capital Markets Regulation, BCSC
Lynn Tsutsumi, Director, Market Regulation, ASC
Elaine Lanouette, Directrice principale de l'encadrement des structures de marché, AMF
Tracey Stern, Manager, Market Regulation, OSC