CANADIAN SECURITIES EXCHANGE
The Exchange For Entrepreneurs

July 17, 2019

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

c/o

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Re: **CSA Notice and Request for Comment – Proposed Amendments to National Instrument 21-101 *Marketplace Operation* and Proposed Changes to Companion Policy 21-101CP *Marketplace Operation***

Dear CSA Members:

CNSX Markets Inc. ("CSE") is responding to the CSA Notice and Request for Comment – Proposed Amendments to National Instrument 21-101 *Marketplace Operation* and Proposed Changes to Companion Policy 21-101CP *Marketplace Operation* (collectively "21-101") published on April 18, 2019. The CSE commends the initiative taken by the Canadian Securities Administrators ("CSA") to reduce regulatory burden through proposed amendments to 21-101. The CSE encourages the CSA to maintain a focus on reducing regulatory burden generally. This will facilitate the achievement of one of the pillars of regulatory oversight of the Canadian capital markets, namely efficiency.

STREAMLINING REPORTING REQUIREMENTS

Fee Filing – s. 3.2(2)

The CSA has proposed increasing the length of time for the implementation of fee changes from at least 7 days to at least 15 days. While not a streamlining or burden reduction action, it does provide the CSA with more

time to review proposed fee changes. The CSE supports the increase in time provided that there is a decision made by the applicable securities regulatory authority within the 15 day period that the proposed fee change may either be implemented immediately, be subject to a public comment process, or be resubmitted with revisions for a new 15 day review period. This will provide clarity to the marketplaces in terms of timelines and provide closure on a filing. With this in mind, the marketplaces' recognition orders would need to be amended to reflect this process.

It should also be considered that a fee decrease may be implemented immediately as opposed being subjected to a 15 day review period.

Filing of non-significant changes to Form 21-101F1 (other than fees) – s. 3.2(3)

The CSE supports the CSA proposed revised filing period for changes from 10 days after a month in it occurred to 10 days after a calendar quarter month (unless publicly disclosed earlier).

Exhibit C – *Organization* to Form 21-101F1

The CSE supports the CSA proposal to eliminate the requirement to report historical employment information for partners, directors and officers of a marketplace (item 5 in part 1 of Exhibit C).

The CSE recommends the elimination of item 4 in part 1 of Exhibit C, specifically "*Type of business in which each is primarily engaged and current employer*". This information for the most part is already captured in item 1 in part 1 of Exhibit C i.e. "*Principal business or occupation and title*". It is also suggested that the first line in part 1 of Exhibit C be modified to move the first instance of directors as it is already captured subsequently in the sentence: "*A list of partners, ~~directors,~~ officers, governors, and members of the board of directors…*" (emphasis added).

Re-filing of Form 21-101F1 each year – s. 3.2(5) and (6)

The filing of documents should be required only when changes have occurred (as indicated by the title of s. 3.2 "*Change in Information*"). Currently, s. 3.2(5) requires the re-filing of a complete Form 21-101F1 every year - even though filings for changes have been made throughout the year.

As filings are triggered by changes, Form 21-101F1 should be current and up-to-date at any point in time. Filing a year-end version is duplicative.

It is proposed by the CSA [in new s. 3.2(6)] that a marketplace may incorporate by reference a previously filed year-end version of its Form 21-101F1 where no changes have occurred since such previous filing. As above, it is recommended that the year-end filing in s. 3.2(5) requirement be eliminated and thus new s. 3.2(6) would not be necessary.

Chief executive officer certification – s. 3.2(4)

Currently, the chief executive officer of a marketplace is required to certify in at year-end that the information contained in the marketplace's current Form 21-101F1, including the description of its operations, is true, correct, and complete and that the marketplace is operating as described in the Form 21-101F1.

It is recommended that this requirement be eliminated. Form 21-101F1 itself already contains a certification requirement from a director, officer or partner of the exchange upon filing an initial or amended form: *"[t]he undersigned certifies that the information given in this report is true and correct*". This could be modified to include "complete" which is currently part of the chief executive officer certification i.e. *"[t]he undersigned certifies that the information given in this report is true, ~~and~~ correct, and complete*". (emphasis added)

Form 21-101F1 Exhibits preamble

It is recommended that the actual date be included for the implementation of a change as the change may have already occurred which makes the expected date problematic i.e. in the second paragraph "…*the actual or expected date of the implementation of the change*…". (emphasis added)

Additionally, it is recommended for amended Form 21-101F1s that only the blacklined versions are filed. The blacklining would then be removed on a subsequent filing if that change reflected an implemented change (prior to the subsequent filing). The inclusion of clean versions every filing creates tracking challenges.

Exhibit B – *Ownership* to Form 21-101F1

The CSA has proposed a 5% floor for reporting an exchange's security holders (where the exchange is a corporation). The CSE is in favour of establishing a floor but believes that 10% would be more appropriate in order to align with the approval requirements for ownership under the exchange recognition orders. Additionally, calculating the 10% floor on beneficial ownership or control or direction would likewise align with recognition order requirements. Suggested drafting:

> *"For an exchange or quotation and trade reporting system that is a corporation, provide a~~A~~ list of the ~~registered or~~ persons (including those acting in concert) that exercise control or direction or beneficially hold ~~beneficial holders of~~ ~~five~~ ten percent or more of any class of securities…"* (emphasis added)

The addition of guidance in Companion Policy 21-101CP *Marketplace Operation* ("Companion Policy") as to the calculation of acting in concert and exercising control or direction or beneficially holding securities would be helpful. For instance, where holders are limited partnerships, investments funds, pooled funds, trusts, etc.

The CSE suggests that the requirement to report the occupation and title of a security holder in item 2 of Exhibit B be deleted. Item 2 requires the reporting of the security holder's principal business – it is not clear as to the relevance of also requiring the occupation and title.

Exhibit E – *Operations of the Marketplace* to Form 21-101F1

There appears to be a duplication in item 2 and item 4 of Exhibit E regarding co-location.

Item 7 appears to be captured by item 6. As such, it is suggested that item 7 be deleted.

Form 21-101F3

The CSE recommends various changes to Form 21-101F3.

In Part A – General Marketplace Information, item 4 should be eliminated. This item requires a listing of amendments that have been made to Form 21-101F1 (including a description of the amendment, the date filed and date implemented). The description of the amendment and date filed are part of the process for filing amendments for Form 21-101F1 – it is unnecessary to repeat this information in Form 21-101F3. To the extent that the implementation date is a required data point, this should be incorporated into the Form 21-101F1 requirements (for example, the removal of blacklining to reflect implementation of a change in Form 21-101F1 could be footnoted to indicate the date of implementation). Likewise, item 5 should be eliminated. Item 5 requires a list of non-implemented changes – these items are already blacklined in the Form 21-101F1 as non-implemented changes.

Item 6 regarding a log and summary description of various systems events is too broad as drafted. Only material systems issues should be logged. Materiality may be evaluated on a severity level scale. This scale should be defined in 21-101. It is suggested that only Severity 1 or 2 events would be considered material and would need to be logged (Severity 3 events would not need to be logged as they would not be material). Suggested drafting for the severity levels:

> Severity 1 incident - characterized by a service outage impacting a majority of users, widespread performance issues, or widespread significant deviations in operation from the documented specifications; and redundancy mechanisms have failed to provide an immediate recovery.
>
> Severity 2 incident - characterized by a service outage impacting many users, primary service functionality being impacted, significant functionality degradation being experienced by many users, or latencies or response times are significantly above peak levels as per documented specifications; and redundancy mechanisms have failed to provide an immediate recovery.
>
> Severity 3 incident - service is operational, but with minor degradation to some or all users further characterized by one or more of the following: (i) occasional, isolated service usability problems; (ii) service performance issue causing minor impact to business operations; (ii) minor bug or erroneous service operation leading to non-critical loss of functionality of some service components; (iv) side-effects of designed service failover behavior, such as temporary interruption of data flow during switching, or sequence number discontinuities; or (v) data errors in individual records or a small proportion of records, or in non-critical data that were directly caused by marketplace's system.

Item 7 regarding systems significant changes should be eliminated. Significant changes require regulatory approval. There is no need to repeat the information in Form 21-101F3.

For Part B and onwards in Form 21-110F3, where the required information is available from the regulation services provider (i.e. IIROC), the marketplace should not need to file such duplicate information.

FINANCIAL REPORTING

The CSA has proposed that exchanges file interim financial reports within 45 days after the end of each interim period. The CSE suggests that this requirement should align with recognition order requires and be a 60 day window. Changing from a 60 day window will cause board scheduling conflicts as well as reducing the time to prepare such interim financial reports.

SYSTEMS REQUIREMENTS

The CSA has proposed various amendments to Part 12 regarding systems. As discussed in the Form 21-101F3 section of this letter, it is recommended that materiality of a systems event be determined according to a defined severity level scale.

In s. 12.1.2, it is noted that there is no reporting obligation associated with this provision.

In s. 12.2, the CES recommends that "best industry practices" be removed from the proposed amendments. If the review is conducted in accordance with established audit standards, that should be sufficient. Applying a "best industry practices" overlay is a subjective measure (notwithstanding the one suggested best practices reference in the Companion Policy). Additionally, it is recommended that the independent systems review ("ISR") be conducted on a bi-annual basis rather than annually. The CSA proposes that the ISR must be conducted by an external auditor – this will increase expense for the marketplaces. By shifting to a bi-annual period, this new additional cost can be spread out over the two years.

The CSA has proposed amendments in s. 14.1(3) of the Companion Policy regarding ISRs. If a chosen auditor is qualified to perform the ISR, it is unclear as to why a marketplace is expected to discuss its choice with the regulator/securities regulatory authority. If the intent is for the regulator/securities regulatory authority to approve the selection of the external auditor, then that should be made explicit. Otherwise, without a prior approval being required, this should be removed form the Companion Policy. If the discussion of auditor choice is not removed from the proposed amendments, then the discussion with the regulator/securities regulatory authority should only be required for an initial selection or change from an existing auditor.

OTHER ITEMS

It is recommended that s. 5.4(a) be deleted as it is already covered by s. 5.3(i). S. 5.4(b) can be moved to s. 5.3 which would then permit the repeal of s. 5.4 in totality.

Suggested drafting:

5.3 Public Interest Rules

(1) Rules, policies and other similar instruments adopted by a recognized exchange or a recognized quotation and trade reporting system must

(a) ~~must~~ not be contrary to the public interest;

(b) provide appropriate sanctions for violations of the rules or other similar instruments of the exchange or quotation and trade reporting system; and

(~~b~~c) ~~must~~ be designed to

(i) ~~ensure~~ require compliance with securities legislation,

(ii) prevent fraudulent and manipulative acts and practices,

(iii) promote just and equitable principles of trade, and

(iv) foster co-operation and co-ordination with persons or companies engaged in regulating, clearing, settling, processing information with respect to, and facilitating, transactions in securities.

~~***5.4 Compliance Rules –*** *A recognized exchange or a recognized quotation and trade reporting system must have rules or*~~

~~other similar instruments that~~

~~(a) require compliance with securities legislation; and~~

~~(b) provide appropriate sanctions for violations of the rules or other similar instruments of the exchange or quotation and trade reporting system.~~

(emphasis added)

GENERALLY

As noted in the CSE letter to the Ontario Securities Commission regarding the OSC's Burden Reduction programme, and repeated by other marketplaces at the OSC's Roundtable on Burden Reduction, there is a tension between rules-based and principles-based approaches in the rules and instruments to which market participants are subject. While presumably flexible in concept, more often than not a principles-based approach to regulation results in unpleasant surprises when a "should" is interpreted to be a "must". Even an "expectation" is uncertain – i.e. is it required? If an expectation is actually a requirement, then it is much better to state it as such i.e. "must" or "shall". In doing so, the intent is clear and transparent, whether from a legal perspective or a plain English interpretation. With this in mind, the CSE encourages and suggests that passive language not be used in drafting provisions. There may be a view that such a rules-based approach is rigid – however, a marketplace participant may always seek an exemption from a requirement. Furthermore, from a compliance perspective, a marketplace participant inevitably is put into a worse position when a passive "should" is actually meant to be a "must".

Conclusion

The CSE appreciates the opportunity afforded by the CSA to comment on the proposed amendments to 21-101. The CSE is encouraged by the will of the CSA to reduce regulatory burden and looks forward to continuing a dialogue on this and further regulatory burden reduction initiatives.

Sincerely,

Jamie Anderson
General Counsel & Corporate Secretary

cc. Richard Carleton – Chief Executive Officer, CSE