

## APPENDIX B

### Summary of Public Comments on Proposed Amendments to National Instrument 21-101 *Marketplace Operation* (NI 21-101) and National Instrument 23-101 *Trading Rules* (NI 23-101)

#### Comments

#### CSA Responses

##### Necessity of Order Protection

Many commenters indicated that they believe in the importance of an order protection obligation.

One commenter however, was of the view that an order protection requirement is not necessary in light of advances in direct market access technology, smart order routing technology, improved transaction cost analysis products and other technology developments in the market.

*In our view, order protection is important for maintaining investor confidence and fairness in the market, especially where there is a high degree of retail participation and an historical expectation of order protection. The advances in technology do not address these important policy objectives.*

##### Depth of Order Protection

Some commenters expressed an opinion as to how far the order protection obligation should be applied.

Two commenters favoured full depth-of-book trade-through protection. One of these commenters further explained that current technology has addressed the complexity of a full-depth obligation and stated that unless analysis of the data generated to date provides evidence of a disadvantage, the obligation should remain as is.

*As discussed in the Canadian Securities Administrators Notice of Amendments to National Instrument 21-101 Marketplace Operation and National Instrument 23-101 Trading Rules (Notice), after review and analysis of the comment letters and the information and recommendations provided by the Implementation Committee (for details on the Implementation Committee, see Part II of the Notice) we have decided to maintain full depth-of-book protection. We believe that it is important for investors to know that any order they enter on a marketplace will be executed before an inferior-priced order.*

One commenter indicated that full depth-of-book protection would not provide substantial and meaningful protection and would introduce considerable latency into marketplace systems. This commenter suggested that the appropriate level of trade-through protection should be limited to five price levels. Another commenter supported initially implementing trade-through protection for top-of-book quotes only and expanding the obligation later on. One other commenter suggested protecting more than top-of-book but less than full depth-of-book.

Some commenters had concerns about the implementation costs of a full-depth requirement.

##### Fees

One commenter suggested that the trading fees regime should be broadened to an “access fees” regime that restricts the fees a marketplace may charge other markets and smart order routing vendors for displayed “protected quote data” that they are obligated to consume to enforce order protection obligations.

*We have removed the trading fee limitation requirement but have added language to sections 7.1 and 8.2 of 21-101CP to further explain certain factors the Canadian securities regulatory authorities will consider when determining if a marketplace’s fees unreasonably condition or limit access to its services.*

Commenters requested two clarifications with respect to fees: (1) that marketplaces are not restricted in setting fees for non-protected or specialty order types that are not executed strictly to comply with trade-through, such as benchmark orders, where the market participant elects to use such order types and (2) that a marketplace cannot discriminate based on the order’s originating marketplace

*We also note that a marketplace is prohibited from imposing terms that discriminate between orders that originate on that marketplace and those that are routed to that marketplace under section 10.2 of NI 21-101.*

and that imposing different terms on orders depending on the identity of the originating marketplace should also not be permitted.

### **Protected Orders**

One commenter submitted that the definitions of “protected bid” and “protected offer” as proposed need to be narrowed to include only those orders that are required to be provided to an information processor or information vendor. The following language was suggested: “...about which information is required to be provided pursuant to Part 7 of NI 21-101 to an information processor...”.

*We agree and have made this suggested amendment.*

### **Enforcement**

A number of commenters requested clarification as to how the order protection obligation will be monitored and enforced. A commenter also called for meaningful fines or other penalties.

*We will be providing further information as to how the order protection obligation will be monitored and enforced in a subsequent notice prior to the implementation of the Order Protection Rule.*

### **Implementation of Order Protection Requirement**

One commenter specifically noted that the CSA should consider whether the industry is currently able to comply with the proposed requirements, and if not, whether additional time to develop the appropriate tools will cure their lack of ability to comply. This commenter also added that flexibility in implementation is needed to accommodate the various interests and levels of sophistication.

*We have been consulting with industry with respect to this issue and expect to provide a more detailed implementation schedule shortly.*

### **Locked and Crossed Markets**

One commenter stated that unless there is a prohibition on intentionally locking or crossing markets, marketplaces will have a difficult time implementing technology systems to comply with order protection requirements.

*We agree that there should be a prohibition on intentionally placing orders that lock or cross the market and have included this prohibition in section 6.5 of NI 23-101.*

Some solutions suggested by commenters included: (1) marketplaces should automatically re-price orders to prevent them from locking or crossing another market and (2) a designated information processor should be used to address or minimize locked and crossed markets.

### **Trading Hours**

Some commenters cited that the application of order protection should only be required during regular trading hours and one commenter specifically suggested that that trade-through protection should be required either: (1) during the regular trading hours of 9:30 a.m. and 4:00 p.m. or (2) during such period of time when more than one marketplace operating a transparent continuous order book is open for trading.

*We are of the view that the order protection obligation is in effect if there are two or more marketplaces with protected orders open for trading. However, under paragraph 6.2(e) of NI 23-101, a marketplace would not be required to take steps to reasonably prevent trade-throughs during its after hours trading session where the price is established by that marketplace during its regular trading hours.*

### **Technology Systems Requirements**

The comments with respect to the proposed technology systems requirements were mixed.

*We are of the view that the proposed technology systems requirements are necessary and important in order to update the existing requirements and to better reflect current practice.*

One commenter indicated that the increased detail proposed is generally useful and another was in favour of the proposed requirement for alternative trading systems (ATSs) to perform an annual independent systems review.

One commenter suggested imposing requirements to prescribe specific disaster recovery standards and for the CSA to consider establishing minimum standards to be met by marketplaces in the event of non-disaster systems incidents. This commenter submitted that a “reasonable” disaster recovery plan is not sufficient and more detailed standards are required to address incidents that create systems outages.

Another commenter indicated that ATSs should publish a full description of their fill allocation methodology in order for routing marketplaces to adequately adapt their routing logic in a way that will provide for the most effective execution of the trade-through obligation.

Two commenters believed that the proposed requirements are too prescriptive and onerous. One of these commenters suggested that the level of requirements should be related to the complexity of the business and reliance by others on the system.

With respect to the proposed notice and testing time periods, one commenter indicated that these time periods should not be prescribed but should be stated in terms of what is reasonable or appropriate under the circumstances while another commenter suggested shortening the time periods to 60 and 30 days and advised that an exception clause be added that would allow a marketplace to expedite material technology changes if deemed necessary in the circumstances.

#### **Fill-or-Kill Orders**

Two comments were made in relation to “fill-or-kill” orders. One commenter noted that “fill-or-kill” and “fill-and-kill” are terms that are used interchangeably and have different meanings in different jurisdictions. This commenter suggested that the CSA’s definition of “fill-or-kill” or a description of such an order’s functionality be included in the amendments.

Another commenter suggested that the definition of “automated functionality” be revised to replace the references to “fill-or-kill” with “immediate-or-cancel” as this is the term that is consistently used throughout marketplaces in the U.S.

#### **Agreement between Marketplace and Regulation Services Provider**

One commenter indicated that the amendment to subsection 7.2(c) of NI 23-101 should be redrafted so that it does not reference that a regulation services provider monitors an exchange.

*With respect to the suggestion that specific disaster recovery standards be set, we will consult with industry regarding a more detailed marketplace protocol to follow when experiencing systems issues in the context of the systems issues exception.*

*With respect to the comment that an exception clause be added to allow a marketplace to expedite material technology changes if deemed necessary, we agree and have amended paragraph 12.3 (4) of NI 21-101 accordingly.*

*We have replaced the term “fill-or-kill” with “immediate-or-cancel” in NI 23-101 to avoid any possible confusion and better reflect industry practice.*

*These amendments clarify our expectation that a regulation services provider shall receive information it considers necessary from the marketplace participants and marketplaces it surveils to effectively monitor trading on multiple marketplaces. In addition, we expect that because it has the infrastructure in place to do so, IIROC will monitor certain aspects of a marketplace’s compliance with respect to a*

*limited number of applicable regulatory requirements including, order protection and clock synchronization.*

### **Onus of Order Protection Rule**

One commenter argued that the obligation of order protection should rest on dealers if a marketplace passes the obligation on. Another argued that the obligation should be on dealers and possibly on non-dealer subscribers, and a third supported placing the obligation only on dealers and non-dealer participants as an alternative to allowing dealers to assume the responsibility for themselves. One advocated allowing marketplaces to transfer or download the obligation to dealers because regulations in the U.S. allow marketplaces to either pass on part or all of the obligation to marketplace participants and that a marketplace may be required to take action which can have the impact of contradicting a decision made by the dealer with the purpose of complying with their fiduciary obligation.

This commenter also cited several difficulties with moving the order protection obligation to marketplaces which included that the speed of trading would be dictated by trading venues and that a market participant's use of inter-market sweep orders (ISOs) would need to be overseen in addition to trading on foreign markets in order to determine compliance with the anti-avoidance provision.

A commenter stated that cost and technology concerns of placing the obligation on dealers and non-dealer subscribers have already been addressed in practice by many dealers. However, a different commenter noted that not all dealers have found solutions.

### **Filing of Order Protection Policies and Procedures**

One commenter noted that the requirement to file policies and procedures relating to the prevention of trade-throughs and any material changes at least 45 days prior to implementation decreases the flexibility of a marketplace to adapt to events as they occur and that it is not clear why these policies and procedures should be treated any differently than any other policies or procedures.

### **Application of Order Protection Obligation to Active and Passive Orders**

One commenter requested clarification as to whether the order protection obligation applies to both active orders and passive orders sitting in the book. This commenter noted that the definition of "protected order" excludes special terms orders if passive. This commenter also noted that as the value of special terms orders is different than the value of trades executed on standard terms, there is no reason for the distinction between passive and active and concluded that all special terms trades should be excluded from the definition of a "protected order".

*We continue to be of the view that the Order Protection Rule is best implemented at the marketplace level. The CSA have decided to shift this obligation to a marketplace level as opposed to a dealer-level to level the playing field that currently exists in Canada because the UMIR Best Price Rule only applies to dealers but not to non-dealers who are ATS subscribers. The Order Protection Rule makes all participants in the market subject to the rule. In addition, there are fewer marketplaces than dealers, and we are of the view that a marketplace level obligation is more efficient.*

*However, we have provided for the ability of dealers to maintain control of their order flow by using a directed-action order.*

*We acknowledge that there may be circumstances where a marketplace may need to change its order protection policies and procedures in a prompt manner. We therefore note that an application requesting an abridgement of this timeframe would be a viable alternative to the legislated timeframe.*

*There is no distinction between passive and active orders under the definition of "protected order".*

## **Trade-through Exceptions**

### **Systems Failure**

One commenter pointed out that both order entry malfunctions as well as data malfunctions could force a routing marketplace to claim “self help”. This commenter also noted that a marketplace could reasonably conclude that another marketplace is experiencing systems issues when in fact there is a connectivity breakdown between the two marketplaces. As well, this commenter suggested that marketplaces would need to act reasonably together and with third party suppliers to rectify this disconnect.

In addition, this commenter also suggested that there should be a requirement for each marketplace to document and retain, in an auditable manner, the data that contributes to the marketplace’s decision to cease routing to another marketplace.

*We agree that marketplaces will need to act reasonably together and with third party suppliers in the event there is a problem in the communications lines between marketplaces. Relying on 6.2(a) of NI 23-101, a marketplace may cease routing to another marketplace if it reasonably concludes that the other marketplace is experiencing systems issues. As well, each marketplace would be expected, as part of its policies and procedures under Part 6 of NI 23-101 to document and retain data that contributed to its decision to cease routing to another marketplace.*

### **Inter-market Sweep Order (ISO) Requirements**

One commenter indicated that there should not be any additional steps imposed on a marketplace to verify an ISO order as long as a marketplace feature exists to check for an ISO marker and execute and route accordingly.

*We confirm that a marketplace that receives a directed-action order (previously referred to as an inter-market sweep order or ISO) will not have to perform any additional steps to verify it is a bona fide directed-action order but instead merely needs to check for the appropriate marker and execute and/or route or book accordingly. Its policies and procedures must outline what steps it will take upon receipt of a directed-action order.*

Certain commenters requested further guidance on the use of ISO orders, particularly with respect to who bears the regulatory burden in this instance and which regulator will be enforcing these rules.

*We have included a specific requirement with respect to a marketplace participant’s responsibility when using a directed-action order in section 6.4 of NI 23-101 and provided more detailed guidance in the companion policy as to the regulatory obligation and how it should be met by the marketplace participant.*

### **Anti-Avoidance**

A few commenters supported the inclusion of an anti-avoidance provision.

*We agree there should be an anti-avoidance provision and have included this provision in section 6.7 of NI 23-101.*

**Question 1: Should marketplaces be permitted to pass on the trade-through protection obligation to their marketplace participants? If so, in what circumstances? Please provide comment on the practical implications if this were permitted.**

#### **Comments**

The majority of commenters responding to this question were of the view that marketplaces should not be permitted to pass on the order protection obligation to marketplace participants except in certain circumstances. Some of these commenters indicated that when certain exceptions to the trade-through protection rule such as inter-sweep market orders and systems failure are triggered, it would be appropriate for dealers to assume the order protection responsibility for their orders.

Three commenters were in favour of allowing

#### **CSA Responses**

*The CSA agree with the majority of commenters that marketplaces should not be permitted to pass on the order protection obligation to marketplace participants.*

*However, if a marketplace participant sends a directed-action order, the order protection obligation is shifted to that marketplace participant.*

*We also note that if a marketplace participant initiates the systems issues exception, we would expect that it could, among other things, send its orders to another marketplace, relying on the marketplace’s order protection obligation, or choose to send a*

marketplaces to pass on all or part of the order protection obligation to dealers. One commenter noted that this is the approach taken in the U.S. Another commenter was of the view that there is no useful purpose in prohibiting marketplaces from using any particular alternative for meeting the trade-through protection obligation.

*directed-action order. Sending a directed-action order would relieve the marketplace of its order protection obligation.*

## **Question 2: What length of time should be considered an “immediate” response by a marketplace to a received order?**

### **Comments**

Three commenters suggested that an immediate response could be considered to be any response time less than one second. One commenter suggested that an “immediate” response time should be interpreted as less than 50 milliseconds and another mentioned that 20 milliseconds or less should be used as a limit.

Certain commenters were of the view that it is inappropriate to fix a particular time increment since the evolution in technology will change what is considered reasonable over time. These commenters suggested that a more appropriate measure of immediacy should be put in relative terms to the performance of other marketplaces or an agreed upon benchmark.

Two commenters believed that the best approach is for marketplaces and market participants to include what constitutes an immediate response time in their written policies and procedures.

One commenter indicated that marketplaces should provide the same speed of execution of ISO’s as they do for other orders to ensure a prompt response to ISO’s.

### **CSA Responses**

*We have decided not to attribute a specific time period to the word “immediate” but instead expect that marketplaces and marketplace participants will evaluate whether a response is “immediate” in the context of the type of order sent (electronic or manual) and the relative response time of other marketplaces.*

*We will consult with industry to flesh out a consistent approach and develop a protocol to be followed by marketplaces and marketplace participants. We would expect the protocol to be reflected in the policies and procedures of marketplaces and marketplace participants.*

## **Question 3: Are any additional exceptions necessary?**

Commenters indicated that consideration should be given to:

- how block trades may be executed in light of the proposed requirements;
- routing of ISOs after cancellations, short sales and odd lots;
- expanding the definition of “Calculated Price Order” to include “basket trades” where parties to a transaction agree to a price for a basket of securities where no single security makes up a substantial proportion of the basket;
- situations where a buyer wishes to remain under 9.9% (or 5% where a bid is already present or for inter-listed shares) in the context of toe-hold purchases; and
- situations where a buyer must remain below a specified level prescribed by law.

*Upon consideration of the suggestions received by commenters and the recommendations from the Implementation Committee, we have decided to add language to clarify a number of exceptions.*

*Please see section 4(b) in Part III of the Notice for a full discussion of these changes.*

### Contingent Orders, Internal Crosses

One commenter indicated that contingent orders and internal crosses should be exempted from the trade-through protection rule.

### Systems Issues Exception

Some commenters indicated that the systems issues exception should place a higher standard on marketplaces to be more transparent regarding the systems problem they are experiencing and demonstrate that they have resolved the systems issues.

*Marketplaces are required to provide notice of the problems under section 6.3 of NI 23-101 and we expect that they will issue a notice once the problems have been resolved. Details of how to declare a systems issue and actions to be taken in response will be fleshed out in a protocol.*

### Negotiated Trades

Two commenters indicated that an exception should be provided for negotiated trades. One commenter specifically mentioned that the negotiation system should only prohibit any bid or offer outside the spread at the time the bid or offer is made, but be permitted to execute the trade if the bid or offer moves outside the spread at the time the bid or offer is accepted by the counter-party (i.e. 20 seconds later).

*This issue was discussed by the Implementation Committee. Please see our response to this recommendation in subsection 4(b)(iii) in Part III of the Notice.*

### Odd Lot Orders

One commenter submitted that odd lot orders should not receive trade-through protection because to grant such protection would be unmanageable from a routing perspective and could result in higher clearing costs if market participants were required to execute against non-standard trading units.

*Order protection only applies to orders that are in the regular book. If odd lot orders are listed outside of the regular book, they would not garner order protection.*

### Additional Exceptions

Two commenters stated that while there did not appear to be any other additional exceptions necessary at this point, the CSA should remain open to re-assessing the rules as issues arise.

*We agree and once the Order Protection Rule is implemented, we will monitor the market to discern if any additional exceptions are required.*

## **Question 4: Please comment on the various alternatives available to a marketplace to route orders to another marketplace.**

The following have been suggested as alternatives to marketplaces routing orders to another marketplace:

- marketplaces could be directly linked. Some of the commenters indicated that this could be done by marketplaces becoming members or subscribers of all the protected marketplaces through dealer entities, however it was mentioned that the cost of establishing these dealer entities would be significant;
- one commenter expressed a concern about the above-mentioned alternative, specifically with respect to if a marketplace acts as a jitney for its participants, it would have to reveal the participants'

*We thank all commenters for their suggestions on the alternatives available to a marketplace to route orders to another marketplace. In addition, we expect that the industry will further discuss the possible methods to be used to route orders.*

codes and suggested that a marketplace should be able to transmit jitney orders under the marketplace's code instead;

- new ATSSs could display their quotes through a self-regulatory organization such as done through NYSE or NASDAQ in the U.S.;
- an in-house or related-party capability to smart order route, license a stand-alone third-party capability to smart order route, price improve the order to a non-offending price level or reject a potentially offending order;
- route an order intact, including the broker ID; and
- adjust the definition of "jitney order" so that a participant of a marketplace could execute trades for other market participants that are not necessarily members of, or have an agreement with the marketplace where the trade is executed.

**Question 5: Should the CSA set an upper limit on fees that can be charged to access an order for trade-through purposes? If so, is it appropriate to reference the minimum price increment described in IROC Universal Market Integrity Rule 6.1 as this limit?**

#### **Comments**

A few commenters agreed that an upper limit on fees that are charged to access an order for order protection purposes should be set with one commenter specifically stating that the UMIR Rule 6.1 limit was appropriate, another indicating that the \$0.003 fee limit used in the U.S. is appropriate and yet another stating merely that the access fee should be nominal.

A number of other commenters however, were of the view that a strict fee cap should not be set. One commenter indicated that the adoption of a principles-based approach would be preferable to establishing a strict fee cap and another indicated that this issue will be addressed by market competition. Another commenter cited that the CSA must adopt procedures to prevent marketplaces from establishing fee models which take advantage of the order protection requirements by paying large credits for liquidity with the intention of charging high fees for orders routed pursuant to the order protection obligation.

Another commenter suggested that the CSA define what would constitute a pricing abuse warranting an explicit fee cap and move to implement any necessary rule change only if there is clear evidence that such pricing abuses are occurring or are imminent based on announced pricing changes.

Certain other commenters supported taking marketplace fees into account when determining best price or determining routing table priorities.

#### **CSA Responses**

*We note that in addition to these comments, the CSA also took into account the Implementation Committee's recommendation to include a specific cap on trading fees as part of the Order Protection Rule when determining the final rule regarding fees. Please see section 4(d) of the Notice for further details.*



Several commenters supported the principle of non-discriminatory fees.

#### **Question 6: Should there be a prohibition against intentionally creating a “locked market”?**

##### **Comments**

The majority of commenters responding to this question indicated that there should be a prohibition against intentionally creating a locked market. One commenter further suggested that this prohibition should be applied to all market participants including marketplaces to protect the integrity and function of the market as a whole.

Some commenters supported this position by stating that the prohibition of intentionally locking markets is consistent with U.S. regulation and that deliberately locking markets to generate fee rebates is acting contrary to the best interests of the marketplace as a whole.

A number of commenters stated that intentionally locking markets may constitute manipulative and deceptive trading.

Another commenter supported the effort to address the problem of locked markets but expressed the view that it should be the self-regulatory organizations that should regulate and enforce this subject matter.

One suggestion to deal with locked markets included requiring marketplaces to move the sell-side orders to match the buy orders or take the locked order and move it to the marketplace that posted the passive order.

Other commenters were not in favour of such a prohibition. These commenters indicated that a locked market does not pose the same policy issues as does a crossed market and that the only policy objection to a dealer intentionally locking a market is a best execution concern, namely a client has requested expeditious execution of an order but instead of immediately executing the order the dealer posts the order on another marketplace and increases the risk that the client's order may not execute at the desired price.

A commenter also pointed out that while CSA staff may believe that prohibiting locked markets in all instances will improve liquidity, liquidity cannot be created by forcing dealers and their clients to trade. This commenter further explained that many participants will hold back on making their bids and offers and wait for the market to move away to permit them to post on a cheaper execution venue.

##### **CSA Responses**

*We agree with the majority of commenters responding to this question and have maintained the prohibition against intentionally placing a “locking” order on a marketplace in section 6.5 of NI 23-101. The section is meant to capture the situation where a marketplace participant intentionally enters an order that locks or crosses a particular marketplace or the market as a whole.*

*Additional guidance has been included in section 6.4 of Companion Policy 23-101CP to provide more detail as to which circumstances would be considered to be an unintentional locking or crossing of the market.*

**SUMMARY OF PUBLIC COMMENTS ON PROPOSED AMENDMENTS TO NATIONAL INSTRUMENT 23-101  
MARKETPLACE OPERATION AND NATIONAL INSTRUMENT 23-101 TRADING RULES**

**List of Commenters**

1. Alpha ATS
2. BMO Nesbitt Burns Inc.
3. Canadian National Stock Exchange
4. Canadian Security Traders Association Inc.
5. CanDeal
6. Chi-X Canada ATS Limited
7. CIBC World Markets
8. Investment Industry Association of Canada
9. ITG Investment Technology Group
10. Liquidnet Canada Inc.
11. Omega ATS
12. RBC Asset Management Inc. and Phillips, Hager & North Investment Management Ltd.
13. RBC Dominion Securities Inc.
14. TD Asset Management
15. TD Securities Inc.
16. Simon Romano
17. TMX Group Inc.
18. TriAct Canada Marketplace

## APPENDIX C

### Report of the Implementation Committee Regarding Potential Material Changes to the Proposed Trade-Through Protection Rule

#### Committee Members

Judith Robertson	Chair, Belzberg	Chris Sparrow	Liquidnet
Michael Brady	Alpha	Mark Armstrong	National Bank Financial
Randee Pavalow	Alpha	Nadyne McConkey	National Bank Financial
AnneMarie Ryan	AMR Associates	Fera Jeraj	National Bank Financial
Doug Clark	BMO Capital Markets	Al Kovacs	National Bank Financial
James Ehrensperger	BMO Capital Markets	Michael Sheridan	Norstar Securities
Jenny Drake	CCL Group	Mario Josipovic	Omega
Tal Cohen	Chi-X	Greg King	Omega
Matthew Trudeau	Chi-X	Spencer MacCosham	Raymond James
Kevin McCoy	CIBC	Kelley Hoffer	RBC
Cindy Petlock	CNSX Markets	Greg Mills	RBC
Richard Carleton	CNSX Markets	Vanessa Gardiner	Scotia Capital
Sonny Lennon	CSTA	Peter Haynes	TD Newcrest
Martin Hakker	Fidessa	Ray Tucker	TD Newcrest
Iven Bryer	Fidessa	Deanna Dobrowsky	TMX Group
Steve Harvey	Fidessa	David Chmelnitsky	
Darren Sumarah	Goldman Sachs	Tim Thurman	
Shawna Katan	Haywood Securities		
Susan Copland	IAC		
Stephen Plut	ITS		
Torstein Braaten	ITG		
Jim Davies	IRESS		
Dave Mulder	IRESS		

The Implementation Committee identified 5 areas in the proposed rule where desired changes could rise to a level of materiality that would require a republication of the rule (“material changes”). We created a sub-committee to address each of these areas. The sub-committees were open to participation from all members of the Implementation Committee. They met to discuss the issues at least twice. The results of those discussions were presented and further discussed by the full Implementation Committee at least twice. The results of the sub-committee deliberations are included as Appendix A.

This report summarizes the concluding discussion of the Implementation Committee regarding the 5 areas of potential material change. In some circumstances, we have been able to create a specific recommendation(s). In others areas, a consensus conclusion was not possible. However, even where we were unable to agree on conclusions, we agreed on many of the supporting arguments. We have included this information to provide insight for the regulators and a direction of further investigation to assist in their deliberations.

#### 1. Anti-Avoidance

##### ● Recommendations

- i. The anti-avoidance provisions in the proposed rule and the proposed IIROC rule should be harmonized. This will ensure that all marketplace participants are operating under the same rule set.
- ii. It should contain prescriptive language, rather than remain principle based.
- iii. It should not constrain normal cross-border trading activities, or be in conflict with best execution decisions. It should be expressly limited to large, pre-arranged trades.
- iv. The CSA rule should reference the IIROC rule in some way to ensure continued harmonization and to allow for more timely changes to dollar amounts etc., as warranted.
- v. Proposed wording is included as Appendix B.

#### 2. Exceptions

##### ● Recommendations

- i. One additional exception should be considered to address the situation where a trade is negotiated off-marketplace, in a manual manner. The exception would recognize that the parties to the trade could have negotiated the trade price to be within the NBBO at the

time of the trade, but the market may have moved by the time the trade is posted, creating the appearance of a trade-through.

- ii. The exception should include the concept of a “look back” i.e. the parties can look back to market levels up to 10 seconds prior to the trade print for the purposes of compliance with trade-through.
- iii. The CSA should consider other constraints to this exception to avoid the potential for gaming or abuse. Many members were concerned about the seeming contradiction in creating an exception to accommodate manual trading when the general thrust of regulatory oversight is to migrate towards electronic audit trails and transparent, on marketplace, trading. For example, the rule should clearly define at what point the time clock starts. In some instances, (e.g. Liquidnet) the time of the trade is clearly captured by an electronic system whereas in other instances (e.g. phone based trading) the time of trade is not electronically captured. Another constraint to consider would be a size constraint. This exception is not necessary for normal course trading and should be restricted to exceptional circumstances like block trades.
- iv. It was recognized that there would need to be harmonization with the UMIR wording which defines a trade occurring at the point it is printed on a marketplace.
- v. The Committee thought the US rule of basing the look-back window around the time the trade was entered into an automated system had merit, but did not agree that 20 seconds was necessary or that the exception should only apply to agency block trades. The point was made that in the Canadian market, dealer capital has historically played a more important role than in the US and that there are circumstances where one block sized order is matched by several smaller, non-block orders.
- vi. It is expected that there may be additional exceptions that will only be surfaced when the mechanics of implementation are more fleshed out. The CSA should imbed a simplified mechanism for adopting additional exceptions in the future, as needed. It should be noted that in the US experience, there were 17 additional exceptions granted after the rule was made final.

### 3. Dealer Responsibility

- Recommendations

- i. The Committee believes that there are circumstances where a market participant would prefer not to rely on the routing mechanisms of a marketplace to ensure compliance with the trade-through rule. Therefore the proposed rule should be amended to set out the requirements more specifically when market participants choose to assume the responsibility for trade-through compliance. It is important to note that while the Committee used “dealer responsibility” as shorthand, the recommendation applies to all market participants, including access persons.
- ii. The key reason is the recognition that some market participants may invest in specialized routing technology for competitive purposes. They desire the freedom to use their specialized technology and ignore the routing technology of the marketplace, provided that they can ensure the same standard of compliance.
- iii. The suggested solution is to create a voluntary marker called an IEB (“Immediately Execute and Book”). This marker would signal to the marketplace that they need not enforce trade-through for that particular order, but should execute immediately and book the remainder or book the order without checking prices on other marketplaces.
- iv. The Committee confirmed that the dealer would be responsible for trade-through compliance if a DMA client selected the IEB marker.
- v. One issue that was raised by the Committee for consideration by the CSA was what the marketplace should do if booking the remainder of the IEB order would result in a crossed market.
- vi. The subcommittee created a draft language proposal for inclusion in the rule (attached as Appendix C).

### 4. Depth-of-book

- Recommendation – The Committee recommends that the CSA oversee an independent review of the costs and benefits of full depth-of-book versus top-of-book. The Committee members are willing to assist through providing data and their particular views, however it must be recognized that each individual member’s cost position will be different, competitive issues will have influence on responses and an over arching view is beyond the scope of this Committee. However, while the Committee is supportive of further research to guide the policy conclusions, there is no appetite for adding delay to this already lengthy process. Therefore,

the CSA should only accept this recommendation if it is possible to conduct the further research in a timely manner.

- i. The Committee was split on its views on whether the CSA should consider limiting the protected orders to the top-of-book. While there were many strongly held views supporting a full depth-of-book standard among the dealers, marketplaces and vendors on the Committee, it is recognized that opinions on this matter in the dealer community appear to have shifted to supporting top-of-book, as evidenced by the IIAC survey results. It is further recognized that the Committee is lacking a full representation of buy-side, retail investors and smaller dealers. There was no support for a standard which incorporates an arbitrary number of levels.
- ii. There was agreement on many of the decision inputs; however different conclusions were drawn depending on the facts and weighting given.
- iii. The Committee agreed that depth-of-book protection was more complete and philosophically consistent with some of the policy objectives of the CSA.
- iv. The Committee agreed that depth-of-book was more complex and potentially more costly to the industry in aggregate. The Committee's view on costs is an industry wide perspective and includes the specific costs of implementing the rule which will vary by entity, plus the on-going costs of monitoring and enforcing the rule.
- v. The differences arose around the conclusions of whether the incremental protection of full depth was sufficient to justify the incremental costs.
- vi. The benefits of full depth are difficult to quantify, but a change from this standard would represent a change from the current standard which may contribute to the perception of a lower level of investor protection.
- vii. The incremental costs of full depth over top-of-book are also disputed and vary across participants and marketplaces. It is acknowledged that the current regime is a full depth-of-book regime, although this standard is not currently strictly enforced. Therefore the cost of implementing either full depth or top-of-book for each party (marketplace, vendor, and participant) from this point will depend on what they have currently put in place and whether the final rule is a change from the status quo.
- viii. The Committee requests the CSA facilitate the research which may allow a greater consensus on this topic. An independent cost-benefit analysis, including the on-going costs of enforcement, data and impact on market structure would be extremely helpful. However, the Committee is not supportive of this additional research adding delay in the implementation of this rule. Below are some of the issues we recommend be further researched.
  - i) Latency – there is a concern that the requirement to exhaust full depth will contribute to the latency associated with routing for trade through. If the trader must wait for the slowest market to respond multiple times they risk missing liquidity on other markets. What are the mitigations available to ensure that latency does not unduly disrupt trading e.g. self help, minimum standard for response time for marketplaces?
  - ii) Enforcement – The costs of depth-of-book protection increase with a higher standard of enforcement. At the extreme, a zero-tolerance, trade by trade enforcement of full depth would be significantly more costly than a “pattern of behaviour” standard. What will the enforcement model require to ensure compliance? Will this be consistently applied between the CSA and IIROC?
  - iii) Record keeping and data – What are the standards of record keeping, audit trail and data storage required to protect against trade-throughs and ensure the ability to prove this when challenged? The requirement for full depth data for all markets solely for the purpose of trade-through compliance is significantly more costly than a top-of-book regime. Will the information processor supply sufficient data at a reasonable cost to allow regulatory compliance?
  - iv) Investor confidence/price formation – The majority of the current routing technology in Canada is iterative. With the increasing proportion of ELP providers the market structure may be changing. Depending upon the specific capabilities and speed of the order routers, the result may be that the market's ability to comply with trade through is *de facto* top-of-book. The orders that are actually protected may be ELP or hidden (iceberg) orders because they can replenish the top-of-book faster than an iterative order router can take out orders farther down the book. If this scenario is the norm, will the CSA find this outcome acceptable or will they look to create enforcement or other measures that will require additional costs to ensure those orders below the top are actually taken out e.g. requiring spray routers?

- v) Block trades – There was a greater agreement, even among those favouring top-of-book, although still not a consensus, that a pre-arranged, block trade that would trade through several price levels should provide some liquidity for those orders lower in the book, as is done now. This could be possibly achieved with a hybrid structure (e.g. top-of-book for standard trades and full depth for blocks), a consistent application of the anti-avoidance provision and a stricter enforcement of the best execution requirements. Would the CSA consider whether this hybrid structure would accomplish enough of the benefit of full depth-of-book with lower costs to the industry?
- vi) Best execution – Those members favouring full depth-of-book are concerned that, if the CSA selects a top-of-book solution, enforcement of best execution would need to be significantly increased. A cohesive enforcement regime of best execution and the anti-avoidance provisions would mitigate the lower level of order protection. What are the CSA and IIROC plans for monitoring and enforcing best execution?
- vii) Intersection with other rules - There is the potential that a depth-of-book standard increases the complexity and cost of compliance with other trading rules. For example, the recent costs incurred by marketplaces, vendors and participants to accommodate the bypass market would not have been incurred if the standard was a top-of-book. Are there other areas where we can anticipate increased costs to accommodate the intersection of trade through with other rules?

## 5. Fee Caps

- Recommendations
  - i. The Committee agreed that including fee caps for trading fees in the proposed rule was advisable. While the marketplaces generally felt that competitive forces were adequate to govern trading fees, they acknowledged the concern of market participants and were willing to accept a reasonable constraint.
  - ii. Given the concerns of the market participants, the Committee agreed that the proposed level of fee cap referencing a trading increment was not the most appropriate.
  - iii. One proposal that the Committee suggests the CSA consider is a model similar to the US model of a set price for stocks trading above \$1 and a % of share price for stocks trading below \$1.
  - iv. Although there were concerns regarding access, data and routing fees, the Committee did not believe it was necessary to impose any other fee caps at this time.

**APPENDIX A - Report of the Implementation Committee**

**Trade-through Implementation Committee Recommendation Summary**

<b>SUB-COMMITTEE</b>	<b>MANDATE</b>	<b>SUBCOMMITTEE RECOMMENDATION(S)</b>	<b>OTHER VIEWS EXPRESSED</b>	<b>FINAL IMPLEMENTATION COMMITTEE RECOMMENDATION</b>
Anti-Avoidance	To determine whether the anti-avoidance provision in the proposed rule is adequate, or additional requirements, as proposed by IIROC, are necessary.	<p>1. Suggested changes to UMIR were presented (attached at TAB A). Prescriptive language in the ATS Rules rather than a principles-based rule was recommended. Clarity should be provided around the rules that regulators are concerned about large pre-arranged trades taking place in other jurisdictions and not trades of smaller size.</p>	<p>Other views expressed were that:</p> <ul style="list-style-type: none"> <li>- it would be better to use a relative metric because hard dollar values will need to be updated in time; and</li> <li>- a prescriptive rule should be included in UMIR that can be referenced in the ATS Rules. This would allow for quicker updates when needed.</li> </ul>	
Exceptions	To determine whether there were gaps in the proposed rule that should be addressed through additional exemptions.	<p>1. A 10 second look-back for pre-arranged trades was recommended. This look back exception would allow markets to print a pre-arranged trade outside the NBBO at the time of the print as long as: (a) the price was within the NBBO at the time the trade was agreed to, and (b) the trade is printed by a marketplace within 10 seconds of when the parties agreed to the trade.</p> <p>2. The CSA should be able to adopt additional exceptions quickly, without the need for a long comment period, should a need present itself.</p>	A contrary view was expressed that Recommendation #1 goes against the principles of trade-through protection and will have a negative impact on price discovery.	
Dealer Responsibility	To determine: - the extent of a dealer's responsibility with respect to preventing trade-throughs when relying on an ISO or systems exception;	<p>1. Presented revised language (attached at Tab B) to the proposed rule that:</p> <ul style="list-style-type: none"> <li>- introduces an "immediately execute/book" (IEB) order where a receiving marketplace would be</li> </ul>	Alternative language was presented (attached at Tab C) that does not materially change the recommended language but clarifies that after entering an IEB, one or more additional	

SUB-COMMITTEE	MANDATE	SUBCOMMITTEE RECOMMENDATION(S)	OTHER VIEWS EXPRESSED	FINAL IMPLEMENTATION COMMITTEE RECOMMENDATION
	<ul style="list-style-type: none"> <li>- the extent of a marketplace's responsibility in those circumstances; and</li> <li>- whether marketplaces should have the ability to rely on a dealer (or other participant) to take responsibility for compliance with the trade-through protection rule.</li> </ul>	<p>required to immediately execute the order with any remainder to be booked and not implement its own policies and procedures to reasonably prevent trade-throughs;</p> <ul style="list-style-type: none"> <li>- provides for IEBs to be used in conjunction with by-pass and immediate-or-cancel markers, depending on the sender's objectives; and</li> <li>- requires a marketplace or marketplace participant using an IEB to have policies and procedures to reasonably prevent trade-throughs that include the use of such an order.</li> </ul>	<p>orders of sufficient volume must be routed, as necessary, to <u>protected</u> marketplaces with a better price to the IEB.</p>	
Depth of Book	<p>To examine the proposal to continue a full depth-of-book trade-through obligation or whether there are policy reasons to impose it at a lesser depth (top-of-book or multi-levels).</p>	<p>1. Suggested maintaining full depth of book protection for the following reasons:</p> <ul style="list-style-type: none"> <li>- best alternative for maintaining investor confidence and maintaining the incentive to contribute to the price discovery process;</li> <li>- technology considerations should serve the market and its regulatory requirements;</li> <li>- SORs currently operating protect full depth of book; and</li> <li>- comparison with U.S. top of book requirement is not valid given the significantly greater number of trading venues and greater liquidity in U.S.</li> </ul>	<p>Others held that top of book protection is preferable to full depth because:</p> <ul style="list-style-type: none"> <li>- most SORs operate in an iterative, top of book approach;</li> <li>- it is a more practical way to regulate trade-through requirements;</li> <li>- investor confidence has not suffered in U.S. or Europe;</li> <li>- marketable orders typically exhaust 2 or 3 price levels making full depth of book protection unnecessarily onerous for the marginal protection it would provide over top of book protection;</li> <li>- it is important to consider limits and costs of technology; and</li> <li>- the latency of some marketplaces and race conditions could cause trade-throughs in a full depth of book environment,</li> </ul>	



SUB-COMMITTEE	MANDATE	SUBCOMMITTEE RECOMMENDATION(S)	OTHER VIEWS EXPRESSED	FINAL IMPLEMENTATION COMMITTEE RECOMMENDATION
Fee Caps	To determine whether the proposed fee cap in the CSA amendments was appropriate and if not, what alternatives are available.	There was no agreed upon recommendation from the subcommittee.	Certain members of the subcommittee recommended: - the proposed cap for stocks should be a fee less than one half of one tick increment; - the use of a net pricing model; - fees should be capped for stocks priced under \$1.00 using a percentage of the price.	

## APPENDIX B - Report of the Implementation Committee

### Anti-Avoidance Committee - Suggested changes to UMIR Anti-avoidance

(3) The exemption provided for in clause (d) of subsection (2) is unavailable if the order to be executed on the foreign organized regulated market would avoid execution against a better-priced order on a marketplace pursuant to Part 6 of the Trading Rules had the order been entered on a marketplace rather than the foreign organized regulated market and the order is on behalf of a Canadian account denominated in Canadian funds and is:

- (a) part of an intentional cross;
- (b) part of a pre-arranged trade;
- (c) for more than 50 standard trading units; or
- (d) has a value of \$250,000 or more.