

Notice of Proposed Amendments to National Instrument 21-101 *Marketplace Operation* and National Instrument 23-101 *Trading Rules*

I. INTRODUCTION

The Canadian Securities Administrators (CSA or we) are publishing proposed amendments to the following materials (Proposed Amendments) for a 90-day comment period:

- National Instrument 21-101 *Marketplace Operation* (NI 21-101) and Companion Policy 21-101CP (21-101CP);
- National Instrument 23-101 *Trading Rules* (NI 23-101) and Companion Policy 23-101 CP (23-101CP);
- Form 21-101F1 *Information Statement Exchange or Quotation and Trade Reporting System* (Form 21-101F1);
- Form 21-101F2 *Initial Operation Report Alternative Trading System* (Form 21-101F2);
- Form 21-101F3 *Quarterly Report of Marketplace Activities* (Form 21-101F3 and, together with Form 21-101F1 and Form 21-101F2, the Forms); and
- Form 21-101F5 *Initial Operation Report for Information Processor* (Form 21-101F5).

II. DESCRIPTION AND PURPOSE OF THE PROPOSED AMENDMENTS

The key objective of the Proposed Amendments is to update and streamline the regulatory and reporting requirements in NI 21-101, NI 23-101 and the Forms and to align, where appropriate, requirements applicable to all marketplaces. To accomplish this objective, we are proposing amendments in a number of areas:

1. *Regulatory and reporting requirements of marketplaces* – our objective is to increase consistency, streamline and update the regulatory and reporting requirements applicable to recognized exchanges (Exchanges), recognized quotation and trade reporting systems (QTRSs) and alternative trading systems (ATSs);
2. *Transparency requirements applicable to marketplaces dealing in exchange-traded securities* – the objectives are to propose amendments that would establish that only orders meeting a minimum size threshold will be exempt from the existing pre-trade transparency requirements; to give guidance regarding the definition of an “order” and clarify when an indication of interest (IOI) is considered an order; and to clarify our expectations regarding the obligations of marketplaces that send IOIs to selected smart order routers (SORs);
3. *Transparency of marketplace operations* – the objective is to increase transparency of marketplace operations;

4. *Other requirements applicable to marketplaces* – our objectives are to address conflicts of interest, real and perceived, that may arise at a marketplace; to address instances where marketplaces outsource certain services; to update the trading value and volume threshold at which ATSS are required to provide notification to the securities regulatory authority; to expand the requirement to maintain a business continuity plan beyond systems requirements; and to provide additional guidance on what may constitute an independent systems review;
5. *Definition of a marketplace* – the objective is to give guidance regarding the definition of a “marketplace” in NI 21-101 to clarify when a dealer would be considered to operate a marketplace;
6. *Transparency requirements applicable to marketplaces, inter-dealer bond brokers and dealers dealing in government debt securities* – to extend the current exemption from transparency requirements applicable to government debt securities until December 31, 2014;
7. *Locked and crossed markets* – to extend the obligation in NI 23-101 to not intentionally lock or cross the markets to marketplaces in certain circumstances; and
8. *Information processors* – to revise existing requirements applicable to the information processors.

A detailed description of the Proposed Amendments follows below.

III. SUBSTANCE OF THE PROPOSED AMENDMENTS

1. Regulatory and reporting requirements of marketplaces

Background and current requirements

NI 21-101 and NI 23-101 (together, the Marketplace Rules) set out the regulatory and reporting requirements applicable to Exchanges, QTRSs¹ and ATSS. The Marketplace Rules were implemented in December 2001, and their main purpose was to establish the regulatory framework within which existing and new marketplaces, such as ATSS, could operate.

Since the implementation of the Marketplace Rules, we have seen significant growth in the number of ATSS and increasing complexity in the equity markets.² As the market share of ATSS has increased, their influence on how trading occurs in the Canadian capital market and their role in shaping market structure have also increased.

We note that there are significant differences between some of the functions that Exchanges, QTRSs and ATSS may perform. For example, unlike the Exchanges and QTRSs, ATSS do not have regulatory responsibilities and may not establish requirements

¹ At this time, there are no QTRSs in Canada.

² ATSS have in the last year increased their market share to approximately 32% of the value of equity securities traded and approximately 26% of the volume traded (based on information for the quarter ended December 31, 2010 from IIROC Market Share Report).

governing the conduct of marketplace participants or discipline their subscribers other than by exclusion from the marketplace. However, the trading activities, services and functions offered by Exchanges and ATSS are similar in many aspects. In addition, the ATSS' trading activities may have an impact on the Canadian market that is as significant as that of the Exchanges. For example, ATSS may positively or negatively impact price discovery, transparency, and fairness of access to liquidity through their introduction of new structures or order types.

In light of the increasing impact of trading on ATSS on the Canadian market, the CSA reviewed the requirements set out in NI 21-101 and the Forms to assess the changes necessary to increase consistency and streamline the regulatory and reporting requirements applicable to Exchanges, QTRSs and ATSS. As a result of this review, we found a number of areas where the regulatory requirements applicable to all marketplaces could be improved or revised for consistency and, as a result of our review, we are proposing a number of revisions in the Proposed Amendments, listed below by topic. Items (i) through (iv) are aimed at increasing consistency between the requirements applicable to Exchanges, QTRSs and ATSS. Item (v) describes the existing requirements that are common to all marketplaces that were included in different sections of NI 21-101 and that we propose to consolidate. Item (vi) refers to our expectation that ATSS consider the maintenance of fair and orderly markets in their trading requirements.

- i. *Marketplace reporting requirements* – we have revised the ongoing reporting requirements applicable to all marketplaces, as well as guidance on what constitutes a significant change to a marketplace's operations;
- ii. *Proposed amendments to the Forms* – we have revised and streamlined these forms;
- iii. *Financial reporting* – we propose that the current financial reporting requirements in NI 21-101 that currently only apply to Exchanges and QTRSs apply to all marketplaces, including ATSS;
- iv. *Other requirements currently applicable only to ATSS*– we propose that the risk disclosure requirements for foreign exchange-listed traded securities and the confidentiality requirements in NI 21-101, currently applicable only to ATSS, apply to all marketplaces;
- v. *Requirements applicable to all marketplaces* – we have combined and consolidated the requirements in NI 21-101 that are common to all marketplaces to avoid duplication and to streamline these requirements; and
- vi. *Marketplace rules* – in 21-101CP, we clarified our expectation that, when developing or changing trading requirements, ATSS consider their obligation to avoid engaging in any activity that interferes with the maintenance of fair and orderly markets.

In addition, we have introduced a new requirement that a marketplace not engage in an activity that interferes with fair and orderly markets.³ This requirement, implicit in other provisions in existing NI 21-101 and proposed amendments to NI 21-101, such as the fair access requirements, requirements to manage conflicts of interest, transparency

³ See section 5.7 of proposed amendments to NI 21-101.

requirements and rule-making requirements, if applicable, is an overarching obligation of any marketplace and is clearly articulated as part of the Proposed Amendments.

Below, we provide a description of the proposed amendments listed in items (i) through (vi).

i. Marketplace reporting requirements

Background and current requirements

NI 21-101 establishes the initial and ongoing reporting requirements applicable to the marketplaces. The initial reporting requirements are as follows:

- An applicant for recognition as an Exchange or QTRS must file Form 21-101F1;⁴ and
- An ATS must file an initial operation report using Form 21-101F2 before commencing its operations.⁵

The current ongoing reporting requirements are:

- All marketplaces must file amendments to Form 21-101F1 or Form 21-101F2, as the case may be, at least 45 days before implementing a significant change to a matter contained in these forms;⁶
- For changes other than significant changes, marketplaces must file amendments to their respective forms within 30 days after the end of the calendar quarter in which the changes took place;⁷ and
- ATSS are also required to file Form 21-101F3 on a quarterly basis, within 30 days after the end of each calendar quarter during any part of which the ATS has carried on business.⁸

21-101CP provides guidance on what is considered to be a significant change. Currently, any change to certain exhibits of Form 21-101F1 and Form 21-101F2 is considered to be a significant change.⁹

Proposed amendments

In the proposed amendments to NI 21-101, we maintain the initial reporting requirements for marketplaces, as well as the requirement that marketplaces file amendments to their applicable forms at least 45 days before implementing a significant change to their operations.¹⁰ We introduce, however, an exception for proposed fee changes and propose

⁴ Sections 3.1 and 4.1 of NI 21-101 for Exchanges and QTRSs respectively.

⁵ Section 6.4 of NI 21-101.

⁶ See subsections 3.2(1), 4.2(1) and 6.4(2) of NI 21-101 for Exchanges, QTRSs and ATSS, respectively.

⁷ See subsections 3.2(2), 4.2(2) and 6.4(3) of NI 21-101 for Exchanges, QTRSs and ATSS, respectively.

⁸ Subsection 6.4(4) of NI 21-101.

⁹ These are Exhibits A, B, G, I, J, K, M, N, P and Q of Form 21-101F1 and Exhibits A, B, C, F, G, I and J of Form 21-101F2.

¹⁰ See sections 3.1 and 3.2 of proposed amendments to NI 21-101 for the initial and ongoing filing requirements, respectively.

to require marketplaces to provide notification of such changes at least seven days before their expected implementation.¹¹ While we generally consider fee changes to be significant changes (the exception being, for example, minor modifications to the fee charged), and review them thoroughly in order to assess their impact on their marketplace participants, we acknowledge that given today's competitive environment and the need for marketplaces to be able to adjust their fees expeditiously to be able to compete, the existing 45 day notification requirement may be too long. For this reason, we only propose a seven day notification period for proposed fee changes.

In 21-101CP, we propose guidance on what is considered to be a significant change to a marketplace's operations. Generally, this would be a change that is expected to have a significant impact on the marketplace, marketplace participants, investors or the Canadian capital markets, and would include all changes to an entity's market structure, how it operates, the types of securities it trades, the types of marketplace participants, governance and fees, and significant changes to their systems and technology that support trading and, if applicable, market surveillance.¹² Significant changes would not include housekeeping or administrative changes to Forms 21-101F1 or 21-101F2, which would follow the filing requirements applicable to changes that are not significant and which are described below.

In the Proposed Amendments, we also revise the filing requirements for changes in marketplaces' Form 21-101F1 or 21-101F2 that do not constitute significant changes. For these, we propose that marketplaces file amendments to the information provided in Form 21-101F1 or 21-101F2 immediately prior to the implementation of changes that are not significant changes.¹³ The proposed requirement for prior notification is different than the existing one in NI 21-101, which requires marketplaces to file amendments for non-significant changes after the end of the calendar quarter in which they occurred. We believe that the proposed reporting requirement would allow us to get notice of changes to Form 21-101F1 or 21-101F2 on a more timely basis, closer to the date of implementation of these changes.

In 21-101CP, we included a description of the process for review of marketplace filings related to significant and other changes.¹⁴ We indicate that the Canadian securities regulatory authorities will make best efforts to review amendments to Forms 21-101F1 and 21-101F2 within the specified time periods, and in accordance with staff practices in each jurisdiction.

In proposed amendments to NI 21-101, we require that all marketplaces, including Exchanges, file a Form 21-101F3.¹⁵ This would help us obtain a complete picture of the trading activities on all Canadian marketplaces. We have also revised and updated Form

¹¹ Proposed subsection 3.2(2) of NI 21-101.

¹² Proposed subsection 6.1(4) of 21-101CP.

¹³ Proposed subsection 3.2(3) of NI 21-101.

¹⁴ Proposed subsections 6.1(6) and 6.1(7) of 21-101CP.

¹⁵ Proposed section 3.3 of NI 21-101.

21-101F3 to include more meaningful and relevant information. A description of the proposed revisions is discussed below.

ii. Proposed amendments to the Forms

Background and current requirements

As discussed above, Part 3 of NI 21-101 outlines the reports that marketplaces must file on an initial and ongoing basis and, in the case of ATSS, when they intend to cease their operations. These are Forms 21-101F1, 21-101F2, 21-101F3 and 21-101F4 *Cessation of Operations Report for Alternative Trading Systems*. 21-101CP indicates that, where possible, all forms and exhibits required to be filed under the instrument be filed in electronic format.

The forms filed by the marketplaces have been in place since the Marketplace Rules were implemented in 2001, and have not changed significantly since their initial implementation. As part of our review of the requirements applicable to marketplaces, we reviewed the Forms to assess their continuing adequacy in light of the changes in the Canadian market. We determined that these forms should be updated to be more reflective of the existing market structure and trading activities of the marketplaces.

Proposed amendments

In the Proposed Amendments, we revise the Forms to:

- align the exhibits in Forms 21-101F1 and 21-101F2 and increase consistency between the information filing requirements applicable to Exchanges and ATSS;
- enhance the Forms with additional information, including information about the operations of the marketplace, outsourcing activities, or governance; and
- Remove obsolete or unduly onerous reporting requirements.

We attach a summary of the reporting requirements in existing Forms 21-101F1 and 21-101F2, as well as those in proposed amendments to these forms as **Appendix A** of this notice.

As indicated earlier, we also propose to require all marketplaces, including Exchanges, to file Form 21-101F3 and revise Form 21-101F3 as follows:

- we tailored the reporting requirements in Form 21-101F3 to the different types of marketplaces currently operating: fixed income, transparent and non-transparent equity marketplaces, and marketplaces that facilitate securities lending transactions;
- we removed the requirement to provide detailed information about the securities traded on the ATS; and
- we included information that is more reflective of the activities on existing marketplaces and the types of securities traded, such as: information on certain order types and trading activity for each; value and volume of different types of crosses; concentration of trading by marketplace participants; other services offered by the

marketplaces, such as routing and co-location; and systems information, specifically, information regarding outages.

We believe that collecting this information on a quarterly basis will provide us with an overview of the activities of marketplaces, as well as with data that will inform future policy making.

In proposed amendments to NI 21-101, we also included a requirement that marketplaces file their forms in electronic form.¹⁶ We believe that this will help increase consistency between the format of the forms filed by the marketplaces and could also facilitate the filing process. We are now in the process of developing a filing system that would allow the marketplaces to submit their forms online. When that process is complete, we will notify the marketplaces and will amend 21-101CP accordingly.

iii. Financial reporting

Background and current requirements

Currently, Exchanges and QTRSs are required to file, as Exhibit O of Form 21-101F1, their audited financial statements and an independent auditor's report. For new Exchanges, the financial information to be included must be future oriented. In addition, NI 21-101 requires that Exchanges and QTRSs file audited financial statements, and requires that this be done within 90 days after the end of their latest financial year.¹⁷ ATSS, as dealer members of the Investment Industry Regulatory Organization of Canada (IIROC), are required by applicable IIROC dealer member rules to file financial statements in accordance with IIROC's requirements.¹⁸

Proposed amendments

In the Proposed Amendments, we maintain the requirement that Exchanges and QTRSs file financial statements.¹⁹ We also include a requirement that ATSS file financial statements on an initial and an ongoing basis. In 21-101CP, we indicated that the financial statements filed by ATSS may be in the same form as those filed with IIROC, and that ATSS may file the annual audited financial statements at the same time as they are filed with IIROC.²⁰ This is because we acknowledge that ATSS already follow the financial reporting requirements established by IIROC and it is not our intention to duplicate these requirements. Rather, we intend to review the ATSS' financial statements to get a better understanding of their activities, including sources of revenue and costs.

In addition, we propose to require that the financial statements of Exchanges and QTRSs be prepared in accordance with Canadian Generally Acceptable Accounting Principles

¹⁶ Proposed section 3.5 of NI 21-101.

¹⁷ Section 5.6 of NI 21-101.

¹⁸ See IIROC Rule 16 *Dealer Members' Auditors and Financial Reporting*.

¹⁹ See proposed sections 4.1 and 4.2 of NI 21-101.

²⁰ See proposed section 6.2 of 21-101CP.

(GAAP) applicable to publicly accountable enterprises²¹ or with International Financial Reporting Standards (IFRS).²² This approach is consistent with that taken for other market participants, which are required by National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards* to follow IFRS.

iv. Other requirements currently applicable only to ATSS

Background and current requirements

A number of existing requirements in NI 21-101 apply only to ATSS. These are:

- the requirement that ATSS that trade in foreign-exchange listed securities provide their subscribers with certain disclosure;²³ and
- the requirement for confidential treatment of trading information by ATSS.²⁴

Proposed amendments

In our view, these requirements should apply to all marketplaces, including Exchanges and QTRSs. For this reason, in proposed amendments to NI 21-101 we extended their application to all marketplaces.²⁵

v. Requirements applicable to all marketplaces

Background and current requirements

A number of requirements in NI 21-101 are common to all marketplaces. These are:

- The initial filing and ongoing reporting requirements;²⁶ and
- The fair access requirements.²⁷

Proposed amendments

In proposed amendments to NI 21-101, we combined these requirements in the same section. Specifically, proposed Part 3 of NI 21-101 contains the initial filing and ongoing reporting requirements for all marketplaces. Proposed section 5.1 of NI 21-101 includes the fair access requirements and is applicable to all marketplaces.

vi. Marketplace rules

Background and current requirements

²¹ The proposed definition is in section 1.1 of NI 21-101.

²² At this time, Canadian GAAP applicable to publicly accountable enterprises are equivalent to IFRS.

²³ In section 6.10 of NI 21-101.

²⁴ In section 6.8 of NI 21-101.

²⁵ See sections 5.9 and 5.10 of proposed amendments to NI 21-101.

²⁶ In NI 21-101 the requirements applicable to Exchanges are included in sections 3.1 and 3.2, those applicable to QTRSs in sections 4.1 and 4.2, and those applicable to ATSS, in section 6.4.

²⁷ In section 5.1 of NI 21-101 for Exchanges and QTRSs and 6.13 of NI 21-101 for Exchanges and QTRSs and ATSS

Section 5.3 of NI 21-101 currently sets out the requirements applicable to the rules, policies and other similar instruments adopted by Exchanges or QTRSs. Specifically, it requires that rules, policies and other similar instruments adopted by an Exchange or QTRS not be contrary to the public interest, and that they be designed to: (i) ensure 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. Section 5.3 of NI 21-101 also requires Exchanges and QTRSs to not permit unreasonable discrimination among clients, issuers and members or among clients, issuers and users, or to impose any burden on competition that is not reasonably necessary and appropriate.

Section 5.4 of NI 21-101 establishes the additional requirements that Exchanges and QTRSs have rules that require compliance with securities legislation and that provide appropriate sanctions for violations of the rules, policies or other similar instruments of these Exchanges and QTRSs.

Section 5.5 of NI 21-101 requires Exchanges and QTRSs to file their rules, policies and other similar instruments, as well as amendments thereto. Section 7.3 of 21-101CP specifies that these filings must be done as required by the Canadian securities regulatory authorities. The review and approval process for proposed new and amendments to rules, policies and other similar instruments is set out in the rule protocols applicable to the Exchanges. The rules of the Exchanges are included in a centralized “rulebooks” which are made publicly available on their websites.

ATs, by definition, may not set requirements governing the conduct of their subscribers, other than conduct in respect of the trading by those subscribers on the marketplace. Specifically, this relates to the method of trading or trading algorithms used to execute trades in the ATs’s system, and may be described in the ATs’ trading rules, provisions in the subscriber agreements, in other policies and procedures, or various sections of Form 21-101F2. Generally, ATs publish information about these trading activities, including information regarding order types that the ATs supports, on their websites. There is no requirement for ATs to have a centralized “rulebook”.

New or changes to these requirements are reviewed by the CSA in accordance with requirements or staff practices in each jurisdiction.

Proposed amendments

We maintained the requirements applicable to rules, policies and other similar instruments of Exchanges and QTRSs. We do not propose to apply these requirements to ATs which, unlike Exchanges, are not permitted to have a regulatory function and may not set conduct rules other than trading requirements on their marketplaces. We clarified this distinction in proposed amendments to 21-101CP.²⁸

²⁸ See section 7.5 of proposed amendments to 21-101CP.

However, in proposed amendments to 21-101CP, we clarified our expectation that the obligation of ATSS to avoid engaging in any activity that would interfere with the maintenance of fair and orderly markets applies to their trading requirements.²⁹ We are of the view that imposing this obligation, the elements of which include requirements to provide fair access to the marketplace, to be transparent regarding their operations and to have procedures to manage conflicts of interest, would subject ATSS' trading requirements to an appropriate standard.

In proposed amendments to 21-101CP, we also clarified that, since ATSS' trading requirements are incorporated in their Form 21-101F2, they would be subject to the filing requirements set out in NI 21-101 and reviewed in accordance with staff practices in each jurisdiction.³⁰

2. Information transparency requirements for marketplaces dealing in exchange-traded securities

Background and current requirements

Part 7 of NI 21-101 sets out the information transparency requirements for marketplaces dealing in exchange-traded securities. One of these requirements is that a marketplace that displays orders of exchange-traded securities must provide information regarding the orders displayed on that marketplace to an information processor.³¹ An exemption from this requirement is available for orders that are displayed to a marketplace's employees or those retained by the marketplace to assist in the operation of the marketplace.³² This exemption permits marketplaces that do not offer pre-trade transparency (Dark Pools) to operate. It also permits orders to be entered with no pre-trade transparency on a transparent marketplace. We refer to these as Dark Orders.

Part 9 of 21-101CP includes additional guidance regarding these transparency requirements. In addition, Part 5 of 21-101CP provides clarification of what constitutes an "order" as defined by section 1.1 of NI 21-101, and indicates that, at a minimum, the Canadian securities regulatory authorities will consider an IOI to be an order if it can be executed without further discussion between the person or company entering the IOI and its counterparty.

CSA staff have been reviewing issues related to Dark Pools and Dark Orders. The review process started with the publication of Joint CSA/IIROC Consultation Paper 23-404 *Dark Pools, Dark Orders, and Other Developments in Market Structure in Canada*³³ (Consultation Paper), where we identified and sought comment on a number of issues, particularly the impact of Dark Pools, the introduction of dark order types, and the

²⁹ See section 7.2 of proposed amendments to 21-101CP.

³⁰ See section 7.5 of proposed amendments to 21-101CP.

³¹ Subsection 7.1(1) of NI 21-101.

³² Subsection 7.1(2) of NI 21-101.

³³ Published at (2009) 32 OSCB beginning at page 7877.

introduction of SORs. The Consultation Paper discussed these issues and their potential impact on the Canadian markets.

We received 23 response letters to the Consultation Paper and, on March 23, 2010, the CSA and IIROC hosted a forum (Forum) to further discuss the issues in the consultation paper and in the response letters. In May 2010, we published CSA/IIROC Joint Staff Notice 23-308 – *Update on Forum to Discuss CSA/IIROC Joint Consultation Paper 23-404 “Dark Pools, Dark Orders and Other Developments in Market Structure in Canada” and Next Steps* (CSA-IIROC Staff Notice 23-308), to summarize the themes discussed at the Forum and discuss next steps. They included:

- whether Dark Pools should be required to provide price improvement and, if so, what is considered meaningful price improvement;
- the use of sub-penny pricing;
- the practice of broker preferencing and dealer internalization of order flow;
- the use of IOIs by Dark Pools to attract order flow; and
- the fairness of a marketplace offering smart order router services (SORs) that use marketplace data that is not available to other marketplace participants.

In CSA-IIROC Staff Notice 23-308, we also included a discussion of ongoing initiatives, proposed next steps to address some of the issues raised in responses to the Consultation Paper and at the Forum, and a summary of the comments received in response to the Consultation Paper.

On November 19, 2010, we published Joint CSA/IIROC Position Paper 23-405 *Dark Liquidity in the Canadian Market* (Position Paper), setting out CSA and IIROC’s position on a number of these issues. The Position Paper included CSA and IIROC’s recommendations regarding:

- the circumstances under which Dark Pools or marketplaces offering Dark Orders³⁴ may be exempted from the pre-trade transparency requirements of NI 21-101;
- whether Dark Orders should be required to provide meaningful price improvement over the national best bid or national best offer and, if so, under which circumstances;
- whether visible orders should have priority over Dark Orders when they are at the same price and on the same marketplace; and
- what is considered a meaningful level of price improvement.

In the Position Paper, we recommended that the exemption from pre-trade transparency only apply to orders that meet a minimum size threshold, and requested feedback on what this minimum size should be.

³⁴ In the Position Paper, we referred to any order on any marketplace entered with no pre-trade transparency and not required to be reported to an information processor or data vendor as Dark Orders. Reserve or iceberg orders were not included.

We received 20 comment letters to the Position Paper from marketplaces, dealers and buy-side participants. In this Notice, we deal with the exemption from the pre-trade transparency requirements included in NI 21-101. We will issue a separate notice that will address the other issues discussed in the Position Paper and will include a summary of the comments received.

Approximately a third of the respondents were in favour of limiting the exemption from pre-trade transparency requirements to orders that meet a minimum size threshold for a number of reasons, including that this approach would help preserve the value and quality of the visible order book. However, some of these respondents cautioned that there are risks associated with imposing a threshold, for example, that this would create the potential to “game” orders. The feedback on an appropriate minimum size was mixed: some respondents suggested that 50 standard trading units is appropriate. One commenter suggested that the minimum size threshold be based on a percentage of the average daily volume or a multiple of the average order size for a security.

The remainder of the respondents did not support establishing a minimum size threshold for the exemption from the transparency requirements applicable to orders in NI 21-101. Reasons given included:

- the fact that dark pools only comprise about 2% of the Canadian market and there has been no evidence of harm to market quality to justify substantial regulatory changes;
- a concern that risks of information leakage and gaming associated with a minimum size requirement might result in lower overall liquidity, due to more large orders being held rather than placed in dark venues;
- a concern that regulatory restrictions would limit the ability of marketplaces to offer innovative and new features;
- the potential that a size threshold would limit the use of dark liquidity to retail order flow, due to the fact that minimum trade size restrictions would likely be added to many resting liquidity orders to avoid gaming;
- the risk of liquidity migrating to other jurisdictions for inter-listed securities; and
- dealers need the flexibility to determine how to best execute their orders, irrespective of their size.

We acknowledge that, to date, there has been limited activity in dark pools and no evidence that dark liquidity has had a negative impact on the Canadian capital markets. However, we are of the view that it is important and timely to establish a regulatory framework so that we are in a position to respond quickly to future market developments. For this reason, in the proposed amendments to NI 21-101, we propose to introduce a requirement that orders meet a minimum size established by a regulation services provider in order to be exempt from the transparency requirements in NI 21-101. However, at this time no minimum order size is being proposed. Any size threshold that may be proposed in the future would follow a regular public comment process. The CSA and IIROC will continue to monitor the level of activity on non-transparent marketplaces and its impact on price discovery to determine whether and when to propose a specific size threshold.

We believe that introducing the amendments to the transparency requirements in NI 21-101 at this time meets the policy objectives set out in the Position Paper, which were to establish the framework within which dark liquidity can be offered without detriment to the price discovery process while acknowledging the concerns raised by the respondents to the Position Paper.

In the Position Paper, we also noted that some of the issues discussed in the Consultation Paper and at the Forum would be addressed separately. These are:

- the use of IOIs by Dark Pools to attract order flow – we indicated that we would provide clarity on when an IOI would be considered to be an order and subject to the transparency requirements of NI 21-101; and
- the practice of marketplaces offering SORs that use marketplace data that is not available to other marketplace participants – we indicated that we would clarify the expectation that marketplaces consider fair access requirements when sending marketplace data to an SOR but not to other marketplace participants.

We also cover these issues in the Proposed Amendments.

Proposed Amendments

- i. Transparency requirements applicable to marketplaces dealing in exchange-traded securities*

In proposed amendments to NI 21-101, we revise the pre-trade transparency requirements applicable to marketplaces dealing in exchange-traded securities.

As set out above, we revise the exemption from pre-trade transparency requirements to include a requirement that orders meet a size threshold in order to be exempt from the transparency requirements in addition to the existing requirement that orders only be displayed to the employees or those assisting in the operations of a marketplace.³⁵ We indicate that the size threshold would be established by a regulation services provider, currently, IIROC. At this time, no size threshold is proposed.³⁶

In addition, we replace the existing requirement that a marketplace display order information for the orders displayed *on* that marketplace with a requirement to make transparent information relating to orders displayed *by* that marketplace; this would acknowledge that the transparency requirements should apply to all orders that are

³⁵ See subsection 7.1(2) of proposed amendments to NI 21-101.

³⁶ It should be noted that Rule 6.3 of the Universal Market Integrity Rules that IIROC administers, commonly known as the Order Exposure Rule, currently requires that a Participant immediately enter on a marketplace that displays orders a client order to purchase or sell 50 standard trading units or less. The requirements of the Order Exposure Rule are subject to certain exceptions, including when the client has specifically instructed the Participant to deal otherwise with the particular order (e.g. authorized the entry of the order on a dark pool).

displayed or disseminated by a marketplace to external individuals or entities, including SORs.³⁷

ii. Use of IOIs

In 21-101CP, we propose additional guidance on when an IOI would be considered an order and thus subject to the transparency requirements.³⁸ Specifically, we indicated that the Canadian securities regulatory authorities would consider an IOI to be “actionable” when it includes sufficient information to enable it to be executed without further discussion or negotiation between the person or entity entering the IOI and their counterparty. Furthermore, we clarified that this information may be explicitly stated, for example the IOI may include the symbol, side, size and price of the security, or may be implicit, based on the characteristics of a marketplace. For example, a marketplace may disseminate IOIs without specifying the price associated with the IOIs. However, if that marketplace is known to always offer price improvement of a certain percentage, the recipient of the IOIs may infer their price, which may render the IOI actionable and may qualify it as an order.

In 21-101CP, we also set out our expectation that marketplaces that send IOI information to a selected SOR consider the extent to which such information should be sent to other SORs in order to meet their fair access obligations.³⁹ As indicated above, if the IOIs provided meet the characteristics of an order, they would be subject to the transparency requirements of Part 7 of NI 21-101.

3. Transparency of marketplace operations

Background and current requirements

Currently, the only disclosure requirement applicable to marketplaces in NI 21-101 is the requirement that a marketplace make its schedule of trading fees publicly available.⁴⁰ In Ontario, OSC Staff Notice 21-703 sets out OSC staff’s view that Exchanges and ATSS should be subject to a similar degree of transparency when proposing to carry on business and when making changes to their operations. OSC staff described some of the information that they expect would be made transparent by ATSS. It included the following information regarding the operations of an ATS that would be provided in conjunction with Form 21-101F2, filed when proposing to carry on business as an ATS:

- its access requirements;
- a description of the securities to be traded;
- the order types to be offered or features/characteristics of orders;

³⁷ See subsections 7.1(1), 7.3(1), 8.1(1) and 8.2(1) of proposed amendments to NI 21-101 for the requirements applicable to exchange-traded, foreign exchange-traded, government debt and corporate debt securities.

³⁸ See subsection 5.1(2) of proposed amendments to 21-101CP.

³⁹ See subsection 7.1(4) of proposed amendments to 21-101CP.

⁴⁰ Section 10.1 of NI 21-101.

- how orders are entered, displayed (if applicable), executed and how they interact; and
- the special facilities or sessions of the marketplace (for example, pre-opening and market-on-close facilities).

OSC staff also indicated that, on an ongoing basis, certain changes filed by marketplaces would also be published. These included:

- order types (i.e. new or existing order types) or features and characteristics of orders;
- procedures governing how orders are entered, displayed (if applicable), executed and how they interact; and
- changes to the procedures relating to special facilities or sessions of the marketplace (for example, pre-opening and market-on-close facilities).

In CSA-IIROC Staff Notice 23-308, CSA and IIROC staff stated that more transparency of marketplace operations was required so that investors and industry participants understand all the trading options offered by each marketplace. We further indicated that we were considering requiring each marketplace to provide specific disclosure on its website regarding how orders entered interact with other orders on that marketplace throughout the day, including a detailed description of each order type. The proposed amendments to NI 21-101 would require the public disclosure of this information and some additional information described below.

Proposed Amendments

To address the objectives described above, in proposed amendments to NI 21-101 we require that a marketplace publicly disclose on its website information relating to its operations, including but not limited to:⁴¹

- its fees, including listing, trading, data and routing fees charged by the marketplace, an affiliate or by a third party to which the marketplace outsourced its services;
- a description of how orders are entered, interact and execute;
- all order types;
- the marketplace's access requirements;
- its policies and procedures to identify and manage conflicts of interest arising from the operation of the marketplace or the services it provides;
- any referral arrangements between the marketplace and service providers;
- where routing is offered, how routing decisions are made; and
- when IOIs are disseminated, the information included in these IOIs and the types of recipients of such IOIs.

In addition, we enhanced the existing requirement in NI 21-101 that a marketplace make its schedule of trading fees publicly available, and required that all fees, including trading, data and routing fees, as well as listing fees, when applicable, should be made transparent on a marketplace's website.

⁴¹ See section 10.1 of proposed amendments to NI 21-101.

We note that these provisions would constitute the minimum disclosure requirements for marketplaces and that marketplaces may make other information publicly available as well.

4. Other requirements applicable to marketplaces

i. Conflicts of interest

Background and current requirements

We are of the view that it is important for marketplaces to identify and disclose existing material conflicts of interest. We would consider a conflict of interest to be any circumstance where the interests of different parties, such as the interests of a marketplace and those of a member, subscriber or user, are inconsistent or divergent.

Section 13.4 of National Instrument 31-103 *Registration Requirements and Exemptions* (NI 31-103) imposes requirements related to identifying and responding to conflicts of interest on registered firms. These apply to ATSS, but not to Exchanges or QTRSs.

Proposed amendments

To increase consistency between the requirements applicable to all marketplaces, in proposed amendments to NI 21-101 we require that marketplaces establish, maintain and ensure compliance with policies and procedures that identify and manage any conflicts of interest arising from the operation of the marketplace or the services it provides.⁴² As noted earlier, the proposed amendments would also require that each marketplace make these policies and procedures publicly available in order for all interested parties to be aware of material conflicts of interest a marketplace may have.⁴³

ii. Outsourcing

Background and current requirements

In many instances, a marketplace may choose to have a third party or an affiliate provide certain services on its behalf. We are of the view that the quality of services provided by marketplaces must be maintained, even in instances where a service has been outsourced to a third party provider or an affiliate.

The benefits and issues associated with outsourcing, as well as principles to assist market intermediaries considering or already involved in outsourcing arrangements and the regulators are outlined in a report of a Technical Committee of the International

⁴² See section 5.11 of proposed amendments to NI 21-101.

⁴³ See subsection 10.1(e) of proposed amendments to NI 21-101.

Organization of Securities Commission (IOSCO Outsourcing Report).⁴⁴ The principles in the IOSCO Outsourcing Report apply to markets, defined as exchanges only.

In Canada, ATSS, as registered firms, are subject to Part 11 of Companion Policy 31-103CP, which sets out the expectation that registered firms be responsible and accountable for all functions that they outsource to a service provider. These expectations are consistent with the principles in the IOSCO Outsourcing Report. However, Companion Policy 31-103CP does not apply to Exchanges and QTRSs.

Proposed amendments

The proposed amendments to NI 21-101 include requirements for marketplaces that outsource any of its key services or systems to a service provider, which would include affiliates or associates of the marketplace.⁴⁵ These proposed requirements, also consistent with the principles in the IOSCO Outsourcing Report, would require that marketplaces that outsource any of their key services establish and maintain policies and procedures for the selection of service providers and for the evaluation and approval of outsourcing arrangements. Marketplaces would also need to monitor the performance of the service provider. These outsourcing requirements would apply regardless of whether the outsourcing arrangements are with third-party services providers or affiliates or associates of the marketplace.

iii. Notification of threshold by ATSS

Background and current requirements

Section 6.6 of NI 21-101 requires an ATS to notify the security regulatory authority in writing at least six months before conducting certain functions such as listing securities, market-making activities, establishing conduct requirements or establishing procedures for disciplining its subscribers other than exclusion from trading. In addition, section 6.7 of NI 21-101 requires an ATS to notify the security regulatory authority if one of three thresholds are met or exceeded.⁴⁶

Proposed amendments

⁴⁴ Available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD299.pdf>.

⁴⁵ See section 5.12 of proposed amendments to NI 21-101.

⁴⁶ An ATS is required to notify the securities regulatory authority in writing if, (a) during at least three of the preceding four calendar quarters, the average daily dollar value of the trading volume on the ATS for a calendar quarter in any type of security is equal to or greater than 20 percent of the average daily dollar value of the trading volume for the calendar quarter in that type of security on all marketplaces in Canada; (b) during at least three of the preceding four calendar quarters, the total trading volume on the ATS for a calendar quarter in any type of security is equal to or greater than 20 percent of the total trading volume in the calendar quarter in that type of security on all marketplaces in Canada; or (c) during at least three of the preceding four calendar quarters, the number of trades on the ATS for a calendar quarter in any type of security is equal to or greater than 20 percent of the number of trades for the calendar quarter in that type of security on all marketplaces in Canada.

In the proposed amendments to NI 21-101, we removed the requirement that an ATS notify us before conducting exchange-like functions. This is because an ATS wishing to conduct these types of activities would have to apply for recognition as an Exchange and would include this information in its application for recognition. In addition, any significant change to a marketplace's functions would be reported to us in advance, in accordance with the notification requirements in Part 3 of the proposed amendments to NI 21-101.

We maintained the requirement for notification if certain trading volumes are met, but revised it as follows⁴⁷:

- we changed the notification thresholds from 20 percent to 10 percent; and
- we required that notification be provided if in a particular quarter, one of the thresholds are met for two of the preceding three months of operation.

We believe that these new notification thresholds are indicative of an ATS increasing its market presence in a type of security, which could be an indication that it may be more appropriate that the ATS be regulated as an Exchange. In 21-101CP, we clarified that if one of the proposed thresholds is met or exceeded, we would review the ATS, its structure and operations to determine whether it should be considered to be regulated as an Exchange, or whether additional terms and conditions should be placed on its dealer registration.⁴⁸

iv. Recordkeeping requirements

In conjunction with the Order Protection Rule⁴⁹, which became effective on February 1, 2011, we introduce a new requirement for marketplaces and dealers to indicate whether orders they receive are directed-action orders.⁵⁰ In proposed amendments to NI 21-101, we also require that marketplaces keep records that indicate whether a marketplace or whether a marketplace participant marked an order as a directed-action order.⁵¹

A new national instrument, to be published for comment shortly, will be introducing provisions governing electronic trading. A direct electronic access identifier will be a proposed requirement under this rule which will mandate that each direct electronic access client will need to be assigned a unique identifier. This specific identifier has been added to the list of records that would be required to be maintained in section 11.2 of NI 21-101 and the audit trail requirements in section 11.2 of NI 23-101. These sections may be further revised to incorporate definitions in the new national instrument referred to above.

v. Business continuity planning

⁴⁷ See section 6.7 of proposed amendments to NI 21-101.

⁴⁸ Subsection 3.4(7) of proposed amendments to 21-101CP.

⁴⁹ See Part 6 of NI 23-101.

⁵⁰ See subparagraph 11.2(1)(c)(xviii) of proposed amendments to NI 21-101 and subparagraph 11.2(1)(u) of proposed amendments to NI 23-101 for the requirements applicable to marketplaces and dealers, respectively.

⁵¹ See subparagraph 11.2(1)(c)(xix) of proposed amendments to NI 21-101.

Currently, subsection 12.1(a)(i) of NI 21-101 requires marketplaces to develop and maintain reasonable business continuity and disaster recovery plans. Subsection 12.1(b)(iii) requires marketplaces to test their business continuity and disaster recovery plans on a reasonably frequent basis, and in any event, at least annually.

Both these requirements are included in section 12.1 *System Requirements* of NI 21-101. We are of the view that business continuity and disaster recovery planning goes beyond systems requirements. A marketplace's business continuity plan may include, for example, maintenance of a back-up location, or alternate working arrangements for its employees.

To acknowledge this, and to highlight the great importance we place on marketplaces developing and testing business continuity plans, we maintained the existing requirements applicable to business continuity and disaster recovery planning, but set them out separately from the systems requirements.⁵²

vi. Independent systems review

Background and current requirements

Subsection 12.2(1) of NI 21-101 requires a marketplace to engage a qualified party annually to conduct an independent systems review and prepare a report in accordance with established audit standards. The purpose of the review is to assess the adequacy of the internal controls over the systems of the marketplace, of information technology general controls, and of the marketplace's business continuity planning processes.

Part 14 of 21-101CP provides additional guidance on the requirements of an independent systems review, including who may constitute a qualified party to conduct such a review and when an exemption from the requirements of subsection 12.2(1) may be considered.

Proposed amendments

In 21-101CP, we provide additional guidance on the individuals or entities that may be qualified to conduct independent systems review, and indicated that these may include external auditors or third party information systems consultants.⁵³ In 21-101CP, we also provide additional clarification on the criteria we may consider in granting exemptions from the requirement to engage a qualified party to conduct an independent systems review, and also that these criteria would not only guide us in determining if the exemption is in the public interest, but also on the length of the exemption.⁵⁴

5. Definition of a marketplace

⁵² See section 14.6 of proposed amendments to NI 21-101.

⁵³ See subsection 14.1(3) of proposed amendments to 21-101CP.

⁵⁴ See subsection 14.1(4) of proposed amendments to 21-101CP.

In 21-101CP, we provided additional clarification regarding the definition of “marketplace”.⁵⁵ Specifically, we clarified that a dealer using a system that brings together multiple buyers and sellers using established, non-discretionary methods to match or pair orders with contra-side orders outside of a marketplace and which generates trade execution through the routing of both sides of a match to a marketplace as a cross would be considered to be operating a marketplace. The rationale for this clarification is that the use of technology to match orders received by the dealer electronically, in a non-discretionary, established fashion is very similar to the function performed by a marketplace. However, a dealer manually matching orders in the upstairs market would not be considered to be functioning as a marketplace.

6. Transparency requirements applicable to marketplaces, inter-dealer bond brokers and dealers dealing in government debt securities

Background and current requirements

Part 8 of NI 21-101 sets out the transparency requirements for marketplaces dealing in unlisted debt securities, inter-dealer bond brokers (IDBs) and dealers. The specific pre-trade and post-trade transparency requirements applicable to government debt securities are set out in section 8.1. Section 8.6 of NI 21-101 provides an exemption from these requirements until January 1, 2012. This exemption has been in place since 2003, and last renewed in 2006.

Over time, the CSA have reviewed the continuing appropriateness of this exemption and the alternatives for transparency for government fixed income securities. In proposed amendments to NI 21-101 published in 2006,⁵⁶ we presented a number of options to deal with transparency for government debt securities. One of these options included an incremental approach to transparency. Based on feedback received through the public comment process, the CSA decided not to mandate transparency for government debt, but rather to extend the exemption until December 31, 2011. We indicated, at the time, that the level of transparency in the government debt market had increased and that it was our expectation that it would continue to increase. We also noted that we would continue to monitor the fixed income market to determine whether regulation or further guidance will be needed in the future.⁵⁷

We have been monitoring the fixed income markets and related developments, including regulatory developments regarding government debt transparency. We found that, while no jurisdiction has established mandatory transparency requirements for government debt, there has been progress towards additional transparency in the fixed income market internationally. For example, in the United States, the Securities and Exchange Commission (SEC) approved amendments to certain rules of the Financial Industry

⁵⁵ See subsection 2.1(8) of proposed amendments to 21-101CP.

⁵⁶ Published at (2006) 29 OSCB beginning at (2006) 29 OSCB 5735.

⁵⁷ Notice of Amendments to NI 21-101 *Marketplace Operation*, Companion Policy 21-101CP, NI 23-101 *Trading Rules* and Companion Policy 23-101CP, published at (2006) OSCB beginning at (2006) 29 OSCB 9731.

Regulatory Authority (FINRA) that would expand the scope of securities reportable to the Trade Reporting and Compliance Engine (TRACE). These rule amendments, approved by the SEC in September 2001 and effective as at March 1, 2010, expanded TRACE to include Agency debt securities to the securities for which trade information is reported by FINRA members (U.S. broker-dealers).⁵⁸ The rationale for the change was that it would increase transparency in the bond market and foster developments such as improved pricing, narrower bid-ask spreads, and reduced investor costs.

In Europe, recent technical advice by the Committee of European Securities Regulators (CESR) to the European Commission⁵⁹ recommended a post-trade transparency regime for non-equity securities, including corporate and public bonds.⁶⁰ A recent review of the Markets in Financial Instruments Directive (MiFID) by the European Commission⁶¹ indicates an intention to amend the MiFID framework directive to require pre- and post-trade transparency for all trades in certain non-equity products, including all bonds with a prospectus or which are admitted to trading either on regulated markets or multilateral trading facilities.

We have also seen the emergence, in Canada and abroad, of facilities offering prices for selected securities, including government debt securities.⁶² In Canada, a number of marketplaces are offering price information regarding government debt securities and CanPX, the information processor for corporate debt securities, provides quotations for certain government bonds. As a result, we believe that there has been some progress towards additional government debt transparency.

Proposed amendments

In light of developments regarding transparency for government debt securities, we extended the exemption from the transparency requirements in NI 21-101 until December 31, 2014.⁶³ This would allow us to review international regulatory developments and progress towards additional transparency made in Canada in order to determine what, if any, mandatory requirements are needed in this area.

⁵⁸ The definition of a TRACE-eligible security in FINRA Rule 6710 was amended to include securities issued or guaranteed by an agency or a government-sponsored enterprise (except securities issued by the U.S. Treasury). The rule is available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4400

⁵⁹ CESR Technical Advice to the European Commission in the Context of the MiFID Review: Non-equity Markets Transparency, available at http://www.cesr-eu.org/index.php?page=contenu_groups&id=61&docmore=1

⁶⁰ Under CESR's proposed definition, public bonds would generally include transferable debt securities excluding those with a maturity below 12 months and treasury bills issued by a Member State's general government, monetary authorities of one of the Member States; international bodies of which one or more Member States are members; and the European Central Bank.

⁶¹ Available at http://ec.europa.eu/internal_market/securities/isd/mifid_en.htm.

⁶² For example, PC Bond Analytics in Canada, see <http://www.canadianbondindices.com>, Canadian Fixed Income (provided by Perimeter CBID), see <http://www.pfin.ca/canadianfixedincome/Default.aspx>, xtrakter in Europe, see <http://www.bondmarketprices.com/default.aspx>.

⁶³ See section 8.6 of proposed amendments to NI 21-101.

7. Locked or crossed markets

Background and current requirements

A “locked market” occurs when there are multiple marketplaces trading the same security and a bid (offer) on one marketplace is at an identical price level to an offer (bid) on another marketplace. Had both orders been entered onto the same marketplace the bid and the offer would have matched and a trade would have been executed. A “crossed market” occurs when a bid (offer) on one marketplace is higher (lower) than another offer (bid) on a different marketplace. Currently, section 6.5 of NI 23-101 prohibits a marketplace participant from intentionally locking or crossing a market.

Proposed amendments

Proposed section 6.5 of NI 23-101 would provide that marketplaces, in addition to marketplace participants, shall not intentionally lock or cross a market when the marketplace routes or reprices orders. Specifically, marketplaces that route or re-price orders will be required to ensure that their routing or re-pricing activities do not lock or cross markets. In proposed section 6.4 of 23-101CP, we are giving additional guidance regarding situations that would be considered to be an unintentional locking or crossing of the market.

8. Requirements for information processors

Background and current requirements

Part 14 of NI 21-101 sets out the initial and ongoing filing requirements for an information processor. It also sets out other requirements applicable to an information processor, which include data, access and system requirements.

There are two information processors operating in Canada: the information processor for exchange-listed securities other than options (TSX IP) is operated by the Toronto Stock Exchange, and the information processor for corporate debt securities is CanPX.⁶⁴ At the time that the CSA made a determination that it was not against the public interest for these two entities to act as information processors, TSX IP and CanPX signed a number of undertakings that they would meet certain conditions which included governance, financial and other requirements in order to become and continue to act as information processors.⁶⁵

Proposed amendments

⁶⁴ In Québec, these entities are recognized as information processors under the *Securities Act*.

⁶⁵ The undertakings signed by TSX IP are available at http://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20090605_21-309_processor-exchange.jsp. The undertakings signed by CanPX are available at http://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20090626_21-310_debt-securities.pdf

We are of the view that some of the requirements applicable to marketplaces are equally relevant to an information processor. As a result, in proposed amendments to NI 21-101 we added the following requirements applicable to marketplaces to the information processors:

- A requirement to file annual audited financial statements;
- A requirement to file a financial budget on an annual basis;
- A requirement for confidential treatment of trading information;
- A requirement to publicly disclose certain information relating to an information processor's operations; and
- A requirement to develop and maintain reasonable business continuity plans, including disaster recovery plans.

We note that the existing information processors already meet these requirements, either as required by their undertakings or as part of their prudent business practices. However, we thought it was important to formalize them, and included them in proposed amendments to NI 21-101.⁶⁶

In 21-101CP, we clarified the ongoing filing requirements and, similar to our approach for marketplaces, gave guidance on what we would consider a significant change.⁶⁷

IV. ANTICIPATED COSTS AND BENEFITS

The following is a description of the costs and benefits that marketplaces may encounter in complying with the Proposed Amendments. Omitted from the cost discussion are Proposed Amendments that would clarify existing requirements, consolidate existing similar requirements applicable to all marketplaces, or extend the time provision of existing requirements (such as the extension of the exemption from transparency requirements applicable to government debt securities) because we anticipate these changes will not result in any costs.

All marketplaces will incur a one-time cost of:

- reviewing the Proposed Amendments;
- determining the regulatory compliance gaps that exist and the actions required to address any gaps that are found;
- implementing new compliance measures; and
- training staff on the new requirements.

The magnitude of these costs will be dictated by the needs of each marketplace. The initial compliance costs are applicable to all the Proposed Amendments examined below. For brevity, we have omitted discussion of these compliance costs from the analysis, unless a particular type of compliance cost was deemed significant. For example, initial costs associated with the implementation of systems that would accommodate the proposed reporting requirements set out in Form 21-101F3, initial costs to adjust a

⁶⁶ See section 14.4 of proposed amendments to NI 21-101.

⁶⁷ See section 16.3 of proposed amendments to 21-101CP.

marketplace's system in case a minimum size threshold from the transparency requirements of Part 7 of NI 21-101 is established, or costs to upgrade a marketplace's information technology infrastructure to prevent intentional locked and crossed markets may be significant and were highlighted separately.

COSTS

1. Regulatory and reporting requirements of marketplaces

i. Proposed forms

Of the Proposed Amendments, we anticipate that the proposed requirement for quarterly reporting of marketplace activities will have the greatest impact on marketplaces. We anticipate that required upgrades to the information technology infrastructure of marketplaces will be the compliance activity that would entail the greatest costs. The magnitude of this cost will vary depending on the marketplace's information technology infrastructure. We anticipate these costs to be a one-time cost.

However, ongoing annual costs of complying with quarterly reporting requirements will vary depending on information technology and workflow designs, in particular the level of automation, that a marketplace has chosen in fulfilling its reporting requirements.

We anticipate the ongoing annual costs will remain unchanged based on the assumption that the new administrative requirements imposed by the Proposed Amendments will be offset by the elimination of an equivalent amount of administrative burden created by the existing reporting requirements (holding all other variables constant). In the long run, it is highly likely that ongoing workflow related cost savings can be realized. These savings can be attributed to the experience curve effect, whereby the learning that results from the repetitious performance of a task leads to a reduction in the cost of undertaking that task.

ii. Financial reporting

We anticipate negligible costs associated with the new rule pertaining to financial filings. ATSS already file annual financial statements with IIROC and these IIROC filings can be used to fulfill the proposed financial reporting requirements in Proposed NI 21-101; therefore, the proposed rule will not create any new on-going annual costs for ATSS.

iii. Other requirements currently applicable only to ATSS

It is our understanding that exchanges already have in place measures related to risk disclosure for foreign exchange-listed securities and confidential treatment of trading information as part of their prudent business practices; therefore, the new rules will not create any new ongoing annual costs.

2. Information transparency requirements for marketplaces dealing in exchange-traded securities

As we indicated in Position Paper 23-405, we anticipate that the proposal to establish a size threshold for an exemption from the transparency requirements in Part 7 of NI 21-101 would impact the business models and systems of marketplaces that do not currently have a size threshold. At this time, no threshold has been proposed, and we do not foresee additional costs to the marketplaces in the near future. Costs to marketplaces that are expected to incur when a size threshold will be imposed would be evaluated against the expected benefits of establishing limits to what may trade away from the transparent marketplaces. These are the maintenance of the price discovery mechanism and, more generally, preservation of the quality and integrity of the Canadian capital market.

3. Transparency of marketplace operations

Many marketplaces already publicly disclose most, if not all, the information that we are requiring, generally on their websites. For this reason, we do not anticipate additional costs to comply with the proposed transparency requirements in Part 10 of NI 21-101.

4. Other requirements applicable to marketplaces

i. Outsourcing

We expect that marketplaces, as part of their due diligence and prudent business practices, already have in place procurement policies related to outsourcing and monitor the performance of entities to which they outsourced services, although these policies and procedures may not be codified. For this reason, we do not expect the proposed requirements in section 5.12 of proposed amendments to NI 21-101 to create significant additional costs to marketplaces.

5. Locked or crossed markets

We anticipate that some marketplaces will incur one-time costs in upgrading their information technology infrastructure to prevent intentional locked and crossed markets, if they presently do not have these measures in place. On-going annual costs will be incurred in keeping this program running; however, we expect these costs to be minimal since any program that is created will be automated.

BENEFITS

The Proposed Amendments will promote a competitive balance in the industry by requiring marketplaces, regardless of their designation, to operate under an equivalent set of rules.

Harmonizing and clarifying the regulatory requirements that apply to all marketplaces will create a more transparent environment regarding regulatory expectations, and facilitate fairer and more efficient operations of the capital market.

The new reporting and transparency requirements will provide the CSA with timely and adequate information to understand the trading activities on the marketplaces, monitor market trends, and inform future policy making. The Proposed Amendments aim to strike a balance between protecting the confidential business activities undertaken by marketplaces and marketplace participants and the need to make this information available to facilitate a fair capital market. This would benefit other industry participants and investors, who will be provided with additional information regarding the marketplace's features and operations, and would help in making decisions on how and where to trade.

V. AUTHORITY FOR THE PROPOSED AMENDMENTS

In those jurisdictions in which the amendments to the Marketplace Rules are to be adopted, the securities legislation provides the securities regulatory authority with rule-making or regulation-making authority in respect of the subject matter of the amendments.

In Ontario, the proposed amendments to NI 21-101 and the Forms are being made under the following provisions of the *Securities Act* (Ontario) (Act):

- Paragraph 143(1)7 authorizes the Commission to make rules prescribing requirements in respect of the disclosure or furnishing of information to the public or the Commission by registrants.
- Paragraph 143(1)10 authorizes the Commission to make rules prescribing requirements in respect of the books, records and other documents required by subsection 19(1) of the Act to be kept by market participants (as defined in the Act), including the form in which and the period for which the books, records and other documents are to be kept.
- Paragraph 143(1)11 authorizes the Commission to make rules regulating the listing or trading of publicly traded securities including requiring reporting of trades and quotations.
- Paragraph 143(1)12 authorizes the Commission to make rules regulating recognized stock exchanges, recognized self-regulatory organizations, and recognized quotation and trade reporting systems including prescribing requirements in respect of the review or approval by the Commission of any by-law, rule, regulation, policy, procedure, interpretation or practice.
- Paragraph 143(1)12.1 authorizes the Commission to make rules regulating alternative trading systems, including prescribing requirements in respect of the review or approval by the Commission of any by-law, rule, regulation, policy, procedure, interpretation or practice.
- Paragraph 143(1)13 authorizes the Commission to make rules regulating trading or advising in securities to prevent trading or advising that it is fraudulent, manipulative, deceptive or unfairly detrimental to investors.
- Paragraph 143(1)39 authorizes the Commission to make rules requiring or respecting the media, format, preparation, form, content. Execution, certification, dissemination, and other use, filing and review of all documents required under or

governed by the Act, the regulation or the rules and all documents, determined by the regulations or the rules to be ancillary to the documents.

In Ontario the proposed amendments to NI 23-101 are being made under the following provisions of the Act:

- Paragraph 143(1)10 authorizes the Commission to make rules prescribing requirements in respect of the books, records and other documents required by subsection 19(1) of the Act to be kept by market participants (as defined in the Act), including the form in which and the period for which the books, records and other documents are to be kept.
- Paragraph 143(1)12 authorizes the Commission to make rules regulating recognized stock exchanges, recognized self-regulatory organizations, and recognized quotation and trade reporting systems including prescribing requirements in respect of the review or approval by the Commission of any by-law, rule, regulation, policy, procedure, interpretation or practice.
- Paragraph 143(1)12.1 authorizes the Commission to make rules regulating alternative trading systems, including prescribing requirements in respect of the review or approval by the Commission of any by-law, rule, regulation, policy, procedure, interpretation or practice.
- Paragraph 143(1)13 authorizes the Commission to make rules regulating trading or advising in securities to prevent trading or advising that it is fraudulent, manipulative, deceptive or unfairly detrimental to investors.

VI. APPENDICES

The appendices with this Notice are organized as follows:

- A table summarizing the changes to Form 21-101F1 and Form 21-101F2 and a summary of changes to NI 21-101 (Appendix A);
- The Proposed Amendments (Appendix B);
- A blackline of NI 21-101 and 21-101CP, revised with the proposed amendments, against the existing NI 21-101 and 21-101CP (Appendix C); and
- A blackline of NI 23-101 and 23-101CP, revised with the proposed amendments, against the existing NI 23-101 and 23-101CP (Appendix D).

VII. COMMENTS AND QUESTIONS

We invite all interested parties to make written submissions with respect to the Proposed Amendments. Please send your comments electronically in Word, Windows format. We will consider submissions received by June 16, 2011.

Please address your submissions to all of the Canadian securities regulatory authorities, as follows:

Alberta Securities Commission

Autorité des marchés financiers
 British Columbia Securities Commission
 Manitoba Securities Commission
 New Brunswick Securities Commission
 Nova Scotia Securities Commission
 Ontario Securities Commission
 Saskatchewan Financial Services Commission
 Securities Commission of Newfoundland and Labrador
 Superintendent of Securities, Northwest Territories
 Superintendent of Securities, Yukon Territory
 Superintendent of Securities, Nunavut
 Superintendent of Securities, Prince Edward Island

Please deliver your comments **only** to the two addresses that follow. Your comments will be distributed to the other participating CSA member jurisdictions.

c/o John Stevenson, Secretary
 Ontario Securities Commission
 20 Queen Street West
 Suite 1900, Box 55
 Toronto, Ontario M5H 3S8
 e-mail: jstevenson@osc.gov.on.ca

and

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

We cannot keep submissions confidential because securities legislation in certain provinces requires that a summary of the written comments received during the comment period be published.

Questions may be referred to any of:

Ruxandra Smith Ontario Securities Commission (416) 593-2317	Sonali GuptaBhaya Ontario Securities Commission (416) 593-2331
Tracey Stern Ontario Securities Commission (416) 593-8167	Serge Boisvert Autorité des marchés financiers (514) 395-0337 ext.4358
Élaine Lanouette Autorité des marchés financiers	Doug Brown Manitoba Securities Commission

(514) 395-0337 ext.4356	(204) 945-0605
Gabrielle Kaufmann Alberta Securities Commission (403) 297-5303	Michael Brady British Columbia Securities Commission (604) 899-6561
Jason Alcorn New Brunswick Securities Commission (506) 643-7857	

