

March 21, 2022

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

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Dear Sirs/Mesdames:

Re: Bloomberg Tradebook Canada Company (“TB Canada”) Comments on Proposed National Instrument 93-101 *Derivatives: Business Conduct* (the “Instrument”) and Proposed Companion Policy 93-101 *Derivatives: Business Conduct* (the “CP”, and together with the Instrument, the “Proposed Instrument”)

TB Canada writes this letter in response to the Canadian Securities Administrators’ (“CSA”) Notice and Third Request for Comment with respect to the Proposed Instrument.

TB Canada currently operates an alternative trading system (“ATS”) in Alberta, Nova Scotia, Ontario and Québec, is registered as an investment dealer in each jurisdiction of Canada and is a member of the Investment Industry Regulatory Organization of Canada. TB Canada is a subsidiary of Bloomberg L.P., a Delaware limited partnership.

TB Canada supports the CSA’s efforts to help protect participants in the OTC derivatives markets, reduce risks including potential systemic risk, improve transparency, increase accountability and promote responsible business conduct in the OTC derivatives markets.

TB Canada would like to comment on one aspect of the Proposed Instrument, specifically, the following deleted sentence in the regulatory guidance set out in the CP under “Factors in determining a business purpose – derivatives dealer” from the initial draft of the CP which was published for comment on April 4, 2017¹:

Facilitating or intermediating transactions – The person or company provides services relating to the facilitation of trading or intermediation of transactions between third-party counterparties to derivatives contracts.

TB Canada is concerned that, with the foregoing deletion, the business trigger guidance for derivatives dealer registration can be interpreted broadly enough to capture electronic communication tools that allow third-party counterparties (i.e., registered dealers subscribing to the communication tools) to communicate with their customers (who are also subscribers to the communication tools).

It is commonly understood that the provision of technology systems, including hardware and software, which allow communications between market participants does not trigger the requirement to register as a dealer. We note that the business trigger guidance for dealer registration set out in Section 1.3 of CP 31-103 includes “intermediating trades or acting as a market maker”, but does not use the broader language of “facilitating trades”. We are concerned that the broader language signals a potential expansion of the CSA’s jurisdiction over software service providers that facilitate communications between derivatives counterparties, which does not apply in the context of securities dealers.

Examples of electronic communication tools provided by TB Canada are the request-for-quote and request-for-trade functionalities made available to Canadian participants of TB Canada’s ATS. TB Canada’s Canadian participant subscribers may use these functionalities to communicate electronically with counterparties they have established and existing relationships with outside of TB Canada’s ATS, and ultimately enter into derivatives transactions with such counterparties. Therefore, such functionalities offered by TB Canada could reasonably be described as “facilitating transactions”. However, TB Canada is not involved in any way in intermediating these transactions and at no time does TB Canada provide its own quotations, act

¹ We note that the deleted text was also deleted from the June 2018 draft of the CP, without any explanation from the CSA in the Notice which accompanied that draft.

as a counterparty to, take title to or perform clearing or settlement functions in connection with any transactions that are negotiated between counterparty subscribers.

In TB Canada's view, the provision of electronic communication tools, such as the request-for-quote and request-for-trade functionalities made available to Canadian participants of TB Canada's ATS should not trip the business trigger for derivatives dealer registration as set out in the Proposed Instrument. Below is a discussion of the list of non-exhaustive factors provided by the CSA in the CP together with TB Canada's view of the applicability of each factor to a provider ("**software services provider**") of such electronic communication tools:

1. *Acting as a market maker* – Market making is generally understood as the practice of routinely standing ready to transact derivatives by:
 - responding to requests for quotes on derivatives, or
 - making quotes available to other persons or companies that seek to transact derivatives, whether to hedge a risk or to speculate on changes in the market value of the derivative.

The provision of electronic communication tools to registered dealers to facilitate their own trading with their customers does not constitute acting as a market maker on the part of the software services provider. It is the registered dealers who engage in responding to requests for quotes on derivatives or making quotes available, not the software services provider.

2. *Directly or indirectly carrying on the activity with repetition, regularity or continuity* – Frequent or regular transactions are a common indicator that a person or company may be engaged in trading or advising for a business purpose. The activity does not have to be its sole or even primary endeavour for it to be in the business. We consider regularly trading or advising in any way that produces, or is intended to produce, profits to be for a business purpose.

The software services provider makes electronic communication tools available on a continuous basis to its customers, but does not otherwise engage in any activity with respect to transactions in derivative contracts that is regularly or repeatedly conducted. Those activities are instead conducted by the registered dealers and their customers.

3. *Facilitating or intermediating transactions* – The person or company provides services relating to the facilitation of trading or intermediation of transactions between third-party counterparties to derivatives contracts.

In offering the electronic communication tools to its Canadian customers, the software services provider is not facilitating or intermediating (i.e., negotiating or arranging) derivatives transactions in the traditional sense. Rather, facilitation and intermediation is conducted by the registered dealers that subscribe to the electronic communication tools in order to facilitate their own transactions with their customers.

4. *Transacting with the intention of being compensated* – The person or company receives, or expects to receive, any form of compensation for carrying on transaction activity. This would include any compensation that is transaction or value-based including compensation from spreads or built-in fees. It does not matter if the person or company actually receives compensation or what form the compensation takes. However, a person or company would not be considered to be a derivatives dealer solely by reason that it realizes a profit from changes in the market price for the derivative (or its underlying reference asset), regardless of whether the derivative is intended for the purpose of hedging or speculating.

The software services provider typically receives remuneration or compensation for providing access to the electronic communication tools, such as through subscription-based fees. Remuneration or compensation that results from, or is connected to, transactions in derivatives resulting from the communications between registered dealers and their customers using the electronic communication tools is paid to the registered dealers.

5. *Directly or indirectly soliciting in relation to transactions* – The person or company directly solicits transactions. Solicitation includes contacting someone by any means, including communication that offers (i) transactions, (ii) participation in transactions or (iii) services relating to transactions. This would include providing quotes to derivatives parties or potential derivatives parties that are not provided in response to a request. This also includes advertising on the internet with the intention of encouraging transacting in derivatives by local persons or companies. A person or company might not be considered to be soliciting solely because it contacts a potential counterparty, or a potential counterparty contacts them to enquire about a transaction, unless it is the person or company's intention or expectation to be compensated as a result of the contact. For example, a person or company that wishes to hedge a specific risk is not necessarily soliciting for the purpose of the Instrument if it contacts multiple potential counterparties to enquire about potential transactions to hedge the risk.

The software services provider typically is not engaged in soliciting registered dealers or their customers to participate in derivatives transactions. Use of the electronic communication tools is entirely optional for the software services provider's subscribers. TB Canada requests that the CSA provide clarification that "services relating to transactions" relates to dealing or brokering services, not to the provision of electronic communication tools.

6. *Engaging in activities similar to a derivatives adviser or derivatives dealer* – The person or company carries out any activities related to transactions involving derivatives that would reasonably appear, to a third party, to be similar to the activities discussed above. This would not include the operator of an exchange or a clearing agency.

The software services provider does not in any way engage in activities that are similar to a derivatives dealer (i.e., entering into derivatives contracts). We note that the guidance expressly states that the operator of an exchange or a clearing agency is not included in this factor.

7. *Providing derivatives clearing services* – The person or company provides services to allow third parties, including counterparties to transactions involving the person or company, to clear derivatives through a clearing agency. These services are actions in furtherance of a trade conducted by a person or company that would typically play the role of an intermediary in the derivatives market.

The clearing services described above are not applicable to the software services provider.

We propose that the CSA maintain the sentence “This typically takes the form of the business commonly referred to as a broker” into the CP in the discussion of “Facilitation or intermediating transactions” and incorporate additional guidance into the CP clarifying that a party that provides electronic communication tools that allow third-party counterparties to communicate with their customers to conduct derivatives transactions will not be considered to be in the business of trading in derivatives (i.e., acting as derivatives dealer).

We appreciate the opportunity to provide our comments on the Proposed Instrument, and would be pleased to discuss any questions that the CSA may have with respect to this letter. Thank you again for the CSA’s efforts.

Very truly yours,



Soh Bridgeford
Chief Compliance Officer
Bloomberg Tradebook Canada Company