

June 19, 2013

Mr. John Stevenson, Secretary  
Ontario Securities Commission  
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Ms. Anne-Marie Beaudoin  
Corporate Secretary  
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Dear Mr. John Stevenson and Ms. Anne-Marie Beaudoin:

In response to the Canadian Securities Administrators (“**CSA**”) OTC Derivatives Committee (“**Committee**”) request for comment issued with CSA Staff Consultation Paper 91-407 (“**CSCP 91-407**”), FIRMA Foreign Exchange Corporation (“**FIRMA**”) wishes to provide the CSA with commentary on the Committee’s overview proposal on implementing a registration regime for derivatives market participants in Canada (the “**Commentary Items**”).

We are appreciative of the opportunity to provide our feedback to the Committee on the Commentary Items in advance of the implementation of corresponding legislation and policies, and recognize that the Commentary Items remain subject to revision.

The content of this letter is similar in parts to FIRMA’s commentary letter provided on February 5, 2013 with regards to Staff Consultation Paper 91-301. We feel that these statements remain pertinent to the Commentary Items, and we have further augmented our letter with specific commentary on the impact to FIRMA and similar companies if they are required to register as derivatives dealers under the proposed regime.

#### **ABOUT FIRMA**

As an industry participant, we believe that a brief explanation of FIRMA’s business model is important for the purpose of providing context to our responses on the Commentary Items. FIRMA is an international leader in corporate foreign exchange as well as large-scale personal foreign currency exchange transactions. FIRMA targets a niche customer base that is underserved by banks by providing more favorable exchange rates, lower transaction costs, and a differentiated level of personalized service.

FIRMA has grown significantly since its inception in 1998. Beginning with three employees and increasing into the multi-national firm it is today, employing over 220 people world-wide. FIRMA’s growth has been largely attributed to organic growth via the addition of new offices and expansion into multiple geographies. Today, FIRMA operates across nineteen branch locations in Canada, along with four branches in the United Kingdom, the United States, Australia, and New Zealand. FIRMA has a strong financial track record, reporting profitable and significant growth since its inception in 1998.

FIRMA provides foreign exchange solutions for retail and wholesale customers. The services we provide are founded on a principle of providing cost-effective foreign exchange services to

companies that require foreign exchange financial certainty in their business operations. We do not view our services as trades in the traditional securities or derivatives markets because, unlike speculators in these markets, our clients are not looking to capitalize on the fluctuating nature of foreign currency, but rather to remove this variability from being a factor in their pricing models and to ensure cost certainty.

The three ways in which our clients typically utilize FIRMA to achieve these objectives are through (i) Spot Orders, (ii) Market Orders and (iii) Forward Contracts.

- (i) Spot Orders are foreign exchange contracts that allow FIRMA clients to instruct us to acquire a fixed amount of foreign currency at any given time for immediate settlement. On a self-directed basis, the client will determine when the exchange rate for a foreign currency has reached a conversion cost that fits their pricing model and they will then execute an immediate transaction on this basis.
- (ii) Market Orders are essentially conditional, deferred Spot Orders. Clients that have pre-calculated foreign exchange conversion rates built into their pricing models can instruct FIRMA to acquire foreign currency as soon as the exchange rate for the foreign currency falls within their customized cost parameters. After execution of the Market Order, FIRMA monitors the exchange rates and executes a transaction once the rate matches the client's instructions.
- (iii) Forward Contracts (or Deliverable foreign exchange forward contracts) are specialized orders where FIRMA will provide foreign exchange contracts to clients based on present foreign currency exchange conditions for settlement at a future date (no greater than 12 months from the date of order). This service allows FIRMA clients to plan long-term pricing certainty without having to amass and hold unnecessary foreign exchange cash surpluses in advance of needing that foreign currency. On the future settlement date, the transaction is settled and the client purchases the pre-determined amount of foreign currency at the pre-determined price. Forward Contracts may be subject to a deposit requirement as deemed necessary from time to time. The client will be notified of any deposit requirement in advance of entering into any forward contract with us.

All three of these services are non-speculative in nature, and are used by our clients to conduct their own business operations; not to create investment opportunities. Our clients use our Spot Orders and Market Orders because of the service benefits they receive:

- Simple, convenient and competitive foreign currency pricing;
- Industry-leading customer service; and
- A professional/personal business relationships with a FIRMA sales person that understands their business needs.

In addition to these benefits, FIRMA's clients also use our Forward Contract service to ensure price certainty over fixed intervals of up to 12 months. This services allows them to focus on their own business operations rather than the potentially volatile currency markets. FIRMA's clients are typically small to medium sized enterprises in industries that are required to buy or sell foreign currencies in order to buy or sell products or services in foreign jurisdictions. They fit within any number of industries but all share the common business reality of having to acquire foreign currency in order to facilitate cross-border transactions.

## CURRENT SECURITIES REGULATORY REGIME

In Alberta, it is our current understanding that Spot Orders and Market Orders are not treated as “OTC Derivatives” under securities legislation and the Forward Contracts are subject to Blanket Order 91-505 (“**BO 91-505**”), which exempts FIRMA from the requirement to register as a securities Dealer (as defined in the Alberta *Securities Act*) and trade subject to a prospectus (or applicable prospectus exemption found in National Instrument 45-106).

Under BO 91-505, the FIRMA Forward Contract transactions are exempted on the basis that both FIRMA and the client are “qualified parties”; persons or companies that sell, buy, trade, produce, market, broker or otherwise use the foreign exchange commodity in their business and enter into over-the counter trades in futures contracts only as a consequence of this business activity.

FIRMA believes that this exemption is appropriate for the foreign exchange services it provides because the trading activity is a business reality of commercially using foreign currency and is not speculative. In fact (and contrary to the traditional nature of a speculative derivative), FIRMA Forward Contracts are being used to limit the client’s exposure to the activities of speculative traders and the currency fluctuations that they create.

Based on CSCP 91-407, we were unable to determine whether or not BO 91-505 would remain in force upon publication of the rules proposed in the Commentary Items. FIRMA believes that the qualified party exemption created by transactions among commercial users does not carry a risk of harm to the public, and allowing BO 91-505 to continue in force would not be contrary to the Committee’s objectives in meeting its G-20 commitments.

Even if BO 91-505 were to remain in force, the Commentary Items propose new requirements which do not appear to be exempted for “commercial users” and would negatively impact the market segment relying on Forward Contracts for cost-certainty rather than speculative purposes.

In addition, if the CSA were to determine that registration would be required for companies involved in facilitating deliverable foreign exchange Forward Contracts, further clarification on the type of activities that would trigger registration is required. Specific to this issue of regulation of key derivative market participants in the United States (“U.S.”), the Dodd-Frank Act provides an exemption from dealer registration for persons who engage in a de minimis quantity of swap dealing activity with or on behalf of customers. The Dodd-Frank Act also specifically recognizes the difference and unique nature with deliverable foreign exchange Forward Contracts and has provided certain exceptions to this product offering. We would request that the CSA also provide clarification.

To provide comments on CSA’s question #3: “Should registration as a derivatives dealer be subject to a de minimis exemption similar to the exemption adopted by U.S. regulators? Please indicate why such an exemption is appropriate.”

*There needs to be exemptions based on deliverable foreign exchange products. The exemptions are appropriate, for reasons described below and above. Deliverable foreign*

*exchange forward contracts fill a real operational need for a business purpose with small and medium size enterprises (SME's) to facilitate global commerce and secure rates on future payments or receivables. The intent is not for investment purposes. As stated above and to emphasize the point, FIRMA believes that this exemption is appropriate for the foreign exchange services it provides because the trading activity is a business reality of commercially using foreign currency and is not speculative. In fact (and contrary to the traditional nature of a speculative derivative), FIRMA forward contracts are being used to limit the client's exposure to the activities of speculative traders and the currency fluctuations that they create.*

## **IMPACT OF THE REGISTRATION**

Previous Committee publications and the Commentary Items have made it clear that FIRMA Spot Orders for the purchase and sale of currency are a form of excluded derivative because they require (among other things) the counterparties to make or take physical delivery of the currency within 2 business days. We believe that this exclusion will also apply to FIRMA Market Orders because the condition precedent to the agreement is that a pre-determined currency exchange rate occurs, and the delivery of the physical currency is made within 2 business days of the Market Order being perfected by the condition precedent.

Unlike Spot Orders and Market Orders, the FIRMA Forward Contracts do not fit within proposed derivative exclusions and would appear to be subject to the proposed legislative regime. There has been some discussion of end-user exemptions that could benefit FIRMA clients who acquire "derivatives" for a business rather than speculative purpose and we remain optimistic that specific industry exemptions may become available.

Since FIRMA's Spot Orders, Market Orders and Forward Contracts are all targeted towards the same client profile of "commercial end-user", we believe that materially distinguishing how these services are treated under securities legislation will create confusion for public consumers. From the client's perspective, Spot Orders and Forward Contracts are being purchased for the same business purpose however the Scope Rule requires that they be treated differently. FIRMA's clients will need to be provided with significant clarification and disclosure on the differences between these types of services such as:

- the logistics of closing;
- the amount of information that is required to participate in a service; and
- the proportionate cost of each service that is being applied to compliance, legal and reporting obligations rather than to the acquisition of foreign currency to be provided to the client.

FIRMA believes that this has the potential to cause confusion because Forward Contracts are (in our opinion) not traditionally among the class of derivative that the Committee is seeking to regulate through implementation of the new regulations.

In contrast to traditional derivatives, foreign exchange Forward Contracts always require both parties to physically exchange the full amount of currency on fixed terms that are set at the outset of the contract. Market participants know the full extent of their own payment obligations

to the other party to a trade throughout the life of the Forward Contract. We do not offer non-deliverable contracts and only deal with the physical exchange of currency.

Because Forward Contract transactions involve the actual exchange of currency, settlement risk (the risk that one party to the foreign exchange transaction will pay the currency it sold but not receive the currency it bought), is the main source of risk in these transactions. There is extensive documented process and restrictions in FIRMA's payment systems that permit the transfer of one currency to take place only if the final transfer of the other currency also takes place and has physical (electronic) delivery of currency to FIRMA. So long as the transaction is being fully executed on the settlement date (which can be ensured, in part because both the client and FIRMA are the only parties to the Forward Contract), we believe that this risk is significantly mitigated.

In the Commentary Items, we appreciate the opportunity to speak to Question #2 proposed by the Committee: "What is the appropriate standard for determining whether a person is a qualified party? Should the standard be based on the financial resources or the proficiency of the client or counterparty? If the standard is based on financial resources should it be based on the net assets of the client or counterparty, gross annual revenues of the client or counterparty, or some other factor or factors? Should registration as a derivatives dealer be subject to a de minimis exemption similar to the exemption adopted by U.S. regulators? Please indicate why such an exemption is appropriate."

*An appropriate standard for determining whether a person is qualified should be based on the proficiency of the client or counterparty. This could take the form of representations and warranties which would require there to be an equal responsibility on customers to understand the services they are purchasing once full disclosure is provided. In absence of this proficiency, a minimal financial test should be required. A financial test should include a minimum amount of exception limit, possibly \$100,000 in tangible shareholders equity. Please refer to FIRMA's comments on Question #3 above with regards to de minimis exemptions similar to the exemption adopted by U.S. regulators.*

*In the absence of a commercial end-user exemption to the overall regime, FIRMA believes that it may be appropriate to incorporate acquisition intent into the definition of a qualified party for FIRMA clients who are acquiring commodity derivatives (including currency) as commercial end-users. By creating purely financial "sophistication" tests, the proposed registration regime could disproportionately penalize end-user market participants that are small to medium size enterprises and create unfair competitive advantages for large businesses.*

At question #8 of the Commentary Items, the Committee has inquired as to the "advising" business trigger: "Are the factors listed the correct factors that should be considered in determining whether a person is in the business of advising on derivatives?"

*The proposed regime has the potential of creating uncertainty on whether or not a participant is "dealing" or "advising". FIRMA wishes to inquire whether or not the Committee intends to enact provisions of the proposed legislation that will create a similar exemption to that found in section 8.23 of National Instrument 31-103 (pertaining to securities dealer registration) which allows certain registered dealers to provide advice without registration so long as this advice is in*

*connection with a trade for which they are a registered dealer and it is not in respect of a fully managed account. We believe that a similar exemption would ensure that registered derivatives dealers do not inadvertently become unregistered derivatives advisors.*

We also appreciate having the opportunity to provide comments on questions #11 and #12 from the Commentary Items: "Is it appropriate to impose category or class specific proficiency requirements? Is the proposed approach to establishing proficiency requirements appropriate?"

*FIRMA's comments only relate to the following:*

- a) capital requirements - namely minimum specified levels;*
- b) margin calls - namely being consistent with international standards;*
- c) maintenance of financial records and periodic financial reporting; and*
- d) proficiency requirements*

*To begin:*

- a) Capital requirements - FIRMA believes that it is important to ensure that once limits are set they do not put undue capital pressure on companies and that consideration be given to existing structures with healthy tangible shareholders equity. The tangible shareholders equity could be a minimum amount as appropriate given size of the company's derivative operations. Capital requirements similar to that of Basel 3 would put undue pressure on non-bank providers like FIRMA or other small market enterprises, again creating regulatory competitive advantages that are not conducive to economic growth (and would further create significant barriers to entry which could harm end-user market participants).*
- b) Margins calls - these should be excluded from consideration in most circumstances with registered dealers. However, if large currency swings occur in the market then margin calls for at least 50% to 75% of the exposure should be secured. We agree that registered derivative advisers that do not hold a position should be excluded.*
- c) Financial reporting – financials should be limited to an annual requirement, not quarterly. In addition, on page 32 of CSCP 91-407 are examples of what the reporting needs to look like to the CSA and Board. Specifically what reports would be required to cover off risk management systems, issues related to derivative compliance, risk management presentations, general control environment and general compliance systems? OR a recommendation would be for a certification process similar to public companies whereby there are sign-offs made by the CEO and CFO to remediate the requirements of filing numerous controls and risk reports with the CSA. The Board can still be provided the required detailed reports on controls and risks for governance purposes.*
- d) Proficiency requirements - registration and certification for our employees or agents who are involved in trading in or advising on derivative otherwise known to FIRMA as our "Customer Service and Account Managers in Sales" will create a significant barrier to finding candidates and would likely result in an increase in salary and training costs. Greater clarity on what aspects of a "trade" constitute dealing or advising activities would ensure that inefficiencies are not created by proficiency requirements casting a wider net than is required to adequately protect market participants.*

*In addition, FIRMA believes that a concept of "restricted derivatives dealer" could be borrowed from the registration category of "restricted dealer" as found in National Instrument 31-103. Particularly for industry specific participants such as FIRMA, a category restriction which relieves certain proficiency and/or other requirements under the proposed regime could allow securities regulatory authorities to exercise greater discretionary control over registration requirements where participants create minimal market risk. By limiting their ability to deal outside of a restricted market area (and by requiring appropriate disclosure to purchasers of derivatives), the CSA could ensure that low-risk derivatives businesses are not adversely impacted by a regime that is intended to capture a generally higher risk market.*

## **CONCLUSION AND PROPOSALS**

At FIRMA, we believe that the unique nature of non-speculative, deliverable Forward Contracts in the foreign currency market by commercial end-users is a unique subset of the derivatives market that should be excluded from registration because they do not carry the same risk profile. By increasing the compliance costs of small to medium sized enterprises participating in Forward Contract currency activities as a means of achieving cost certainty for their business operations, not only could cross-border competitiveness of Canadian companies be negatively impacted, but these businesses might actually be incentivized to increase their participation in high-risk speculative derivative trading in an effort to hedge against the increased costs.

A commercial end-user exemption similar to that found in BO 91-505 would sufficiently exempt these non-speculative activities under the TR Rule however market protection could be further bolstered by having prohibitions on re-trade to prevent the Forward Contracts from becoming anything other than bilateral business transactions and by implementing cash hold periods to protect against settlement risk.

Nonetheless, in the event that the Commentary Documents are enacted in their current (or a substantively similar) form, we would ask that the Committee consider granting non-traditional derivative participants an increased transition period so that the impact cost to clients can be decreased as much as possible.

Regards,



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