

PROPOSED POLICY STATEMENT RESPECTING THE AUTHORIZATION OF FOREIGN-BASED EXCHANGES

1. INTRODUCTION

Financial markets have developed at a rapid pace over the past few years. This development is the inevitable consequence of technological advancements that the financial industry relies on. This has also provided investors with greater access, on a timelier basis and at less cost, and a constantly increasing diversity of financial products.

This development has removed traditional borders. The search for new investments is no longer limited to a single marketplace (such as an exchange) within a given jurisdiction, but is frequently conducted at the international level.

Exchanges have thus attempted to extend their activities into countries other than that of their central operation. The main obstacle is the legal and regulatory conditions imposed in the various jurisdictions. These conditions may also vary considerably from one jurisdiction to the next.

In addition to these obstacles is the issue of co-operation among market regulators who must, in administering the laws of their jurisdiction, ensure that prescribed local conditions are met before authorizing an exchange to set up operations. There has been little harmonization and co-operation among regulators on this issue.

The *Autorité des marchés financiers* (the “AMF”) applies the *Securities Act* (R.S.Q., c. V-1.1) (the “Act”), as amended by *An Act respecting the Agence nationale d'encadrement du secteur financier* (R.S.Q., c. A-7.03), whereby, under sections 169 and following, an exchange must be authorized to carry on such an activity in Québec. The regulation entitled National Instrument 21-101, *Marketplace Operation* (“Regulation 21-101”) states how to handle such a request and what information to submit, both when the initial application is filed and on an ongoing basis.

2. POLICY STATEMENT GOAL

The AMF notes that the uniform application of its authorization process for exchanges may involve burdensome and inefficient duplication where a foreign-based exchange is already subject to an equivalent process in its home jurisdiction (the jurisdiction in which the exchange mainly operates), particularly when the measures in place to ensure investor protection are equivalent to those in Québec.

This Proposed Policy Statement respecting the Authorization of Foreign-Based Exchanges (“Policy Statement”) is intended to outline the AMF’s approach to and interpretation of regulatory provisions regarding applications for authorization from foreign-based exchanges that are already recognized or authorized in their home

jurisdiction. It sets out the information that the AMF expects to receive in support of such applications.

The AMF takes into account three main factors in assessing an application from a foreign-based exchange:

- the regulatory framework in the home jurisdiction;
- the powers of the exchange regarding co-operation;
- co-operation between the regulator in the home jurisdiction and the AMF.

Lastly, the Policy Statement sets out the type of oversight the AMF intends to exercise with regard to the foreign-based exchanges it authorizes, taking into account applicable regulations and the oversight already carried out by the regulator in the home jurisdiction, in order to avoid any unnecessary duplication.

The AMF favours granting authorization rather than exemptions from authorization, given the flexible nature of the regulatory regime prescribed by the Act, which grants discretion in the regulation of exchange activity, allowing conditions for authorization to be adjusted effectively.

3. ENTITIES COVERED

This Policy Statement serves as a guide for exchanges recognized or authorized by a foreign (other than Canadian) regulator that seek to operate their market in Québec, or a portion thereof, and have been subject to a recognition or authorization process equivalent to that for authorization in Québec.

To be covered by this Policy Statement, a foreign-based exchange must be established in a foreign jurisdiction with a regulatory framework that is, in the opinion of the AMF, similar to the Québec regime.

When in the view of the AMF the regulatory framework or the recognition or authorization process in the home jurisdiction are not equivalent, this Policy Statement will not apply. The foreign-based exchange must then submit to the authorization process applicable to local exchanges.

Without limiting the scope of the Act, regulations, policy statements or policies already set up by the AMF, a marketplace must be authorized by the AMF before allowing access to its market from Québec. An exchange planning to do business in Québec must therefore contact AMF staff in order to determine on a preliminary basis whether the Policy Statement is applicable.

4. APPLICATION PROCESS FOR AUTHORIZATION

An application for authorization must be made on Form 21-101A1 (the “Form”) in accordance with the requirements set out in Regulation 21-101. In addition to certain information identifying the applicant, schedules to the Form require descriptions and documents.

The application for authorization is published in the AMF Bulletin for comment.

In order to make the procedure less burdensome, the AMF is prepared to accept that all required documents, such as internal by-laws, rules, policies or other similar instruments, be filed simply with a reference on a website, provided they are kept up to date. Each heading of the schedule of the Form must refer to a specific location where the documents can be found.

All required descriptions must be completed in full. The application must describe the criteria and process for obtaining recognition or authorization to act as an exchange in the home jurisdiction and the regulatory structure applied by the regulator in the home jurisdiction.

In support of the application, the AMF expects the applicant to provide a copy of the decision regarding its recognition or authorization and any other related decision as well as notify the AMF of any condition imposed by the regulator in the home jurisdiction related to its right to carry on business.

The AMF expects the applicant to obtain a letter from the regulator in the home jurisdiction confirming that it complies with the requirements and conditions imposed and to send such letter to the AMF.

5. APPLICATION OF POLICY STATEMENT

In its analysis for authorization of a foreign-based exchange, the AMF will consider in particular the legal and factual structure imposed by the regulator in the home jurisdiction. Accordingly, the AMF will not conduct an exhaustive study of the internal by-laws, rules, policies and other similar instruments of the exchange.

The AMF will focus its analysis on the elements set out in the following paragraphs:

(A) Regulation of exchange in home jurisdiction

As part of the application, the AMF expects the applicant to provide enough information to readily determine whether the regulatory regime in the home jurisdiction (recognition or authorization, regulation and the oversight process) is equivalent to that in Québec. In particular, the AMF expects the application to detail the following aspects:

- i) measures put in place by the regulator to ensure compliance and effective supervision of exchange operations;
- ii) approval of internal by-laws, rules, policies and similar instruments by the regulator;
- iii) powers of the regulator in respect of investigations and penalties to ensure effective investor protection (the reputation of the legal system in which the regulatory regime operates is considered);
- iv) power of the regulator to obtain information from the exchange and carry out inspections;
- v) approval of products traded on the exchange;
- vi) for a derivatives exchange, the existence of a process for the approval of contracts or types of contracts by the regulator;
- vii) adherence to IOSCO standards by the regulator;
- viii) any other relevant criteria.

(B) Recognition or authorization process of regulator in home jurisdiction

As part of the application, the AMF expects the applicant to provide enough information to ensure that the recognition or authorization process of the regulator in the home jurisdiction took the following elements into consideration:

- i) governance
 - a) fair and meaningful representation on the board of directors and its committees;
 - b) appropriate representation by independent directors on the board of directors and its committees;
 - c) appropriate qualifications, remuneration and limitation of liability for directors and officers;
 - d) appropriate conflict of interest provisions for directors, officers and employees.
- ii) fees
 - a) fair, transparent and equitable process for setting fees;
 - b) fees not to constitute a barrier to access;
 - c) fees balanced to ensure the exchange has sufficient revenues to satisfy its responsibilities.

- iii) fair and equitable access
 - a) rules governing access to the facilities are fair, transparent and reasonable;
 - b) access limited to persons who are duly registered in Québec.
- iv) regulation
 - a) power to set rules and ensure their fair and effective enforcement;
 - b) rules governing the activity of participants in the exchange;
 - c) rules to prevent fraudulent acts and practices;
 - d) rules prohibiting unreasonable discrimination among issuers or participants;
 - e) rule transparency;
 - f) accessibility of public to current rules.
- v) market operations
 - a) rules governing market operations;
 - b) rules ensuring market integrity and effectiveness;
 - c) rules promoting fair and equitable business principles;
 - d) transparency of trading information;
 - e) agreement with a supplier of regulatory services for market or member supervision, where applicable;
 - f) agreement with a market operator, where applicable.
- vi) systems and technology
 - a) systems and technology for adequate performance of exchange activities;
 - b) a process ensuring the integrity and reliability of systems in place.
- vii) clearing and settlement
 - a) existence of clearing agreements with an authorized clearing agency;
 - b) adequate oversight of the clearing agency;

- c) clearing of all transactions by the authorized clearing agency;
- d) restrictions on foreign members respecting legislation that are not anti-competitive and do not create obstacles to access.

(C) Powers of exchange respecting co-operation

As part of the application, the AMF expects the applicant to confirm that it has the powers set out below and that it undertakes to furnish information on request in respect of its powers:

- i) the power to co-operate fully with the AMF and to provide information and documents respecting its operations, including the following:
 - a) its annual report and its quarterly and annual financial statements;
 - b) any amendment to the laws or regulations governing its activities in its home jurisdiction;
 - c) any amendment to its internal by-laws, rules, policies or other similar instruments;
 - d) any change respecting its right to operate in its home jurisdiction;
 - e) notice of any situation that could have an impact on its financial viability or its ability to operate and may result, in particular, from the bankruptcy or financial difficulties of a member dealer;
 - f) any disciplinary or administrative action taken by the exchange.
- ii) the power to co-operate and share information with a self-regulatory organization in Québec.

(D) Powers respecting co-operation of regulator in home jurisdiction

As part of its analysis, the AMF expects the regulator in the home jurisdiction to have the ability to co-operate and share with the AMF information respecting oversight of the activities of the exchange in its jurisdiction, including:

- i) inspection reports on the exchange;
- ii) disciplinary, civil, penal or criminal action related to activities of the exchange;
- iii) assessments respecting the financial condition of the exchange;

- iv) any amendment to the laws and regulations governing the activities of the exchange.

In this respect, the AMF considers the existence of an information-sharing and co-operation agreement respecting oversight of the activities of a foreign-based exchange (MOU), or the equivalent, with the regulator in the home jurisdiction as essential. Although the authorization to exercise activities may be granted to the exchange before such an agreement is signed, it will be conditional on reaching an agreement within an acceptable time frame.²

(E) Conditions of compliance

As this Policy Statement takes into account the regulatory structure of the regulator in the home jurisdiction in granting authorization, the oversight that the AMF intends to exercise must also be adjusted to avoid duplications and burdens. Once the foreign-based exchange has been authorized, it may be required to comply with a certain number of conditions, including:

- i) providing the AMF with the following information:
 - a) its annual report and annual financial statements;
 - b) any material amendment to the laws or regulations governing its activities;
 - c) any amendment to its internal by-laws;
 - d) any change respecting its right to operate or the existence of conditions respecting the performance of activities in the home jurisdiction;
 - e) notice of any situation that could have an impact on its financial viability or its ability to operate.
- ii) complying with any other applicable Québec law, including *An Act respecting the legal publicity of sole proprietorships, partnerships and legal persons* (R.S.Q., c. P-45);
- iii) maintaining its recognition or authorization in the home jurisdiction;
- iv) abiding by any AMF decision.

As part of the application, the AMF expects the applicant to undertake a commitment to fulfill these conditions.

² An information-sharing agreement in respect of investigations is not sufficient.

6. AMF DECISIONS

As part of its analysis, the AMF will also evaluate the advisability of issuing decisions other than those authorizing the exchange to conduct business in Québec.

For example, the AMF may:

- exempt foreign dealers and intermediaries, participants or members of the foreign-based exchange from the requirement to register in Québec, to the extent that they conduct trades on behalf of a person who resides outside Québec;
- exempt the exchange from the requirements respecting authorization and the filing of documents concerning derivatives set out in the Act, regulations, policy statements or policies set up by the AMF;
- exempt the exchange from certain requirements set out in Regulation 21-101.