IIACACCVM
INVESTMENT INDUSTRY ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÈRES

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Corporate Secretary
Autorité des Marchés Financiers
Tour de la Bourse
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Dear M^e^ Chicoine and M^e^ Beaudoin:

Re: Request For Comments - as per Circular 146-16 issued by Bourse de Montréal Inc. on November 22, 2016

The Investment Industry Association of Canada (the "IIAC") would like to take this opportunity to express its views on the proposed changes via Request for Comments - as per Circular 146-16 issued by Bourse de Montréal Inc. on November 22, 2016.

The IIAC is the national association representing the position of 132 IIROC-regulated Dealer Member firms on securities regulation, public policy and industry issues. We work to foster a vibrant, prosperous investment industry driven by strong and efficient capital markets.

As previously discussed during the Compliance user group meeting held at the Canadian Annual Derivatives Conference in Quebec City on November 30, our Members have grave concerns with the proposed process to impose fines for minor violations.

The IIAC and its Members understand that the proposed process would increase efficiency for the application of the Rules by the Bourse vs. the current filing of a disciplinary complaint. However, we have concerns about the policy implications of the proposal. While Members are supportive of policies to simplify process and reduce cost of regulation, we must be cognizant that the process is enhancing market integrity. Under the Bourse's definition, "minor violations" do not impact the market, the clients or the reputation of the Bourse. As such, it would appear that the "minor violation" would not impact the overall market integrity. If the impact is insignificant, without harm to the market or the clients, the purpose of enforcement of this type appears to be unclear.

The Bourse has represented that the intent of the proposal is not to increase the scope or volume of sanction activities. However, the implicit language of the proposal does not conform to this interpretation. We would like to get comfort that there are control mechanisms in place to ensure that the effect of the proposal does not increase the scope of sanction activity beyond activities that would otherwise have been deemed, under the current process, to represent egregious violations sufficient to impact market integrity.

Allowing a Self-Regulatory Organization ("SRO") to impose fines without oversight by an independent Committee further increases concerns on conflicts of interest, particularly for a for-profit entity such as the TMX Group. While the proposal does have a process to bring the fine to the Disciplinary Committee, most fined Participants would likely choose to pay a fine rather than face a lengthy contest.

The proposal seems to be moving towards a US style of regulation. The regulatory environment in Canada has proven itself resilient and effective. Leveraging from a US model that has not necessarily been proven effective in mitigating a number of significant circumstances seems unwarranted.

While the proposal points to other SROs having similar process for imposing fines (CME, CBOE, etc.), there has also been much criticism that this process encourages SROs to pursue small easy wins and miss warnings on severe cases such as the failure of MF Global in 2011.

Impact on enforcement efforts

The proposal aims to reduce the costs of enforcement by way of levying fines. We support efficiency in the application of regulation especially since the cost of enforcement is ultimately borne by Participants. We also believe that the facility with which the Bourse can implement these actions has potential to mitigate abusive trading practices (such as improper crossing, use of hidden liquidity).

However, there is no information given in the proposal on how the cost saving from this initiative will be put towards effort on monitoring severe violations. This is the main argument for the proposal but yet no plan or further detail is given. If the proposal represents a significant saving for the Bourse in the cost of enforcement activities, we recommend that the Regulatory Division consider reducing the regulatory levy applied against firms (which currently stands at $0.03 per contract).

The Regulatory Division has represented that the impetus for the proposal, at least in part, is intended to enhance enforcement for certain Members who have been unresponsive to warnings from the Bourse for repeated minor infractions. We believe that enforcement of this type of activity should focus on the unresponsive firms that are committing the infractions rather than impose a punitive regime against all Member firms.

Certain Members also believe that the MX examiners would become, with implementation of this proposal, an extension of enforcement (under the guise of an examination, which does not legally protect our Members, the enforcement division is conducting an "investigation").

Members are also concerned about the information they provide to the Bourse. Currently, the Bourse cannot use what the Members have submitted through Gatekeeper Reports (Self-reporting of Non-Compliance or Potential Non-Compliance – Rule 4002) as evidence for their fines. The Bourse can only use what has been discovered through their due diligence process as evidence/facts to a fine. The Bourse must prove the Participant intended to breach a rule. Our Members are comfortable with the current process. In instances where a self-reporting of non-compliance or potential non-compliance that appears as or is related to the proposed minor violations, will the self-reported instances still be subjected to the minor violation fine process (if implemented) or is amnesty provided in such instances?

The Fines

The fines are anonymous as per this proposal – meaning there would be little to no reputational impact. The anonymous nature of the fine may encourage firms to simply look at violations as cost of doing business. Furthermore, fines would seemingly be levied at the firm level so there would be no impetus for the Bourse to name individuals in the enforcement process.

It should be noted that the Members generally appreciate the fact that annually published information on fines imposed would be done on an anonymous basis. We believe that publishing the information on a more frequent basis would increase transparency and provide Members with a better understanding of the minor violation decision making process.

The absolute liability nature of this proposed regime further minimizes the opportunity for disputing the fine in an existing structure that provides little to no opportunity to dispute other disciplinary actions. Also, the imposition of the fines seems to be arbitrary – the administration of the fines is at the discretion of the Vice-President of the regulatory division. We suggest that the Bourse, similar to what is done with a Regulatory panel, form a panel with Approved Participants, the public and the business, in order to assess the need for fines in circumstances where a breach of these rules appears to have occurred. We realize that the process is designed to streamline dealing with “minor violations”, but the judgement of whether such violation has occurred should not be left to one individual to enforce at their own will.

Some Members have suggested, instead of a sliding or increasing scale for successive minor violations, keeping the same fine amount for each instance unless the Approved Participant or Authorized Person is found to be unresponsive or has repeat instances of the same issue. In which case, to then escalate to the Disciplinary Committee or another panel for review.

Other concerns and suggestions from the industry:

- Reminder letters should be sent before a first fine (from each category) is given to a firm. The proposal is unclear as to what factors are used to determine when a reminder letter is warranted and not a fine. Also, it is unclear if this means that a second violation immediately goes to the higher dollar threshold or if the Regulatory Division can impose the lesser amount of a first offence.

- It is unclear what the communication protocols are for the reminder letters, notices of fine, etc. Greater specificity on the exact process would be appreciated.

- Even though the fees are decreasing overall, increasing the period from a calendar year to a consecutive 24-month prior period would increase the violation number a firm might be subject to. The consecutive 24-month period should be reduced to 6 months and the period should be uniform for all violations.

- The fine calculation regarding the granting of unauthorized access to the automated system should not be done retroactively to the date of initial registration.

- There should be transparency on how the Bourse determines there is a violation. This process should include bundling of errors or daily thresholds to conclude to a violation. For example, counting each non-compliance of order identification would be irrational since market conditions may justify why order IDs are not proper at order entry. The sliding scale (i.e. fines go up for each subsequent occurrence), per violation approach and "per business day" of the fine schedule means that the magnitude of the fines could escalate very quickly – for example five mismarked trades could result in a fine of $10,000 for the fifth mismarked trade and accumulated fine of $15,000 for the first four. Fining each marker error is too strict. This is especially concerning if the error or omission is the result of technical issues which may not be immediately detected, may result in multiple occurrences, and often require significant time lag for resolution.

- Order identification violations could technically be considered as a violation regarding inappropriate or incomplete recordkeeping of orders (article 6377 – "pursuant to the provisions of article 6376"). The same violation should not be fined twice under different articles.

- There seems to be little consideration for the circumstances that may have contributed to a violation. This should be clarified.

- Certain fines are at higher amounts than others for first and subsequent violations. Recommendation is to provide the rationale for the amounts and delineate why the disparity between the amounts exists.

- As evidenced in the tables of proposed fines, it is clear that certain "minor violations" are treated with greater severity than others. For those that have a market conduct type impact and qualify as misconduct/wrongdoing, perhaps they should be removed from the table of fines as these should not be determined as "minor violations" and should be left to the Disciplinary Committee (or other panel) to determine. One of the purposes of the "minor violation" process was to manage the more frequent instances of violations, so as to ensure focus on the more serious matters. In the normal course, our impression is that items that qualify as misconduct/wrongdoing would not be frequent and won't be negatively impacted by the proposed process.

- The fine structure does not take into account the relative volume of a Member's participation on the Bourse. This would seem to penalize more active Members since, by its nature, the more volume a Participant executes, the more potential there is for errors or omissions to occur. The sliding scale nature of the fine structure based on absolute numbers of errors penalizes active Participants. A more prudent approach would be to gauge the level of infraction based on a proportion of the Participant's overall activity.

- The proposal does not provide a mechanism for self-identification of minor infractions. The Regulatory Division should consider the provision of a mechanism for self-identification and reporting of certain minor infractions, similar to the IIROC's regulatory Marker Correction System, for which Participants would receive safe harbor from the imposition of fines. Members believe that the reporting of minor violations in a timely manner does not materially detract from the Regulatory Division's ability to effectively monitor Participant activity and consequently should not be subject to punitive actions.

- It is unclear which category of fines or minor violation scenarios are explicitly applicable to an Approved Participant or an Approved Person. Greater specificity is needed in this regard.

- In instances where an Approved Person is the subject of an alleged minor violation, will the Approved Participant associated with the Approved Person always be informed of such instances? Are there cases where the Approved Participant will not be informed?

- Will the fines be used to enhance education and training programs? Could the funds be used in other areas?

Furthermore, the notice states that "The Division intends to use this new Process for the enforcement of any violation appearing in the List of Fines for Minor Violations regardless of the date of the violation". Our Members believe that the process should not be used retroactively to fine previous violations if the process is self-certified. In other words, a fine paid by a firm in the past should not be held against the firm if the process is self-certified.

It should be noted that the real impact of this proposal depends on how the Bourse implements these proposed changes. Would the fines be imposed on a granular level such as per marker error or on a prudential basis such as against a pattern or series of breaches? Questions remain.

Also, at present, it is known that the Bourse is in the process of rewriting certain rules, particularly around trading and/or order management. We recommend that any proposed minor violations that may be impacted by the rule rewrites are delayed until the new rules come into effect.

Lastly, “minor violations” albeit based on instances of non-compliance of the Rules of the Bourse should be focused on items that are administrative and not serious in their nature (such as those that have no market integrity and/or end-client impacts).

Please note that the IIAC and its Members remain available for further consultations on this proposal.

Yours sincerely,

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