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

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Dear Me Allouba and Me Lebel:

Re: Bourse de Montréal Inc. – Request for Comments - Amendments to Part 4 of the Rules of Bourse de Montréal Inc.: Conduct of the Regulatory Functions of the Bourse

The Investment Industry Association of Canada (the "IIAC") and its members would like to take this opportunity to express their views on the proposed amendments (the "Proposal") to the Rules (the "Rules") of Bourse de Montréal Inc. (the "Bourse") regarding the Conduct of the Regulatory Functions of the Bourse as per Circular 094-21 (the "Circular") issued on May 25, 2021.

The IIAC is the national association representing the position of 116 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.

We remind Bourse de Montréal Inc. that this comment letter, in its entirety, can be published on the Bourse's website.

Member Concerns

IIAC Members have identified several concerns with the Proposal – some highly significant – including the following:

1. The Use of the Term "Qualified Lawyer" in the Circular;
2. The Delegation of Powers and Obligations from the Regulatory Division to the Bourse's Profit-Making Unit;
3. The Lack of Investigation Transparency;
4. The Lack of a Proper Proposal Format and Lack of Proposal Transparency;
5. The Terms of Agreements with Clients and Third Parties;
6. Issues with Requests for Information, Interviews and Similar Processes;
7. The Possible Improper Sharing of Information by the Regulatory Division.

1. The Use of the Term "Qualified Lawyer" in the Circular – Annex 1, B. Proposed amendments – Part 4 of the Rules

Pages 14 and 39 of the Proposal (PDF) give the following definition of a Qualified Lawyer: "a Person who has practiced law in the Province of Quebec for no fewer than 10 years and has relevant experience as the Bourse may determine." The IIAC and its members would like confirmation that this term (Qualified Lawyer) will only relate to the composition of the Disciplinary Committee (Article 4.600) and not to legal counsel representing industry participants or personnel.

Furthermore, members are concerned about the wording "has relevant experience as the Bourse may determine" and question what this experience would entail. Members are also seeking clarity on the necessity of the condition of having practiced "in the Province of Quebec for no fewer than 10 years." Members believe that the most important asset of a Disciplinary Committee member should be their extensive knowledge of derivatives trading and related regulatory framework in Canada. [Emphasis added]

2. The Delegation of Powers and Obligations from the Regulatory Division to the Bourse's Profit-Making Unit – Annex 1, A. Proposed amendments to related Articles and miscellaneous

Pages 9 and 35 of the Proposal (PDF) include the [New] Article 1.104 which states the following:

[NEW] Article 1.104 Delegation

(a) Unless otherwise specified and subject to compliance with any applicable law (including any order or requirement of a Securities Regulator), the following individuals may delegate the powers and obligations granted to them under these Rules to an employee of the Bourse:

(i) The President of the Bourse;
(ii) The Vice-President, Regulatory Division; and
(iii) The Chief Legal Officer.

(b) For greater clarity, no delegated powers or obligations may be further sub-delegated.

Significant concerns arose from this new proposed Article. The IIAC and its members believe that powers or obligations of the Vice-President, Regulatory Division, should never, under any circumstances, be delegated to an employee of the Bourse. As stated in many prior IIAC comment letters, including our comment letter of November 23, 2018, responding to Circular 166-18, and our comment letter of June 1, 2017, responding to Circular 038-17, on proposed amendments to the governance structure of the Bourse, conflicts of interest

such as this between the Bourse's profit-making division and its Regulatory Division can be damaging to market integrity and market reputation.

Below are some important excerpts from our 2018 letter that also apply to the current Proposal if the Vice-President of the Regulatory Division (the self-regulatory organization (SRO)) can delegate his/her powers and obligations to an employee of the profit-making unit of the Bourse, regardless of whether the powers and obligations are or are not "*specified and subject to compliance with any applicable law (including any order or requirement of a Securities Regulator)*."

> *The IIAC and its members believe that the new proposed amendments, if implemented, would cause the Regulatory Division to be in a clear and significant conflict of interest with the "profit-making" unit of the Bourse.*

We would, once again, like to remind the Regulatory Division that

- *The (AMF) 2012 Recognition Decision (the "2012 Decision"), requires that the Regulatory Division's functions and activities be independent from the profit-making activities of the Bourse and be organizationally distinct. Independence must exist on the decision-making level and therefore at the governance level of the Regulatory Division.*

The current Proposal, as did Circular 166-18, issued in 2018, "*would create a clear and significant conflict of interest detrimental to the independence of the Regulatory Division and the Canadian marketplace and its participants.*"

The 2012 Decision in its original (French) version, states:

> *« VIII. DIVISION DE LA RÉGLEMENTATION*
>
> *a) La Bourse maintiendra la Division indépendante relevant du comité spécial, désigné par le conseil d'administration de la Bourse et investi de responsabilités clairement définies de réglementation du marché et de ses participants et dotée d'une structure administrative distincte. »* [Emphasis added]

Our 2018 submission notes the following:

As per the above, the Regulatory Division of the Bourse must have an independent administrative structure and be independent from the profit-making unit.

As mentioned in our IIAC submission dated November 23, 2018, we do not believe that the 2012 Decision intended for employees of the profit-making unit to have direct control over the Regulatory Division (the not-for-profit unit). The industry is astonished at the suggestion that the self-regulatory organization, through delegation of powers and obligations from the Vice-President of the Regulatory Division to an employee of the profit-making unit, would be placed under the direct control of the Bourse's profit-making unit in any way. To the IIAC and its members, this proposed delegation would create a clear and significant conflict of interest, even if the "powers and obligations" were purely administrative in nature. Such a delegation of powers and obligations has the potential to jeopardise the very definition of the Regulatory Division as an SRO. The investing public would also be put at risk in such a scenario where the "powers and obligations" of the Vice-President, Regulatory Division, could be delegated to the business function of the Bourse.

Furthermore, the 2012 Decision states the following:

> « b) *La Bourse obtiendra l'approbation préalable de l'Autorité avant d'effectuer tout changement à la structure organisationnelle et administrative de la Division ou du comité spécial qui aurait une incidence importante sur les fonctions et activités de réglementation.* » [Emphasis added]

We believe that if the Vice-President of the Regulatory Division delegates powers and obligations to the Bourse, it would have a significant impact (*incidence importante*) on regulatory functions and activities. Each delegation, if the current Proposal is accepted by the AMF despite the clear conflict of interest, would need to be given prior consent by the AMF.

We also wish to remind the Regulatory Division and the Bourse about the following excerpt from the 2012 Decision:

> « c) *La Division sera pleinement autonome dans l'accomplissement de ses fonctions et dans son processus décisionnel. L'indépendance de la Division et de son personnel sera assurée et des mesures de cloisonnement strictes seront maintenues, afin d'assurer l'absence de conflits d'intérêts avec les autres activités de la Bourse, de Groupe TMX et de Maple.* » [Emphasis added]

The new proposed amendment regarding delegation of powers and obligations fails to meet the conditions stated above. The "independence" and "absence of conflict of interest" obligations, as well as the presence of a "strict information barrier", referred to in the 2012 Decision, would clearly not be met.

Members would like to reiterate a few other relevant items from our 2018 submission that continue to require attention:

> *We believe that the AMF's intention when issuing the 2012 Decision was to require "the Division to be independent from the other activities of the Bourse."*
>
> *The IIAC and its members believe this means that there must be autonomy, independence and an absence of conflict of interest between the governance of both*
>
> - *The Regulatory Division (often referred to as "Division") – the not-for-profit unit of the Bourse, and*
> - *The Bourse's profit-making unit.*
>
> *The independence of the Regulatory Division, which performs a regulatory function in accordance with the Bourse's status as a self-regulatory organization ("SRO"), is key for the market and its participants. This activity must be performed in the public interest, in a not-for-profit environment, without any pressures from the profit-making unit or its directors.* [Emphasis added]
>
> *The Bourse's profit-making unit performs, within the TMX Group, an important business function as the operator of an exchange-traded financial derivatives marketplace in a "for-profit" context.*
>
> *Circular 166-18 gives further details on the intent of the AMF with respect to the 2012 Decision and states that:*
>
> > *The Recognition Decision always required the Bourse to have a Division to oversee the regulatory functions and operations of the Bourse and always provided that the Division shall be a separate business unit of the Bourse that shall be governed by the Board. The Recognition Decision provided for the Board to appoint a Special Committee to oversee the duties and operations of the Division.*
>
> *We would not necessarily go as far as to qualify the Regulatory Division as a "separate business unit" (because of its public-interest and market surveillance mandate) although we wholeheartedly agree it should remain a separate unit from the "profit-making" unit of the Bourse.* [Emphasis added]

The IIAC and its members wholly support the original stance taken by the AMF in the 2012 Decision to create a totally separate governance structure for the Regulatory Division by mandating a separate Special Committee to oversee the duties and operations of the Division. More importantly, we support the explicit (or at least implicit) interpretation of the 2012 Decision that requires this Special Committee to be comprised of non-directors of the Bourse.

As previously noted, the IIAC and its members believe that the new proposed amendments do not reflect the spirit of the governance structure contemplated by the AMF in its 2012 Decision as they create a conflict of interest and a lack of independence between the Regulatory Division and the Bourse's profit-making marketplace activities.

We fail to see how the new proposed delegation of powers and obligations (from the Regulatory Division to the Bourse) could realistically maintain the independence between these two separate functions.

The 2012 Decision also states the following:

« *… j) Sous réserve de tout changement dont peuvent convenir la Bourse et l'Autorité, la Division doit être exploitée comme suit :*

i) Les fonctions et activités de la Division doivent être indépendantes des activités à but lucratif de la Bourse et distinctes sur le plan organisationnel. La Division doit opérer ses fonctions et activités selon le principe de l'autofinancement et doit être sans but lucratif;
ii) La Division doit constituer une unité d'affaires distincte de la Bourse…» [Emphasis added]

In previous IIAC comment letters, we noted that the Bourse acts as a commercial entity to increase shareholder value (by increasing volumes, revenues, profit, and number of participants) but must also act as a self-regulatory organization recognized by the AMF in a role that is fundamentally different. We feel the Bourse, in its previous and current Proposals, is blurring the lines between these two functions and activities (namely, between a business function and a regulatory function) that should be governed independently in order to maintain the reputation of the derivatives market in Canada, as required by the 2012 Decision.

Furthermore, the IIAC has asked numerous questions in prior submissions regarding the topic of conflicts of interest and has yet to receive any suitable responses. We believe that these questions have only become more pressing and that they require answers in order to reassure Canadian investors and industry participants in regard to market integrity. We once again reiterate some comments from a prior IIAC submission below:

…We still have questions regarding the remuneration structure of the Vice-President and Chief Regulatory Officer (VPCRO) of the Regulatory Division. Does the VPCRO remuneration assist in maintaining independence between the regulatory unit and the profit-making unit of the Bourse? Is the remuneration structure of the VPCRO a hindrance to maintaining independence?

- *Is the remuneration of the VPCRO based in any way on the objectives of the Bourse's profit-making functions?*
- *Is the remuneration linked to the Bourse's volumes?*
- *Is the remuneration linked to the Bourse's revenues?*
- *Is the remuneration linked to the Bourse's profit?*

The comments provided by the Bourse in the second Request for Comments [on the proposed governance structure] regarding the potential conflict of interest if the VPCRO has a remuneration linked to the profit-making unit's performance do not alleviate the industry's worries regarding lack of independence. The Bourse commented that…considering the VPCRO is currently an employee and officer of the Bourse, the

proposed changes do not ultimately change the overall accountability of the VPCRO towards the Board of the Bourse. The current proposal does not address or purport to make any change with respect to the remuneration of the VPCRO.

The IIAC and its members, at the time of receiving this response, failed to see the concept of independence in the proposed governance structure, considering that the VPCRO of the Division

- *would report directly to the Board of the profit-making unit;*
- *would no longer share the responsibility of the regulatory function with members independent from the profit-making unit; and*
- *may be remunerated based on the Bourse's business activities.*

The Regulatory Division and the Bourse, when drafting proposals, must take into account the concept of independence.

Three years ago, Circular 166-18 proposed a governance structure where conflicts of interest were flagrant, and stated the following:

The Recognition Decision requires the Division to be independent from the other activities of the Bourse.

Yet now another proposal has been drafted where the proposed amendments would blur the lines of independence. How could the Vice-President delegate powers and obligations to a representative of the profit-making unit of the Bourse? How could an employee of the profit-making unit make independent decisions when "regulating" its own clients? We also feel tremendous concerns that the Vice-President's remuneration could be perceived to be or actually be linked to the Bourse's "commercial" results.

Circular 166-18, issued on October 23, 2018, states the following:

The public has an interest in making sure that an SRO is governed in accordance with sound governance principles and with the Recognition Decision.

The IIAC and its members do not believe that the Bourse's current Proposal is in the public interest since it creates a clear and significant conflict of interest. The industry believes that the Division's governance must, first and foremost, be independent from the Bourse's profit-making governance. Independence is key for the sound governance of an SRO. No "commercial pressures" should be put on the not-for-profit unit, nor on its Vice-President and Chief Regulatory Officer.

We respectfully submit that operational objectives should not be pursued at the expense of a loss of autonomy and independence of the Regulatory Division. A loss of independence may lead to a perception of the profit-making unit imposing its views on the regulatory function. Such a perception would be highly detrimental to the Canadian market and its participants.

We will again quote excerpts below from prior IIAC comment letters submitted to the Bourse and to the Autorité des marchés financiers:

The proposed changes would have a significant impact on the Division's functions and regulatory activities, which in the name of protecting the public and the proper functioning of the Bourse's markets, must be fully independent in performing its duties, in its decision-making process and in its governance.

The Division's functions, including compliance and market surveillance activities, must be independent of the Bourse's profit-making activities, both through its organizational structure and its decision-making structure.

The industry believes that, in the unique and particular context of the Bourse being both a profit-making and a not-for-profit organization, these accountability issues must be addressed, but not at the expense of creating conflicts of interest. As previously mentioned, we are concerned by the number of times the industry has had to comment on a Bourse proposal where conflicts of interest were flagrant between the Regulatory Division and the profit-making unit of the Bourse.

As the Bourse itself states in Circular 166-18, it is important to "*separate the implementation measures from the operating activities of the exchanges ... and to isolate the enforcement activities and market surveillance of commercial pressures.*"

We strongly agree with the Bourse on this last point.

SRO Independence in Canada

We wish to reiterate other prior IIAC comments on the topic of independence of SROs in Canada:

> *…the industry believes that the AMF should assess whether a fully separated legal regulatory entity, similar to the FINRA model in the United States, would be better positioned to properly regulate the Canadian listed derivatives market.*

As stated by the Bourse in Circular 166-18: "*IIROC is recognized as an SRO by securities regulators and is a separate legal entity from the exchanges operating the markets it oversees.*" [Emphasis added]

In comparison, Circular 166-18 states the following concerning the Regulatory Division of the Bourse:

> *The Bourse monitors the conduct of its approved participants and enforces its rules directly, rather than through a regulation service provider. The Division, to whom this responsibility has been assigned, is not a separate legal entity from the Bourse with a separate recognition order. The Bourse is the legal entity that the Autorité has recognized as an SRO.*

Industry members view a regulatory body that is "*a separate legal entity from the exchanges operating the markets it oversees*" as truly independent. The Regulatory Division of the Bourse, in contrast, is not viewed by industry members as fully independent from the marketplace it regulates. Proposals that further blur the lines of independence between the marketplace and its SRO are not helpful in increasing investor confidence in our industry.

The IIAC has remarked that potential and significant conflicts of interest have become recurring themes materializing in Requests for Comments and regulatory proposals issued by the Bourse. The IIAC and industry members are therefore concerned that the role of an SRO may not be properly understood by the Bourse and the Regulatory Division. We would ask the AMF to provide some comfort that market integrity is well maintained and protected, to the benefit of Canadian investors and market participants. We would also welcome an assessment, by the AMF, of a third-party regulatory service provider model for listed derivatives products, through a public consultation.

3. Lack of Investigation Transparency

Circular 094-21 states the following:

> *To fulfill its regulatory functions efficiently, it is essential for the Division, its staff and market participants, that the Rules provide a clear framework that can be applied consistently and fairly to all Approved Participants and persons subject to the Rules.*

In light of the foregoing, in 2020 the Division proposed a first set of amendments to the Rules to make the investigative process of the Division more transparent and predictable to market participants, and also improve efficiency during an investigation (the "2020 Proposal"). The 2020 Proposal was published for comments by way of Circular 074-20 on April 30, 2020. Given that the present proposal encompasses the amendments of the 2020 Proposal, the Division will withdraw that proposal and instead integrate those suggested amendments, taking into account comments received since their publication, within this proposal.

The IIAC and its members would like to reiterate previous comments from our IIAC submission dated July 24, 2020, in regard to Circular 074-20, issued on April 30, 2020, now withdrawn by the Regulatory Division. Our comments from 2020 related to the lack of transparency of the Regulatory Division's investigation process. We strongly believe that the 2020 comments below, drafted for the proposed amendments to Part 4 of the Rules of the Bourse, must be taken into consideration, as many portions of the current proposal create similar industry concerns as did Circular 074-20.

The IIAC agreed with the stated objectives of the Bourse in Circular 074-20, in drafting the Proposal "*…to make the investigative process of the Division more transparent and predictable to market participants, and improve efficiency during an investigation.*"

The IIAC and its members also fully supported the Regulatory Division of the Bourse in its "*…responsibility to prohibit and counter market abuse, market manipulation, fraud and deceptive trading, and to promote the integrity of the derivatives market.*"

The IIAC also welcomed the following mentions, stated in Circular 074-20, that

…the Division aims to encourage collaboration with the various stakeholders in order to foster a compliance culture.

…the Division considers that its investigation process should be fair, while being flexible where applicable.

Our members also acknowledge, as stated in our submission of July 24, 2020, that "*The Regulatory Division must obtain a thorough understanding of the facts and circumstances to make measured decisions regarding the appropriateness of enforcement activity.*"

Our 2020 comment letter continues as follows:

However, the process employed should take into consideration the significant associated costs and burdens on the firm being investigated, relative to the quality of the information likely to be obtained.

Recently, members have observed that an increasingly burdensome approach to information gathering has been taken by the Regulatory Division, including requests for multiple interviews for which investigators often seem ill-prepared and unfamiliar with the basic operation and functioning of the capital markets.

While other regulators reserve the right to conduct interviews, this authority has typically been exercised judiciously. The more recent actions by the Regulatory Division seem to represent a departure from this approach.

It is unclear how these interviews - for which members must prepare and incur significant costs - contribute to the appropriate governance and integrity of the derivatives market.

Our 2020 comment letter also included the following:

> ***Questions from Members and Amendments to the Investigation Process***
>
> *The* [2020] *Proposal states that "the [Regulatory] Division has received questions from Approved Participants regarding the powers of the Division during an investigation." We believe these questions arose from recent changes in rule interpretation, application and in the investigation process of the Regulatory Division. Our members were concerned, in the recent past, about the possible inconsistencies stemming from the Regulatory Division in regard to its investigation process.*
>
> *Due to a certain confusion amongst our members, the IIAC believes that the investigation process does require some amendments. Serious issues have arisen in the past, notably with the Regulatory Division's decision to prevent Chief Compliance Officers from attending investigation interviews.*
>
> *Such "misunderstandings" should not occur in the future and the investigation process, when applied, should consistently respect the rights of members. We welcome the Regulatory Division's attempt to make the investigation process more fair, transparent, and predictable to participants.*

With the publication of the current Proposal (Circular 094-21) on May 25, 2021, our members confirmed that the investigation process continues to create confusion, continues to be highly time and energy consuming, and crucially, continues to lack transparency.

4. The Lack of a Proper Proposal Format and Lack of Proposal Transparency

The IIAC believes that the format in which the proposed amendments are presented causes confusion for market participants.

We do not understand why the Circular includes duplicate pages. Members would like to note that pages 35-58 are duplicates of pages 9-34 of the PDF. We initially believed that pages 9-34 were the blackline version of the Rules and pages 35-58 were the clean version of the Rules. However, we noticed that what we assumed was the blackline version, following a reconciliation with current applicable rules on the Bourse's website, did not identify all proposed changes (proposed by the Bourse) to the current valid rules on the Bourse's website.

For example, the format does not clearly identify the change from 36 months to five years that the Bourse has included in the Proposal under Article 4.2 (Jurisdiction). The Circular creates confusion for industry participants in regard to complaints filed against a former Approved Participant or Approved Person. Article 4.201 (Complaints) of the current applicable rules of the Bourse (on the Bourse's website) mentions the following:

> *The Bourse, in accordance with the procedures provided in this Chapter, may file a complaint against an Approved Participant or an Approved Person for violation of:*
> …
> *(b) The Bourse may also file a complaint described in paragraph (a) against a former Approved Participant or Approved Person provided an originating notice is served on such Person within thirty-six (36) months from the date upon which the Person ceased to be an Approved Participant or Approved Person. [Emphasis added]*

However, proposed Article 4.2 (Jurisdiction) seems to be mentioning a five-year period as per below, although the significant change in period is not marked in what we believe to be the Proposal's blackline version (pages 9-34):

> (c) *A Person who has ceased to be a Regulated Person shall remain subject to the Bourse's jurisdiction as though they were a Regulated Person, but no proceedings shall be commenced under Part 4 of the Rules against a former Regulated Person unless a Notice of Proceedings has been served upon that former Regulated Person no later than five years from the date upon which they ceased to hold that status.* [Emphasis added]

As per the concordance table (Annex 2) of the Circular, new Article 4.2 (Jurisdiction) replaces Article 4.201(b). Yet the significant change of 36 months to five years could only be noticed by industry participants by reconciling the Proposal to the current Rules, which cannot be done within the information provided in the Proposal by the Bourse. This lack of transparency is, once more, concerning to the IIAC.

Industry members wishing to comment had to compare the information provided by the Bourse in its Request for Comments to the Rules included on the Bourse's website. Expecting industry participants to reconcile information between different sources in order to identify all proposed amendments is unfair and confusing.

The confusion may arise from a lack of transparency. Proper blackline versions, showing all changes to the current Rules, must be included in Requests for Comments. All changes proposed, including material changes such as a change from 36 months to five years (as per above), are easier to identify in a blackline version. There is also a concern that there may be other items that have changed and have not been properly flagged as such by our manual reconciliation.

We would request proper and complete blackline versions in future Requests for Comments as they help the public and industry members understand proposed changes to the Rules and provide comments. Asking participants to compare information from different sources, outside of the Request for Comments, is unacceptable. The Bourse must show better transparency throughout its Proposal process.

Since the IIAC and its members were able to identify the significant change of 36 months to five years mentioned above – despite the lack of blackline version in the Request for Comments – we must inform the Bourse that the change is unacceptable and unwarranted. The industry believes that an SRO should, when a complaint is filed, be able to investigate and reach a conclusion within 36 months (three years). The inability for an SRO to do so causes further concern.

5. The Terms of Agreements with Clients and Third Parties

Circular 094-21 states the following:

> *The provisions will address the obligation to respond and cooperate with a request for information. For example, participants must make reasonable efforts to ensure the cooperation of persons they deal with in relation to their trading on the Bourse, such as clients or technology providers. In the Division's view, participants can fulfil this obligation by including clauses in their agreements with third parties requiring such cooperation.*

The IIAC and its members understand the importance of complying with requests for information. However, many third parties and technology providers have standard service agreements that cannot be amended at a member's request.

Furthermore, only persons under the Bourse's jurisdiction should be involved in receiving a request for information in an interview or in similar proceedings. We therefore ask the Bourse to rephrase the portion below from Article 4.101 (Obligation to respond and cooperate) included in its Proposal:

(c) *Approved Participants must make reasonable efforts to ensure the cooperation, in connection with the exercise by the Bourse of its authority under Part 4 of the Rules, of any Person over which they have any control or direction or <u>with which they are in a business relationship, including their clients.</u>* [Emphasis added]

We wish to remind the Bourse that Approved Participants may not be able to influence their business partners and clients to provide information requested by the Bourse, as some of these individuals are not under the Bourse's jurisdiction. Furthermore, as mentioned in prior IIAC letters, certain types of information the Regulatory Division has requested from members in the past cannot be provided as that would constitute a privacy breach. For example, members recall that in the recent past, the Regulatory Division has made requests for some information that was not under the control of Approved Participants, such as client information surrounding "give-up" transactions.

We would like to reiterate that when the Regulatory Division is seeking end-client information in give-up transactions, it should request this information from the firm obtaining the "give-up," since the client belongs to that firm, and not from the firm executing the "give-up" transaction. Requesting client information from the executing firm, as mentioned above, could lead an Approved Participant to a breach of privacy of its policies and procedures.

Furthermore, we firmly believe that an Approved Participant cannot be held responsible if its clients refuse to cooperate with the Regulatory Division. An Approved Participant has no control over its clients in this case.

The IIAC and its members would also like to provide comments on the proposed Article 4.103 (Conduct of investigations) and its use of the term "any Person."

(b) *In the course of an investigation and in accordance with Article 4.100, the Regulatory Division may require <u>any Person</u> to provide it with any Document or information that the Regulatory Division deems relevant to the investigation [Emphasis added]. Any such Person shall:*

i. comply, in accordance with Article 4.101, with a request under paragraph (a) within the time prescribed in the request; and

ii. appear in person for an interview with the Regulatory Division, or by any other means determined by the Regulatory Division, to answer questions from the Regulatory Division. This interview may be transcribed or recorded electronically, on audiotape or videotape, as determined by the Regulatory Division.

As mentioned in our IIAC comment letter dated July 24, 2020, including the term "any Person" in this Article is inappropriate. Our comment letter mentions that "any Person" should be changed to "any employee of an Approved Participant or Approved Person" in the case of a request for information (RFI), interviews and similar proceedings. Once again, we believe that only persons under the Bourse's jurisdiction should be receiving an RFI during the course of an investigation, and the time period allotted to respond to this RFI should be reasonable based on the circumstances. For example, pulling together data from a remote location (such as in "work from home" situations) may require more time than the "usual" timeframe allotted for such a request.

6. <u>Issues with Requests for Information, Interviews and Similar Processes</u>

A prior IIAC letter on the topic of requests for information during an investigation, suggested that the following wording should be used (bolded text has been inserted into the relevant Article below):

*In the course of an investigation, the personnel of the Regulatory Division may request, in writing **<u>and in digital form</u>**, from an Approved Participant, an Approved Person and any other person where authorized under the Rules or by law, to produce any document or information that the personnel of the Regulatory Division deems relevant*

to the investigation. ***A copy of the request must be sent to the Chief Compliance Officer. In cases where the Approved Participant does not deem the document or information requested to be relevant, the Regulatory Division will provide written justification for its request.***

… due to the COVID-19 outbreak, we believe that all requests for information should be made, at a minimum, in digital form. Mailroom staff may currently be overwhelmed, and a mailed request may not be processed in the allotted time. Furthermore, employees working remotely have access to email, not to physical documents that may be delivered to the office.

We believe that the Chief Compliance Officer must be made aware of all requests and should therefore be receiving a copy of any requests the Regulatory Division makes to the firm.

Furthermore, we believe that any request should be justified in writing by the Regulatory Division if an Approved Participant does not believe the request to be reasonable or justifiable. Creating a dialogue with participants in this way would help achieve the stated goals of the Regulatory Division for greater transparency and fairness for industry participants. We reiterate our prior IIAC comment letters which included the following:

We also strongly believe that the Regulatory Division should, in cases where the Approved Participant does not deem the document or information requested to be relevant to an investigation, provide written justification for its request. We believe this would make the process more transparent to all market participants. Such justification should also confirm the Regulatory Division's role in protecting market integrity.

Another serious concern from industry members, also included in a prior IIAC submission letter, relates to the participation of an Approved Participant's Chief Compliance Officer at interviews. A Chief Compliance Officer, having the responsibility to oversee compliance, must have the right to attend interviews and to be involved in any subsequent disciplinary proceedings. Any other representative of an Approved Participant should also be allowed to attend. The current Proposal states:

(d) *Any Person responding to a request in the course of an investigation pursuant to this Article may be assisted by legal counsel. The Regulatory Division may, at its discretion, allow a representative of the Approved Participant to be present during an interview. The presence of legal counsel or a representative of the Approved Participant at an interview conducted by the Regulatory Division must not cause prejudice to the conduct of the investigation.* [Emphasis added]

Besides the use of "any Person," industry members have serious concerns with interviews conducted without the firm's Chief Compliance Officer (CCO), other designated compliance personnel, or another representative of the Approved Participant. The role of the CCO is to oversee all compliance functions, and the CCO should therefore be permitted to attend interviews. The industry's view is that the presence of the CCO can only provide further clarification to investigators. For example, a trader may use "trading lingo" and have a difficult time explaining a situation in "layman's terms" to the Regulatory Division's staff. A CCO or another representative of the Approved Participant would be able to explain complex concepts in plain language to the Regulatory Division's staff. This would be beneficial to both parties. Also, we do not believe that including the language "at the discretion" of the Regulatory Division adds any transparency or fairness to the process. Our prior industry comments stated that the language referring to investigations should be amended to the following:

An Approved Participant, any employee of an Approved Participant or any Approved Person shall have the right to legal assistance and representation during an investigation and any subsequent disciplinary proceedings. Any employee of an Approved Participant or any Approved Person shall also have the right to have a representative of the Approved Participant (such as the Chief Compliance Officer or designated compliance personnel) attend any interview conducted…

Including Article 4.1 in the Current Proposal

Since the Regulatory Division was proposing, in Circular 074-20 issued last year, to amend the title of Article 4.1 from "Obligation to Respond to Inspection" to "Obligation to Respond" and to therefore broaden the "Obligation to Respond" to include investigations and enforcement, we believe the request for comments was incomplete and that Article 4.1 should have been included in the Circular for proper review by industry participants. The IIAC, in our letter dated July 24, 2020, mentioned the following:

> *In order to provide comments on Article 4.1, we are including excerpts below:*
>
> ***Article 4.1 Obligation to Respond to Inspection***
>
> *Approved Participants, their employees, and Approved Persons must comply with the obligation to provide information as set forth in this Chapter.*
>
> *(a) Upon the request of the Regulatory Division or of one of its representatives, such Persons must provide without delay all information related to their business, Trades, positions or conduct as well as to the identity, business, Trades or positions of any of their customers and employees and customers of Persons for whom they provide account maintenance services. To this end, these Persons must submit and give to the Regulatory Division access to any records, registers, data, data bases, files, documents, papers and information <u>for examination</u>, and allow the Regulatory Division or its representative to obtain a copy thereof on demand.* [Emphasis added]
>
> *Since the Regulatory Division did not include Article 4.1 in Annex 1 of the Circular* [issued in 2020]*, we believe that the section above will remain as currently drafted, only mentioning examinations. We agree with the paragraph above.*

Our IIAC comment letter dated July 24, 2020, also stated:

> *Article 4.1, which is <u>not</u> included in Circular 074-20, continues:*
>
> *(b) For the purposes of any investigation or examination, the Regulatory Division or its representative <u>may obtain such information</u> from any source whatsoever, including any of the customers of any Approved Participants.* [Emphasis added]
>
> *Since the Regulatory Division did not include Article 4.1 in Annex 1 of the Circular, we believe that the section above will remain as currently drafted. We believe that "may obtain such information" refers to the information listed in the prior paragraph. If so, the Approved Participant "must provide without delay all information related to their business, Trades, positions or conduct as well as to the identity, business, Trades or positions of any of their customers and employees and customers of Persons for whom they provide account maintenance services." We find the wording to be quite different than the wording proposed by the Regulatory Division in regard to Article 4.2 in its current proposal* [Circular 074-20 issued in 2020]*. The wording in the current proposal is so general that it may give free access to the Regulatory Division to information outside the scope of an investigation.*

The section in the current proposal (Circular 094-21) that relates to the Obligation to Respond has changed dramatically from the prior version. Our assumption, in our 2020 submission, that the rule would remain unchanged was therefore inaccurate. We believe, once again, that the format used by the Bourse in 2020 lacked transparency and created confusion for industry participants.

In the current proposal, Article 4.101 (Obligation to respond and cooperate) includes the repeated use of the terms "free access." It states, for example, the following:

(i) *promptly, fully and truthfully cooperate with the Regulatory Division, including by replying to all requests made, submitting and allowing free access to the Regulatory Division to any Document or information;*

(ii) *give free access to and provide any Documents and information, in their possession or under their control, that the Regulatory Division may require, regardless of the nature of the medium and the form in which such information, register, data, file, documents or exhibit can be accessed.*

As mentioned in our submission dated July 24, 2020, a response to the request for comments on Circular 074-20, we disagree with the language of "free access." Approved participants should provide information and documents requested in order for the Regulatory Division to conduct an investigation. However, the term "free access" implies that the Regulatory Division should be allowed to access any of an Approved Participant's systems and to access any information stored on its systems, whether related to an investigation or not. We strongly disagree with this and ask that the sentence be reworded.

Furthermore, as industry members are concerned that the Regulatory Division may not completely understand the trading of derivatives products, we believe that, in cases where the Approved Participant does not deem the document or information requested to be relevant to the investigation, the Regulatory Division will provide written justification for its request. As previously mentioned, this would make the process more transparent to all market participants. We would hope that such written justification would also confirm the Regulatory Division's role in protecting market integrity.

In the current proposal, Article 4.103 (Conduct of investigations) mentions the following:

(b) In the course of an investigation and in accordance with Article 4.100, the Regulatory Division may require any Person to provide it with any Document or information that the Regulatory Division deems relevant to the investigation. Any such Person shall:

(i) comply, in accordance with Article 4.101, with a request under paragraph (a) within the time prescribed in the request; and

(ii) appear in person for an interview with the Regulatory Division, or by any other means determined by the Regulatory Division, to answer questions from the Regulatory Division. This interview may be transcribed or recorded electronically, on audiotape or videotape, as determined by the Regulatory Division. [Emphasis added]

We believe that the above wording needs further clarity and should be amended to the following:

(ii) *appear in person **or electronically (such as by videoconference)** for an interview with the Regulatory Division, or by any other means determined by the Regulatory Division **if reasonable to the Approved Participant**, to answer questions from the Regulatory Division. This interview may be transcribed **and** recorded electronically, on audiotape or videotape.* [Emphasis added]

Due to the COVID-19 outbreak and the transition to remote work, we believe that in-person interviews may be difficult to perform for the foreseeable future. We believe that interviews conducted electronically, such as by using videoconferencing technology, may be warranted and also much less expensive to conduct. This is especially true when an Approved Participant does not deem the investigation to be justified. An electronic interview would cost much less in time, energy and money. We also believe, for added transparency and fairness to participants, that all interviews should be recorded and transcribed to ensure a proper audit trail. Approved Participants should have access to the recordings and transcriptions upon request. This may be needed if the file is escalated to higher authorities for further investigation.

Article 4.103 (Conduct of investigations), as currently proposed, mentions the following:

(e) *All requests, Documents and information pertaining to an investigation shall be treated as confidential and any Person who receives a request under this Article, who participate or assist in the course of an investigation, shall not disclose any information in relation to the investigation except:*

(i) to legal counsel providing assistance in the course of the investigation;

(ii) to a Person responsible for compliance or supervision with the Approved Participant;

(iii) to a representative of the Approved Participant for purposes of supervision or to inform a partner, director or officer of the Approved Participant;

(iv) as required by law; or

(v) where the Regulatory Division provides a written authorization to disclose following a request made.

(f) *Failure to comply with any provision of this Article shall be deemed a violation of Article 4.101.*

As previously mentioned in our IIAC comment letter dated July 24, 2020, we believe the Circular contains a grammatical error and the wording should be amended to the following:

(e) *All requests, documents and information pertaining to an investigation shall be treated as confidential and any person who receives a request under this Article, who* ***participates*** *or* ***assists*** *in the course of an investigation…*

Furthermore, we agree that investigations should mostly remain confidential. However, requests made to an Approved Participant which are deemed unfair, unjustifiable, unreasonable or which demonstrate a lack of knowledge from a regulator, should not have to remain confidential. Approved Participants have received such requests in the recent past.

In order for the investigation process to be "more transparent and predictable to market participants" as well as "fair, while being flexible where applicable," as stated in the Circular, the Approved Participant should be able to receive from the Regulatory Division, a written justification for a request deemed unfair, unjustifiable or unreasonable.

If, after receiving a written justification from the Regulatory Division, the Approved Participant still believes that the request is unfair, unjustifiable, unreasonable or exhibits a serious lack of knowledge from the regulator, the Approved Participant must be able to discuss some general information concerning the investigation with their IIAC representative, and be able to share the complete information with the Autorité des marchés financiers as well as with any organization that is a gatekeeper for investor protection and/or market integrity. This would ensure the stated goals of the Regulatory Division of transparency and fairness to market participants, while proving the Regulatory Division's role of maintaining market integrity.

It is crucial that members can rely on a regulator that is educated in the underlying complexities specific to their industry. If there is a perception from members that this knowledge is lacking, this information must, for the benefit of the market and all participants, be conveyed to the proper gatekeepers and must not remain confidential. Transparency is essential.

Ensuring the Division and its representatives are accountable and well-informed is also relevant with respect to Article 4.106 (Costs and Expenses) which states *that the following shall constitute a debt owed to the Bourse by the Regulated Person, who must pay the amount thereof upon demand:*

(a) *all costs and expenses paid or incurred by the Regulatory Division, including professional fees, in connection with any investigation carried out or any proceedings initiated under Part 4 of the Rules; and*

(b) *any amount charged by the Regulatory Division in accordance with the fee schedule of the Bourse in effect from time to time.*

7. The Possible Improper Sharing of Information by the Regulatory Division

Article 4.105 (Information sharing) in the current proposal mentions the following:

> *The Regulatory Division may, on behalf of the Bourse, enter into agreements with any exchange, central clearing counterparty, self-regulatory organization, securities regulator, financial intelligence or law enforcement agency or authority, in Québec or elsewhere, to collect and share information. Subject to the legislation relating to the protection of personal information, the Regulatory Division may at any time make available to such Persons any report, Document or information described in such agreements or upon request, pursuant to Article 4.100 (b).* [Emphasis added]

The industry participants understand the reasons behind agreements to collect and share data with other SROs and law enforcement agencies. However, because of its regulatory function, the Regulatory Division must be conscious that our members' trading data and related information should not be shared with the Bourse for the Bourse's business purposes. We believe that the independence between the Regulatory Division and the profit-making unit of the Bourse is the key to maintaining market integrity, market protection and the reputation of the Canadian derivatives market. Therefore, the wording of Article 4.105 should be changed to exclude the collection and sharing of information with the profit-making unit of the Bourse for the Bourse's business purposes.

Conclusion

The IIAC and its members believe that the conduct of the Regulatory Functions of the Bourse needs to be made more transparent and predictable to market participants. Improvements to processes for increased efficiency during an investigation are required. However, concerns remain over the amendments that are currently proposed.

Our industry requires proper regulation and governance to maintain the reputation of the Canadian market. A lack of independence between marketplace and regulator, either real or perceived, will undoubtedly hurt such a reputation. Canadian regulators must, without any pressures from marketplaces, properly regulate our Canadian markets for the benefit of all stakeholders (market participants and investors). A proper governance structure is essential to the proper functioning of our markets.

In the opinion of the IIAC and its members, certain amendments suggested by the Bourse in the Circular do not address the protection of the investing public as they interfere with the independence of the Regulatory Division, whose regulatory function could easily be impacted by commercial pressures from the Bourse's profit-making unit.

As the IIAC has mentioned in many of its previous comment letters to the Bourse and to the Autorité des marchés financiers, we believe independence must exist between the Bourse and the Regulatory Division. We therefore recommend an AMF assessment of a third-party regulatory service provider model for listed derivatives products, through a public consultation.

Many amendments to the current proposal have been suggested in this letter. Many concerns were identified. We provide a summary below:

- **It is important for the AMF to seriously consider the implications that may arise from a position where the Vice-President of the Regulatory Division can delegate powers and obligations**, regardless of whether these powers and obligations are or are not "*specified and subject to compliance with any applicable law (including any order or requirement of a Securities Regulator),*" **to an employee of the Bourse (the profit-making unit)**. As previously noted, significant concern arises from the proposed Article 1.104.

- **We would ask the AMF to provide some comfort that market integrity is well protected**, to the benefit of Canadian investors and market participants. We would also welcome **an assessment, by the AMF, of a third-party regulatory service provider model for listed derivatives products, through a public consultation.**

- The enforcement process employed should take into consideration the **significant associated costs and burdens** on the firm being investigated, **relative to the quality of the information likely to be obtained**. Furthermore, our members have confirmed that the investigation process **continues to create confusion, continues to be highly time and energy consuming, and crucially, continues to lack transparency**.

- We would request **proper and complete blackline versions in future Requests for Comments** as they help the public and industry members understand proposed changes to the rules and provide comments. Asking participants to compare information across different sources, outside of the Request for Comments, is unacceptable. **The Bourse must show better transparency throughout its Proposal process.**

- Since the IIAC and its members were able to identify the significant change of 36 months to five years (Section 4 of this letter), we must inform the Bourse that **the change is unacceptable and unwarranted**. The industry believes that an SRO should, when a complaint is filed, be able to investigate and reach a conclusion within 36 months (three years). The inability for an SRO to do so creates further concern.

- We wish to remind the Bourse that **Approved Participants may not be able to influence their business partners and clients to provide information that has been requested by the Bourse**, as some are not under the Bourse's jurisdiction. Furthermore, as mentioned in prior IIAC comment letters, **certain types of information requested by the Regulatory Division in the past cannot be provided as this would constitute a privacy breach**.

- We believe that **all requests for information should be made, at a minimum, in digital form**.

- We believe that **the Chief Compliance Officer must be made aware of all requests and should therefore be receiving a copy of any requests the Regulatory Division makes to the firm**.

- We ask that requests for information (RFI) are sent only when warranted. This serves to preserve market integrity and ensures that a clear process is adhered to in order to make the investigation process more efficient. **When an Approved Participant deems an RFI to be unfair, unjustifiable, unreasonable or displaying a lack of knowledge, we strongly believe the Regulatory Division should justify its request in writing to the Approved Participant**. Such transparency would be welcomed by industry participants.

- **If such written justification provided by the Regulatory Division is not deemed reasonable, the Approved Participant should have the right to discuss general information contained in the RFI with its IIAC representative and to share the complete details of the request with the Autorité des marchés financiers or any other organization that acts as a gatekeeper for investors, markets and the industry**. Sharing information in this way ensures that the process remains fair and transparent for investors and market participants.

- We continue to disagree with the mention of "free access" in regard to investigations. Approved participants should provide information and documents requested in order for the Regulatory Division to conduct an investigation. However, **the term "free access" implies that the Regulatory Division should be allowed to access any of an Approved Participant's systems and to access any information stored on its systems, whether related to an investigation or not. We strongly disagree with this and ask that the sentence be reworded**.

- We wish to reiterate that the Proposal should be amended to clearly state that **representatives of the Approved Participant – the Chief Compliance Officer, other designated compliance personnel and representatives of the Approved Participant – can be involved in the investigation process (such as attending an interview) and in any subsequent disciplinary proceedings**.

- We believe that in-person interviews may be difficult to perform for the foreseeable future. We believe that **interviews conducted electronically, such as by using videoconferencing technology, may be warranted and also much less expensive to conduct**.

- We believe that **our members should have access to recordings and transcriptions of their interviews, upon request, to ensure the accuracy, completeness, and fairness of the materials**. This access would also increase the transparency of the enforcement process.

- The Regulatory Division must be conscious that **our members' trading data and related information should not be shared with the Bourse for the Bourse's business purposes**. We believe that the independence between the Regulatory Division and the profit-making unit of the Bourse is the key to market integrity, market protection and to the reputation of the Canadian derivatives market.

Lastly, we believe that in order to foster a vibrant, prosperous investment industry driven by strong and efficient capital markets, a few absolutely critical elements are required: consistency in rule interpretation, application and investigation process; a truly independent SRO; and knowledgeable Regulatory Division personnel.

Please note that the IIAC and its members, as always, remain available for further consultations.

Yours sincerely,

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