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Dear Ms. Greenglass and Ms. Stern:

Re: Consideration of Market Data Fees Pursuant to NI 21-101

We write in furtherance of the recent decision by the US Securities and Exchange Commission (the "SEC") relating to market data fees, and the applicability of the key elements of the decision to the Canadian context to the regulation of such fees.

On October 16, 2018, in a unanimous decision, the SEC[1] ruled against the NYSE Arca and Nasdaq Stock Market in respect of a 2013 challenge to certain market data fees brought by the Securities Industry and Financial Markets Association ("SIFMA"). The SEC found that NYSE Arca and the Nasdaq Stock Market did not provide sufficient justification to continue charging

[1] *Sec.Indus & Fin Mkts.Ass'n* Admin. Proc. Ruling Release No.84432 (Oct. 16, 2018) https://www.sec.gov/litigation/opinions/2018/34-84432.pdf

the rates imposed for depth-of-book market data, which is used to gauge market demand in respect of securities trading.

We reference this decision to support our many submissions to the Canadian Securities Administrators (the "CSA") relating to the escalating costs of market data and related fees, specifically, the shortcomings in the content and application of regulation to ensure the fees imposed by exchanges and marketplaces are reasonable and do not create barriers to access the services provided by the marketplace.

A key element of the SEC decision was that the market data fees are not tempered by competition among marketplaces providing data. Rather, market competition is distorted by the exchanges' competing obligations as a utility-providing access, while also profiting from providing market data.

In the decision, the SEC has characterized the marketplaces providing the core market data[2] required by dealers to meet their regulatory obligations as "monopolistic", and recognized there is little opportunity for market forces to determine the overall level of fees. Given that each exchange is the exclusive source of its own product, in order to meet regulatory obligations such as best execution, changing trading venues or substitution of market data providers is often not an option. The SEC, in discussing core data, indicated that fees for core data "need to be tied to some type of cost-based standard in order to preclude excessive profits if fees are too high."

The SEC ruling, however, specifically dealt with market data products that involved depth-of-book information, that in the US, unlike Canada, is not considered core data. Notwithstanding that the depth-of-book information is not technically required to comply with existing US trading regulation, the SEC found that the exchanges were still obligated to demonstrate fees are fair and reasonable and not unreasonably discriminatory.

We believe the findings in the SEC decision are directly relevant to the Canadian scenario in respect of marketplace fees. Although the precise scenario considered in the decision is not replicated in the Canadian context, the general findings about the nature of competition, marketplace monopoly over data and the resulting fairness of certain marketplace fees are applicable to the Canadian market structure.

The US National Market System ("NMS") shares similarities to the Canadian regulatory framework, inasmuch as multiple trading centers including exchanges, alternative trading systems, and broker-dealers trade securities under various regulations that require some form of best execution (including best price, order protection etc.) to protect investors. Under this structure, exchanges and other market centers compete to attract order flow from market participants.

[2] The core market data in the US is top of book trading information, rather than full depth-of-book information as required in Canada.

Although there is some flexibility in the choice of trading venue under certain conditions, in Canada, the Order Protection Rule and Best Execution obligations, and the designation of Protected Marketplaces limit the ability of broker-dealers to choose venues on which they trade, and therefore where they must purchase the relevant market data (since it is tied to the execution venue), either directly or indirectly. This is the basis for the marketplace monopoly power in respect of their data.

This perspective that marketplaces could (and in some cases do) exert monopoly power was the subject of a study undertaken by the Securities Litigation & Consulting Group ("SLCG") and submitted to the OSC by the IIAC in January 2011. This perspective is echoed in the report by Copenhagen Economics, commissioned by the Danish and Swedish Security Dealers Associations in November 2018[3] in the context of MiFID II and MiFIR, which share many of the structural issues surrounding market data as Canadian regulation.

It is the IIAC's position that the results of the study provided sufficient evidence of aggressive pricing of market data in the Canadian marketplace to justify vigorous pro-active regulatory oversight of pricing practices and the imposition of pricing constraints. Excessive pricing for market data undermines efficiencies by raising execution costs as data fees are passed on to investors.

In recent years, the CSA implemented a framework to analyze market data fees based on a formula, taking into account the market share of the marketplaces. However, we are of the view that this has not been a sufficient mechanism to constrain not only market data fees, but certain other fees that participants must pay in order to access the marketplaces and data that is required for compliance with trading regulation.

In addition to the fees charged for market data, the exchanges have implemented other fees that in our view, are abuses of their market power, do not reflect the cost of providing such services, and are not tempered by market competition. Most recently, we believe the approval of the TSX Decryption Fee, despite the evidence submitted by the IIAC demonstrating the significant and disproportionate effect it had on non-bank dealers, was contrary to the access provisions of NI 21-101 CP.

In addition, we believe the new Nasdaq fees, effective August 1, 2018, which were not published for comment, violated the access provisions in NI 21-101 CP, and did not provide the industry with adequate transparency about the fee approval process, nor the opportunity to provide comment. Given the market power of the exchange as a protected marketplace, at a minimum, the affected firms should be afforded the ability to comment on new fees, and understand the rationale, and method of calculation justifying the implementation of such fees. Although the CSA may have been presented with such information, it is critical that those who will be subject to those fees through regulatory requirements have the ability to

[3] https://finansdanmark.dk/media/38280/pricing-of-market-data.pdf

understand the basis for, and submit information about the effect such fees will have on the industry.

In light of the SEC decision, as well as the supporting arguments presented in the Copenhagen Economics report, we request that the CSA consider the market power of the exchanges and ATSs, and the effective monopoly they exercise over their own market data, as well as certain access fees imposed by the marketplaces. The marketplaces should be required to clearly justify their fees, in light of their monopoly power, and not use market competition as an argument that the market will constrain unfair or excessive fees. We also request that marketplace fees be subject to greater transparency and industry comment, so that the regulators obtain a more complete picture of the effect of such fees on the industry.

Thank you for considering our submission. We would be pleased to meet with you to discuss our concerns and suggestions.

Yours sincerely,

Susan Copland