

Investment Products & Wealth Management Bulletin

September 2008

Fasken Martineau DuMoulin LLP

Canadian Securities Administrators Notice on Best Execution

On September 12, 2008, amendments to National Instrument 23-101 *Trading Rules* (“NI 23-101”) and its Companion Policy 23-101CP are scheduled to come into force obligating all dealers and advisers to “make reasonable efforts to achieve best execution” when acting for a client. The amendments do not contain any substantive or material changes to the proposed amendments initially published on April 20, 2007 with the CSA’s and the Investment Industry Regulatory Organization of Canada’s *Joint Notice on Trade-Through, Best Execution and Access to Marketplaces*, where changes were proposed to the best execution requirements in NI 23-101, consistent with the existing obligations in the Universal Market Integrity Rules.

Best execution, which is defined as the “most advantageous execution terms reasonably available under the circumstances”, is a principles-based obligation that goes beyond price to include other considerations such as speed of execution, certainty of execution and the overall cost of the transaction when determining if the obligation has been met for a securities transaction. As set out in Companion Policy 23-101CP, these four broad elements encompass more specific considerations, such as order size, reliability of quotes, liquidity, market impact (i.e. the price movement that occurs when executing an order) and opportunity cost (i.e. the missed opportunity to obtain a better price when an order is not completed at the most advantageous time). The overall cost of the transaction is meant

to include, where appropriate, all costs associated with accessing an order and/or executing a trade that are passed on to a client, including fees arising from trading on a particular marketplace, jitney fees (i.e. any fees charged by one dealer to another for providing trading access), settlement costs and the commission fees charged by a dealer.

Companion Policy 23-101CP clarifies that the application of the best execution obligation will vary depending on the specific circumstances and, to meet the “reasonable efforts” test, a dealer or adviser should be able to demonstrate that it has, and has abided by, its policies and procedures that (i) require it to follow the client’s instructions and the objectives set, and (ii) outline a process designed to achieve best execution. The policies and procedures should describe how the dealer or adviser evaluates whether best execution was obtained and should be regularly and rigorously reviewed. The policies outlining the obligations of the dealer or adviser will be dependent on the role it is playing in an execution. For example, in making reasonable efforts to achieve best execution, the dealer should consider the client’s instructions and a number of factors, including the client’s investment objectives and the dealer’s knowledge of markets and trading patterns. An adviser should consider a number of factors, including assessing a particular client’s requirements or portfolio objectives, selecting appropriate dealers and marketplaces and monitoring

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dealers and marketplaces and monitoring the results on a regular basis.

Where a security trades on multiple marketplaces, best execution will not require dealers to maintain access to all marketplaces. To achieve best execution, a dealer should assess whether it is appropriate to consider all marketplaces, both within and outside of Canada, upon which the security is traded.

Please click on the following link for the complete text of the amendments to NI 23-101 and Companion Policy 23-101CP:

http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part2/csa_20080620_21-101_and_23-101.pdf

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Our Investment Products & Wealth Management Group

Fasken Martineau's Investment Products & Wealth Management Group, comprised of lawyers with expertise in corporate/securities, tax and trust law, is known as one of the leading investment products and wealth management legal practices in Canada. The achievements and expertise of partners in our group are consistently recognized in notable and prestigious publications. We act for public mutual funds, private investment funds, exchange-traded funds, labour-sponsored venture capital funds, commodity pools, special purpose investment vehicles, and mutual fund managers, investment advisers and dealers. In particular, we act for leading Canadian fund sponsors in the three major investment fund areas, namely open-end mutual funds, closed-end investment funds and exchange-traded funds. In our broad practice we deal with a range of investment management issues impacting issuers, managers, distributors, financial institutions and service providers on a regular basis. We have excellent relationships with the Canadian securities administrators and other government and private organizations involved in the investment management industry. We also have been at the centre of Canada's fund governance initiatives.

If the Investment Products & Wealth Management Group can be of assistance to you, please contact us.

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