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Re: Maple Group Acquisition Corporation – Ontario Securities Commission Request for Comments

The Canadian Advocacy Council¹ for Canadian CFA Institute² Societies (the CAC) appreciates the opportunity to provide comment on the on the proposed Maple Group acquisition dated October 7, 2011. Please see below the CAC's responses to the OSC's questions regarding Maple's requested Commission approvals.

¹ The CAC represents the 12,000 Canadian members of CFA Institute and its 12 Member Societies across Canada. The CAC membership includes portfolio managers, analysts and other investment professionals in Canada who review regulatory, legislative, and standard setting developments affecting investors, investment professionals, and the capital markets in Canada. See the CAC's website at <http://www.cfaadvocacy.ca/>

² CFA Institute is the global association for investment professionals. It administers the CFA and CIPM curriculum and exam programs worldwide; publishes research; conducts professional development programs; and sets voluntary, ethics-based professional and performance-reporting standards for the investment industry. CFA Institute has more than 100,000 members, who include the world's 90,000 CFA charterholders, in 135 countries and territories, as well as 135 affiliated professional societies in 58 countries and territories. More information may be found at www.cfainstitute.org.

Question 1: In the Introduction above, we outline the approvals requested by Maple. Do you believe that the Commission should consider the requested approvals all at the same time, or should the requested approvals be considered in stages?

In the CAC's opinion, the request is complex enough that the approval should be considered in stages.

Question 2: What is the optimal composition of Maple's board, and why?

Under an assumption that an exchange must operate in the public interest, the majority of the board must be independent, with no links to industry. Specifically, this means that employees, directors of shareholders, or other persons with financial links to shareholders including consulting fees, pension or other benefits, share or option holders in Maple shareholders should not be eligible to sit on the Maple board.

Question 3: Is fair and meaningful representation on the board of directors being achieved in the Maple Proposal or is the proportion of shareholder representation under the proposed nomination agreements too large?

The CAC has significant concerns that the public interest will not be served with the current board composition proposal due to too much emphasis on shareholder representation. If Maple is effectively controlled by the shareholder companies, there would be a perception of a conflict of interest. There would also be a natural tendency for the Maple board to put less emphasis on pursuing issues that would be in the best interest of the public but to the detriment to the Maple Shareholders.

Question 4: Is it appropriate that the shareholder representatives are nominated by only a certain subset of the shareholders, i.e. the Investors?

The CAC's response to this question is negative. Maple stakeholders include the general investing public, professionals within the industry who do not work for a Maple investor, and the Government of Canada and Provinces that might be required to step in should Maple experience financial difficulties because of poor risk management. All of these stakeholders should have an equal chance at representation if the company is to act in public interest and avoid perception of conflict of interest.

Question 5: Should there be representation of non-owner users on the board of directors?

The CAC feels that mere representation on the board of non-owner users does not go far enough towards protecting the public interest. In the case of Maple, non-owner users, including retail investor protection groups, must make up the majority of the Board. The CAC also suggests representation by participants that deal in the venture and early stage development of companies be included.

Question 6: How should independence be defined for purposes of the Maple Proposal?

Independent directors should have no material interest in Maple's financial performance. This would exclude employees and their families, anyone receiving consulting or other fees from the main

shareholders, those receiving pension or other benefits, and those owning shares or options in the companies controlling Maple. In addition, a number of independent directors should be independent from listed issuers. At least 10% or 2 directors (whichever is less) must represent retail investors. The Nomination Committee should comprise only those members who have not worked in the industry for at least five years.

Question 7: Should founding non-dealer shareholders of Maple be excluded from the definition of independent director?

All Maple shareholders, by virtue of having a material interest in Maple's financial performance, should be excluded from the definition of independent director.

Question 8: Should listed issuers be excluded from the definition of independent director?

Listed issuers should not be automatically excluded from the definition of independent director, since there is only a minor probability of conflict of interest for an issuer and issuers are likely to have priorities that are different from those of the dealer shareholders.

Question 9: Is it appropriate that eight of the Investors be entitled to nominate one director each for a period of six years?

In the CAC's opinion, such an arrangement would likely preclude Maple from having an independent board acting in the public interest. In addition, the CAC feels that it is important to ensure that the term of directors must not be such that independent directors have on average less tenure than shareholder directors.

Question 10: Are Maple's proposed measures to mitigate potential conflicts of interest sufficient or are additional measures needed? If additional measures should be implemented, please indicate which ones and why.

It is the CAC's view that the current proposed measures are not sufficient to mitigate conflicts of interest. TMX Group's current board code of conduct could presumably be influenced by the CEO of Maple through indirect influence on the board. The Maple proposal suggested the use of "enhanced conflicts of interest policies and procedures not only at the exchange level but also at the individual dealer shareholder level" – this implies the current policies might not be adequate with the current structure. The assumption that Maple will significantly enhance conflicts of interest policies without specific external oversight is questionable.

Requiring dealer-owners to provide transparency to their clients regarding the dealers' routing decisions and ownership in the exchange is not sufficient to eliminate conflict since under the new structure clients will not be able to "go elsewhere".

A regulatory oversight committee at the board level proposed by Maple would still be part of the board. Regulatory oversight must be moved outside of the Maple board and any other self-regulatory organization to be truly independent.

The establishment of a separate regulatory division or subsidiary is also insufficient, since such a structure could never be independent. Any “division or subsidiary” would always be subject to control from the board and/or the CEO of Maple. This suggestion is a particularly weak tool for maintaining high quality regulatory oversight.

The Maple proposal to outsource the listings regulatory function in the longer term is also not acceptable. Outsourcing the listings regulatory function should be a pre-condition for the Maple transaction. This proposal could be achieved quickly by spinning-off the current listings function into a completely independent body before the transaction.

Question 11: Do you have any concerns with a shift to a more concentrated ownership of the exchange, in particular by dealer users?

One of the causes for concern in this case is due to only some of the dealer users having ownership of the exchange. An exchange in which some dealers have an ownership interest and others are only ‘clients’ will continually face criticisms, complaints and possibly even legal claims - perhaps unfounded - which the exchange will find expensive and time-consuming to address. Those costs are more likely to be passed on to clients of the exchange than to be absorbed by its shareholders.

Question 12: Are the concerns exacerbated by the fact that the same dealers control the majority of order flow in Canada?

The appearance of potential conflicts of interest between large dealers, small dealers and the exchange are more likely to give rise to concerns about preferential arrangements.

Question 13: Does this shift to a more concentrated ownership of the exchange raise other market structure issues in addition to the ones already identified in this Notice?

To the extent that the exchange operates as a de facto public utility, ownership restrictions similar to those in Canada’s banking sector, and pricing and profitability restrictions similar to those in the consumer electricity market, should be examined. Concentrated ownership adds to the systemic risk in the financial industry as it increases dependency and connection between the fiscal situation of some dealers and the clearing and stock exchange system itself.

Question 14: Notwithstanding the percentage set out in section 21.11 of the Act, should the degree of ownership by each Investor be capped at the level proposed by Maple (or should it be capped at a lower level)?

If the current Chartered Bank model were to be followed, the Maple consortium would be limited to holding 10% of the shares of the Exchange. The CAC is concerned why the language of 21.11 should be interpreted in one way, while similar language in the Bank Act would not be interpreted in that way.

Question 15: Do you have any concerns with the Non-Competition Agreement or the Non-Preferencing Agreement?

In the CAC's view, these agreements would impede, but not imperil, the development of other ATS systems in Canada, therefore the CAC is not concerned about them.

Question 16: Will the Alpha acquisition impact competition in the Canadian market or concentrate market power with respect to trading?

We believe that Maple's ownership in Alpha, as proposed, would reduce competition by further strengthening an oligopoly arrangement. Alpha's creation had been based on the very fact of the lack of competition. The current competitive landscape has provided healthy competition and innovation (despite an overlap between the Maple consortium and the owners of Alpha). The loss of a significant competitor could impact service to the public, competitive pricing practices and innovation.

Question 17: More generally, what are other implications, both positive and negative, of the Alpha acquisition?

The CAC has concerns about the business risks of concentrated ownership in a significant piece of the Canadian market's infrastructure and operations. A common ownership of both would eliminate healthy competition as a reason for innovation and improved service to the public. If Alpha operates as it does currently, which is a non transparent marketplace serving only its limited group of members, then nothing is achieved. However, Alpha now meets the criteria to file as a fully registered stock exchange and if it operates as such then the market benefits from the addition of a transparent and accessible marketplace. If it is consolidated into the TSX, then the visibility and accessibility gained is a benefit. Either way, Alpha has to change into a fully registered stock exchange due to its market size, independent of the Maple bid so that acquisition wouldn't be considered a factor as its only a benefit to the Maple group to merge with the TSX.

Question 18: What are the implications of the vertical integration of TSX and CDS, the monopoly clearing agency, to the capital markets, market participants and the provision of depository, clearing and settlement services? Please explain both positive and negative implications for Canada.

There is not a compelling case of how vertical integration would be in the public interest, quite the opposite, the integration of the CDS with the TSX would introduce a higher level of the operational and systemic risk into the Canadian market. The current arms-length arrangement is serving Canada well by

avoiding those risks. On an operational level, it is assumed CDS will begin operating as a for profit enterprise and regardless of restriction placed on it, the capital budgets for system updates and service cost recoveries are fully expected to climb substantially under the proposed vertical integration.

Question 19: Is the answer to question 18 above affected by the fact that the TSX currently has a dominant position in the market for trading systems? Please explain.

The dominant position of the TSX did not have bearing on the CAC's response to question 18. CDS provides an important service to the markets that is invisible to most people. It works very well, in a cost-recovery (not for-profit) model, and does a good job of managing systemic risk. Consolidating it with the TMX would result in a higher level of operational and systemic risk.

Question 20: Do you have any concerns with the move from a horizontal model of clearing to a vertical model of clearing? If so, please explain the issues and how they may be addressed through appropriate regulatory measures or why the concerns could not be mitigated.

Consolidating so much of the infrastructure of Canada's financial system would introduce additional systemic and operational risks. For example, while an operational failure (natural disaster, terrorism etc.) of either of the parts in the horizontal model would present Canada's financial system with a severe strain, the possibility of both of them being disrupted at once would be catastrophic. Such risks are not easily mitigated by regulatory measures due to their unpredictable and binary nature.

Question 21: Is there a concern that the interests of unaffiliated marketplaces may not be taken into account? If so, are the mechanisms proposed by Maple adequate to address the concern? If not, what other mechanisms could be put in place?

The CAC believes there should be a distinction between a clearing firm, like the CDS, which is run by and for the users, in a not for-profit utility model, and an exchange, like the TMX. An unaffiliated exchange, such as TMX, Maple, Alpha, or any other ATS, would have a different agenda on the board of the CDS than would its users. As a result, the CAC does not believe that marketplaces should be represented on the Clearing Boards.

Question 22: If you are of the view that unaffiliated marketplaces should be represented on Clearing Boards, what is the appropriate percentage representation? What should the nomination process be to ensure that different unaffiliated marketplaces are well represented on the Clearing Boards?

As per above, the CAC does not believe that marketplaces should be represented on Clearing Boards.

Question 23: What are your views on the user-owned and the non-user owned model for clearing agencies, including the pros and cons of each model?

A reliable clearing system is the foundation upon which the rest of the financial services industry is built and Canadians may take for granted the reliability with which the current clearing system works. A user-owned system has served the Canadian marketplace well and reliably. There is no reason to believe that a non-user owned system would work better, and the consequences of it not working well outweigh whatever benefits might accrue from changing the ownership structure. A non user- owned system has an entirely different agenda and interest than a user-owned facility. The former will give precedence to its self interest and the latter has only one known purpose, which is the common interest of the users.

Question 24: What criteria should be used to determine which model would be more appropriate for our capital markets?

The strategic value of the system to the Canadian economy, and the quality and price of service to users, should be a primary criteria, but the proposal is to create a monopoly on a core functioning institution in the economy with all the attendant issues that accompany such a structure.

Question 25: In your view, is one model preferable for our capital markets and why? If you believe that both models could work for Canada, please explain.

The CAC believes that the current model works well for the Canadian capital markets and the additional potential risks do not justify changing the ownership model.

Question 26: Are there concerns related to the divergence of the interests of the users of CDS services and the interests of the owners of CDS and Maple? Why?

The CAC believes that the potential strategic consequences of the change in ownership model to the Canadian economy should be the overriding decision factor in this case. The interests of Maple may not necessarily always be the same as the interests of users of CDS. The interest of CDS users is an efficient and economic clearing and settlement system that works equally well and is easily accessible by all users.

Question 27: Are requirements ensuring a minimum number of directors representing users on Clearing Boards effective to ensure that CDS services are appropriately designed and operated to meet the needs of users? If so, what would be the appropriate number of user representatives?

It would be preferable that a majority of directors were independent users, as defined under the current CDS Recognition Order.

Question 28: Is the definition of independent director under the Maple Proposal appropriate? If not, how should an independent director be defined and why?

The argument for changing the definition of independent director from that under the CDS Recognition Order to the one proposed is unclear. Further clarification of this point and the reason for its change should be provided.

It might be useful to look at OBSI's set of rules supporting that the banking industry directors do not end controlling key candidatures, executive oversight and budget issues for example. As the Ombudsman for Banking Services and Investments is publicly criticized by banking members, it might indicate its functional independence.

Question 29: What is the optimal composition of CDS' board and why?

Due to the strategic importance of the CDS to the Canadian financial infrastructure, the CAC believes that the CDS board should be primarily reflective of users of CDS services and the public interest.

Question 30: Are there other measures that should be considered to ensure that CDS services are appropriately designed and operated to meet the needs of market participants and the industry generally?

At the very least, a majority of the CDS board should be made up of users who are independent of the Maple group.

Question 31: What are the implications of a for-profit CDS to the capital markets, market participants and for the provision of clearing and settlement services? Please describe both positive and negative implications; in particular, any implications for capital market developments, innovation, costs of clearing and settlement services, risk management or other areas affecting the public interest.

Due to the fact that all of the costs of the CDS are ultimately passed on to issuers and investors, the CAC believes that the main goal of the CDS should be to minimize costs and optimize service rather than to maximize profits. General cost hikes for services that may or may not be desired by the users group and difficulties accessing or becoming a CDS member are anticipated with the proposal.

Question 32: Are the measures proposed by Maple adequate to address the conflicts that may arise, or are there other measures or specific requirements that are needed?

While the measures proposed by Maple go some way in addressing some of the conflicts, they fall short of what is necessary.

Question 33: What are your views on the additional measures outlined above? Should any other measures be considered, and if so, why?

The main issue is the change in the ownership model which presents inherent conflict of interest that cannot be resolved under a proposed new arrangement.

Question 34: Are the measures proposed by Maple sufficient to prevent anti-competitive or monopolistic pricing? If not, what other measures should be put in place?

The CAC believes that while the measures proposed by Maple appear reasonable to prevent anti-competitive pricing, nonetheless in the case of a vertically integrated organization, the allocation of costs is an area of concern.

Question 35: Is increased fee regulation by the Commission warranted and, if so, what specific measures should be adopted and why?

The CAC believes that due to the fact that the new entity would create a private company with a near-monopoly on what is essentially a public utility, fee regulation is necessary if fees in Canada were to remain competitive with fees elsewhere in the world.

Question 36: Are the current fair access requirements sufficient to mitigate any fair access concerns that arise with dealer-ownership of an exchange and non-user ownership of a clearing agency? Are additional requirements required? If additional measures are required, please provide examples.

The current fair access requirements are reasonable, however the Commission should ensure sufficient resources to police this as fair access is the keystone of a competitive financial services sector.

Question 37: Are there concerns with access to clearing and settlement services by unaffiliated marketplaces? If so, what measures could be put in place to address the concerns?

In the same way the unaffiliated dealers should have the ability to play on a level playing field as dealers affiliated with the Maple group, the CAC would expect that unaffiliated ATS's should as well. The CAC would like to reiterate that the Commission will need to allocate sufficient staff to ensure that the TMX adheres to the spirit of 21-101.

Question 38: What are the benefits and costs of integrating CDS and CDCC?

In addition, an integration that results in higher costs to the users of the systems would not be beneficial to the Canadian marketplace. Considering the benefits, including operational efficiencies and lower costs, are dependent on a successful integration of CDS and CDCC, but the integration is expected

to take intense resources, more details on the plan would enable the CAC to effectively weigh the costs and benefits of such an integration.

Question 39: Would you support the integration of CDS and CDCC and why? If so, what, in your view, would be the optimal degree of integration?

The CAC has not seen enough detail on this plan to render an opinion.

Question 40: What would the impact of integration be to market participants?

The CAC has not seen enough detail on this plan to render an opinion.

Question 41: In addition to the specific issues identified above, do you have any concerns with the changes in market structure that the Maple Proposal introduces? If so, please provide examples of issues not already identified and whether the concerns can be mitigated by some of the measures already mentioned or others.

The CAC is concerned with the fact that Maple investors can be assumed to be entering the transaction in order to maximize their profits, while the extent to which the new structure will affect the Canadian financial infrastructure is profound. As a result, there is little expectation that the public good will be the motivating force behind the changes, since at the end of the day the profits will have to come at the expense of some of the market participants who are not likely to be the Maple shareholders. The CAC is concerned that transferring ownership of an SRO to the private sector is not likely to work out in the interest of the investing public in Canada.

The CAC believes that insufficient consideration has been given to the likelihood that Maple syndicate members would enjoy a closer relationship with the TMX Group of Companies than the dealers that fall outside that syndicate. This would be of an obvious detriment to those outside dealers.

The CAC would like to see details about how the TMX and the Investment Industry Regulatory Organization of Canada would ensure that an arms-length relationship would be enforced. Of particular concern is the transfer of personnel from bank-owned dealers to the TMX and vice-versa.

Question 42: Do you believe it would be useful to require Maple to perform regular international benchmarking of its operations? In answering, please explain why you believe it would or would not be useful.

An international benchmarking process would be useful, but the CAC questions whether Maple is the most unbiased group to do this, and whether or not such reviews would be timely enough to ensure that Canada remained at the forefront of international competitiveness.

The CAC would appreciate an opportunity to participate in the in-person consultation (Policy Hearing) in order to clarify or expand on the above written submission. We thank you for the opportunity to provide these comments and appreciate the time you are taking to review our concerns. Please feel free to contact us at chair@cfaadvocacy.ca on this or any other issue in future.

(Signed) Keith Summers

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