BY EMAIL

November 9, 2011

The Secretary of the Commission
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario M5H 3S8

Email: jstevenson@osc.gov.on.ca

Dear Sir:

RE: MAPLE PROPOSAL

We are pleased to respond to the OSC's request for comment on the application ("Maple Application") by Maple Group Acquisition Corp. ("Maple"). As the operator of CNSX, the only non-TMX listed market in Canada, as well as the Pure Trading facility, we are directly impacted by the changes proposed to the Canadian capital markets by Maple.

General Comments

There is an underlying theme throughout the Maple Application that the creation of a dominant, consolidated exchange and clearing conglomerate would be good for the competitiveness of the Canadian capital markets. No evidence is offered by Maple in support of this broad statement and we are aware of a contrary view among global market participants: the creation of a cash equity and derivative trading and clearing conglomerate owned by the largest buy- and sell-side users of the services in Canada would lead to an environment that is closed to competition, domestically and internationally. It is more accurate to state that the higher earnings multiple awarded by investors to other vertically integrated exchange entities confirms that the structure proposed by Maple would add value for its owners. We feel strongly that a for-profit clearing operation within Maple would inevitably, as discussed below, form a significant barrier to existing and potential competition. Without meaningful competition in the provision of trading, listings and clearing services, it is hard to anticipate how innovation and service level improvements can be expected.

An unprecedented range and depth of conflicts of interest are posed by the Maple Application. Undoubtedly, the issue of conflicts of interest is a complicated one; all ownership models present conflicts and perceived conflicts can be more damaging than

actual ones to confidence in the markets. Experience has shown, however, that some conflicts can be readily managed, while others are much harder to identify and address.

The Maple Application changes the conflicts not only due to a shift to user-owners, which impacts all services to be provided, but also the nature of the clearing operations. For example, whether the largest users of marketplace services choose to stop supporting their wholly-owned ATS and instead prioritize TMX Group marketplaces does not have a large impact; nor does the fact that dealers would be, once again, a major presence in the governance of TMX Group exchanges. Trading is commoditized and order flow can be shifted among venues. If independent dealers and small issuers are concerned about venture market trading and listings policies, they have the alternative of trading and listing on CNSX. On the other end of the spectrum, the conversion of a national utility clearing and settlement agency for all equities and debt to a for-profit, clearing department of a for-profit exchange organization raises troubling issues for non-Maple users and non-Maple marketplaces. We discuss these issues in response to the specific questions from the request for comment.

Responses to Questions

1. **Should the Commission consider the requested approvals at the same time or in stages?**

Most of the issues are inter-related and would benefit from consideration as a whole, but those around the quasi re-mutualisation of the TMX exchanges and combination with Alpha could be dealt with separately from the CDS acquisition.

Exchange Governance

2. **What is the optimal composition of Maple's board, and why?**

As Maple is seeking to return to a centralized, user-owned exchange model, it is important that the owner-users are not in a position to influence the rules, policies and administration of the entity inappropriately. Optimally, the board would have at least 50% independent directors, meaningful representation from non-owner users and directors with expertise that covers all the various business lines. In thinking about these issues, we found it instructive to review the approach to board independence adopted by the US Securities and Exchange Commission in approving the governance of the two newest national securities exchanges in the US (BATS and DirectEdge). See for example, the BATS Y-exchange order at http://www.sec.gov/rules/other/2010/34-62716.pdf.

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?**
4. **Is it appropriate that the shareholder representatives are nominated by only a certain subset of the shareholders, i.e. the Investors?**
5. **Should there be representation of non-owner users on the board of directors?**

The proportion of shareholder representation under the nomination agreements would lead to a block of board seats populated with individuals with substantially similar interests in addition to significant influence unrelated to ownership. It is difficult to see how this would facilitate fair and meaningful representation and promote the public interest in the operation of the exchanges and clearing facilities.

If Maple is to proceed with appropriate measures in place to deal with both actual and perceived conflicts the governance should not be constrained to the degree suggested by nomination from a sub-set of shareholders, and it should have more than token non-owner representation, diversity requirements beyond geography and derivatives (which, while both important, are not the only criteria that should be considered) and a significant presence of independent members. Whether it should be 50% or a majority independent depends on the decisions made regarding non-owner users and diversity.

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

Independence should be defined by starting with the principles, i.e. including individuals with no interest in the outcome of any decisions other than the public interest. This is a very difficult task when the entity is an exchange with owners that are the largest providers of financial services nationally. On this basis, representatives of users – i.e. dealers, issuers and other large users of clearing and settlement services – are clearly not independent. Nor are officers or employees of the exchange, those with significant ownership interests and individuals that are reliant on (by virtue of the services they provide) the owners. Given the commonality of interests demonstrated through the operation of Alpha as well as the coordination in respect of the Maple Application, we would propose that the threshold for significant ownership be 5%.

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

Yes. As noted above, independence criteria should exclude significant owners and those with interests other than the public interest. The Commission could consider whether it would be appropriate to continue to deem the Investors to be acting in concert for the purposes of determining independence, regardless of the size of their ownership position. There is no reason to believe that the buy-side investors in Maple are there as passive investors only; to the contrary, there is good reason to suspect that many of these organizations have an interest in implementing their ideas as to what constitutes an ideal market structure for large institutions in Canada.

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

As stated above, listed issuers should be excluded from the definition due to their conflicts, especially as they remain regulated directly by the exchange.

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

The nomination requirements underscore the concerns, in addition to those noted above, that the Investors are seeking to create a publicly-owned monopoly in exchange and clearing services and then exit their positions once they have achieved the desired changes in market structure. If Maple does, indeed, seek to achieve those changes, then it would be even more inappropriate for a small group of shareholder to have guaranteed rights to participate in its decision-making. The experience with Market Regulation Services Inc. ("RS"), where ownership was separated from governance but many market participants still perceived that the TSX had an undue advantage, should be carefully considered.

Conflicts of interest at the exchange level

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.

We agree that there would be no change regarding the conflicts associated with the exchange's for-profit status and its regulatory mandate. As exchange operators we understand the strong economic incentives to maintain a fair listing process.

The Maple Application itself underscores the importance of managing the conflicts with respect to ownership, in acknowledging that the Maple participants that are Alpha owners have preferenced Alpha. It is widely known that the tool used to generate "lift-off" was an agreement to send orders in particular stocks on a specified timetable (the "Momentum Initiative"). The utility of the suggested measures would therefore depend on their implementation. With an appropriate Board composition, however, the measures could be sufficient, especially if requirements for transparency regarding routing and ownership, and structural changes such as the creation of a Regulatory Oversight Committee ("ROC") and separation of regulatory functions were put into effect.

We do not think it is beneficial to consider outsourcing listing regulation at this time, not because we disagree that it would resolve conflicts, but because it would likely lead to reduced innovation. Further, the current options are IIROC, which would have to build the expertise, or the CSA which, without a single regulator, would cause fragmentation in regulation.

Concentrated exchange ownership and investor agreements

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

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

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?

As noted above, all exchange ownership models have conflicts; the challenge is how to identify and address them. The main concerns we have with more concentrated ownership relate more to the purpose of the shift than to the simple fact of concentrated

ownership, and to issues discussed below in relation to CDS. That the dealer-owners control the majority of order flow in Canada is, of course, a concern as a provider of competing exchange services. These entities have demonstrated via Alpha a willingness to prioritize ownership interests in how they conduct trading. We also note that historically the Maple dealers have provided little support to new entrants. As evidence of this we list the resistance on the part their discount brokerages to establishing on-line order entry for the CNSX listed market, the issues experienced by dark pool operators BlockBook and TriAct/MatchNow (especially when compared with the response to Alpha's IntraSpread) and the weak support in general for alternative trading venues such as Pure Trading, Omega and Chi-X even though all were operating prior to the launch of Alpha. In addition, the comparatively low participation in Liquidnet may be an indication of the level of interest by the non-dealer Maple participants in supporting competition in the equity markets.

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)?

The appropriateness of the stated ownership limit mostly depends on whether all or part of the Maple Application is approved, but we agree that majority or significant ownership of a publicly-held exchange conglomerate by a group with shared interests – whether all the Investors or the bank-owned dealer Investors – raises questions about whether the perception of an unfair market will emanate from it to make the Canadian markets less competitive and less attractive to foreign market participants and investors.

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

We see the referenced agreements as further indications that the intention of the Maple participants is to achieve a change in market structure. The first agreement confirms that the major dealers will not provide financial support to any competitor to Maple and the second emphasizes the preferencing of Alpha to date. Any non-preferencing agreement should include the TMX Group exchanges to ensure that best execution, acting in best interests of clients, service levels and costs – not ownership – govern decisions as to which marketplace services to consume.

Alpha Acquisition

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

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

We do not view the Alpha acquisition as having a significant impact on the rest of the industry. Various Investors have cited a consolidation of trading volumes as a key benefit, and that is a concern. However, it may be that the remaining alternative venues would have a better opportunity to compete on the basis of service levels and costs, as mentioned above, if not competing with a marketplace (Alpha) that is currently preferenced by its powerful owner-users.

Vertical vs. horizontal model for clearing services

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.

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.

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.

We do not believe that the conversion of a well-functioning not-for-profit industry utility to a profit driven service embedded within an exchange conglomerate is in the public interest. Simply stated, an organization that returns an excess of revenue over costs to its users in the form of lower fees or service improvements is going to provide its services at a lower cost than an entity that is expected by its shareholders to earn a return on investment.

The vertical integration aspect of the Maple Application is troubling both from a general capital markets perspective and its major impact on non-TMX marketplaces, including ours. Maple suggests that there are efficiencies from vertical integration for regulators, and therefore in the public interest. There is no information about what inefficiencies there are in the current connections between the marketplaces and CDS and what the impact would be on non-Maple marketplaces and *their* regulation. There is also a statement that systemic risk would be better addressed, but we query whether this would, instead, create a larger single point of failure.

The cross border links with CDS and DTCC have worked well and the studies recently carried out by CDS on clearing costs show that the North American utilities are significantly cheaper than their vertical, for profit, counterparts around the world. These issues only peripherally relate to the TMX exchanges' dominant position in equity market trading and instead centre on the anti-competitive elements of the model.

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?

This is an area of significant concern to us as a competing marketplace. The conflicts are substantial. Just as market participants did not accept that TSE Regulation Services could be adequately walled off from a for-profit TSE to allow it to regulate competing ATSs (thus leading to the creation of RS) there are realistically no mechanisms that can completely address our concerns. We emphasize that TSE RS was seen to be inappropriate even though it was to be operated on a cost-recovery basis.

Our concerns are underlined by the well documented issues faced by Chi-X Australia in integrating into the (for profit, ASX-owned) Australian clearing and settlement system: it became clear that entry into the system was being used as a blocking mechanism by the incumbent monopoly to the entry of a competitor.

If the Commission comes to the conclusion that this model is in the public interest, then we submit that CDS be operated on a cost-recovery basis, with governance accommodations to ensure fairness to all non-Investor users, including Board and committee membership, and a ROC.

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?

We believe the original approach to the constitution of the CDS board, to reflect the various types of user, should be combined with the need for more independence, leading to a model that would ensure that the ownership conflict does not inappropriately impact decision making. We suggest one third user-owners, one third non-owner users, and one third comprising at least two unaffiliated marketplace reps and the rest independent. The ROC should be responsible for all nominations to this board, which should report to the ROC. If the Maple Application is approved with a ROC that reports to the Maple board, then if any nominees are not approved, this should be reported to the Commission.

Ownership structure of CDS

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?

The move away from a user-owned model has significant downside, including the cross-border and cost issues noted above. The Maple Application does not address the fact that CDS evolved as a utility, has open access and has not been a barrier to the entry of new dealers or marketplaces. Most importantly, it does not address the fact that there is no realistic possibility of competition arising, since there are natural constraints on DTCC moving north (including submitting to regulation on both sides of the border), the likelihood of the Bank of Canada accepting the role of lender of last resort for more than one clearing agency is very remote, and participants will not desire to be members of additional credit rings.

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

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.

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?

Generally: which model is more consistent with principles of regulation of fair and efficient markets, especially as there is little likelihood of competition in clearing

services? Specific criteria: which model will minimize conflicts and enhance risk management, and better ensure fairness in the application of the clearing rules among users, fair access to all participants and marketplaces and confidence in the markets? Also, what has been the experience of non-owner users (including competing markets) in both models?

As a competing marketplace it is clearly in our interest that CDS continue to be run as a utility, but we are of the view that the detrimental impact of the Maple proposal would be broader. Exchange-owned clearing for equity markets for the most part exists in regions with either a monopoly exchange (with considerable government oversight) or multiple exchange/clearing entities. Neither is the case in Canada. If an exchange has a system outage, trading can be ported to other venues so it is not imperative that it not fail and therefore it is easier to balance system costs with the need to generate profits. The same cannot be said for clearing and settlement.

The interests of the different users – and owners – of CDS have diverged in the past. Concerns arise out of the combination of ownership that reflects only certain users, incorporation into an exchange conglomerate and, most importantly, a for-profit model, as discussed below.

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?

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

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

Given the severity of the conflicts, especially with CDS as a for-profit entity, the governance issues would become even more important. The definition of independence should follow the principles-based approach noted above regarding the exchange's board. However, the answer may not be in focusing solely on independence. Clearing and settlement is a technical and highly specialized area, raising the question of whether it would be feasible to find many experienced candidates that are free from all conflicts – which would require the exclusion of representatives of and service providers to dealers, issuers, institutional investors, banks or other users. One solution might be to ensure that the owner-users would not dominate the board and, instead, provide all types of users with representation.

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?

We again encourage the Commission to consider maintaining CDS as separate utility. If however, it is determined to be in the public interest for it to be incorporated into Maple, we suggest the following measures: constraining the mandate to cost-recovery, providing non-owner users, including marketplaces, with board membership (or at a minimum

observer status) in addition to the proposed advisory committee membership, reporting to a ROC and a requirement that the CDS budget be approved by the ROC and provided to the Commission.

For-Profit vs. Cost Recovery Model for Clearing Agencies

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.

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?

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

It is unlikely that the costs of clearing overall would remain constant with a for-profit CDS or that service levels would not drop for competing marketplaces. As noted above, we take as instructive the recent example in Australia where the costs to Chi-X of accessing the ASX's clearinghouse went well beyond the connection costs.

Fees to large users of depository, clearing and settlement services may remain stable given the interests of the user-owners, but the possibility remains that they may accept somewhat higher costs if mitigated by higher profits. It would be hard to argue that a for-profit clearing agency would not seek to make a profit when setting fees for connectivity and access. On the service side, the risk model and ability to ensure robust systems can only be eroded by a profit mandate. One potential unintended consequence is that the hands-off approach taken to date by the SEC to the CDS/DTCC relationship could change in the face of a shift to a for-profit clearing agency operated out of a for-profit exchange conglomerate. The impact of this would be hard to measure.

It is our view that the desire to operate CDS on a for-profit basis, when combined with other elements of the proposal by Maple, would create new incentives to use the control of clearing and settlement services to enhance the value proposition for the exchange conglomerate and its owners at the expense of the rest of the industry and, ultimately, the public. There are no measures that would avoid or adequately mitigate this. It is not encouraging that there are no undertakings in the Maple Application relating to ensuring the continued viability and fairness of CDS, such as those for TSX V, Mx and CDCC, including funding of clearing and settlement services, change of control, systems or governance.

Fees

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?

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

We reiterate that we do not believe any measures will be sufficient to address the conflicts created by the shift to a vertical model with for-profit clearing. With a profit goal, how could a competitor argue unfairness? One need look no further than the TSX's provision of its SMARS surveillance system to RS on a "cost-plus" basis to see that such arrangements can lead to added costs and constraints on innovation. In the event that the Commission was to approve the Maple Application with these elements in it, at the very least fees should be closely regulated and benchmarked not only to other for-profit clearing agencies, but to DTCC.

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.

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?

We have noted above that this is an area of significant concern. Access can be affected by inappropriately high fees, but also by the quality of service and products offered to competing marketplaces. Again, we do not believe there are measures that can be put in place to reasonably address these concerns other than not allowing CDS to become wholly owned by Maple or at least restricting it to a cost-recovery financial model.

Integration of CDS and CDCC

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

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?

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

This, in our view, is the only benefit of the incorporation of CDS into Maple. Cross-margining would lead to some efficiencies and there is a role for both clearing entities in the solution for centralized OTC clearing. However, as noted in the request for comments, there is little detail on how the combination would lead to synergies, i.e. which systems, processes or staff could be rationalized, so it is difficult to assess the amount of the benefit. We also therefore cannot assess how much of the efficiencies could be obtained through stronger connectivity and cooperation between the two if they were to remain separately owned – especially as many of their large users are the same.

There is no mention of fair access to the services of CDCC in the Maple Application. This should be a requirement, to facilitate the potential for competing derivatives markets in Canada and further protect against anti-competitive behaviour.

Market structure changes

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.

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.

Please see our general comments. Depending on the decisions made by the Commission, benchmarking may or may not be useful. We do not believe that any benchmarking against for-profit exchange/clearing silos in the rest of the world would reduce the problems created by a for-profit CDS, but some benchmarking of service levels in other areas, given the potential for monopolistic behaviour, would be helpful. We would also hope that IIROC would be vigilant in its review of the trading behaviours of the Maple members. It would be critical to ensure that Maple participants do not adopt best execution procedures that simply equate best execution with routing to marketplaces with the highest volumes, without any analysis of fill rates or costs, or they would be able – without explicit agreements – to preference the Maple exchanges and make it next to impossible for others to offer market services in Canada.

We commend Commission staff for their thorough work in drafting the request for comment.

Yours truly,

Cindy Petlock
General Counsel & Corporate Secretary

cc: Richard Carleton, Interim CEO
Rob Cook, President
Mark Faulkner, Vice President, Listings & Regulation