14 December 2018

Via E-Mail to audpublicaSDM0518@cvm.gov.br

Leonardo P. Gomes Pereira
Chairman
Comissão de Valores Mobiliários (CVM)
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Rio de Janeiro -RJ
20050-901
Brazil

Re: 1) Audiência Pública SDM nº 05/18 (Alterações na Instrução CVM nº 505); and

2) Audiência Pública SDM nº 05/18 seção 2.4 (Maior detalhamento das mídias utilizadas como meio de transmissão de ordens, novas exigências de informação cadastral e arquivamento)

Dear Mr. Pereira,

NICE and NICE Actimize (collectively "NICE") appreciates the opportunity to comment on the above-captioned proposal. NICE supports and commends the Securities and Exchange Commission of Brazil's ("CVM" or "Commission") objectives of enhancing investor protection while preserving investor access to technical, independent, fast and transparent performance, guided by ethics, efficiency, balance and legal security of decision making. We look forward to remaining constructive participants in the process and hope you find our response informative and helpful.

A. Electronic Communications are the worldwide standard in investor protection

The proposed art. 12 suggests that an intermediary should have specific archiving of data and voice records relating to the orders that have been transmitted.[1] NICE generally supports the Proposal, which meaningfully raises the bar from the current standard, and acts consistent with international requirements already imposed in the United States, the European Union, and in parts of Central America.

NICE believes that Proposed art. 12 would greatly enhance protections for market participants because it is significantly stronger than the current supervision standard and provides meaningful evidence to the existence or absence of financial crime. Additionally, NICE believes that it is appropriate to interpret art. 12 through principles-based obligations that are reasonable in light of the complexity, scope, and risks to the firm. This provides intermediary's with flexibility, as is the case with the fiduciary standard under the Investment Advisers Act of 1940 ("Advisers Act").

Similar requirements are presently mandatory for transactions in over 51% of the global market[2], therefore Brazilian firms transacting cross-border are likely already in compliance with proposed art. 12. To be clear, the implementation costs of proposed article would be impactful to some domestic firms, but necessary for the industry. That said, NICE believes that these costs could be manageable for new firms if given sufficient time to amend current legacy technologies and internal procedures. Furthermore, there are major strategic implications that could bring market opportunities and competitive advantage for those who plan in advance, or potential revenue loss for those who fail to react.

B. The European Union Acknowledges the Importance of Recording Electronic Communications alongside Trade Data

The three most significant financial regulations of Europe in the past several years are Market Abuse Regulation (MAR), the Markets in Financial Instruments Directive II (MiFID II), and the Benchmarks Regulation

[1] Audiência Pública SDM nº 05/18 seção 2.4, página 7 (30 de novembro de 2018).
[2] The World Bank, DataBank, World Development Indicators, available at *http://databank.worldbank.org/data/indicator/NY.GDP.MKTP.CD/1ff4a498/Popular-Indicators*

(BMR). As with all EU Directives and Regulations, each Act includes “recitals”. Recitals serve to set out the reasons for the contents of the enacting terms (i.e. the articles) of an act.

Each of the Acts has one recital in common – almost verbatim.

“Existing recordings of telephone conversations and data traffic records constitute crucial, and sometimes the only, evidence to detect and prove the existence of”:

- MAR – insider dealing and market manipulation.[3]
- MiFID II –market abuse as well as verify compliance by firms with investor protection.[4]
- BMR –the compliance with governance and control requirements.[5]

This was plainly a deliberate tactic by the European Parliament orchestrated to highlight the importance of holistic surveillance for all firms conducting business within the European Union. Telephone and data traffic records may establish the identity of a person responsible for the dissemination of false or misleading information or that persons have been in contact at a certain time, and that a relationship exists between two or more people engaged in market manipulation. In practice, firms that fail to supervise based on inadequate communications and data surveillance procedures run the risk of violating all three European Acts simultaneously.

MiFID II represents one of the centerpieces of financial markets reform and it is far from an incremental change. MiFID II has dramatically changed almost the entire marketplace as we know it today, with far-reaching impacts on everyone engaged in the dealing and the processing of financial instruments. For example, it is well understood that MiFID II requires the capture of more communications than ever before. Article 16(7), states, “[r]ecords shall include the recording of telephone conversations or electronic communications relating to, at least, transactions concluded when dealing on own account and the provision of client order services that relate to the reception, transmission and execution of clients orders⋯even if those conversations or communications do not result in the conclusion of such transactions or in the provision of client order services.” On its face, this section does not seem to apply to best execution principles. However, Recital 92 specifically states, “[a]dvances in technology for monitoring best execution should be considered when applying the best execution framework.”

[3] Market Abuse Regulation, Recital 65.
[4] MiFID II, Recital 144.
[5] Benchmarks Regulation, Recital 52.

Lastly, MiFID II and the Market Abuse Regulation (MAR) place a large emphasis on detecting and preventing market abuse. In its 22 May 2014 Consultation Paper, ESMA states, "market abuse is one of the most difficult offences to investigate and prosecute." Good quality recordings of voice conversations and of electronic communications can assist National Competent Authorities (NCAs) in detecting, deterring, and indicting unlawful behavior. "**Capturing relevant conversations and communications will enable NCAs to capture and deter more inappropriate behaviour which would not be in the clients' best interests.**" (emphasis added).[6]

C. The United States Started Recording as a Result of the Financial Crisis, and Extends Jurisdiction Globally

Most insider trading cases in the United States are uncovered by sophisticated computer systems that are employed by the stock exchanges and by Self-Regulatory Organizations tasked with monitoring trading. The computer systems constantly monitor volume and price movements of all publicly traded stocks, and generate alerts if an anomaly is detected – Finding the act or the 'what' of market manipulation. As noted above, evidence proving insider trading (or other market manipulations) is obtained through communication, which explains the 'why' of manipulative acts. Recent regulations embrace this principle of examining the 'what' and the 'why.'

Under U.S. Securities and Exchange Commission (SEC), CFTC, and FINRA record-retention requirements[7], firms must ensure the capture of business-related communications regardless of the devices or networks used. A firm must capture and maintain all business-related communications in such a way that the firm can review them for inappropriate business conduct. The Dodd-Frank Act (the "DFA") gives the SEC broad authority to combat fraud and corruption in the financial markets. The DFA extended the SEC's jurisdiction to 'conduct occurring outside the United States,' and the regulator has shown increasing willingness to pursue enforcement actions with substantial international dimensions.

Section 731 of the DFA amended the Commodity Exchange Act (CEA) by inserting Sections 4s(f) and 4s(g), which establish reporting, recordkeeping, and daily trading records requirements for swap dealers and major swap participants. Satisfaction of a CFTC inquiry under Dodd-Frank requires firms to maintain daily trading

[6] ESMA Consultation Paper, 22 May 2014, ESMA/2014/549.
[7] *See generally*, FINRA Rule 3120, available at http://www.finra.org/industry/supervision.

records of swaps (including related cash and forward transactions). Execution records must include all swap terms, trade tickets, unique swap identifier, a record of the date and time of execution, the name of the counterparty, the date and title of the agreement to which the swap is subject, the product name of the swap, the price at which the swap was executed, and related fees and commissions. Post-execution information includes records of post-execution processing and events including the confirmation, record of swap portfolio reconciliation and compression, ledgers reflecting payments and interest received, moneys borrowed and loaned, daily valuations, daily calculations of current and future exposure for each counterparty, daily calculation of initial and variation margin, collateral values, and charges against and credits to each counterparty's account.

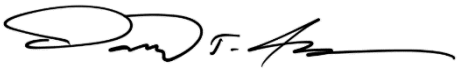
The requirements of CFTC Rule 1.35 go further and include an obligation to record all related communications, such as electronic mail, instant messages, and phone calls. The Commission reiterated in the Adopting Release that any conversation, regardless of whether it occurs on a firm-provided or personal telephone, must be recorded if the contents fall within the rule.

D. The CVM Should Provide an Adequate Implementation Period Once the Proposals are Adopted

A new standard of conduct would raise a variety of detailed practical issues for the CVM, market participants, and the financial services industry. In order to comply with these requirements, firms must develop extensive infrastructure and policies and procedures. Firms will need sufficient time to implement training programs and to build systems to comply with any standard of conduct that is adopted. Any new rule should have a reasonable effective date that allows firms to adequately prepare for its implementation. We recommend a sufficiently long implementation period to come into compliance. At the same time, as previously stated, while a sufficiently long implementation period will be necessary to ensure timely firm compliance, we are by no means suggesting that the Proposals should be delayed. To the contrary, the proposal represent an important investor protection initiative, and for that reason, the CVM should move forward without delay and proceed to final rulemaking as expeditiously as possible.

We appreciate the opportunity to comment and your consideration of our views. If you have any questions or require any additional information, please feel free to contact me at dave.ackerman@nice.com.

Sincerely,



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