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CSA Notice and Request for Comment
Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives*
Proposed Companion Policy 94-101CP *Mandatory Central Counterparty Clearing of Derivatives*

February 12, 2015

Introduction

We, the Canadian Securities Administrators are publishing for a 90-day comment period expiring on May 13, 2015:

- Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (the **Clearing Rule**), and
- Proposed Companion Policy 94-101CP *Mandatory Central Counterparty Clearing of Derivatives* (the **Clearing CP**).

Collectively, the Clearing Rule and the Clearing CP will be referred to as the "Proposed National Instrument".

We are issuing this notice to provide interim guidance and solicit comments on the Proposed National Instrument.

We would like to draw your attention to the recent publication of Proposed National Instrument 24-102 *Clearing Agency Requirements* and the January 2014 publication of CSA Staff Notice 91-304 *Model Provincial Rule – Derivatives: Customer Clearing and Protection of Customer Collateral and Positions.* These publications, including the Proposed National Instrument, relate to central counterparty clearing and we therefore invite the public to consider these publications comprehensively.

Background

On December 19, 2013, the OTC Derivatives Committee (the **Committee**) published CSA Notice 91-303 *Proposed Model Provincial Rule on Mandatory Central Counterparty Clearing of Derivatives* (the **Draft Model Rule**). The Committee invited public comments on all aspects of the Draft Model Rule. Thirty-four comment letters were received. A list of those who submitted comments, as well as a chart summarizing the comments received and the Committee's responses are attached in Appendix A to this Notice. Copies of the comment letters can be found at http://www.lautorite.qc.ca/en/previous-consultations-derivatives-conso.html.

The Committee has reviewed the comments received and made determinations on revisions to the Draft Model Rule, which has been transformed into the Proposed National Instrument for the purpose of adopting a harmonized instrument across Canada.

A few modifications were made since the last publication, such as including the Bank for International Settlements in the non-application section as well as deleting the requirements for an approval from the board of directors and the agency relationship from the end-user exemption.

The Committee will review all comment letters on the Proposed National Instrument to make recommendations on changes at a Committee level.

Substance and Purpose of the Proposed National Instrument

The purpose of the Clearing Rule is to propose mandatory central counterparty clearing of certain standardized over-the-counter (**OTC**) derivatives transactions, in order to improve transparency in the derivatives market and enhance the overall mitigation of systemic risk.

The Clearing Rule is divided into two rule-making areas: (i) rules relating to mandatory central counterparty clearing for certain derivatives (including proposed end-user and intragroup exemptions), and (ii) rules relating to the determination of derivatives subject to mandatory central counterparty clearing (each a mandatory clearable derivative).

Summary of the Clearing Rule

a) Mandatory central counterparty clearing and end-user and intragroup exemptions

The Clearing Rule provides that a local counterparty to a transaction in a mandatory clearable derivative must submit that transaction for clearing to a regulated clearing agency.

The Clearing Rule provides substituted compliance for transactions involving a local counterparty where the transaction is submitted for clearing pursuant to the laws of a jurisdiction of Canada other than the jurisdiction of the local counterparty or pursuant to the laws of a foreign jurisdiction listed in Appendix B or, in Québec, that appears on a list to that effect. It also provides substituted compliance for a local counterparty in a reliant jurisdiction if the transaction is submitted for clearing to a clearing agency or a clearing house that is recognized or exempted from recognition pursuant to the securities legislation of another jurisdiction of Canada.

Two exemptions to the clearing requirement are provided in the Clearing Rule. The proposed end-user exemption applies when at least one of the counterparties is not a financial entity, as defined in the Clearing Rule, and the counterparty that is not a financial entity is entering into the transaction to hedge or mitigate a commercial risk. The Clearing Rule provides an interpretation of hedging or mitigating commercial risk. There is no requirement to apply for the end-user exemption or to submit any documents to the regulator in order to rely on the exemption.

The proposed intragroup exemption applies, subject to conditions provided in the

Clearing Rule, where affiliated entities or counterparties prudentially supervised on a consolidated basis enter into a transaction in a mandatory clearable derivative. A counterparty relying on the intragroup exemption must submit a form to the regulator, identifying the other counterparty and the basis for relying on the exemption.

A counterparty relying on either exemption must document and maintain records to demonstrate its eligibility to rely on the exemption.

b) Determination of mandatory clearable derivatives

A regulated clearing agency is required to notify the regulator of all OTC derivatives or classes of OTC derivatives:

- for which it provides clearing services as of the date of the coming into force of the Clearing Rule, and
- for which it provides clearing services after the date of the coming into force of the Clearing Rule.

After receiving notification by the clearing agency, the regulators will determine whether such cleared derivative or class of derivatives should be made a mandatory clearable derivative.

Our goal is to harmonize, to the greatest extent appropriate, the determination of mandatory clearable derivatives or classes of derivatives across Canada and with international standards.

The Committee is contributing to the work carried out by the OTC Derivative Regulators Group (**ODRG**), which is composed of executives and senior representatives from OTC derivatives regulators in Australia, Brazil, Ontario, Québec, the European Union, Hong Kong, Japan, Singapore, Switzerland and the United States. The Committee's goal is to harmonize the determination process in Canada with the relevant international standards on clearing determinations,[1] which provide for: 1) a framework for consultation among authorities on mandatory clearing determinations, and 2) where practicable, an expeditious review of derivatives that are subject to a mandatory clearing determination in another jurisdiction.

As part of the determination process, we will publish for comment the derivatives we propose to be mandatory clearable derivatives and invite interested persons to make representations in writing. Except in Québec, the determination process is expected to follow our typical rule-making or regulation making process. The list of mandatory clearable derivatives will be included in the Clearing Rule as Appendix A, as amended from time to time. In Québec, the determination process will be made by decision and the

[1] This framework is founded on IOSCO recommendations and aims to harmonize mandatory clearing determinations across jurisdictions to the extent practicable and where appropriate, subject to jurisdictions' determination procedures. *See IOSCO Report on Requirements for Mandatory Clearing* (February 2012), available at: http://www.iosco.org/library/pubdocs/pdf/IOSCOPD374.pdf

list of mandatory clearable derivatives will appear on a public register kept by the Autorité des marchés financiers.

In assessing whether a derivative or class of derivatives should be a mandatory clearable derivative, we anticipate considering various factors including the standardization of a derivative or class of derivatives, its risk profile, and the liquidity and characteristics of its market in determining whether the derivative or class of derivatives is appropriate for mandatory central counterparty clearing. It is anticipated that derivatives transaction data reported pursuant to local derivatives data reporting rules[2] will provide key information in the determination process.

c) Phase-in of the requirement to clear a mandatory clearable derivative

We expect to follow a phase-in approach with respect to the clearing requirement which would be consistent with the approach taken by the United States and the European Union, and which has been proposed in Australia.

More specifically, we anticipate that the requirement to clear a derivative or class of derivatives that has been determined to be a mandatory clearable derivative would be phased-in across different categories of market participants. Clearing members of a regulated clearing agency that provides clearing for the mandatory clearable derivative at the time its determination becomes effective would be subject to the clearing requirement in the first phase-in category. The second phase-in category would include financial entities above a specified (yet to be determined) threshold. The third phase-in category would include all other financial entities. The fourth and final phase-in category would include all counterparties that are not financial entities.

We are considering granting a cumulative 6-month grace period to each phase-in category except the first category. Hence, counterparties that are not financial entities would benefit from an 18-month grace period after the date the determination becomes effective for the first phase-in category. The Committee asks market participants to comment on an appropriate basis and value for the threshold that would determine whether a financial institution should be included in the second or third phase-in category; that is, whether the requirement to submit for clearing a transaction in a mandatory clearable derivative that involves a local counterparty should apply at 6 months or 12 months after the date on which the determination becomes effective. Is average monthly aggregate gross notional outstanding value an appropriate basis for the threshold? If so what time period should be used, for example the last 3 months preceding the determination?

[2] *Regulation 91-507 respecting Trade Repositories and Derivatives Data Reporting* (Québec); Ontario Securities Commission Rule 91-507 *Trade Repositories and Derivatives Data Reporting*; Manitoba Securities Commission Rule 91-507 *Trade Repositories and Derivatives Data Reporting*; and, once implemented, Proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* (collectively, the **TR Rules**).

Anticipated Costs and Benefits

We believe that the impact of the Clearing Rule, including anticipated compliance costs for market participants, is proportional to the benefits we seek to achieve. Greater transparency in the OTC derivatives market is one of the central pillars of derivatives regulatory reform in Canada and internationally. The G20 has agreed that requiring standardized and sufficiently liquid OTC derivatives transactions to be cleared through central counterparties, where appropriate, will result in more effective management of counterparty credit risk. In addition, central counterparty clearing of derivatives may also contribute to greater stability of our financial markets and to a reduction in systemic risk.

We recognize that counterparties will incur additional costs in order to comply with the Clearing Rule. The primary expenditure associated with the proposed Clearing Rule is the cost of clearing transactions. However, we note that the G20 has also committed to impose capital and collateral requirements on OTC derivative transactions that are not centrally cleared; the related costs may well exceed the costs associated with clearing OTC derivatives transactions. The end-user and intragroup exemptions in the Clearing Rule will help mitigate the initial costs associated with the clearing of OTC derivative transactions. Moreover, the proposed phase-in of the clearing requirement for a mandatory clearable derivative will provide temporary relief for market participants that are not financial entities and smaller or less active financial entities. We note that the phase-in approach of the clearing requirement will allow the local provincial regulators to provide more clarity on the developing derivatives registration regime, and to use trade repository data to investigate whether thresholds or carve-outs are appropriate for certain types of entities.

Contents of Annexes

The following annexes form part of this CSA Notice:

- Annex A – Summary of Comments and List of Commenters;
- Annex B – Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives*; and
- Annex C – Proposed Companion Policy 94-101 *Mandatory Central Counterparty Clearing of Derivatives*.

Comments

Please provide your comments in writing by **May 13, 2015**.

We cannot keep submissions confidential because securities legislation in certain provinces requires publication of a summary of the written comments received during the comment period. In addition, all comments received will be posted on the websites of each of the Alberta Securities Commission at www.albertasecurities.com, the *Autorité des marchés financiers* at www.lautorite.qc.ca and the Ontario Securities Commission at www.osc.gov.on.ca. Therefore, you should not include personal information directly in

comments to be published. It is important that you state on whose behalf you are making the submission.

Thank you in advance for your comments.

Please address your comments to each of the following:

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Ontario Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

Please send your comments **only** to the following addresses. Your comments will be forwarded to the remaining jurisdictions:

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Questions

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ANNEX A

COMMENT SUMMARY AND CSA RESPONSES

Section Reference	Issue/Comment	Response
General Comments	Harmonization A number of commenters raised concerns about a possible lack of harmonization across provinces in the implementation of the Clearing Rule and in the determination of derivatives to be subject to mandatory clearing.	Change made. We note that the Committee has now opted to develop a national instrument, given its intention that the substance of the rules be the same across jurisdictions, and that market participants and derivative products will receive the same treatment across Canada, both in terms of participants (similar exemptions) and of products (same determinations) included. See *Determination of mandatory clearable derivatives* above.
	Implementation A commenter requested greater clarity regarding the intended timing of implementation and application of the Clearing Rule. Another commenter recommended that the local provincial regulators give sufficient time to counterparties to get set up with their clearing intermediaries and agents.	No change. The committee would like to see the rule in place by Q4 2015 or Q1 2016. We note that a requirement to clear would not be triggered until a proposed determination has been published for comment and a final determination made. See *Phase-in of the requirement to clear a mandatory clearable derivative* above.
	Determination Four commenters were concerned about the harmonization, within Canada and at the international level, of derivatives subject to mandatory clearing. Three commenters proposed a joint determination process for the local provincial regulators. Three commenters suggested types or classes of derivatives that should or should not be mandated for clearing, and one	No change. See *Determination of mandatory clearable derivatives* above. We also note that the existence of master agreements or short form confirmations is a factor considered in evaluating the level of standardization of a derivative.

	commenter discussed additional factors to consider when making a determination. Two commenters suggested that a "top-down approach" whereby local provincial regulators assess what types of products and transactions contribute to systemic risk in the market and determine, based on their analysis, that certain products are "clearable derivatives", should be considered in addition to the bottom-up approach. Another commenter supported an approach whereby a regulator cannot mandate that a clearing agency clears a particular clearable derivative. Finally, five commenters requested that regulators provide advance notice or mandatory consultations with the industry before mandating a derivative or class of derivatives for clearing.	
	<u>Scope</u> A commenter submitted that OTC derivative transactions involving physical commodities such as OTC natural gas commodity hedging transactions should not be classified as derivatives per the Draft Model Rule's definitions and therefore should not be subject to the pending derivatives legislation.	No change. We note that it is the intention of the Committee that the determinations to be made will not include derivatives that are outside the scope of the local *Derivatives: Product Determination*[3] rules.
S. 1 – Definitions: Local Counterparty	A commenter pointed out that the local counterparty definition in TR Rules differs from the local counterparty definition in the Draft Model Rule.	No change. We note that the inclusion of registrants in the local counterparty definition of the Clearing Rule would result in requiring foreign registrants to

[3] Manitoba Securities Commission Rule 91-506 *Derivatives: Product Determination*, Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination*, Québec *Regulation 91-506 Respecting Derivatives Determination* and Proposed Multilateral Instrument 91-101 *Derivatives: Product Determination* (the **Scope Rules**).

		clear even when there is no local counterparties involved in a transaction.
	A number of commenters requested additional guidance on concepts such as "head office", "principal place of business" and "affiliate" or, more specifically, what is meant by "responsible for the liabilities of that affiliated party". Another commenter suggested cross-referencing the definition of local counterparty found in the Policy Statement of the TR Rules.	No change. We note that these are longstanding legal concepts.
	A commenter pointed out that the definition of local counterparty brings into the clearing requirements numerous counterparties that conduct no business and, in particular, do not carry out any derivative trading activities in Canada, such as companies organized under a province law but which have no actual presence or business in Canada.	No change. We note that a local provincial regulator may exempt entities or groups of entities in its jurisdiction.
S. 1 – Definitions: Financial Entity	A commenter pointed out that former paragraph 1(g) reference to former paragraph 1(f) would capture any entity anywhere in the world that might potentially be subject to registration as a derivatives dealer in Canada. The practical effect of this is that any such party transacting with a local counterparty that is itself a financial entity may be subject to mandatory clearing requirements in Canada regardless of whether the transaction is eligible for a clearing exemption in such party's own jurisdiction. Another commenter suggested that a local counterparty has	No change. See *Determination of mandatory clearable derivatives* above. We note that the local provincial regulators intend to adopt a "stricter rule applies" principle in case of cross-border discrepancies. As a result, when a foreign party transacts with a local counterparty in a derivative that is subject to mandatory clearing under the Clearing Rule, the transaction must be cleared even if an exemption exists in the foreign party's jurisdiction. We also note that the Committee continues to monitor the development of cross-border guidance with respect to

	satisfied its clearing requirement in respect of a transaction if the counterparty to that transaction is not a local counterparty and, if under the applicable laws of the foreign jurisdiction, such transaction is exempt from clearing because the counterparty qualifies for an exemption.	substituted compliance on clearing requirements.
	A number of commenters have requested more clarity on the upcoming registration regime, or to wait until the regime is in place before mandating derivatives to be cleared. Moreover, a number of commenters expressed concern with the inclusion of certain entities in the definition of financial entity, such as pension funds, investment funds (mortgage investment entities, private equity funds and venture capital funds) and entities registered or exempt from registration.	No change. See *Phase-in of the requirement to clear a mandatory clearable derivative* above. We note that the phase-in approach to the clearing requirement will allow the local provincial regulators to provide more clarity on the developing derivatives registration regime, and to use trade repository data to investigate whether thresholds or carve-outs are appropriate for certain types of entities.
	A commenter suggested that, in former paragraph (g), reference should also be made to entities that would be regulated "or exempted from regulation" under the applicable legislation of Canada or the applicable local jurisdiction to conform to former paragraph (f). The commenter further suggested that the statement "had it been organized in Canada or the applicable local jurisdiction" is not necessary.	Change made. See revised section 1. We note that entities exempted from registration are included in the financial entity definition. See *Phase-in of the requirement to clear a mandatory clearable derivative* above.
S. 1 – Definitions: Transaction	Three commenters proposed that trades which reduce risk, such as compression replacement trades, terminations, compression amended trades (partial unwinds) and certain risk rebalancing	No change. We note that the Committee will continue to monitor international regulatory developments with regards to trade compression.

	trades resulting from post-trade risk reduction services should not trigger the clearing requirement.	
	A commenter pointed out that it would be beneficial to have an objective test to determine what is considered to be a "large change".	No change. We note that the Committee considers that the proposed approach provides flexibility as an entity should be able to establish subjectively whether a transaction was amended with the sole purpose of avoiding the central clearing requirement.
Former S. 3 – Interpretation of hedge or mitigation of commercial risk	A number of commenters have requested additional guidance on the concepts of "hedging" and "mitigating commercial risk", and how these differ from "speculation". Commenters also suggested that the Committee adopt a flexible approach to these concepts given the wide variety of derivatives, potential end-users, and hedging strategies to which the Clearing Rule will apply. Another commenter encouraged the recognition of derivatives, which satisfy the requirements under IFRS or U.S. GAAP to be accounted for as hedges, as being held for the purpose of hedging or mitigating commercial risk.	No change. We note that the Committee considers that the proposed approach provides flexibility and legal certainty, and that the Clearing CP provides sufficient guidance on the concepts of "hedging" and "mitigating commercial risk". Additional guidance may be published once compliance with the Clearing Rule is assessed. We also note that hedges meeting the stricter accounting standards should be sufficient to meet the conditions of the end-user exemption.
	A number of commenters requested additional or revised guidance with regards to the interpretation of commercial risk or a definition for the terms "closely correlated" and "highly effective".	Changes made. See revised section 4 on Interpretation of hedge or mitigation of commercial risk.
	A number of commenters pointed out that the list of risks in former paragraphs 3(a)(i) and (ii) may not be exhaustive.	Changes made. We note that the amendments brought to paragraphs 4(1)(a) and (b) are consistent with the definition of Derivatives in the *Securities Act* (Ontario).

	A commenter suggested that the addition of "incurring in the normal course of its business" at the end of former paragraph 3(a)(i) may be problematic as companies develop new risk management strategies as they enter into new lines of business and new commercial arrangements.	No change. We note that new activities occur in the normal course of business. Entities can therefore use the end-user exemption as long as the conditions are met.
	Two commenters stated that they enter into commodity derivatives trading with their customers as part of their core business and are required to hedge these transactions. However, given that the transactions with their customers are not held for the purpose of hedging or mitigating commercial risk, they cannot benefit from the end-user exemption (see former paragraph 3(b)(ii)). They argued that former paragraph 3(b)(ii) should be modified so that the ineligibility applies only where the party concerned is hedging in its capacity as an intermediary or market-maker in derivatives, rather than hedging to mitigate a commercial risk of another kind.	No change. We note that the end-user exemption specifically targets transactions that are entered into to hedge or mitigate a commercial risk incurred by an eligible entity.
Former subsection 4(1) – Duty to submit for clearing	Two commenters pointed out that there may not be sufficient time to clear a transaction before the end of the day if that transaction is executed shortly before the clearing agency closes.	No change. We note that this issue should not materialize where straight-through processing is implemented. The Committee will monitor the implementation of the rule and may provide further guidance if needed.
	A commenter pointed out that technically, the "transaction" is not submitted for clearing. If the transaction has the required features, then the clearer submits the deal terms and a new transaction with the clearing	No change. We note that the Committee believes that the Clearing Rule provides sufficient clarity as currently drafted.

	agency is created. The contract between the original parties no longer exists.	
Former subsection 4(2) – Duty to submit for clearing: substituted compliance	Two commenters suggested to broaden the concept of substituted compliance such that the clearing requirement would be satisfied if the transaction was submitted for clearing, pursuant to the laws of another Canadian jurisdiction or the laws of an approved foreign jurisdiction, to a clearing agency recognized in that jurisdiction.	Partial change made. Substituted compliance was added for a local counterparty in a reliant jurisdiction if the transaction is submitted for clearing to a regulated clearing agency of another jurisdiction of Canada. See *Determination of mandatory clearable derivatives* above. We note that the Committee continues to monitor the development of cross-border guidance with respect to substituted compliance on clearing requirements.
Former S. 5 – Notification	Three commenters were concerned with the operational consequences of considering a transaction to be void *ab initio* if it is rejected for clearing by the clearing agency.	Changes made. See revised Section 7 of the Policy Statement. The guidance now refers to the rules of the clearing agencies and to the legal arrangements governing indirect clearing in place with regards to the rejection of transactions.
Former S. 7 – End-user exemption	A number of commenters pointed out that the end-user exemption should not require a formal agency relationship.	Change made. The reference to "agent" has been removed from former paragraph 7(2)(a).
	A number of commenters requested precisions on the end-user exemption: • Are both the end-user exemption and the intragroup exemption available for intragroup transactions? • Can an entity self-exempt on the basis that it is not a financial entity and is undertaking transactions to hedge or mitigate risk? • In the event that both counterparties are not financial entities, is it	No change. We note that: • Both the end-user exemption and the intragroup exemption are available for intragroup transactions unless the entity seeking exemption is a financial entity (cannot use the end-user exemption). • It is the responsibility of the entity seeking to be exempted to determine whether the exemption applies to its transactions.

	sufficient that only one party satisfies the requirement under former paragraph 7(1)(b)?	• In the event that both counterparties are not financial entities, it is sufficient that only one party satisfies the requirement under paragraph 9(1)(b).
	A number of commenters have requested that the end-user exemption be available to small financial entities (including credit unions, captive financial companies, registered dealers and registered portfolio managers) that fall below a threshold coherent with the size of the Canadian OTC derivatives market. Moreover, a commenter suggested allowing registered dealers to exercise the end-user exemption when hedging the risk of their affiliates, as long as such affiliates would qualify to exercise the end-user exemption on their own.	No change. See *Phase-in of the requirement to clear a mandatory clearable derivative* above. We note that the phase-in approach of the clearing requirement will allow the local provincial regulators to provide more clarity on the developing derivatives registration regime, and to use trade repository data to investigate whether thresholds or carve-outs are appropriate for certain types of entities, such as credit unions.
	A commenter stated that former paragraph 7(2)(c) should refer to an affiliated entity that is not subject to a registration requirement, or that is exempted from a registration requirement, under the securities legislation of a jurisdiction of Canada. Failing to include all exempt entities on a general basis may prevent access to the exemption even where there the policy rationale underlying the Draft Model Rule does not support it.	Change made. See revised paragraph 9(2)(c).
	A commenter proposed to add "at least" prior to "one of the counterparties is not a financial entity" to make it clear that the end-user exemption is also	Changes made. See revised paragraph 9(2)(a).

	available to two parties if neither of them is a financial entity.	
Former S. 8 – Intragroup exemption	Two commenters questioned the necessity of Form F1 in the context of securities regulation. A commenter suggested that the intragroup exemption be simplified such that transactions between 100% owned affiliates are exempt as long as certain conditions are met without the need for additional agreements or forms. Three commenters proposed that a Form F1 should be effective until withdrawn, unless updates or notifications of change to the originally filed form are submitted. Two other commenters requested that parties should be permitted to provide a listing of all types of transactions in a particular sub-asset class expected between them.	Change made. We note that the Committee believes that Form F1 is necessary in all cases, even for 100% owned affiliates. We note, however, that the annual filing requirement has been removed and replaced with a requirement to amend the original filing with a notification of material change.
	A commenter asked whether "prudentially supervised" is intended to refer to federally-regulated financial entities that are under the regulatory jurisdiction of the Office of the Superintendent of Financial Institutions.	No change. We note that "entities prudentially supervised on a consolidated basis" refers to two counterparties that are supervised on a consolidated basis either by the Office of the Superintendent of Financial Institutions (Canada), a government department or a regulatory authority of Canada or a jurisdiction of Canada responsible for regulating deposit-taking institutions.
	Two commenters suggested that the requirement that the entities prepare statements on a consolidated basis is not necessary and may unduly exclude affiliated entities that should otherwise properly be	No change. We note that the former paragraph 8(1)(b) is sufficiently broad to allow entities which do not prepare financial statements on a consolidated basis to rely on the Intragroup exemption.

	able to rely on the exemption. They suggested the adoption of the securities laws' "affiliate" definition.	
	A commenter suggested that transactions between credit unions and their centrals should benefit from the intragroup exemption.	No change. We note that the proposed phase-in of the clearing requirement provides temporary relief for credit unions and their centrals. The proposed phase-in of the clearing requirement will also allow the local provincial regulators to use trade repository data to investigate whether thresholds or carve-outs are appropriate for certain types of entities.
	A commenter pointed out that the documentation related to the intragroup exemption should be flexible and should refer to the CFTC and EMIR rules on the matter.	No change. We note that the Committee has reviewed the CFTC and EMIR rules on the matter and believes the Clearing Rule provides sufficient flexibility.
	A commenter suggested that it should be clarified that reference to "securities legislation of a jurisdiction of Canada" includes commodity futures and derivatives legislation.	No change. We note that "securities legislation" is defined in NI 14-101 and includes in Québec the *Derivatives Act*. In other jurisdictions, the relevant *Securities Act* applies. We further note that it is the intention of the Committee to respect the Scope Rules in the determinations to be made.
	A commenter would like confirmation that the intragroup exemption is available to registered dealers as long as they satisfy the necessary criteria.	No change. We note that the intragroup exemption applies to registered dealers as long as the criteria provided by the exemption are met.
	A commenter proposed that former paragraph 8(2)(c) could be shortened to simply stipulate the requirement for a written agreement setting out the terms of the transaction between the counterparties.	Changes made. See revised paragraph 10(2)(c).

Former S. 9 – Improper use of exemption	Three commenters requested clarification on how the local provincial regulators would determine that an entity has improperly used an exemption, and on the process by which the local provincial regulators would direct a local counterparty to submit a transaction for clearing under section 4.	Changes made. Former section 9 on Improper use of exemption has been removed as local regulators have the legal powers to enforce regulations.
Former S. 9 – Record keeping	A commenter pointed out that a party to an OTC derivatives transaction should be able to rely on representations made by the other party, without any further investigation or documentation, in order to determine whether the clearing requirement applies.	Changes made. See additional guidance included in Section 11 of the Clearing CP. We note, however, that certain conditions must be met for a local counterparty to rely on factual representations by the other counterparty.
	A commenter pointed out that, with respect to the requirement in former subsection 9(1) and specifically with respect to the Intragroup exemption, it should be sufficient that the records are kept by one of the "intragroup" parties.	No change. We note that it is not expected that documents or legal opinions be kept by each counterparty; however, both counterparties must be able to make copies of these agreements available to the regulator upon request.
	Three commenters questioned the necessity to obtain board approval for qualifying for the end-user exemption. A commenter suggested that a board of directors should be required to authorize the use of the end-user exemption no more than annually and requested that the CSA permit lower-tier entities to rely upon authorization from the board of directors of a higher-tier affiliate to exercise the exemption.	Changes made. See revised paragraph 11(1). End-users will not be required to obtain board approval in order to qualify for the end-user exemption.
	A number of commenters requested additional guidance and questioned the level of detail required as supporting documentation with respect to	No change. We note that hedge-accounting compliant record-keeping is not a requirement for all hedging derivatives under the Clearing Rule. However, hedges

	each transaction for which the end-user exemption will be relied upon. They also expressed the opinion that it imposed a heavy regulatory burden on participants using this exemption. Notably, a number of commenters requested guidance on how the Committee requires entities to assess or document their hedging effectiveness.	meeting the stricter accounting standards should be sufficient to meet the conditions of the end-user exemption.
Former S. 10– Non-Application	Two commenters requested that the non-application be extended to foreign governments, entities owned by foreign governments and recognized supra-national agencies, such as the International Monetary Fund.	Change made. See amendments made to section 6 on Non-Application. We note that non-application has not been extended to recognized supra-national agencies. The Committee expects to receive exemption requests from these entities.
	A commenter requested that the non-application should be extended to entities wholly owned by a federal, or provincial government, **or** to entities whose obligations are guaranteed by a federal or provincial government. Another commenter proposed that the non-application should be extended when a crown corporation or other corporation owned by the government is an agent of the Crown without a guarantee being in place. Another commenter argued that government-related entities that are also agents of the Crown should be granted the same immunity through former section 10 as government.	No change. We note that in the case of entities wholly owned by the government of Canada, a government of a jurisdiction of Canada or a government of a foreign jurisdiction, the non-application is only extended to those entities whose obligations are guaranteed, respectively, by the government of Canada, a government of a jurisdiction of Canada or a government of a foreign jurisdiction.
	A number of commenters were opposed to the non-application of the Draft Model Rule to federal and provincial governments and to government entities. A commenter suggested limiting	No change. We note that the local provincial regulators retain the right to modify the applicability of all exemptions and may register certain entities given the size of their activities.

	the application of former section 10 only to those government entities whose OTC derivatives portfolios are not in excess of a certain threshold.	
Former S. 12 – Transition	Two commenters suggested that parties should not have to clear transactions entered into before the coming into force of this rule if they are "materially amended" as this requirement may deter parties from making amendments for legitimate purposes. Two commenters requested confirmation that the end-user and intragroup exemptions will apply to Material Changes.	No change. See the interpretation of material amendment in the Clearing CP. We note that the end-user and intragroup exemptions will apply to material amendments.
	A commenter suggested that an objective test would be beneficial to determine whether an amendment is material.	No change. We note that the Committee considers that the proposed approach provides flexibility as an entity should be able to establish whether a transaction was amended materially. Guidance on material amendments is provided in the Clearing CP.
Form F1	A commenter requested that the word "application" be removed from section 3 of the form. A commenter asked whether this information will be accessible to the public.	Changes made. We note that Form F1 is a notice filing and not an application.
Form F2	A commenter requested that the access given to regulators be limited to "applicable" books and records.	Changes made. See revised Form F2.

List of Commenters

1. Atlantic Central
2. Bruce Power L.P.
3. Caisse de dépôt et placement du Québec
4. Canadian Bankers Association
5. Canadian Commercial Energy Working Group submitted by Sutherland Asbill & Brennan LLP
6. CanadianLife and Health Insurance Association Inc.
7. Capital Power
8. Central 1
9. Canadian Market Infrastructure Committee
10. Concentra Financial
11. Enbridge Inc.
12. Encana Corporation
13. Énergie NB Power
14. Financial Institutions Commission
15. Ford Motor Company
16. FortisBC Energy Inc.
17. Global Foreign Exchange Division
18. IGM Financial Inc.
19. International Swaps and Derivatives Association
20. Investment Industry Association of Canada
21. Just Energy Group Inc.
22. KfW Bankengruppe
23. LCH.ClearnetGroup Limited
24. New Brunswick Investment Management Corporation
25. Pension Investment Association of Canada
26. Sask Energy Incorporated
27. Sask Power
28. Shell Trading
29. Stewart McKelvey
30. Suncor Energy Inc.
31. TMX Group Limited
32. Trans Canada Corporation
33. Tri Optima AB
34. Western Union Business Solutions

ANNEX B

PROPOSED NATIONAL INSTRUMENT 94-101
MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES

PART 1
DEFINITIONS AND INTERPRETATION

Definitions

1. In this Instrument,

"financial entity" means any of the following:

(a) an association governed by the *Cooperative Credit Associations Act* (Canada) or a central cooperative credit society for which an order has been made under subsection 473(1) of that Act;

(b) a bank, loan corporation, loan company, trust company, trust corporation, insurance company, treasury branch, credit union, caisse populaire, financial services cooperative, or league that, in each case, is authorized by an enactment of Canada or a jurisdiction of Canada to carry on business in Canada or a jurisdiction of Canada;

(c) a pension fund that is regulated by either the Office of the Superintendent of Financial Institutions (Canada) or a pension commission or similar regulatory authority of a jurisdiction of Canada;

(d) an investment fund;

(e) a person or company, other than an individual, that under the securities legislation of a jurisdiction of Canada is any of the following:

(i) subject to the registration requirement;

(ii) registered;

(iii) exempted from the registration requirement;

(f) a person or company organized under the laws of a foreign jurisdiction that is similar to an entity referred to in any of paragraphs (a) to (e);

"local counterparty" means a counterparty to a transaction if, at the time of execution of the transaction, either of the following applies:

(a) the counterparty is a person or company to which one or more of the following apply:

(i) it is organized under the laws of the local jurisdiction;

(ii) its head office is in the local jurisdiction;

(iii) its principal place of business is in the local jurisdiction;

(b) the counterparty is an affiliated entity of a person or company referred to in paragraph (a) and the person or company is responsible for the liabilities of the counterparty;

"mandatory clearable derivative" means,

(a) except in Québec, a derivative or a class of derivatives listed in Appendix A, and

(b) in Québec, a derivative or a class of derivatives that is determined by the Autorité des marchés financiers to be subject to the clearing requirement;

"transaction" means either of the following:

(a) entering into, materially amending, assigning, acquiring or disposing of a derivative;

(b) the novation of a derivative, other than a novation resulting from submitting the derivative to a regulated clearing agency;

"regulated clearing agency" means,

(a) except in Québec, a person or company recognized or exempted from recognition as a clearing agency in the local jurisdiction, and

(b) in Québec, a person recognized or exempted from recognition as a clearing house.

Application – Québec

2. In Québec, this Instrument applies to derivatives that are not traded on an exchange and to derivatives that are traded on a derivatives trading facility.

Interpretation of the term affiliated entity

3. (1) In this Instrument, a company will be deemed to be an affiliated entity of another company if one of them is the subsidiary of the other or if both are

subsidiaries of the same company or if each of them is controlled by the same person or company.

(2) In this section, a company will be deemed to be controlled by another person or company or by two or more companies if

(a) voting securities of the first-mentioned company carrying more than 50 per cent of the votes for the election of directors are held, otherwise than by way of security only, by or for the benefit of the other person or company or by or for the benefit of the other companies, and

(b) the votes carried by such securities are entitled, if exercised, to elect a majority of the board of directors of the first-mentioned company.

(3) In this section, a company will be deemed to be a subsidiary of another company if one of the following applies:

(a) it is controlled by,

(i) that other,

(ii) that other and one or more companies each of which is controlled by that other, or

(iii) two or more companies each of which is controlled by that other;

(b) it is a subsidiary of a company that is that other's subsidiary.

Interpretation of hedging or mitigating commercial risk

4. (1) In this Instrument, a counterparty's transaction is considered to be for the purpose of hedging or mitigating commercial risk if, at the time of the transaction, the transaction establishes a position which is intended to reduce risk relating to the commercial activity or treasury financing activity of the counterparty or of an affiliated entity of the counterparty and either of the following apply:

(a) that derivative covers risk arising from the change in the value, price, rate or level of assets, services, inputs, products, commodities or liabilities that the counterparty or an affiliated entity of the counterparty owns, produces, manufactures, processes, provides, purchases, merchandises, leases, sells or incurs or reasonably anticipates owning, producing, manufacturing, processing, providing, purchasing, merchandising, leasing, selling or incurring in the normal course of its business;

(b) that derivative covers the risk arising from the indirect impact on the value, price, rate or level of assets, services, inputs, products, commodities or liabilities referred to in paragraph (a), resulting from fluctuation of one or more interest rates, inflation rates, foreign exchange rates or credit risk;

(2) Despite subsection (1), a counterparty's transaction is not considered to be for the purpose of hedging or mitigating commercial risk if the position referred to in subsection (1) is held for either of the following purposes:

(a) to speculate;

(b) to offset or reduce the risk of another transaction, unless such position is itself held for the purpose of hedging or mitigating commercial risk.

PART 2
MANDATORY CENTRAL COUNTERPARTY CLEARING

Duty to submit for clearing

5. (1) A local counterparty to a transaction in a mandatory clearable derivative must submit, or cause to be submitted, that transaction for clearing to a regulated clearing agency that provides clearing services for that mandatory clearable derivative.

(2) A local counterparty submitting a transaction for clearing under subsection (1) must submit the transaction in accordance with the rules of the regulated clearing agency, as amended from time to time.

(3) A local counterparty must submit a transaction for clearing under subsection (1) not later than

(a) if the transaction is executed during the business hours of the regulated clearing agency, the end of the day of execution, or

(b) if the transaction is executed after the business hours of the regulated clearing agency, the end of the next business day.

(4) In Newfoundland and Labrador, the Northwest Territories, Nunavut, Prince Edward Island and Yukon, a local counterparty satisfies subsection (1) if the transaction in a mandatory clearable derivative is submitted for clearing, or caused to be submitted, to a clearing agency or clearing house that is recognized or exempted from recognition pursuant to the securities legislation of another jurisdiction of Canada.

(5) A local counterparty that is a local counterparty solely under paragraph (b) of the definition of local counterparty satisfies subsection (1) with respect to a transaction if the transaction is submitted for clearing in accordance with the laws of a foreign jurisdiction that

(a) except in Québec, is listed in Appendix B, and

(b) in Québec, appears on a list determined by the Autorité des marchés financiers.

Non-application

6. Section 5 does not apply to a transaction if any of the counterparties is one of the following:

(a) the government of Canada, the government of a jurisdiction of Canada or the government of a foreign jurisdiction;

(b) a crown corporation whose obligations are guaranteed by the government of the jurisdiction in which the crown corporation was constituted;

(c) an entity wholly owned by a government referred to in paragraph (a) whose obligations are guaranteed by that government;

(d) the Bank of Canada or a central bank of a foreign jurisdiction;

(e) the Bank for International Settlements.

Notice of rejection

7. If a regulated clearing agency rejects a transaction submitted to it for clearing, the regulated clearing agency must immediately notify each local counterparty to the transaction.

Public disclosure of clearable and mandatory clearable derivatives

8. A regulated clearing agency must publicly disclose on its website, and must allow access to that website at no cost to the public, a list of all derivatives or classes of derivatives for which it will provide clearing services and, for each derivative or class of derivatives listed, identify whether it is a mandatory clearable derivative.

PART 3
EXEMPTIONS AND APPLICATION

End-user exemption

9. (1) Section 5 does not apply to a transaction if both of the following apply:

(a) at least one of the counterparties to the transaction is not a financial entity;

(b) a counterparty that is not a financial entity is entering into the transaction for the purpose of hedging or mitigating commercial risk.

(2) Section 5 does not apply to a transaction entered into by an affiliated entity of a counterparty that is not a financial entity if all of the following apply:

(a) the affiliated entity is acting on behalf of the counterparty that is not a financial entity;

(b) the transaction is entered into for the purpose of hedging or mitigating commercial risk;

(c) the affiliated entity is not subject to, registered under or exempted from the registration requirement under the securities legislation of a jurisdiction of Canada.

Intragroup exemption

10. (1) In this section, "intragroup transaction" means a transaction between either of the following:

(a) two counterparties that are prudentially supervised on a consolidated basis;

(b) a counterparty and its affiliated entity if the financial statements for the counterparty and its affiliated entity are prepared on a consolidated basis in accordance with accounting principles as defined by the National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards*.

(2) Section 5 does not apply to an intragroup transaction if all of the following conditions apply:

(a) both counterparties agree to rely on this exemption;

(b) the transaction is subject to centralized risk evaluation, measurement and control procedures reasonably designed to identify and manage risks;

(c) there is a written agreement setting out the terms of the transaction between the counterparties.

(3) No later than the 30th day after a local counterparty to an intragroup transaction relies on the exemption in subsection (2), the local counterparty must submit to the regulator, in an electronic format, a completed Form 94-101F1 *Intragroup Exemption*.

(4) No later than the 10th day after a local counterparty becomes aware that the information in a previously submitted Form 94-101F1 *Intragroup Exemption* is no longer accurate, the local counterparty must submit to the regulator, in an electronic format, an amended Form 94-101F1 *Intragroup Exemption*.

Record keeping

11. (1) A local counterparty to a transaction that relies on section 9 or section 10 must maintain, for a period of 7 years following the date on which the transaction expires or terminates, records demonstrating that the conditions referred to in those sections, as applicable, were satisfied.

(2) The records required to be maintained under subsection (1) must be

(a) kept in a safe location and in a durable form, and

(b) provided to the regulator within a reasonable time following request.

PART 4
MANDATORY CLEARABLE DERIVATIVES

Submission of information on clearing services for derivatives by a regulated clearing agency

12. No later than the 10th day after a regulated clearing agency first provides or offers clearing services for a derivative or class of derivatives, the regulated clearing agency must submit to the regulator, in an electronic format, a completed Form 94-101F2 *Derivatives Clearing Services*, identifying the derivative or class of derivatives.

PART 5
EXEMPTION

Exemption

13. (1) The regulator or the securities regulatory authority may grant an exemption to this Instrument, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.

(2) Despite subsection (1), in Ontario, only the regulator may grant an exemption.

(3) Except in Alberta and Ontario, an exemption referred to in subsection (1) is granted under the statute referred to in Appendix B of National Instrument 14-101 *Definitions* opposite the name of the local jurisdiction.

PART 6
TRANSITION AND EFFECTIVE DATE

Transition – regulated clearing agency filing requirement

14. No later than the 30th day after the coming into force of this Instrument, a regulated clearing agency must submit to the regulator, in an electronic format, a completed Form 94-101F2 *Derivatives Clearing Services*, identifying all derivatives or classes of derivatives for which it provided clearing services as of the date of the coming into force of this Instrument.

Effective date

15. This Instrument comes into force on [*insert date*].

APPENDIX A

MANDATORY CLEARABLE DERIVATIVES

[Derivative or] Class of derivatives	**Date on which section 5 applies to a transaction involving a local counterparty**
[*description of derivative*]	[*Insert date* •] - for a local counterparty that is a member of a regulated clearing agency that offers clearing services for the derivative or class of derivatives and subscribes to such service, [*Insert the date which is 6 months after* •] - for a local counterparty that is a financial entity which [*insert specific threshold*] [*Insert the date which is 12 months after* •] - for a local counterparty that is a financial entity, other than a financial entity which [*insert specific threshold*], [*Insert the date which is 18 months after* •] - for a local counterparty that is not one of the following: a member of a regulated clearing agency that offers clearing services for the derivative or class of derivatives and subscribes to such service, or a financial entity.

APPENDIX B

EQUIVALENT CLEARING LAWS OF FOREIGN JURISDICTIONS PURSUANT TO PARAGRAPH 5(5)(a)

The laws and regulations of each of the following jurisdictions outside of Canada are considered equivalent for the purposes of paragraph 5(5)(a).

Jurisdiction	Law, Regulation and/or Instrument

FORM 94-101F1
INTRAGROUP EXEMPTION

Type of Filing: ☐ **INITIAL** ☐ **AMENDMENT**

Section 1 – Notifying counterparty information

1. State the full legal name of the notifying counterparty that relied on the exemption for an intragroup transaction.

2. Disclose the name under which it conducts business, if different from item 1:

3. If this Form is used to report a name change on behalf of the counterparty referred to in item 1 or item 2, enter the previous name and the new name:

   Previous name:
   New name:
   Head office:
   Address:
   Mailing address (if different):
   Telephone:
   Website:

   Contact employee:
   Name and title:
   Telephone:
   E-mail:

   Other offices:
   Address:
   Telephone:
   Email:

   Canadian counsel (if applicable)
   Firm name:
   Contact name:
   Telephone:
   E-mail:

Section 2 – Combined notification on behalf of other counterparties within the group to which the notifying counterparty belongs

1. Provide a statement confirming that both counterparties to each transaction to which this report relates chose to rely on the intragroup exemption and describe the basis on which the exemption is available to them.

2. Provide a statement confirming that each transaction to which this report relates is subject to appropriate centralized risk evaluation, measurement and control procedures. Describe those procedures.

3. State the legal entity identifier of both counterparties to each transaction to which this report relates in the manner required under the securities legislation.

4. For each transaction to which this report relates, describe the ownership and control structure of the counterparties that are affiliated entities.

5. For each transaction to which this report relates, state whether there is a written agreement setting out the terms of the transaction and, if so, state the date of the agreement and the signatories to the agreement and describe the agreement.

Section 3 – Certification

I certify that I am authorised to submit this Form on behalf of the notifying counterparty and, where applicable, on behalf of the other affiliated entities listed above in Section 2 and that the information in this Form is true and correct.

DATED at _____ this _____ day of _____, 20____

_____
(Print name of authorized person)

_____
(Print title of authorized person)

_____
(Signature of authorized person)

_____ _____
(Email) (Phone number)

Instructions: Submit this form to the regulator in the local jurisdiction as follows:

[*Insert names of each jurisdiction and email or other address by which submission is to be made.]*

FORM 94-101F2
DERIVATIVES CLEARING SERVICES

Type of Filing: ☐ **INITIAL** ☐ **AMENDMENT**

Section 1 – Regulated Clearing Agency Information

1. Full name of regulated clearing agency:

2. Contact information of person authorized to submit this form:

   Name and title:
   Telephone:
   E-mail:

Section 2 – Description of Derivatives

1. Identify each derivative or class of derivatives for which the regulated clearing agency provides clearing services, for which a Form 94-101F2 has not previously been filed.

2. For each derivative or class of derivatives referred to in item 1, describe all material attributes of the derivative including:

   (a) standard practices for managing any life cycle events, as defined in the securities legislation, associated with the derivative,

   (b) the extent to which it is electronically confirmable,

   (c) the degree of standardization of the contractual terms and operational processes,

   (d) the market for the derivative or class of derivatives, including its participants, and

   (e) data on the volume and liquidity of the derivative or class of derivatives within Canada and internationally.

3. Describe the impact of providing clearing services for the derivative or class of derivatives on the regulated clearing agency's risk management framework and financial resources, including the default waterfall and the effect on the clearing members.

4. Describe the extent to which the regulated clearing agency can maintain compliance with its regulatory obligations should the regulator or securities regulatory authority mandate the clearing of the derivative or class of derivatives.

5. Describe the clearing services to be provided.

6. If applicable, attach a copy of the notice the regulated clearing agency provided to its members and a summary of any concerns received in response to that notice.

Section 3 – Certification

CERTIFICATE OF REGULATED CLEARING AGENCY

I certify that I am authorized to submit this form on behalf of the regulated clearing agency named below and that the information in this form is true and correct.

DATED at _____ this _____ day of _____, 20____

_____
(Print name of regulated clearing agency)

_____
(Print name of authorized person)

_____
(Print title of authorized person)

_____
(Signature of authorized person)

Instructions: Submit this form to the regulator in the local jurisdiction as follows:

[*Insert names of each jurisdiction and email or other address by which submission is to be made.]*

ANNEX C

PROPOSED COMPANION POLICY 94-101
MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES

GENERAL COMMENTS

Introduction

This Companion Policy sets out how the Canadian Securities Administrators (the "CSA" or "we") interpret or apply the provisions of National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* ("NI 94-101 or the "Instrument") and related securities legislation.

The numbering of Parts and sections in this Companion Policy correspond to the numbering in NI 94-101. Any specific guidance on sections in NI 94-101 appears immediately after the section heading. If there is no guidance for a section, the numbering in this Companion Policy will skip to the next provision that does have guidance.

SPECIFIC COMMENTS

Unless defined in NI 94-101 or explained in this Companion Policy, terms used in NI 94-101 and in this Companion Policy have the meaning given to them in the securities legislation of each jurisdiction including National Instrument 14-101 *Definitions*, in Manitoba and Ontario, local rule 91-506 *Derivatives: Product Determination* and, in Québec, *Regulation 91-06 respecting Derivatives Determination* (chapter I-14.01, r.01).

In this Companion Policy, "TR Instrument" means,

> in Manitoba and Ontario, local rule 91-507 *Trade Repositories and Derivatives Data Reporting*,
>
> in Québec, Regulation 91-507 respecting Trade Repositories and Derivatives Data Reporting, and
>
> in Alberta, British Columbia, New Brunswick, Nova Scotia and Saskatchewan, Proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting*.[4]

[4] This Instrument has been published for consultation, but has not yet come into force.

PART 1
DEFINITIONS AND INTERPRETATION

Definitions

1. The term "financial entity" is defined in NI 94-101 for the purposes of the end-user exemption in section 9 of the Instrument, which provides that a transaction will only be exempt from mandatory clearing if the hedging counterparty is not a financial entity.

The entities referred to under subparagraph (b) of the definition of "financial entity" do not include a company or its affiliates that lend to customers to finance the purchase of its non-financial goods or services.

The investment funds included in subparagraph (d) are those described in subsections 1.2 (1), (2) and (3) of National Instrument 81-106 *Investment Fund Continuous Disclosure* regarding the application of that instrument to investment funds.

Subparagraph (f) of the definition of "financial entity" addresses the situation where a foreign counterparty enters into a transaction in a mandatory clearable derivative with a local counterparty. If the foreign counterparty is similar to an entity referred to in any of paragraphs (a) to (e) of the definition of "financial entity", the end-user exemption will not be available for that transaction unless the local counterparty qualifies to benefit from the end-user exemption.

The Instrument uses the term "transaction" rather than the term "trade" in part to reflect that "trade" is defined in the securities legislation of some jurisdictions as including the termination of a derivative. We do not think the termination of a derivative should trigger a requirement to submit the derivative for central clearing. Similarly, the definition of transaction in NI 94-101 excludes a novation resulting from the submission of a transaction to a regulated clearing agency as this is already a cleared transaction. Finally, the definition of "transaction" is not the same as the definition found in the TR Instrument as the latter does not include a material amendment since the TR Instrument expressly provides that an amendment must be reported.

The term "material amendment" in the definition of "transaction" should be considered in light of the fact that only new transactions will be subject to mandatory central counterparty clearing under NI 94-101. If a derivative that existed prior to the coming into force of NI 94-101 is materially amended after NI 94-101 is effective, that amendment will trigger the mandatory clearing requirement. A material amendment is one that changes information that would reasonably be expected to have a significant effect on the derivative's attributes, including its value, the terms and conditions of the contract evidencing the derivative, the transaction methods or the risks related to its use, excluding information that is likely to have an effect on the market price or value of its underlying interest.

We will consider several factors when determining whether a modification to an existing transaction is a material amendment. Examples of modifications to an existing transaction that would be a material amendment include any modification which would result in a significant change in the value of the transaction, differing cash flows or the creation of upfront payments.

2. The term "derivative" is defined in section 3 of the Québec *Derivatives Act* to include both "standardized" and "over-the-counter" derivatives. Standardized derivatives are derivatives traded on a published market, as provided by section 3 of the Québec *Derivatives Act*. A published market is defined to include an exchange, an alternative trading system or any other derivatives market that constitutes or maintains a system for bringing together buyers and sellers of standardized derivatives. As such, section 2 of the Instrument limits the application of the Instrument to derivatives that are not traded on an exchange; however, an exception is made for derivatives trading facilities.

Interpretation of hedging or mitigating commercial risk

4. The interpretation in the Instrument of the phrase "for the purpose of hedging or mitigating commercial risk" focuses on the purpose and effect of one or more transactions. A market participant executing a transaction for the purpose of hedging would not be precluded from relying on the end-user exemption if a perfect hedge is not ultimately achieved. The use of multiple transactions as a hedging strategy would not in itself preclude an end-user from relying on the exemption. There will be situations where an end-user may be able to rely on the exemption even where some of the transactions could be interpreted as not being a hedge, as long as there is a reasonable commercial basis to conclude that such transactions were intended to be part of the end-user's hedging strategy.

The concept of hedging or mitigating commercial risk excludes all activities that are investing or speculative in nature. However, in some cases macro, proxy or portfolio hedging may benefit from the exemption. The strategy or program should be documented and, where reasonable, subject to regular compliance audits to ensure it continues to be used for relevant hedging purposes. Hedging a risk can be a dynamic process and it is expected that an entity may have to close-out or add contracts to the original hedging position should it begin to under- or over-perform. These additional transactions may also benefit from the exemption provided the transactions are intended to hedge a commercial risk.

The facts and circumstances that exist at the time the transaction is executed should be considered to determine whether a transaction satisfies the criteria for hedging or mitigating commercial risk. A market participant which in the past has conducted speculative transactions using derivatives may use the end-user exemption for a transaction that meets the conditions set out in section 4.

The determination of whether the risk being hedged or mitigated is commercial will be based on the underlying activity to which the risk relates, not the type of entity claiming the end-user exemption. For example, a not-for-profit entity would not be prevented from

relying on the end-user exemption. That determination will depend on the nature of the activity to which the risk being hedged or mitigated relates. The interpretation of "hedging or mitigating of commercial risk" leaves room for judgment but a flexible approach is needed given the variety of derivatives and potential counterparties that may qualify for the exemption and hedging strategies to which this Instrument applies.

Not extending the end-user exemption to speculative transactions is intended to prevent abuse of the exemption. A counterparty's ability to rely on the end-user exemption for a particular transaction depends on the purpose of the transaction.

Section 11 of NI 94-101 requires a local counterparty to maintain records demonstrating that the conditions to the exemption have been met. To meet this obligation, a local counterparty should develop sufficient policies and procedures to ensure that reasonable supporting documentation is prepared and retained with respect to transactions for which the end-user exemption will be relied upon. We would generally consider several factors in determining what constitutes reasonable supporting documentation, including the sophistication of the local counterparty and the regularity with which it enters into derivatives transactions. Where reasonable, we would expect such documentation to include: the risk management objective and nature of risk being hedged, the date of hedging, the hedging instrument, the hedged item or risk, how hedge effectiveness will be assessed, and how hedge ineffectiveness will be measured and corrected as appropriate.

PART 2
MANDATORY CENTRAL COUNTERPARTY CLEARING

Duty to submit for clearing

5. For a local counterparty that is not a clearing member of a regulated clearing agency**,** we have used the phrase "cause to be submitted" to refer to the local counterparty's obligation. The local counterparty will need to have arrangements in place with a clearing member in advance of entering into a transaction. The Instrument requires that a transaction subject to mandatory central clearing be submitted to a regulated clearing agency as soon as practicable, but no later than the end of the day on which the transaction was executed or if the transaction occurs after business hours of the clearing agency, the next business day.

The obligation to submit a transaction for clearing only applies at the time the transaction is executed. If a derivative or class of derivatives is determined to be subject to the clearing requirement after the date of execution of a transaction in that derivative or class of derivatives, a local counterparty will not be required to submit the transaction for clearing. However, if after a clearing determination is made in respect of a derivative or class of derivatives, there is another transaction in that same derivative, including a material amendment to it, (as discussed in section 1 above), that transaction in or material amendment to the derivative will be subject to the mandatory clearing requirement. Where a derivative is not subject to the requirement to submit for clearing but the

derivative is clearable through a regulated clearing agency, the counterparties have the option to submit the derivative for clearing at any time.

Non-Application

6. Section 5 does not apply to any transaction in a mandatory clearable derivative with an entity listed in section 6. Transactions with an entity listed in section 6 are not subject to the duty to submit for clearing under section 5 even if the other counterparty is otherwise subject to it.

For the purpose of paragraphs (b) and (c), it is our view that the guarantee must be for all or substantially all of the liabilities of the crown corporation or entity wholly owned by a government referred to in paragraph (a).

Notice of rejection

7. The rules of regulated clearing agencies providing for confirmations and rejections of transactions as well as legal arrangements governing indirect clearing, where applicable, should ensure that the counterparties are notified of the rejection of a transaction submitted for clearing.

PART 3
EXEMPTIONS AND APPLICATION

End-user exemption

9. (1) Section 9 exempts a transaction from the clearing requirement under section 5 provided that at least one of the counterparties is not a financial entity as defined in section 1 and such transaction, at the time of execution, is intended to hedge, directly or indirectly, commercial risk related to the operation of the business of one of the counterparties that is not a financial entity. If, after execution of the transaction, circumstances change such that the transaction no longer meets the criteria of hedging or mitigating commercial risk, it will not result in a requirement to submit the transaction for clearing under section 5.

Entities not defined as a financial entity may benefit from the end-user exemption provided the particular transaction meets the interpretation of hedging or mitigating commercial risk in section 4 of NI 94-101.

(2) Certain entities may choose to centralize their trading activities through one affiliated entity. An entity that meets all conditions related to the end-user exemption can have an affiliated entity act on its behalf. The affiliated entity acting on behalf of the entity cannot be an entity subject to, registered under or exempted from the registration requirement under the securities legislation of a jurisdiction of Canada, although it may be a financial entity, provided that the conditions in paragraphs (a), (b) and (c) are met. The end-user

exemption includes subsection (2) to allow affiliated entities that are part of a non-financial group to use the end-user exemption to enter into a market-facing transaction so long as the transaction is a hedge under the Instrument. For a transaction to continue to be considered to hedge commercial risk and qualify under the end-user exemption, the affiliated entity may act only on behalf of the entity, and may not act in this capacity for entities that are not affiliated entities, that is to say it cannot be a dealer.

Intragroup exemption

10. (1) and (2) The exemption for intragroup transactions is based on the premise that the risk created by these transactions is expected to be managed in a centralized manner to allow for the risk to be identified and managed appropriately. Entities using this exemption should have appropriate legal documentation between the affiliated entities and detailed operational material outlining the robust risk management techniques used by the overall parent entity and its affiliated entities when entering into the intragroup transactions.

Paragraph 10(1)(a) extends the availability of the intragroup transaction exemption provided for in subsection (2) to transactions among entities that do not prepare consolidated financial statements. This may apply, e.g., to cooperatives or other entities that are prudentially supervised on a consolidated basis.

Subsection (2) sets out the conditions that must be met for the intragroup counterparties to rely on the intragroup exemption for a transaction in a mandatory clearable derivative. Paragraph (b) refers to a system of risk management policies and procedures designed to monitor and manage the risks associated with a particular transaction. We are of the view that a group of affiliated entities may structure its centralized risk management according to its unique needs, provided that the program reasonably monitors and manages risks associated with non-centrally cleared derivatives.

(3) Within 30 days of the first transaction between two affiliated entities relying on the section 10 intragroup exemption, a completed Form 94-101F1 *Intragroup Exemption* ("Form 94-101F1") must be submitted to the regulator to notify the regulator that the exemption is being relied upon. The information submitted in the Form 94-101F1 will aid the regulators in better understanding the legal and operational structure being used to allow counterparties to benefit from the intragroup exemption. The obligation to submit the completed Form 94-101F1 is imposed on one of the counterparties to a transaction relying on the exemption. For greater clarity, a completed Form 94-101F1 must be submitted for each pairing of affiliated entities that seek to rely upon the intragroup exemption.

(4) Examples of changes to the information submitted that we would consider material include: (i) a change in the control structure of one or more of the affiliated entities listed in Form 94-101F1, and (ii) any significant amendment to the risk evaluation, measurement and control procedures of an affiliated entity listed in Form 94-101F1.

Record keeping

11. (1) We would generally expect that the reasonable supporting documentation to be kept in accordance with section 11 would include full and complete records of any analysis undertaken by the end-user to demonstrate it satisfies the requirements necessary to rely on the end-user exemption under section 9 or the intragroup exemption under section 10.

With respect to the end-user exemption under section 9, reasonable supporting documentation should be kept for each transaction where the end-user exemption is relied upon, setting out the basis on which the transaction is entered into for the purposes of hedging or mitigating commercial risk, including:

- risk management objective and nature of risk being hedged,
- date of hedging,
- hedging instrument,
- hedged item or risk,
- how hedge effectiveness will be assessed, and
- how hedge ineffectiveness will be measured and corrected as appropriate.

The level of diligence required may vary depending on the circumstances of each counterparty. We would generally expect that, to the extent produced in relation to an end-user counterparty, records to be kept in accordance with section 11 would include documentation of the end-user's macro, proxy or portfolio hedging strategy or program and the results of regular compliance audits to ensure such strategy or program continues to be used for relevant hedging purposes.

In determining whether an exemption is available, a local counterparty may rely on factual representations by the other counterparty, provided that the local counterparty has no reasonable grounds to believe that those representations are false. However, the local counterparty subject to the mandatory central counterparty clearing is responsible for determining whether, given the facts available, the exemption is available. Generally, we would expect a local counterparty relying on an exemption to retain all documents that show it properly relied on the exemption. It is not appropriate for a local counterparty to assume an exemption is available.

PART 4
MANDATORY CLEARABLE DERIVATIVES

and

PART 6
TRANSITION AND EFFECTIVE DATE

12 & 14. Each of the regulators has the power to determine by rule or otherwise which derivative or classes of derivatives will be subject to the mandatory central counterparty clearing requirement. NI 94-101 includes a bottom-up approach for determining whether a derivative or class of derivatives will be subject to the mandatory clearing obligation. The information required by Form 94-101F2 *Derivatives Clearing Services* ("Form 94-101F2") will allow the CSA to carry out this determination.

In the course of determining whether a derivative or class of derivatives will be subject to the clearing requirement, some of the factors we will consider include the following:

- the level of standardization, such as the availability of electronic processing, the existence of master agreements, product definitions and short form confirmations;
- the effect of central clearing of the derivative on the mitigation of systemic risk, taking into account the size of the market for the derivative and the available resources of the regulated clearing agency to clear the derivative;
- whether mandating the derivative to be cleared would bring undue risk to regulated clearing agencies;
- the outstanding notional exposures, the current liquidity and the availability of reliable and timely pricing data;
- the existence of third-party vendors providing pricing services;
- with regards to a regulated clearing agency, the existence of an appropriate rule framework, and the existence of capacity, operational expertise and resources, and credit support infrastructure to clear the derivative on terms that are consistent with the material terms and trading conventions on which the derivative is then traded;
- whether a regulated clearing agency would be able to manage the risk of the additional derivatives that might be submitted due to the clearing requirement determination;
- the effect on competition, taking into account appropriate fees and charges applied to clearing, and whether mandating clearing could harm competition;

- alternative derivatives or clearing services co-existing in the same market;
- the existence of a clearing obligation in other jurisdictions;
- the public interest.

Submission of information on clearing services of derivatives by the regulated clearing agency

Paragraphs (a), (b) and (c) of item 2 in section 2 of Form 94-101F2 address the potential for a derivative or class of derivatives to be a mandatory clearable derivative given its level of standardization in terms of market conventions, including legal documentation, processes and procedures, and whether pre- to post -transaction operations are carried out predominantly by electronic means. The standardization of the economic terms is a key input in the determination process as discussed in the following section.

In paragraph (a), life cycle event has the same meaning as in section 1 of the TR Instrument.

Paragraphs (d) and (e) of item 2 in section 2 of Form 94-101F2 provide details needed to assess the extensiveness of the use of a particular derivative or class of derivatives, the nature and landscape of the market for that derivative or class of derivatives and the potential impact a determination for central counterparty clearing could have on market participants, including the regulated clearing agency. The determination process will have different or additional considerations when assessing whether a derivative or class of derivatives should be a mandatory clearable derivative in terms of its liquidity and price availability, versus the considerations used by the securities regulator in allowing a regulated clearing agency to offer clearing services for a derivative or class of derivatives. The stability of the pricing availability will also be an important factor considered in the determination process.

APPENDIX A

For each mandatory clearable derivative, the requirement under section 5 to submit, or cause to be submitted, a transaction for clearing does not apply to a local counterparty until both counterparties to a transaction are subject to it pursuant to Appendix A or, in Québec, as determined by the Autorité des marchés financiers. For example, where a transaction is between a counterparty that is a member of a regulated clearing agency that offers clearing services for the mandatory clearable derivative and subscribes to such service and a counterparty that is neither a member of a regulated clearing agency nor a financial entity, section 5 will not apply until 18 months after the date on which section 5 will apply to the first counterparty.

Where a local counterparty enters into more than one category provided in Appendix A or, in Québec, as determined by the Autorité des marchés financiers, the earlier date on

which section 5 applies to it prevails. For example, where a local counterparty is both a member of a regulated clearing agency that offers clearing services for the mandatory clearable derivative and subscribes to such service and a financial entity, its status as a member of a regulated clearing agency prevails for purposes of the date on which section 5 applies.

May 13, 2015

BY EMAIL

Dear Sirs/Mesdames:

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Ontario Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

Me Anne-Marie Beaudoin, Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage C.P. 246, tour de la Bourse
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and

Josée Turcotte, Secretary
Ontario Securities Commission
20 Queen Street West Suite 1900, Box 55
Toronto, Ontario M5H 3S8
comments@osc.gov.on.ca

Re: CSA Notice and Request for Comment Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* and Proposed Companion Policy 94-101CP *Mandatory Central Counterparty Clearing of Derivatives* (together, the "Proposed National Instrument")

The Canadian Advocacy Council[1] for Canadian CFA Institute[2] Societies (the CAC) appreciates the opportunity to comment on the Proposed National Instrument and wishes to

[1]The CAC represents the 14,000 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.cfasociety.org/cac. Our Code of Ethics and Standards of Professional Conduct can be found at http://www.cfainstitute.org/ethics/codes/ethics/Pages/index.aspx.

[2] CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion for ethical behavior in investment markets and a respected source of

make the following remarks relating to the proposed rules for mandatory central counterparty clearing for certain derivatives.

We agree with the stated goal to harmonize as much as possible the determination of mandatory clearable derivatives across all jurisdictions of Canada. We would like to stress the importance for participants located in Canada to be able to transact among provinces and territories pursuant to harmonized legislation. It is also important that our legislation be harmonized, to the extent possible, with the requirements of the other G20 countries. If parties to transactions are required to clear them in Canada through a central counterparty but are not required to do so elsewhere, it could lead to regulatory arbitrage opportunities.

The notice accompanying the Proposed National Instrument indicates that the clearing rule is intended to provide for substituted compliance for (i) transactions involving a local counterparty, where the transaction is submitted for clearing pursuant to the laws of another jurisdiction of Canada or pursuant to the laws of a foreign jurisdiction listed in Appendix B or, in Québec, that appears on a list to that effect; and (ii) a local counterparty in a reliant jurisdiction if the transaction is submitted for clearing to a clearing agency or a clearing house that is recognized or exempted from recognition pursuant to the securities legislation of another jurisdiction of Canada. However, the concept of substituted compliance appears to be more limited in the Proposed National Instrument itself.

Pursuant to Section 5(5) of the Proposed National Instrument, a local counterparty that is a local counterparty solely under paragraph (b) of that definition will satisfy the clearing requirement with respect to a transaction if the transaction is submitted for clearing in accordance with the laws of a foreign jurisdiction that is listed in Appendix B of the Proposed National Instrument or in Québec, that appears on a list determined by the AMF. As a result, it could be interpreted such that only local counterparties that are affiliated counterparties would be permitted to use substituted compliance in a listed foreign jurisdiction. It thus does not appear that a local counterparty would be able to use substituted compliance for clearing pursuant to the laws of another jurisdiction of Canada.

The definition of "regulated clearing agency", other than in Québec, means a person or company recognized or exempted from recognition as a clearing agency in the local jurisdiction. Section 5(1) of the Proposed National Instrument provides in part that a local counterparty must submit a transaction for clearing to a regulated clearing agency that provides clearing services for that mandatory clearable derivative. The section suggests that, other than as provided for the provinces and territories specifically listed in Section 5(4) of the Proposed National Instrument, the clearing agency has to be recognized (or exempt) in the local jurisdiction. We are of the view that so long as a clearing agency is recognized in at least one jurisdiction of Canada, such recognition should be sufficient for a local counterparty to meet its obligations in Section 5(1) of the Proposed National

knowledge in the global financial community. The end goal: to create an environment where investors' interests come first, markets function at their best, and economies grow. CFA Institute has more than 119,000 members in 147 countries and territories, including 112,000 CFA charterholders, and 143 member societies. For more information, visit www.cfainstitute.org.

Instrument, even if that clearing agency is not formally recognized or exempt from recognition in that jurisdiction.

The concept of substituted compliance is important for the efficient functioning of the derivatives markets and additional clarity with respect to this concept in the Proposed Instrument would be helpful.

With respect to the phase-in of the requirement to clear a mandatory clearable derivative, we agree with the premise that counterparties that are not financial entities should be subject to an 18-month transition period after the date the determination becomes effective for the first phase-in category. For the thresholds that would determine whether a financial institution should be included in the second or third phase-in category, we agree that the monthly aggregate gross notional outstanding value is an appropriate basis for the threshold, but we think that data over a one year period would be more robust than the last 3 months preceding the determination.

Concluding Remarks

We thank you for the opportunity to provide these comments. We would be happy to address any questions you may have and appreciate the time you are taking to consider our points of view. Please feel free to contact us at chair@cfaadvocacy.ca on this or any other issue in future.

(Signed) *Cecilia Wong*

Cecilia Wong, CFA
Chair, Canadian Advocacy Council

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May 13, 2015

VIA ELECTRONIC MAIL

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British Columbia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Ontario Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
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Re: Comments on Proposed National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives

Dear Sir or Madam:

I. INTRODUCTION.

On behalf of The Canadian Commercial Energy Working Group ("**Working Group**"), Sutherland Asbill & Brennan LLP hereby submits this letter in response to the request for public comment on Proposed National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives ("**Proposed Clearing Rule**") and Proposed Companion Policy

94-101CP ("**Proposed Clearing Companion Policy**").[1] The Working Group welcomes the opportunity to provide comments on the Proposed Clearing Rule and the Proposed Clearing Companion Policy and looks forward to working with Canadian regulators throughout the derivatives reform process.

The Working Group appreciates that the Canadian Securities Administrators ("**CSA**") incorporated suggestions into the Proposed Clearing Rule and the Proposed Clearing Companion Policy that it received from public comments submitted on CSA Staff Notice 91-303 Proposed Model Provincial Rule on Mandatory Central Counterparty Clearing of Derivatives ("**Draft Model Clearing Rule**").[2] The Proposed Clearing Rule and the Proposed Clearing Companion Policy are an improvement from the Draft Model Clearing Rule, and with targeted amendments and clarification, could provide a workable regulatory regime for mandatory central clearing.

The Working Group is a diverse group of commercial firms that are active in the Canadian energy industry whose primary business activity is the physical delivery of one or more energy commodities to others, including industrial, commercial, and residential consumers. Members of the Working Group are producers, processors, merchandisers, and owners of energy commodities. The Working Group considers and responds to requests for comment regarding developments with respect to the trading of energy commodities, including derivatives, in Canada.

II. COMMENTS OF THE WORKING GROUP.

The Working Group has identified the following issues which should be addressed, for the reasons discussed herein, as the final rule on mandatory central clearing is drafted: (i) the End-User Exemption; (ii) the interpretation of "hedging or mitigating commercial risk;" (iii) the Intragroup Exemption; (iv) the interpretation of "affiliated entity;" (v) non application to certain entities, including federal and provincial governments and governmental entities of Canada; and (vi) harmonization. Each of these issues is discussed in detail below.

A. END-USER EXEMPTION (SECTION 9 OF THE PROPOSED CLEARING RULE)

1. The Proposed Affiliate End-User Exemption Should Be Revised.

The Working Group appreciates that the CSA provided end-users with an exemption from mandatory central clearing (the "**End-User Exemption**"). The inclusion of the End-User Exemption is an appropriate step to achieving a framework that balances the CSA's regulatory objectives of improving transparency and the overall mitigation of systemic risk with the

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[1] *See* CSA Notice and Request for Comment, Proposed National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives and Proposed Companion Policy 94-101CP (Feb. 12, 2015) ("**CSA Notice**"), *available at* http://www.albertasecurities.com/Regulatory%20Instruments/5022685-v5-Proposed_NI_94-101_package.pdf.

[2] *See generally* CSA Staff Notice 91-303 Proposed Model Provincial Rule on Mandatory Central Counterparty Clearing of Derivatives (Dec. 19, 2013), *available at* http://osc.gov.on.ca/documents/en/Securities-Category9/csa_20131219_91-303_mandatory-counterparty-clearing- derivatives.pdf.

corresponding burdens imposed on market participants. However, as discussed further below, the Working Group is concerned that the proposed End-User Exemption, as drafted, does not accurately reflect CSA's intent.

Section 9(2) of the Proposed Clearing Rule (the "**Affiliate End-User Exemption**") provides an exemption from mandatory central clearing for an affiliated entity "acting on behalf of a counterparty" that is not a financial entity if certain conditions are met. While the Working Group appreciates that the CSA removed reference to an "agent" in the Proposed Clearing Rule's Affiliate End-User Exemption,[3] the revised language should be amended to address two issues.

First, the proposed language for the Affiliate End-User Exemption does not accurately reflect how it is intended to work. The Affiliate End-User Exemption is intended to allow an entity to hedge the risk of its non-financial affiliates and still qualify for the End-User Exemption. To do so, that entity would have to act as a counterparty to a derivatives transaction with a third party – the affiliates' whose risk is being hedged would not be a counterparty to that transaction. However, the proposed Affiliate End-User Exemption states that the mandatory central clearing requirement "does not apply to a transaction entered into by an affiliated entity of a ***counterparty*** that is not a financial entity…." (emphasis added).[4] That language should be amended so that, among other things, the Affiliate End-User Exemption functions as intended. This issue is resolved by the Working Group's proposed revised language for the Affiliate End-User Exemption provided below.

Second, the proposed Affiliate End-User Exemption places an unnecessary limitation on its use. Specifically, the Affiliate End-User Exemption is not available to an entity hedging the risk of its affiliates if that entity is subject to, or exempt from, a registration requirement. Effectively, this limitation would prevent a derivatives dealer, or even a large derivative participant, from utilizing the Affiliate End-User Exemption.[5] Such a limitation is unnecessary and needlessly restrictive.

The purpose of the Affiliate End-User Exemption is to allow a common market practice whereby an enterprise uses one or a few market facing entities to consolidate and hedge the commercial risk of the larger corporate group. This structure allows market participants to minimize the number of trading agreements they must put in place, and, by allowing the company to hedge its net risk rather than its gross risk, reduces margin requirements and credit risk. Given its purpose, the focus of the Affiliate End-User Exemption should be on the risk being hedged and not the entity doing the hedging. To this point, the CSA even recognizes in its discussion on the interpretation of "hedging or mitigating commercial risk" that: (i) the appropriate focus is on "…the underlying activity to which the risk relates, not the type of

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3 *See* CSA Notice at 14.

4 Proposed Clearing Rule at Section 9(2).

5 *See, e.g.*, CSA Consultation Paper 91-407 Derivatives: Registration (Apr. 18, 2013) ("**Registration Consultation Paper**"), *available at* http://www.osc.gov.on.ca/documents/en/Securities-Category9/csa_20130418_91-407_derivatives-registration.pdf.

entity…;"[6] and (ii) the "…ability to rely on the [End-User Exemption] for a particular transaction depends on the purpose of the transaction."[7] As such, the Affiliate End-User Exemption should be amended, as shown below,[8] to allow an entity to hedge the risk of non-financial affiliates, regardless of whether that entity is subject to, or exempt from, a registration requirement.

The Working Group's Proposed Revised Language for the Affiliate End-User Exemption in Section 9(2) of the Proposed Clearing Rule

Section 9. (2) Section 5 does not apply to a transaction **if all of the following apply**:

(a) **the transaction is entered into by an ~~affiliated entity~~ affiliate of ~~a counterparty that~~ (i) an entity that is not a financial entity or (ii) entities that are not financial entities ~~if all of the following apply:~~; and**

~~(a) the affiliated entity is acting on behalf of the counterparty that is not a financial entity;~~

(b) **the transaction is entered into for the purpose of hedging or mitigating the commercial risk of the entity that is not a financial entity or entities that are not financial entities.**

~~(c) the affiliated entity is not subject to, registered under or exempted from the registration requirement under the securities legislation of a jurisdiction of Canada.~~

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6 *See* Proposed Clearing Companion Policy at Section 4 (discussing the appropriate focus for determining whether a risk being hedged or mitigated is commercial).

7 *See* Proposed Clearing Companion Policy at Section 4.

8 A clean (*i.e.*, non-redline) version of the Working Group's proposed revised language for the Affiliate End-User Exemption in Section 9(2) of the Proposed Clearing Rule is provided below.

Section 9. (2) Section 5 does not apply to a transaction if all of the following apply:

(a) the transaction is entered into by an affiliate of (i) an entity that is not a financial entity or (ii) entities that are not financial entities; and

(b) the transaction is entered into for the purpose of hedging or mitigating the commercial risk of the entity that is not a financial entity or entities that are not financial entities.

2. A Market Participant Should Be Permitted to Use the End-User Exemption for Types, Classes, or Categories of Derivatives for Which It Is Not A Derivatives Dealer or a Large Derivative Participant.

Although the derivatives registration regime in Canada has not been finalized at this time, the Working Group notes that it will impact many aspects of derivatives regulations, including whether a market participant would be eligible to use the End-User Exemption from mandatory central clearing. However, neither the Registration Consultation Paper nor the Proposed Clearing Rule address whether the registration requirement would apply to an entity's derivatives activity generally or if regulators contemplate limited purpose designation such that an entity would only need to register as a derivatives dealer or a large derivative participant for specific types, classes, or categories of derivatives. This would allow an entity to remain eligible to use the End-User Exemption to hedge commercial risks for other derivatives products. Notably, the U.S. Commodity Futures Trading Commission implemented a limited purpose designation regime.[9]

If a limited purpose designation regime is adopted – which the Working Group strongly urges the CSA to do – an entity could, for example, be registered as a derivatives dealer only for its OTC natural gas commodity derivatives activity and still have available to it the End-User Exemption for other derivatives transactions, such as foreign exchange or interest rate swaps, used to hedge or mitigate its commercial risk.

While the Working Group recognizes that the registration regime is outside of the scope of this particular request for comment, the Working Group respectfully notes that a limited purpose designation regime should be adopted and that the End-User Exemption in the final rule on mandatory central clearing should be available to a market participant for the types, classes, or categories of derivatives for which it is not registered as a derivatives dealer or large derivative participant.

B. INTERPRETATION OF "HEDGING OR MITIGATING COMMERCIAL RISK" (SECTION 4 OF THE PROPOSED CLEARING RULE)

The Working Group would like to thank the CSA for its efforts in drafting a largely workable regulatory framework for mandatory central clearing and appreciates that the Proposed Clearing Rule reflects the meaningful progress made throughout the drafting process. Notably, the provisions in the Proposed Clearing Rule regarding the interpretation of "hedging or mitigating commercial risk" are an important improvement from the proposed language in the

[9] Under the derivatives regulatory regime in the United States, there is limited purpose designation available for swap dealers and major swap participants. With respect to swap dealers, Section 1a(49)(B) of the Commodity Exchange Act provides that an entity "may be designated as a swap dealer for a single type or single class or category of swap or activities and considered not to be a swap dealer for other types, classes, or categories of swaps or swap activities." Regarding major swap participants, Section 1a(33)(C) of the Commodity Exchange Act similarly provides that an entity "may be designated as a major swap participant for 1 or more categories of swaps without being classified as a major swap participant for all classes of swaps."

Draft Model Clearing Rule because the phrase "closely correlated" was removed.[10] The inclusion of that phrase would have limited the efficacy of the End-User Exemption and the flexibility of hedging practices of end-users.

However, there is still room to further refine the language to clearly ensure that market participants seeking to rely on the End-User Exemption are able to continue engaging in common hedging practices. To this end, the Working Group has identified the issues listed below regarding the interpretation of "hedging or mitigating commercial risk."

1. The Phrase "in the Normal Course of Its Business" Should Be Removed from the Proposed Interpretation of "Hedging or Mitigating Commercial Risk."

The inclusion of the phrase "in the normal course of its business" in the interpretation of "hedging or mitigating commercial risk" under Section 4(1)(a) of the Proposed Clearing Rule could potentially be problematic. In order to utilize the End-User Exemption, it should be sufficient that there is a legitimate commercial risk the company seeks to reduce. Energy companies are continually evolving and improving the manner in which they hedge their risk. As such, it may be difficult in certain circumstances for energy companies to determine what constitutes "in the normal course of its business." For this reason, certain new and legitimate hedging approaches utilized to prudently manage risk may not qualify for the proposed End-User Exemption. As such, the phrase "in the normal course of its business" should be removed from Section 4(1)(a) of the Proposed Clearing Rule.

2. Guidance Is Required to Clarify Section 4(2)(a) of the Proposed Clearing Rule.

Section 4(2)(a) of the Proposed Clearing Rule seems to suggest that a derivatives transaction will not be considered to be held for the purpose of "hedging or mitigating commercial risk" even if it qualifies under Section 4(1) if the position is held "to speculate." Since Section 4(1) of the Proposed Clearing Rule appears to define activity that is not speculative in nature, it is unclear what is intended to be captured by the language of Section 4(2)(a) noting that positions held "to speculate" will not be considered to be held for the purpose of "hedging or mitigating commercial risk." To address this, the Working Group suggests that the CSA should provide guidance clarifying Section 4(2)(a) of the Proposed Clearing Rule in this respect.

C. INTRAGROUP EXEMPTION FROM MANDATORY CENTRAL CLEARING (SECTION 10 OF THE PROPOSED CLEARING RULE)

The Working Group appreciates the CSA including a largely workable exemption for intragroup transactions in the Proposed Clearing Rule ("**Intragroup Exemption**"). As the Working Group has noted in previous comment letters, intragroup transactions represent a transfer of risk within a corporate group and do not impose risk on the integrity of the markets.[11]

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[10] *See* CSA Notice at 12.

[11] *See* The Canadian Commercial Energy Working Group Comment Letter on CSA Consultation Paper

Thus, the CSA appropriately provided exemptions from mandatory central clearing for intragroup transactions. The Intragroup Exemption in the Proposed Clearing Rule, however, would benefit from the modifications identified below.

1. A Corporate Group Should Be Permitted to File One Form 94-101F1 to Cover the Entire Corporate Group for the Intragroup Exemption.

A completed Form 94-101F1 would need to be submitted for each pair of affiliated entities that seeks to utilize the Intragroup Exemption under the Proposed Clearing Rule.[12] This proposed requirement would impose burdens that could otherwise be eliminated by allowing a corporate enterprise to file one Form 94-101F1 covering an entire corporate group rather than requiring a filing for each pairing of affiliated entities that seeks to rely on the Intragroup Exemption. As such, the Working Group respectfully suggests incorporating amendments that would permit a corporate enterprise to file one Form 94-101F1 which would cover the entire corporate group.

2. Form 94-101F1 Should Be Modified to Remove the Term "Notifying Party," and Section 10(3)-(4) of the Proposed Clearing Rule Should Be Modified to Allow a Local Counterparty to Cause Form 94-101F1 to Be Submitted.

When read together, Form 94-101F1 and Section 10(3)-(4) of the Proposed Clearing Rule do not clearly indicate who is authorized to submit Form 94-101F1. For example, Form 94-101F1 uses the term "notifying party," whereas Section 10(3)-(4) provides that "the local counterparty must submit" Form 94-101F. While the term "notifying party" is not defined, it is reasonable to conclude that the use of this term, when read in conjunction with Section 10 of the Proposed Clearing Rule, would permit a local counterparty to delegate the task of submitting Form 94-101F to another party (*i.e.*, the local counterparty would cause Form 94-101F1 to be submitted by its affiliate). However, Section 10(3)-(4) of the Proposed Clearing Rule does not specifically provide a local counterparty with this option.

To address this issue, the CSA should make the following modifications. *First*, Section 10(3)-(4) of the Proposed Clearing Rule should be modified to allow a local counterparty to cause Form 94-101F1 to be submitted. Specifically, the text of Section 10(3)-(4) should be revised to read as follows: "…a local counterparty must submit**, or cause to be submitted,** to the regulator…." These changes would permit a company that centralizes its compliance and reporting functions in another entity to use those resources to comply with the obligation to file Form 94-101F1. *Second*, Form 94-101F1 should be amended accordingly to make clear that the local counterparty can submit, or cause to be submitted, Form 94-101F1.

92-401 Derivatives Trading Facilities (Mar. 30, 2015), *available at* https://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20150330_92-401_sweeneym.pdf.

[12] Proposed Clearing Rule at Section 10; Proposed Clearing Companion Policy at Section 10.

3. Consistent Guiding Principles That Allow Flexibility Should Be Provided to Indicate What Would Qualify as an Appropriate Risk Management Program.

To exercise the proposed Intragroup Exemption, entities would need to be subject to appropriate centralized risk evaluation, measurement, and control procedures (*i.e.*, an "**appropriate risk management program**").[13] The Working Group appreciates that the Proposed Clearing Rule appears to provide market participants with a degree of flexibility in determining what would qualify as an appropriate risk management program. The Working Group is concerned, however, that the Proposed Clearing Companion Policy conveys potentially conflicting messages about what would constitute an appropriate risk management program.

For example, Section 10 of the Proposed Clearing Companion Policy provides that entities using the Intragroup Exemption should have "…*detailed* operational material outlining the *robust* risk management techniques used…," which may not be appropriate for companies with less complex risk profiles. (emphasis added). Yet, Section 10 of the Proposed Clearing Companion Policy also says that the centralized risk management program needs to "*reasonably* [monitor] and [manage] risks…," which appears to be a more flexible standard. (emphasis added).

A "reasonableness" standard is the appropriate standard in this instance. Reasonableness is inherently contextual. A risk management program that is reasonable for a small market participant hedging a single risk in its only line of business is very different than a risk management program that would be reasonable for a large market participant hedging a multitude of risks across many business lines. As such, adopting a "reasonableness" standard would allow market participants to qualify for the Intragroup Exemption while tailoring their risk management programs to their unique circumstances.

Section 10 of the Proposed Clearing Companion Policy should be revised to provide consistent guiding principles, but not prescriptive requirements, to help inform market participants as to what regulators would consider to be an appropriate risk management program. Any such guiding principles should provide market participants with the flexibility to utilize risk management programs that are specific to their unique needs and corporate structures.

4. The Definition of "Intragroup Transaction" Should Be Clarified.

Section 10(1) of the Proposed Clearing Rule provides two avenues for a transaction to qualify as an "intragroup transaction" – one avenue relates to entities that are prudentially supervised on a consolidated basis (*i.e.*, Section 10(1)(a)) and the other relates to preparation of financial statements on a consolidated basis *(i.e.*, Section 10(1)(b)).[14] As commercial energy companies are generally not prudentially supervised, Section 10(1)(b) of the Proposed Clearing

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[13] Proposed Clearing Rule at Section 10(2); Proposed Clearing Companion Policy at Section 10.

[14] Section 10(1)(b) of the Proposed Clearing Rule provides that the following qualifies as an "intragroup transaction": "a counterparty and its affiliated entity if the financial statements for the counterparty and its affiliated entity are prepared on a consolidated basis in accordance with accounting principles as defined by the National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards.*"

Rule is of particular relevance to the Working Group and to commercial energy companies generally.[15] Given the significance of Section 10(1)(b) of the Proposed Clearing Rule, the Working Group is concerned that the proposed language may not be clear.

The Working Group understands Section 10(1)(b) of the Proposed Clearing Rule to represent the concepts provided below.

- If two entities are consolidated under accounting principles consistent with National Instrument 52-107, then a transaction between the two entities would qualify as an intragroup transaction.

- To the extent that two affiliates' financial results are consolidated into the same ultimate parent's financial statements under accounting principles consistent with National Instrument 52-107, a transaction between those two affiliates would qualify as an intragroup transaction.

- A transaction entered into by (i) a non-issuer Canadian entity, the financial results of which are consolidated into the financial statements of an affiliated foreign issuer that files financial statements in its home jurisdiction in accordance with IFRS, with (ii) another affiliate, the financial results of which are consolidated into the same financial statements qualifies as an intragroup transaction.

The Working Group respectfully requests that the CSA confirm that its understanding of Section 10(1)(b) is correct.

In addition, it is the Working Group's understanding that the revisions made to Section 10(1)(b) of the Proposed Clearing Rule from the analogous Section 8(1)(a) in the Draft Model Clearing Rule were intended to simplify the language and were not intended to change the outcome or substance. The Working Group respectfully requests that the CSA confirm that is the case.

If the CSA did intend to change the outcome or substance with the revisions made to Section 10(1)(b) of the Proposed Clearing Rule from the analogous Section 8(1)(a) in the Draft Model Clearing Rule, the Working Group respectfully requests that the CSA readopt the language used in Section 8(1)(a) of the Draft Model Clearing Rule.

Specifically, Section 8(1)(a) of the Draft Model Clearing Rule provided that an "intragroup transaction" would include a transaction between two affiliated entities whose financial statements are prepared on a consolidated basis in accordance with one of the following:

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[15] As noted by the CSA, "'entities prudentially supervised on a consolidated basis' refers to two counterparties that are supervised on a consolidated basis either by the Office of the Superintendent of Financial Institutions (Canada), a government department or a regulatory authority of Canada or a jurisdiction of Canada responsible for regulating deposit-taking institutions." CSA Notice at 16.

(i) if the head office of the parent entity is located in Canada, International Financial Reporting Standards, Canadian GAAP applicable to publicly accountable enterprises, Canadian GAAP applicable to private enterprises or U.S. GAAP as defined by the National Instrument 52-107 Acceptable Accounting Principles and Auditing Standards;

(ii) if the head office of the parent entity is located in a foreign jurisdiction, generally accepted accounting principles of the foreign jurisdiction in which the head office is located if those principles are substantially similar to those provided in subparagraph (i).

Section 8(1)(a)(ii) of the Draft Model Clearing Rule was important in that it provided a workable proposed framework for market participants operating in multiple jurisdictions to qualify for the intragroup transaction.

D. THE INTERPRETATION OF THE TERM "AFFILIATED ENTITY" SHOULD BE AMENDED (SECTION 3 OF THE PROPOSED CLEARING RULE)

Both the Affiliate End-User Exemption and the Intragroup Exemption require market participants to be "affiliated entities" in order to use those exemptions. In the Proposed Clearing Rule, the term "affiliated entity" is limited to "companies."[16] While the word "company" is not defined in the Proposed Clearing Rule, securities laws in Canada define the term to include "any corporation, incorporated association, incorporated syndicate or other incorporated organization."[17]

Noticeably absent from that definition are partnerships.[18] As such, the proposed interpretation of the term "affiliated entity," would effectively prevent partnerships and other unincorporated entities from exercising the Affiliate End-User Exemption and the Intragroup Exemption. Many commercial energy companies have partnerships and similar types of legal entities within their corporate families.

The Working Group requests that the Proposed Clearing Rule be amended to permit partnerships and other unincorporated entities to exercise both exemptions. To do so, the CSA should revise the interpretation of the term "affiliated entity" to include "persons" and "companies."

In addition, in the proposed interpretation of the term "affiliated entity," the CSA discusses the circumstances where an entity controls another entity. Specifically, an entity controls another entity if it holds more than 50 percent of voting securities of that entity or if 50 percent of voting securities of that entity are held for its benefit. The Working Group would like to confirm that phrase "held for its benefit" is intended to account for indirect control, such that

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16 Proposed Clearing Rule at Section 3.

17 *See, e.g.,* Section 1 of the Ontario Securities Act and Section 1 of the Alberta Securities Act.

18 Partnerships are captured under the definition of "person." *See, e.g.,* Section 1 of the Ontario Securities Act and Section 1 of the Alberta Securities Act.

entities would be deemed affiliated entities if another entity had direct or indirect ownership of over 50 percent of the voting securities of each of the entities.[19]

E. THE EXEMPTION FOR CANADIAN GOVERNMENTAL ENTITIES SHOULD BE REMOVED (SECTION 6 OF THE PROPOSED CLEARING RULE)

The Working Group opposes the exemption from the mandatory central clearing requirement for federal and provincial governments, governmental entities, and wholly-owned government entities whose obligations are guaranteed by the federal or a provincial government (the "**Governmental Entities**"). It is unclear why such an exemption is provided, as no explanation is offered for this categorical special treatment. The Working Group strongly encourages the CSA to avoid providing an advantage to any type of participant in competitive markets, such as Canadian OTC derivatives markets, when establishing the regulatory obligations for market participation. In addition, providing a complete exemption from mandatory central clearing for Government Entities might encourage them to take additional speculative risk as they might be cost advantaged in doing so.

In energy markets, Governmental Entities actively compete with other market participants that fall outside of the categories listed in Section 6 of the Proposed Clearing Rule. Providing Governmental Entities with an exemption from mandatory central clearing would lower their costs of engaging in derivatives transactions and provide them with an unfair advantage over other market participants. As such, the Working Group respectfully requests for the CSA to remove the special categorical exemption from mandatory central clearing provided in Section 6 of the Proposed Clearing Rule.

F. A UNIFORM LIST OF FACTORS SHOULD BE CONSIDERED BY THE REGULATORS FOR THE MANDATORY CENTRAL CLEARING DETERMINATION

The Working Group supports the CSA issuing a National Instrument in an effort to harmonize the substance of the Proposed Clearing Rule and the Proposed Clearing Companion Policy across Canadian jurisdictions. Issues regarding harmonization remain, however, with respect to the mandatory central clearing determination as it would still be made by provincial regulators. The Proposed Clearing Rule includes only suggested criteria for regulators to use when determining which derivatives or classes of derivatives should be subject to mandatory central clearing. In addition, it is unclear if the proper level of analysis would be at the provincial market level or the Canadian market level – this is particularly relevant with respect to the analysis of liquidity.

The Working Group proposes that a uniform list of factors be considered by the regulators for the mandatory central clearing determination and respectfully suggests that the appropriate level of analysis is the Canadian market level. For example, when determining whether Canadian dollar LIBOR-based interest rate swaps should be subject to mandatory

[19] The Working Group notes that Section 3 of the Alberta Securities Act includes a definition of "control" that is broader than the 50 percent test set forth in the Proposed Clearing Rule. The Working Group respectfully suggests that the CSA consider making the definition of "control" in the Proposed Clearing Rule consistent with definition of "control" in securities law context.

central clearing in Alberta, the Alberta Securities Commission ("**ASC**"): (i) should make that determination concurrently with the other provinces' securities regulators; and (ii) should make that determination based on those swaps' characteristics across Canada – not just in Alberta. So, when determining if adequate liquidity exists to subject those swaps to mandatory central clearing, the ASC should look at liquidity across Canada – not just liquidity in Alberta.

Further, each product should be considered in a uniform manner across provinces. To achieve this, the level of significance and weight of each factor in making a mandatory clearing determination with respect to a certain product should be harmonized across the provinces.

III. CONCLUSION.

The Working Group appreciates this opportunity to provide comments on the Proposed Clearing Rule and the Proposed Clearing Companion Policy and respectfully requests that the comments set forth herein are considered during the drafting process.

If you have any questions, please contact the undersigned.

Respectfully submitted,
/s/ R. Michael Sweeney, Jr.
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Alexander S. Holtan
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May 12, 2015

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Dear Sir/Madam:

CSA Proposed National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives

The Canadian Life and Health Insurance Association is pleased to provide comments on Canadian Securities Administrators ("CSA") Proposed National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives.

Established in 1894, the Canadian Life and Health Insurance Association (CLHIA) is a voluntary trade association that represents companies which together account for 99 per cent of Canada's life and health insurance business. The industry, which provides employment to over 150,000 Canadians and has investments in Canada of about $580 billion, protects almost 28 million Canadians through products such as life insurance, annuities, registered retirement savings plans, disability insurance and supplementary health plans. It pays benefits of more than $76 billion a year to Canadians and manages about two-thirds of Canada's pension plans. Canadian life insurance companies participate as end-users in Canadian and foreign derivatives markets.

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We are pleased that the CSA has decided to take the approach of creating a National Instrument regarding central counter party clearing of derivatives since this will greatly aid with ensuring harmonization across Canada. We also support the proposed phased-in approach with respect to different categories of market participants.

We support the proposed exemptions to the requirement for mandatory clearing. We have some specific comments related to the intragroup exemption, as follows.

(i) We agree with elimination of the annual form filing requirement in connection with the intragroup exemption.

(ii) Subsection 10(3) states that "No later than the 30th day after a local counterparty to an intragroup transaction relies on the exemption in subsection (2), the local counterparty must submit to the regulator, in an electronic format, a completed Form 94-101F1 Intragroup Exemption."

Clarity is required regarding whether the proposed subsection 10(3) would require the proposed form 94-101F1 to be filed for every transaction between two affiliated entities. The Policy Statement suggests that the Form would only need to be filed within 30 days of the "first transaction".

(iii) Some further clarification is needed regarding the way in which the timing for the requirement as stated in section 10(2)(c) would operate together with the requirement as stated in Form 94-101F1, section 2, para 5. It would be difficult to state whether "there is a written agreement setting out the terms of the transaction" in advance of a transaction occurring. While there would be a master agreement between the parties setting out the general terms of all transactions at the time the Form is originally filed, the specific terms of each transaction would be determined at the time of such transaction. We have noted that there don't appear to be any similar requirements to file a form for inter-group transactions in the US or Europe.

(iv) We would encourage the CSA to further consider the elimination of a form filing requirement, or failing that, to change the wording of the Form to contain more general language with respect to the documentation of the trades, i.e., that the swap trading relationship is documented.

The CLHIA appreciates the opportunity to provide its comments. If you require any additional information at this time, please feel free to contact me by e-mail at JWood@clhia.ca or by telephone at 416-359-2025.

Yours truly,

"James Wood"

James Wood
Counsel

Canadian Market
Infrastructure Committee

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Ontario Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
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May 13, 2015

Dear Sirs/Mesdames:

Re: Proposed NI 94-101 (the "Proposed National Instrument") and Proposed Companion Policy 94-101CP (the "Proposed Companion Policy") ***Mandatory Central Counterparty Clearing of Derivatives***

INTRODUCTION

The Canadian Market Infrastructure Committee ("**CMIC**")[1] welcomes the opportunity to comment on the Proposed National Instrument and the Proposed Companion Policy.[2]

[1] CMIC was established in 2010, in response to a request from public authorities, to represent the consolidated views of certain Canadian market participants on proposed regulatory changes. The members of CMIC who are responsible for this letter are: Bank of America Merrill Lynch, Bank of Montreal, Bank of Tokyo-Mitsubishi UFJ (Canada), Caisse de dépôt et placement du Québec, Canada Pension Plan Investment Board, Canadian Imperial Bank of Commerce, Deutsche Bank A.G., Canada

General Comments

CMIC supports the efforts of the CSA to implement Canada's G20 commitment in relation to the central clearing of OTC derivatives. However, given the relatively small size of the Canadian market, we strongly believe that a more principles-based approach, rather than the pure rules-based approach set out in the Proposed National Instrument, would be more effective. CMIC submits that a more broadly based approach that is focused on large financial entities that are local counterparties is appropriate in Canada and would be consistent with Canada's G20 commitment. Australia is another comparable smaller jurisdiction that has taken a more broadly-based approach to its clearing regime.[3]

CMIC urges Canadian regulators to re-evaluate their approach to mandatory clearing in the Canadian OTC derivatives market. The Proposed National Instrument appears to be predicated on the assumption that mandatory clearing for all but the smallest non-financial end-users of OTC derivatives will create maximum systemic risk benefits. CMIC disagrees with such an approach. The Proposed National Instrument extends mandatory clearing to small financial institutions (such as pension plans, insurance companies etc.) the vast majority of which are effectively end-users of OTC derivatives. In the current environment, such an approach would create serious concerns relating to access to clearing at a reasonable cost, legal complexity, increased costs and operational limitations. It is noteworthy that many Futures Commission Merchants ("**FCMs**") have very recently exited the market[4]. As a result of the current market realities of low interest rates and increased regulatory burdens, many FCMs, in particular smaller ones, are being challenged by falling fees and high operating costs, including costs of regulatory compliance.[5] This means that it is becoming increasingly difficult for non-clearing members to access clearing services.

The case for excluding Other Market Participants from the application of the clearing regime is not simply a function of the regulatory burden.[6] Taking an approach that is focused on large financial entities that are local counterparties is supported by the very recent and growing withdrawal of access to clearing at a reasonable cost. This trend is not only seen in formal withdrawals from the market,

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Branch, Fédération des Caisses Desjardins du Québec, Healthcare of Ontario Pension Plan, HSBC Bank Canada, JPMorgan Chase Bank, N.A., Toronto Branch, Manulife Financial Corporation, National Bank of Canada, OMERS Administration Corporation, Ontario Teachers' Pension Plan Board, Public Sector Pension Investment Board, Royal Bank of Canada, Sun Life Financial, The Bank of Nova Scotia, and The Toronto-Dominion Bank. CMIC brings a unique voice to the dialogue regarding the appropriate framework for regulating the Canadian over-the-counter ("**OTC**") derivatives market. The membership of CMIC has been intentionally designed to present the views of both the 'buy' side and the 'sell' side of the Canadian OTC derivatives market, including both domestic and foreign owned banks operating in Canada. As it has in all of its submissions, this letter reflects the consensus of views within CMIC's membership about the proper Canadian regulatory regime for the OTC derivatives market.

[2] Available at: https://www.osc.gov.on.ca/documents/en/Securities-Category9/csa_20150212_92-101_roc-derivatives.pdf.

[3] Australian Government Proposals Paper, "Implementation of Australia's G-20 over-the-counter derivatives commitments: AUD-IRD central clearing mandate." July 2014. Available at: http://www.treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/Consultations/2014/Central%20clearing%20of%20OTC%20AUD/Key%20Documents/PDF/Proposals-Paper-20140707.ashx.

[4] (i) MarketsMedia. "FCMs to Exit Market." 11 June 2014.. Available at: http://marketsmedia.com/fcms-exit-market/ (ii) Rennison, Joe. Risk.net. "Nomura reviews viability of swaps clearing business." 24 April 2015. Available at: http://www.risk.net/risk-magazine/news/2405748/nomura-reviews-viability-of-swaps-clearing-business.

[5] Commissioner J. Christopher Giancarlo's testimony before the U.S. House Committee on Agriculture, Subcommittee on Commodity Exchange, Energy, and Credit, April 4, 2015, pg 26. Available at: http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlos-5.

[6] By "Other Market Participants" we are referring to counterparties that are end users or effectively end users and includes smaller financial institutions, pension plans and other non-systemically important financial entities that are using derivatives purely for operating risk mitigation purposes and are not acting in a market making function.

but also by pricing that in effect makes it uneconomic for smaller market participants to hedge. If Other Market Participants are forced to clear, they may not be able to access clearing at a reasonable cost and therefore may not be able to hedge their operating risks. This increases, not decreases, overall risks in the OTC derivatives market. By excluding Other Market Participants from the clearing regime, CMIC submits that Other Market Participants will have a greater likelihood of being able to continue to be able to hedge their risks.

Of even greater importance in analyzing the advantages of a clearing regime that focuses on the large financial entities is the benefit of reinforcing the underlying purpose of establishing a clearing regime, namely, systemic risk mitigation. The goal of implementing a mandatory clearing regime is to mitigate systemic risk in derivatives markets. CMIC submits that goal is achievable by limiting the regime to large financial entities. Other Market Participants, especially the smaller ones, by definition, do not pose systemic risk. This point is particularly important given the evolving nature of the derivatives market both in Canada and globally, especially the recent and accelerating trend towards various banks choosing to withdraw from the market. The derivatives market is increasingly being characterized and challenged by ongoing access to clearing at a reasonable cost and by increasing concentration of clearing services to a smaller number of large clearing banks. Regulatory reform should be designed in a manner that achieves maximum mitigation of systemic risk but does so with regard to market realities. CMIC submits that it would be counter-productive to the key systemic risk mitigation goal of clearing by creating a regime that encourages increasing concentration and discourages Other Market Participants from having clearing access at a reasonable cost. CMIC submits that Other Market Participants need to be able to continue to be properly hedged against their operating risks. This very point has been recognized by Australian authorities and is one of the prime reasons Australian authorities decided to adopt a more broadly-based clearing regime focused on large financial entities. Page 47 of the Australian Council of Financial Regulators report states:

> "the Regulators are not convinced of the public policy case for introducing mandatory central clearing of OTC derivatives for non-dealers . . . . With few exceptions, non-dealers' activity in OTC derivatives is relatively limited and motivated primarily by hedging of underlying cash flows and exposures. Accordingly, even though there may be some systemic risk reduction benefit from central clearing by non-dealers, it is likely to be limited. Indeed, where small financial institutions and especially non-financial entities have restricted access to liquid assets to meet CCPs' initial and variation margin obligations, new sources of risk could emerge."[7]

CMIC's view is that the appropriate approach to mandatory clearing in Canada should be more principles-based and gradual. At the very least, CMIC submits that, initially, the regime should only require large Canadian financial institutions who are dealers in OTC derivatives to clear where practicable, allowing time for clearing incentives to take-hold and for a broader range of clearing solutions to develop.[8] It would be more effective and less complex to take the time to study at least three years' worth of data and then mandate only systemically important counterparties to centrally clear mandated transactions, as opposed to requiring effectively all market participants to clear and

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[7] Council of Financial Regulators (Comprised of the Reserve Bank of Australia, the Australian Prudential Regulation Authority, the Australian Securities and Investments Commission, and The Treasury. "Report on the Australian OTC Derivatives Market". April 2014, pg. 3. Available at: http://www.cfr.gov.au/publications/cfr-publications/2014/report-on-the-australian-otc-derivatives-market-april/index.html.

[8] This is different from the phase-in approach for NI 94-101 suggested by the CSA. The proposed CMIC approach only mandates clearing, where practicable, for large financial institutions who are dealers and therefore no exemptions would be required.

then rely on exemptions to exclude end-users. Studying three years of trade data will also allow regulators to study market changes and assess the merit of our serious concerns about smaller market participants. CMIC submits that once the three years of trade data are available, the CSA should assess those data in light of the disadvantages of imposing mandatory clearing on Other Market Participants (especially smaller market participants) having regard to the various concerns noted above, namely, access to clearing at a reasonable cost, other clearing solutions that have appeared in the market by that time, the absence of material systemic risks being posed by such market participants, the regulatory burden that would be imposed on such participants, and the enhancement of systemic risk mitigation by ensuring that such market participants are not discouraged from continuing to hedge their operating risks. These potential disadvantages of a universal clearing regime need to be measured against what we submit are very marginal and immaterial advantages of requiring Other Market Participants to be subject to mandatory clearing. Alternatively, CMIC believes that it would be appropriate to adopt an approach similar to the Australian approach,[9] which is to mandate central clearing only for certain derivatives denominated in certain currencies for major domestic and foreign banks. In addition to Australia, we would also note that a more limited clearing regime focused on large financial entities is also being adopted in Japan.[10]

Another reason for advocating a more principles-based approach is that the current proposed rules-based approach will inevitably conflict with the mandatory clearing regime in the US or in Europe, given that those two regimes are different. Mandating clearing for Canadian local counterparties under the Proposed National Instrument will therefore bifurcate the Canadian and global OTC derivatives markets. Moreover, as Canadian market liquidity is heavily dependent on outside participants, a Canadian clearing mandate that extends to either products or participants, which are not subject to clearing in other jurisdictions, risks further withdrawal by outside participants from the Canadian market, thereby harming liquidity and increasing concentration. It is CMIC's view that, if a more principles-based approach is adopted, such as the one suggested above, OTC derivatives trades cleared under such approach would provide significant systemic risk management benefits.

CMIC is also of the view that mandatory clearing requirements should not come into effect in Canada until after such requirements (including which products are designated for mandatory clearing) are fully in force in major jurisdictions such as the U.S. and Europe. The smaller Canadian market reform cannot, practically, be at the forefront of developing rules relating to mandatory clearing. Canadian rules should instead "plug-in" to global market rules, including under Dodd-Frank and EMIR. There is a potential for market bifurcation and fragmentation between Canadian and global markets if Canadian rules cannot fully align with, or defer to, foreign regimes. Such fragmentation could drive global capital away from the Canadian market.

A final reason why the Canadian mandatory clearing rules should not become effective until the mandatory clearing rules in other major jurisdictions become effective is that additional time will allow for an effective Canadian substitute compliance regime to be developed. This suggestion, for example, anticipates that clearing rules in Europe will be a permitted jurisdiction for substitute compliance under section 5(5) of the Proposed National Instrument. Again, for example, if Canadian rules come into force before the EMIR rules, local counterparties in Canada that are preparing to mandatorily clear under EMIR would then need to clear pursuant to the Canadian rules and may not have sufficient resources or technological ability to do so.

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[9] *Supra,* note 3.

[10] Clifford Chance, "Recent developments in OTC derivatives regulations in Japan". October 2014. Available at: http://www.cliffordchance.com/briefings/2014/10/recent_developmentsinotcderivative.html.

Specific Comments on National Instrument

If Canadian regulators decide not to adopt a more principles-based approach as CMIC suggests above, and instead decide to adopt a rules-based approach and proceed with the Proposed National Instrument, we have the following comments thereon.

1. Harmonization

As mentioned in our prior response letters to other proposed rules relating to OTC derivatives, CMIC feels very strongly that these mandatory clearing rules should be harmonized across all provinces. Otherwise, if there are differences among provincial rules, those differences will create confusion and potentially conflicting rules. Accordingly, in this respect, CMIC fully supports the national instrument approach taken by the CSA.

In addition, CMIC is of the view that the OTC derivatives rules should be consistent within each Province's rules. For example, the definition of "affiliated entity" should be the same. We note, for example, that the definition of "affiliated entity" in the Proposed National Instrument is different than the definition in the recent proposed multilateral instrument on trade reporting.[11]

Finally, when determining whether a type of derivative should be a mandatorily clearable derivative, CMIC is of the view that a derivative should not be a mandatorily clearable deliverable unless it is a mandatorily clearable derivative in the US or in Europe. Having said that, however, CMIC submits that simply because a derivative is mandatorily clearable in the US or in Europe should not determine whether such derivative should be mandatorily clearable in Canada.

2. Personal Property Security Law Amendments

As we have mentioned previously,[12] any proposed OTC derivatives clearing regulatory regime in Canada is incomplete and inoperable unless Provincial personal property security law is amended to allow the perfection of security interests in cash collateral by way of control. The importance of this amendment cannot be over-emphasized. None of the models discussed in the Consultation Paper (i.e. the principal or agency central clearing model, or any of the four segregation models) is actually capable of functioning properly without these legislative changes. If these amendments are not made, clearing arrangements will not work effectively and will not achieve their intended purpose. Implementing these amendments will cause Canadian law to be harmonized with U.S. personal property security law in this respect. International clearing rules require this perfection to be achievable. If cash collateral is the only form of collateral required[13], the absence of a Canadian regime in relation to perfecting cash collateral by way of control will clearly reduce appreciably the ability of market participants to clear as foreign banks may not be prepared to take this risk, especially during moments of market distress. Furthermore, this legislative gap is not just relevant to the cleared market – it equally compromises the uncleared swap market.

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[11] Proposed Multilateral Instrument 91-101 "Derivatives: Product Determination" and Proposed Multilateral Instrument 96-101 "Trade Repositories and Derivatives Data Reporting". Available at: https://www.bcsc.bc.ca/Securities_Law/Policies/Policy9/PDF/CSA_Multilateral_Notice_and_Request_for_Comment__January_21__2015/.

[12] CSA Consultation Paper 91-404 – "Derivatives: Segregation and Portability in OTC Derivatives Clearing". Available at: https://www.osc.gov.on.ca/documents/en/Securities-Category9/csa_20120210_91-404_segregation-portability.pdf.

[13] For example, see (i) LCH Clearnet SwapClear Service Rule Book, Section 1.7 (Variation Margin) (April 13, 2015) (Available at: http://www.lchclearnet.com/documents/731485/762691/procedure+2c-ot-misc_changes_13-04-15.pdf/cfdf27b9-a9b6-4bcc-97ea-66925044fcd2) and (ii) the Prudential Regulators re-proposed rules regarding margin requirements for uncleared swaps, Margin and Capital Requirements for Covered Swap Entities, 79 Fed. Reg. 57348 (Sept. 24, 2014) (Available at: http://www.occ.gov/news-issuances/federal-register/79fr57348.pdf).

As a business matter, we understand that the absence of such perfection and priority over cash collateral currently causes certain global banks and other financial institutions to impose higher pricing on trades involving Canadian counterparties to compensate for this Canadian risk. Since the relevant jurisdiction is the head office of the party posting collateral, ideally legislation in all Canadian jurisdictions should be similarly amended.

CMIC notes that the Quebec legislature has recently passed legislation[14] to address this issue and would urge the other provinces to follow suit.

3. Determination of Clearable Derivatives

The ultimate determination of derivatives that will be subject to mandatory clearing is arguably one of the most important aspects of derivative reform given the systemic risk implications. The process of making those determinations will need careful consideration and engagement with all Canadian regulatory authorities and all stakeholders.

As mentioned in the CSA Notice and Request for Comments[15] relating to the Proposed National Instrument, the CSA has indicated that, as part of the mandatory clearing determination process, it will publish for comment the derivatives proposed to be mandatorily clearable. The CSA further notes that "except for Quebec", the determination process is expected to follow the CSA's typical rule-making or regulation making process. There is no mention as to what this process will be in Quebec, other than the fact that the determination process will be made "by decision".

CMIC endorses the process of holding a commentary period for the public to comment on any derivative which is proposed to be subject to mandatory clearing. However, it is CMIC's view that there should be a minimum comment period of 60 days (for all provinces) and that this requirement should be expressly stated in the clearing rule. This will add an element of certainty to the mandatory clearing determination process and allow sufficient time for market participants to provide their input.

4. Definition of Hedging of Commercial Risk

Section 4 of the Rule sets out what is meant when a derivative is held for the purpose of hedging or mitigating commercial risk. One of the conditions that must be satisfied is that the derivative establishes a position which is intended to reduce risks relating to the commercial activity or treasury financing activity of the counterparty or of an affiliate and meets any of the tests set out in subparagraphs (i) and (ii). Subparagraph (ii) provides that the derivative covers the risk arising from the indirect impact on the value of assets, services, inputs, products, commodities or liabilities referred to in subparagraph (i), resulting from fluctuation of "interest rates, inflation rates, foreign exchange rates or credit risk". The list of items at the end of subparagraph (ii) does not appear to cover all the risks which might impact the value of such assets, services, inputs, products, commodities or liabilities. For example, changes in commodity prices and equity prices are not referenced and may not otherwise be covered by the other factors listed in subparagraph (ii). Accordingly, CMIC recommends that section 4(a)(ii) of the Rule should be revised to read: "…resulting from fluctuation in interest rates, inflation rates, foreign exchange rates, credit risk, **commodity prices and equity prices**, and other similar rates, risks, levels and prices".

[14] Bill No. 28, *An Act mainly to implement certain provisions of the Budget Speech of 4 June 2014 and return to a balanced budget in 2015-2016*. Effective January 1, 2016. Available at: http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-28-41-1.html.

[15] Proposed National Instrument, pg. 1391.

5. Expanding the End User Exemption

The primary purpose of mandating the clearing of standardized OTC derivatives is to mitigate systemic risk.[16] In CMIC's view, requiring Other Market Participants, especially smaller market participants, who are entering into transactions for hedging purposes, to clear such transactions is not efficient and does not significantly aid in the mitigation of systemic risk. As mentioned in our previous response letter, and as argued above in our "General Comments", small financial institutions enter into derivative transactions merely as a service to their commercial lending customers, and will then hedge that risk with a derivatives dealer. Those derivative transactions are therefore not speculative in nature and, overall, lower risk not only for the small financial institution itself but also systemically. Requiring small financial institutions to clear those transactions may cause such risks to be un-hedged, which benefits neither the financial institution, nor the Canadian financial system. Moreover, the transactions entered into with a small financial institution's commercial lending customers are often secured with non-liquid assets as part of the overall lending transaction. If such a hedging transaction between the small financial institution and a derivatives dealer is then required to be cleared, the small financial institution cannot simply pass along to its clearing agent the collateral received from its customer and, instead, must fund the collateral to be posted in other ways. This increases costs to the lending customer, potentially driving business away from smaller Canadian financial institutions.

Requiring all small financial entities to mandatorily clear their transactions creates market access issues. As noted above, due to various reasons including escalating costs and regulatory complexity, we understand that FCMs are withdrawing from the market or evolving to pricing models that make clearing access uneconomic for Other Market Participants. Such withdrawals and pricing models create a significant impediment to access clearing services, particularly for smaller financial entities.

We note that there is an exemption from mandatory clearing requirements for small financial entities under Dodd-Frank[17]. For the reasons outlined above, and in our introductory discussion in this letter under "General Comments", we think that such an exemption is appropriate in Canada for Other Market Participants, including small financial entities. CMIC submits that the precise form that this exemption takes should be data driven, based on a careful review by regulators of 3 years of trade reporting data relating to both cleared and uncleared trading activity. Also, as noted above, a study of those trade data in the context of the disadvantages enumerated above should be undertaken by the CSA. Subject to the outcome of that regulatory review of such trade data and the assessment of such disadvantages, as an initial proposal, CMIC's preliminary view is that, while an asset test is a possibility, the Other Market Participants exemption (especially for smaller financial entities) should be framed by reference to both cleared and uncleared trading volume, but excluding trading volumes relating to transactions that are not expected to be subject to mandatory clearing (for example, deliverable foreign exchange transactions). Only after a clear picture emerges of what the trade reporting data show can one make a reasonable assessment of the impact of the appropriate breadth of the Canadian mandatory clearing regime. As recommended in our comments above in the introductory discussion, CMIC's strong recommendation is to, at least initially, formulate a regime limited to large financial entities that are local counterparties. CMIC strongly recommends that Canadian regulators reconsider providing an exemption from mandatory clearing for Other Market Participants, especially smaller market participants.

6. Substitute Compliance

CMIC notes that the substitute compliance provision under Section 5(5) of the Proposed National Instrument is available only to guaranteed affiliates and not to any other entity organized under the

[16] CSA Notice and Request for Comment Proposed NI 94-101. Pg. 1390.

[17] See section 2(h)(7)(D)(i) of the *Commodity Exchange Act.*

laws of any other province covered by the Proposed National Instrument. Therefore, if a mandatorily clearable transaction is entered into between an Ontario local counterparty and a BC local counterparty, the transaction must be submitted for clearing to a clearing agency that is regulated by both BC and Ontario. However, it may not be the case that the clearing agency used is regulated by both jurisdictions. For example, clearing agencies may apply for registration only in provinces where their clearing members are located, rather than in all the provinces in which all clients of clearing members are located. Indeed, clearing agencies may not know where all such clients are located as they may only have relationships with their clearing members.

Further, if a mandatorily clearable transaction is entered into between a counterparty organized under the laws of a Canadian province (for example, Ontario) and a foreign dealer that is required to clear such transaction under foreign laws (for example, under Dodd-Frank), the substitute compliance provision under Section 5(5) is not available. Moreover, the clearing agency used to clear the transaction under Dodd-Frank may not be recognized under the laws of Ontario, for the same reason mentioned in the paragraph above (i.e. the clearing member for the Ontario counterparty may also be a foreign dealer and therefore the clearing agency would not seek recognition under the laws of Ontario). In such circumstance, the foreign dealer would be forced to find a clearing agency that is recognized under both jurisdiction and, apply to become a clearing member (or find a clearing member). This result would significantly increase transaction costs and complexity. In such circumstances, the foreign dealer may very well conclude that the costs and complexity do not justify the compliance required and decide to exit the Canadian market which, of course, would decrease liquidity in the Canadian market.

CMIC submits that substitute compliance should apply at least in the above two cases. In other words, Section 5(5) should also apply to a local counterparty that is a local counterparty under paragraph (a) of the definition of local counterparty and should also apply if the transaction is submitted for clearing in accordance with the laws of a jurisdiction covered under the Proposed National Instrument (i.e. under the laws of another province of Canada) or in accordance with the laws of a foreign jurisdiction referenced in Section 5(5)(a) and (b).

7. Phase-In Approach

CMIC supports the phase-in approach of the mandatory clearing rule that the CSA has adopted. The Proposed National Instrument has expressly asked for views on the threshold that should apply to delineate between financial entities in category 2 and category 3. In CMIC's view, determining a threshold amount is difficult as only regulators have access to this information. If it is decided that a dollar threshold amount will be used for such delineation, CMIC is of the view that Canadian regulators should establish such threshold amount only after a thoughtful review of trade data over a period of time, say, three years. However, CMIC would like to suggest that the CSA should consider a different approach to delineating such entities based on the sophistication of the parties. CMIC submits that parties that are dealers or deemed dealers are more sophisticated and will have the ability to access clearing services (in many cases, in fact, are already accessing clearing services). The precise scope of the category 2 entities should also be informed by the review by regulators of trade reporting data by studying who is already clearing and who is not, and calibrate thresholds based on the trade reporting data. In CMIC's view, the types of entities that should fall under category 2 should include dealers and deemed dealers together with those who should be included based on a study of the trade reporting data over an appreciable period. Lastly, and to reiterate the point made earlier, CMIC submits that the mandatory clearing regime should not apply to Other Market Participants.

8. Intragroup Exemption

The Proposed National Instrument requires a local counterparty to submit a Form F1 to the regulator and to prepare consolidated financial statements in order to qualify for the intragroup exemption. Submitting the form directly to the regulator, rather than to a trade repository as is the case under Dodd-Frank, is overly burdensome as this would require submission to multiple provincial regulators. CMIC recommends that Form F1 should be submitted to an approved trade repository.

In addition, the requirement to prepare consolidated financial statements may not be achievable among affiliated entities with different accounting requirements that may not require consolidation. The rule should therefore allow affiliated entities that do not consolidate financial statements as a result of differing accounting requirements to qualify for the intragroup exemption.

In our previous comment letter, we asked whether the information provided in Form F1 is intended to be confidential. The Proposed National Instrument is silent on this point. CMIC is of the view that the information provided in Form F1 is sensitive information in that it relates to the identity of the affiliated entities and the terms of the transaction. Accordingly, CMIC strongly submits that Form F1 should not be accessible to the public and this confidentiality should be incorporated into the Proposed National Instrument.

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CMIC welcomes the opportunity to discuss this response with you. The views expressed in this letter are the views of the following members of CMIC:

Bank of America Merrill Lynch
Bank of Montreal
Bank of Tokyo-Mitsubishi UFJ (Canada)
Caisse de dépôt et placement du Québec
Canada Pension Plan Investment Board
Canadian Imperial Bank of Commerce
Deutsche Bank A.G., Canada Branch
Fédération des Caisses Desjardins du Québec
Healthcare of Ontario Pension Plan
HSBC Bank Canada
JPMorgan Chase Bank, N.A., Toronto Branch
Manulife Financial Corporation
National Bank of Canada
OMERS Administration Corporation
Ontario Teachers' Pension Plan Board
Public Sector Pension Investment Board
Royal Bank of Canada
Sun Life Financial
The Bank of Nova Scotia
The Toronto-Dominion Bank

May 13, 2015

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Ontario Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superindendent of Securities
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

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Re: Proposed NI 94-101 and Proposed Companion Policy 94-101CP (the "Proposed National Instrument") *Mandatory Central Counterparty Clearing of Derivatives*

Dear Sirs and Madams,

The undersigned Canadian public sector pension fund managers, administrators and/or trustees, British Columbia Investment Management Corporation, Caisse de dépôt et placement du Québec, Canada Pension Plan Investment Board, Healthcare of Ontario Pension Plan Trust Fund, OMERS Administration Corporation, Ontario Teachers' Pension Plan, and Public Sector Pension Investment Board (collectively "Canadian Pension Fund Managers," "we" or "our"),[1] are grateful to have the opportunity to provide comments on the Proposed National Instrument.

[1] Please refer to Appendix 2 for a detailed description of each Canadian Pension Fund Manager.

Our group represents many of the largest Canadian pension fund managers. We have common features and objectives, including that of maximizing the returns for our beneficiaries while satisfying our fiduciary duties. On an aggregate basis, we manage approximately $960 billion in assets.

We support the Canadian Securities Administrators' efforts to improve transparency in the derivatives market and enhance the mitigation of systemic risk with the Proposed National Instrument; however, we do not believe that (i) extending mandatory clearing rules to the Canadian Pension Fund Managers, and (ii) including pension funds under the definition of "financial entity" in the Proposed National Instrument, serves to achieve this objective. We believe that Canadian regulators should follow the approach of similar jurisdictions such as Australia and Japan in excluding unlevered asset managers, pension funds and other non-dealers from the mandatory central clearing requirement, given that such entities do not pose a systemic risk to financial markets.

Many of the Canadian Pension Fund Managers have also been involved in commenting on the Proposed National Instrument through the Canadian Market Infrastructure Committee ("CMIC") and the Pension Investment Association of Canada ("PIAC"), and those who are not members of CMIC have been provided with CMIC's comment paper, and support the comments contained within both CMIC and PIAC's responses. Our comments in this letter highlight our concerns with respect to the application of the Proposed National Instrument to Canadian Pension Fund Managers, noting that the other comment papers did not focus on exempting large Canadian pension fund managers from the mandatory clearing requirements.

APPLICABILITY

We believe that the Australian and Japanese regulations on central clearing provide a useful model for Canada, given that they have similar financial markets. In Australia, non-dealers are exempted from mandatory central clearing requirements, based on regulatory findings that non-dealer activity in OTC derivatives is relatively limited, and thus the systemic risk reduction benefit from including them is likely to be limited.[2]

Similarly, the Japanese regulations on central clearing only apply to large domestic financial institutions registered under the Financial Instruments and Exchange Act ("FIEA") that are defined as "Financial Institution Business Operators" or "Registered Financial Institutions" and are members of licensed Japanese clearinghouses. Thus, in practical terms the clearing regime in Japan only applies to dealer-to-dealer transactions.[3]

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[2] Australian Prudential Regulation Authority, Australian Securities and Investment Commission and Reserve Bank of Australia, *Report on the Australian OTC Derivatives Market*, April 2014, p. 3. Accessed at: http://www.cfr.gov.au/publications/cfr-publications/2014/report-on-the-australian-otc-derivatives-market-april/pdf/report.pdf.

[3] Thomas Treadwell, "OTC Clearing in Japan: Solid Start for Interest Rate Swaps," *Futures Industry Magazine*, January 2013, p. 42. Accessed at: https://secure.fia.org/files/css/magazineArticles/article-1534.pdf.

We believe that Canadian regulators should take a similar approach, in that the proposed mandatory clearing regime should only apply to large Canadian financial institutions that are considered dealers in OTC derivatives, where applicable.

SYSTEMIC RISK

In our opinion, the Canadian Pension Fund Managers do not pose a systemic risk to the financial markets and, as such, should be excluded from the scope of mandatory clearing. To reiterate some of the comments submitted by PIAC, we highlight the following fundamental characteristics of Canadian pension funds:

- Canadian pension funds, regardless of size, use derivatives for a variety of investment objectives, including for certain pension funds to hedge foreign exchange risks associated with investments in foreign jurisdictions, given that our pension benefit obligations have to be paid out in Canadian dollars.
- Canadian pension funds are generally very creditworthy counterparties with long-term investment horizons.
- Canadian pension funds, regardless of size, are not highly leveraged, do not rely heavily on short-term financing, and are not subject to redemptions; all key characteristics of market participants that pose systemic risk.
- Canadian pension funds may in fact be viewed as reducing systemic risk and increasing liquidity in derivatives markets.

The aforementioned characteristics were noted by Mr. Lawrence Schembri, Deputy Governor of the Bank of Canada in a speech to PIAC in Quebec City on May 15, 2014, when he stated the following:

> pension funds can more easily bear market and liquidity risk…because they can diversify these risks over time. Their long investment horizons are different from those of most other market participants, who are more focused on short-term returns. Thus pension funds have the capacity to smooth and absorb short-term volatility and act as a net provider of liquidity and collateral to the system, especially in times of stress...Pension funds do not rely primarily on borrowing to fund their investments, and are not vulnerable to excessive leverage or significant liquidity and maturity mismatches…Hence, they are, in general, not a source of systemic risk to the financial system.[4]

These characteristics were also observed by the Financial Stability Board ("FSB") and International Organization of Securities Commissions ("IOSCO") in their second consultative document "Assessment Methodologies for Identifying Non-Bank Non-Insurer Global Systemically Important

[4] See Remarks by Lawrence Schembri, Deputy Governor to PIAC in Quebec City, May 15, 2014, available at: http://www.bankofcanada.ca/2014/05/double-coincidence-needs-pension-funds/

Financial Institutions: Proposed High-Level Framework and Specific Methodologies," dated March 4, 2015,[5] in which FSB and IOSCO have sought to establish methodologies aimed at identifying non-bank, non-insurer financial institutions "whose distress or disorderly failure, because of their size, complexity and systemic interconnectedness, would cause significant disruption to the wider financial system and economic activity at a global level."[6] In their consultation paper, FSB and IOSCO asked if pension funds should be excluded from the scope of being considered systemically important, in which they stated that one argument is that pension funds "pose low risk to global financial stability and the wider economy due to their long-term investment perspective".[7]

Australian regulators came to a similar conclusion in their *Report on the Australian Derivatives Market*, which states:

> the Regulators are not convinced of the public policy case for introducing mandatory central clearing of OTC derivatives for non-dealers . . . . With few exceptions, non-dealers' activity in OTC derivatives is relatively limited and motivated primarily by hedging of underlying cash flows and exposures. Accordingly, even though there may be some systemic risk reduction benefit from central clearing by non-dealers, it is likely to be limited. Indeed, where small financial institutions and especially non-financial entities have restricted access to liquid assets to meet CCPs' initial and variation margin obligations, new sources of risk could emerge.[8]

Additionally, we would like to note that many of the Canadian Pension Fund Managers are already subject to extensive legislation under the federal and provincial governments and are registered with various regulatory bodies, including, for example, the Financial Services Commission of Ontario and the Office of the Superintendent of Financial Institutions Canada. As a result of these regulations we have developed sophisticated investment processes and have extensive risk management systems in place, as outlined in Appendix 1.[9]

For the reasons listed above, it is our opinion that the Canadian Pension Fund Managers, do not pose a systemic risk to the financial markets. Accordingly, such entities should be excluded from the scope of mandatory clearing or should not be included as "financial entities" under the Proposed National Instrument. We are of the view that the G-20 intent behind mandatory clearing was to

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[5] Accessed at: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD479.pdf.

[6] Ibid, p. 1.

[7] Ibid, p. 5

[8] *Report on the Australian OTC Derivatives Market*, p. 47.

[9] This list was taken from Exhibit B of the Global Pension Coalition's (comprised of the American Benefits Counsel, The Committee on Investment Employee Benefit Assets, Pensions Europe, The European Association of Paritarian Institutions, The National Coordinating Committee for Multiemployer Plans, and The Pension Investment Association of Canada) comment paper: "Comments on Second Consultative Document: Margin Requirements for non-centrally cleared derivatives, issued by the Basel Committee on Banking Supervision and the Board of the International Organization of Securities Commissions," dated March 15, 2013.

mitigate systemic risk, and as the Canadian Pension Fund Managers do not pose a systemic risk to the financial markets, we should not be subject to a Canadian mandatory clearing requirement.

COUNTERPARTY RISK

In our opinion, mandatory clearing requirements could increase our counterparty risk. In a July 2013 survey conducted by Australian regulators[10] to determine the incremental costs and benefits of extending any central clearing mandate to non-dealers, the following observations were made with regards to counterparty risk management for non-dealers:

> Non-dealer [survey] respondents reported the creditworthiness of their counterparty as one of the most important factors when trading OTC derivatives. All non-dealer respondents managed the credit risk to bilateral counterparties by applying credit limits and diversifying their exposure across counterparties."[11]

We believe that these findings are largely applicable to Canadian pension funds and other non-dealers in the Canadian OTC derivatives market. Generally, the Canadian Pension Fund Managers only enter into OTC derivatives transactions with highly rated counterparties in Canada, the United States, Europe, and to a lesser extent, Asia, Australia and other global jurisdictions, while diversifying our exposure amongst these counterparties. In each case, we have International Swaps and Derivatives Association ("ISDA") Master Agreements and Credit Support Annexes ("CSAs") in place, and we accordingly have collateral mechanisms in place to mitigate counterparty credit risk. As such, we do not believe that the Canadian Pension Fund Managers pose significant counterparty risk, and moreover, as we are holding liquid collateral from counterparties, we already have sufficient risk measures in place in the event of the default of a counterparty. Further supporting reasons for this viewpoint are provided in Appendix 1.

We would stress that mandating central clearing does not eliminate counterparty risk to Canadian Pension Fund Managers. Instead, it concentrates the risk in the form of futures contract merchants ("FCMs") or clearer default risk. The Canadian Pension Fund Managers are generally of a higher credit standing than our OTC derivatives counterparties, as well as our FCMs/ clearers. It is accordingly important that the Canadian Pension Fund Managers reduce our risk to such counterparties by broadly diversifying our OTC derivatives transactions across multiple counterparties and jurisdictions. If Canadian regulators require mandatory clearing to apply to the Canadian Pension Fund Managers, then in respect of those cleared products, our diversification would be greatly decreased. For cleared derivatives products we continue to face over-collateralization risk should our FCM or clearer face bankruptcy protection. We believe our over-collateralization risk is mitigated if we are facing a much greater number of ISDA counterparties as compared to a much smaller number of FCMs/ clearers.

[10] Including the Australian Prudential Regulation Authority, the Australian Securities and Investment Commission and the Reserve Bank of Australia.

[11] *Report on the Australian OTC Derivatives Market*, p. 41.

Moreover, the Canadian Pension Fund Managers regard the Canadian bank OTC counterparties to be amongst the most financially sound of counterparties. If Canadian Pension Fund Managers were forced to clear OTC products executed with Canadian banking counterparties, we would likely be shifting our risks from Canada to some of the larger US based FCMs or European clearers, who might be of lower credit quality than our Canadian OTC banking counterparties. Such migration to US FCMs and European clearers would result in a decrease of Canadian collateral which we may post, which has the potential to impact the liquidity of such Canadian securities (Canadian federal and provincial bonds) and markets. Moreover, it will introduce FX risk in entering into Canadian derivatives transactions. For example, an interest rate swap between a Canadian pension fund manager and a Canadian bank would have to clear through a US or European central clearing party with both parties likely to post non-Canadian cash as variation margin, resulting in FX risks.

CASH COLLATERAL

Imposing mandatory clearing will obligate the Canadian Pension Fund Managers to post additional cash collateral, which will reduce long-term returns for our beneficiaries. Currently, Canadian Pension Fund Managers are permitted to post high-quality government bonds as variation margin under our ISDA CSA agreements. If we were mandated to centrally clear our OTC derivative transactions, we would be forced to post only cash collateral as variation margin. This would lead to a reduction in the long-term returns for our plan beneficiaries, given that we would be forced to hold a greater percentage of our assets in cash, on which we are unable to make a material return. Moreover, a requirement to post a greater percentage of assets in cash would potentially increase our overall funding risks. In contrast, the ability to post high-quality government bonds as variation margin (as is the case under our CSAs) supports portfolio diversification, our liability-driven investing strategies and our long-term return objectives.

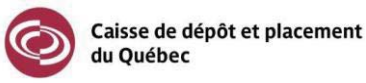
Moreover, central clearing parties have concentration limits in terms of which types of government bonds they are able to accept as initial margin. Such restrictions would limit the types of collateral that Canadian Pension Fund Managers would be able to post as initial margin. For instance, Canadian government bonds are considered a Category 4 collateral type by the CME.[12] As such, the amount of Canadian government bonds that may be posted to the CME per clearing member is capped (notably, provincial government bonds are not included under this category). Moreover, the cap is applied at the clearing member firm level; therefore, if one of the Canadian Pension Fund Managers causes this cap to be reached, another Canadian Pension Fund Manager will not be permitted to post this type of collateral.

For the abovementioned reasons, it is our opinion that the mandatory clearing requirements outlined in the Proposed National Instrument should not apply to the Canadian Pension Fund Managers. Rather, the approach taken to mandatory clearing in Australia and Japan should be adopted in Canada whereby only large Canadian financial institutions that are considered dealers in OTC derivatives are required to clear mandated derivatives, where applicable.

[12] See http://www.cmegroup.com/clearing/financial-and-collateral-management/#foreignSovDebt

We thank you for your consideration of our views.

British Columbia Investment Management Corporation
Caisse de dépôt et placement du Québec
Canada Pension Plan Investment Board
Healthcare of Ontario Pension Plan Trust Fund
OMERS Administration Corporation
Ontario Teachers' Pension Plan
Public Sector Pension Investment Board




APPENDIX 1

The following is the complete text of Exhibit B to the Global Pension Coalition Margin Paper[13] and applies to Canadian Pension Fund Managers that are subject to the Pension Benefits Act:

Below is a summary of some of the key reasons Canadian plans present virtually no counterparty risk. Note that Canadian pension funds may be regulated by provincial or federal laws and regulations, so certain of the factors below may not apply to all pension plans.

- Pension plans are subject to a prudent portfolio investment standard. For example, the administrators of pension plans subject to the laws of Ontario are required to "exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person."[14] In doing so, the administrator must use all relevant knowledge and skill that it possesses, or ought to possess, in the administration and investment of the pension fund.[15]

- Pension plans are subject to investment restrictions, concentration limits and other restrictions mandated by law.

- Pension plans must establish and file with the appropriate regulators a detailed statement of investment policies and procedures, including with respect to the use of derivatives, options and futures.[16] Such document outlines the plans expectations with respect to diversification, asset mix, expected returns and other factors.

- Administrators of pension funds are subject to strict prohibitions concerning conflicts of interest. Similar prohibitions are also imposed on employees and agents of the administrator. [17]

- Pension plans are generally prohibited from borrowing. [18]

- The assets of pension plans are held in trust by licensed trust companies or other financial institutions and are separate from the assets of their sponsors.

- Funding shortfalls may be funded by the pension plan's corporate or government sponsor, by increasing contributions of pensioners or by lowering benefit payments, depending on the nature of the plan.

- Pension plans must regularly file an actuarial valuation with the appropriate regulators.

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[13] Supra, note 9.

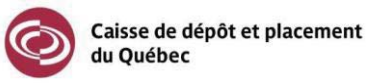
[14] E.g., Pension Benefits Act, RSO 1990, c P.8 ("PBA"), s 22(1).

[15] E.g., PBA s 22(2).

[16] Pension Benefits Standards Regulations, 1985, SOR/87-19, s 7.1.

[17] E.G., PBA ss22(4) and 22(8).

[18] Income Tax Regulations, CRC c 945, s 8502(i).




- Pension plans are transparent to members and regulators. Provincial legislation requires that pension plans file a detailed annual financial statement accompanied by an auditor's report.[19]

- Pension plans are not operating entities subject to business-line risks and competitive challenges.

- The governance of Canadian pension plans is subject to statutory requirements and guided by best practices.

- There is no provision under any Canadian law for pension plans to file for bankruptcy or reorganization to avoid their financial obligations to counterparties or other creditors. Additionally, the voluntary termination of a plan does not relieve the plan of its financial obligations."

[19] E.g., Pension Benefits Act, RRO 1990, Reg 909, s 76. In addition, an auditor's report is required for pension plans with $3 million or more in assets.

APPENDIX 2

DESCRIPTION OF CANADIAN PENSION FUND MANAGERS

BRITISH COLUMBIA INVESTMENT MANAGEMENT CORPORATION

With a global portfolio of more than $114.0 billion, British Columbia Investment Management Corporation ("bcIMC") is one of Canada's largest institutional investors within the capital markets. bcIMC invests on behalf of public sector clients in British Columbia. bcIMC's activities help finance the retirement benefits of more than 522,000 plan members, as well as the insurance and benefit funds that cover over 2.2 million workers in British Columbia.

Based in Victoria, British Columbia and supported by industry-leading expertise, bcIMC offers its public sector clients responsible investment options across a range of asset classes: fixed income; mortgages; public and private equity; real estate; infrastructure; renewable resources; long-term strategic themes. bcIMC's investments provide the returns that secure its clients' future payments and obligations.

CAISSE DE DÉPÔT ET PLACEMENT DU QUÉBEC

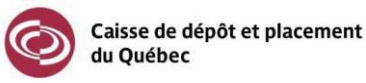
The Caisse de dépôt et placement du Québec ("CDPQ") is a mandatory of the Province of Québec. It manages institutional funds, primarily from public and private pension and insurance funds in Québec. CDPQ's mission is to achieve an optimal return on the deposits of its clients, or depositors, while contributing to the Québec's economic development. It invests in financial markets in Québec, elsewhere in Canada, and around the world, in various types of assets, and in all economic sectors. Through its size and activities, the Caisse is a global investor and one of the largest institutional fund managers in Canada and North America as a whole. It is one of the largest institutional investors in Canada and, as at December 31, 2014, its depositors' net assets totaled $225.9 billion.

CANADA PENSION PLAN INVESTMENT BOARD

The CPP Investment Board is a professional investment management organization based in Toronto that was established by an Act of Parliament in December 1997. Our purpose is to invest the assets of the Canada Pension Plan in a way that maximizes returns without undue risk of loss. The CPP Investment Board has more than $238.8 billion net assets as of December 31, 2014.

HEALTHCARE OF ONTARIO PENSION PLAN

The Healthcare of Ontario Pension Plan ("HOOPP") is a multi-employer contributory defined benefit plan serving more than 295,000 working and retired healthcare workers. HOOPP was originally established by the Ontario Hospital Association (the OHA) in 1960. The Plan is registered under, and regulated by, the Pension Benefits Act (Ontario) and the Income Tax Act (Canada). As at December 31, 2014, it had $60.8 billion in net assets.




OMERS ADMINISTRATION CORPORATION

Under the *Ontario Municipal Employees Retirement System* ("OMERS") *Act* (Ontario), OMERS Administration Corporation ("OAC") is the administrator of the OMERS pension plan, one of Canada's largest multi-employer defined benefit pension plans, and trustee of the OMERS pension fund. As of December 31, 2014, OMERS has approximately $72 billion in net assets and serves approximately 1,000 participating employers and approximately 450,000 employees and former employees of municipalities, school boards, libraries, police, and fire departments, children's aid societies, and other local agencies across Ontario.

ONTARIO TEACHERS' PENSION PLAN

Ontario Teachers' Pension Plan ("OTPP") is Canada's largest single-profession pension with $154.5 billion in net assets as at December 31, 2014. It was created by its two sponsors, the Ontario government and the Ontario Teachers' Federation, and is an independent organization. In carrying out its mandate, OTPP administers the pension benefits of 311,000 working and retired teachers. OTPP operates in a highly regulated environment and is governed by the *Teachers' Pension Act* (Ontario) and complies with the *Pension Benefits Act* (Ontario) and the *Income Tax Act* (Canada).

PUBLIC SECTOR PENSION INVESTMENT BOARD

The Public Sector Pension Investment Board ("PSP Investments") is one of Canada's largest pension investment managers, with $93.7 billion of net assets under management as at March 31, 2014. Its highly-skilled and dedicated team of professionals manages a diversified global portfolio including stocks, bonds and other fixed-income securities, and investments in private equity, real estate, infrastructure and renewable resources. PSP Investments is a Crown corporation established to manage employer and employee net contributions since April 1, 2000, to the pension funds of the Public Service of Canada, the Canadian Forces and the Royal Canadian Mounted Police, and since March 1, 2007, of the Reserve Force. PSP Investments' head office is located in Ottawa, Ontario, and its principal business office is in Montréal, Québec.

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May 11, 2015

DELIVERED VIA ELECTRONIC MAIL
Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Ontario Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

c/o:
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Dear Sirs/Mesdames:

RE: Comment Letter to CSA Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (the "Proposed Clearing Rule") and Proposed Companion Policy 94-101CP *Mandatory Central Counterparty Clearing of Derivatives* (the "Proposed Clearing CP")

Capital Power Corporation, together with its affiliates and subsidiaries (collectively, "**Capital Power**"), makes this submission to comment on the Proposed Clearing Rule and the Proposed Clearing CP, which will be collectively referred to in this letter as the "**Proposed National Instrument**". Capital Power appreciates the opportunity to comment and commends the Canadian Securities Administrators ("**CSA**") for seeking public input on the Proposed National Instrument.

Capital Power is a growth-oriented North America power producer headquartered in Edmonton, Alberta. Capital Power develops, acquires, operates and optimizes power generation from a variety of energy sources, including coal, natural gas, biomass and wind. Capital Power owns more than 2700 megawatts

of power generation capacity across 15 facilities in Canada and the United States, and owns 371 megawatts of capacity through power purchase arrangements. An additional 1020 megawatts of owned generation capacity is under construction or in advanced stages of development in Alberta and Ontario.

Capital Power optimizes and hedges its commodity portfolio using physical forward contracts for electricity, natural gas, environmental commodities (e.g. carbon offsets and credits), USD/CDN currency exchange, and financial derivative transactions based on those same commodities. Capital Power's trading counterparties include other power producers, utility companies, banks, hedge funds and other energy industry market participants. Trading activities take place primarily through electronic exchanges, such as ICE (Intercontinental Exchange) and NGX (Natural Gas Exchange), but also through brokered transactions and directly with counterparties. Capital Power is a registered "market participant" in the Alberta wholesale electricity market constituted as the Alberta "Power Pool" under the *Electric Utilities Act* of Alberta (the "**EUA**") and is also a licensed "retailer" (as defined in the EUA) of retail electricity services to large commercial and industrial customers in the retail electricity market in the Province of Alberta.

Capital Power generally supports the efforts of the CSA to establish a regulatory regime for the Canadian over-the-counter ("**OTC**") derivatives market, in order to address Canada's G-20 commitments. To that end, Capital Power respectfully urges the CSA to develop regulations that strike a balance between not unduly burdening derivatives market participants while at the same time addressing the need to introduce effective regulatory oversight of derivatives and derivatives market activities. Capital Power is a member of the International Energy Credit Association ("**IECA**") and fully supports the comments submitted by the IECA in response to the Proposed National Instrument.

Capital Power thanks the CSA for considering, and making changes based on, public comments, including those of Capital Power, to CSA Notice 91-303 *Proposed Model Provincial Rule on Mandatory Counterparty Clearing of Derivatives* (the "**Draft Model Rule**"), which the CSA published on December 19, 2013, and which set the stage for the Proposed National Instrument. In particular, Capital Power commends the CSA for the following changes from the Draft Model Rule to the Proposed National Instrument: (i) opting to develop a national instrument, rather than province-specific model provincial rules, with respect to mandatory clearing of derivatives; (ii) removing the requirement to obtain board approval to qualify for the end-user exemption; (iii) allowing counterparties to rely on representations made to each other in determining whether clearing exemptions are available; (iv) the clarifications with respect to completing and filing proposed Form F1; and (v) the proposed phase-in approach with respect to the clearing requirement. Despite these and other positive changes however, Capital Power still has concerns about the provisions of the Proposed National Instrument and offers the specific comments below for the CSA's further consideration.

SPECIFIC COMMENTS:

Capital Power has the following specific substantive comments regarding the Proposed National Instrument:

1. **Definition of "financial entity"**

As Capital Power noted in its March 19, 2014 comment letter in response to the Draft Model Rule, and as is still the case in the Proposed National Instrument, the definition of a "*financial entity*", in section 1(e) of the Proposed National Instrument, includes persons or companies that are either (i) subject to a

registration requirement, (ii) registered, or (iii) exempt from the registration requirement, under securities legislation of a Canadian jurisdiction. In our March 2014 letter we asked the CSA to clarify the registration characteristics given that the CSA had not at that time (and still hasn't) finalized any rules with respect to derivatives market participant registration. Capital Power understands that other commenters to the Draft Model Rule raised similar concerns and we note the responses given by the CSA in its February 12, 2015 Notice and Request for Comment document (the "**Clearing Rule Notice**") that introduced the Proposed National Instrument.

At page 11 of the Clearing Rule Notice, and in response to comments about the registration issue, the CSA states that it believes that the proposed phase-in approach to the clearing requirement under the Proposed National Instrument will allow provincial regulators time to clarify the developing registration regime. Although Capital Power fully supports a phased-in approach to the clearing requirement and agrees that more clarity is required about the registration regime, Capital Power still strongly believes that the clearing requirement should not become effective at all until, or unless, the registration regime is finalized. Capital Power respectfully submits that making the clearing requirement effective before the registration regime is finalized represents the idiom of "putting the cart before the horse". If the registration regime is not finalized before the first clearing requirement becomes effective under the proposed phase-in approach, how would the CSA suggest that market participants determine their status as "financial entities" or not under the registration characteristic within that definition? Capital Power respectfully submits that such determination is impossible unless, or until, the registration requirements are finalized.

2. <u>Definition of "local counterparty"</u>

With respect to sub-paragraph (b) of the "local counterparty" definition in section 1 of the Proposed National Instrument, Capital Power requests that the CSA please clarify what it intends the words *"…is responsible for the liabilities of the counterparty;*" to mean? In particular, does the CSA intend those words to mean responsible for: (i) all of such affiliated entity's liabilities of any kind whatsoever; (ii) just liabilities with respect to derivatives trades; (iii) liabilities on a trade by trade, or counterparty by counterparty basis; or (iv) some other meaning?

3. <u>Interpretation of hedging or mitigating commercial risk</u>

Capital Power thanks the CSA for revising the interpretation of "hedging or mitigating commercial risk", found in section 4(1) of the Proposed National Instrument, from the definition that was found in the Draft Model Rule, in particular the deletion of the "closely correlated" and "highly effective" language that was vague and confusing. We also find the revised explanatory guidance on this point in the Proposed Clearing CP to be helpful. That said, Capital Power requests that the CSA please provide additional guidance with respect to the following issues that arise from the revised interpretation:

(a) The words "… establishes a position which is ***intended to*** reduce risk …" *[emphasis added]*, begs the question of how such intent is to be determined, demonstrated or documented? In Capital Power's experience, it is common, with respect to energy commodity derivatives at least, for derivatives market participants to segregate their derivatives into various "trading books", based on various criteria. Criteria could be factors such as commodity asset class, transaction time period (short-term v. long-term derivatives), or "hedges" versus "speculative" derivative transactions. Transactions are contemplated, entered into and then classified as, or allotted to, a particular trading book based on an overall derivatives trading strategy that is typically governed

by underlying corporate risk management and asset optimization policies and procedures. Those policies and procedures typically have been vetted and approved by senior executive and possibly also boards of directors.

Given the above described governance framework, would the CSA please confirm whether a derivatives market participant, that had such a governance framework in place, could simply rely on its derivatives trading book classification system for the purposes of determining, demonstrating and documenting the intent required by section 4(1) of the Proposed National Instrument? In other words, could such a market participant regard those of its derivatives allocated to its "hedging trade book", in accordance with its internal derivatives governance practices, as satisfying the intent requirement of section 4(1), provided that such derivatives also satisfied the other requirements set forth in subparagraphs 4(1)(a) & (b)? If the answer to the foregoing question is "no", then Capital Power respectfully requests that the CSA please clarify how else a party might determine, demonstrate and document the intent required by section 4(1)?

4. <u>"Speculate" should be defined or clarified</u>

Capital Power respectfully urges the CSA to either define, or further clarify, what it considers the term "speculate" (in paragraph 4(2)(2)) means for the purposes of the Proposed National Instrument? Because derivative positions held to "speculate" may not benefit from any of the exemptions to mandatory clearing contained in the Proposed National Instrument, Capital Power submits that "speculate" needs to be clearly defined so that market participants can properly comply with the clearing requirement. Capital Power suggests that a practical definition of "speculate" could be framed in terms of derivatives trading activity that does not have a direct or indirect nexus to hedging or mitigating commercial risks faced by the party engaged in such trading, but is solely entered into for purposes of potentially generating profit or of investing for potential gain.

5. <u>Crown Entity Exemption - Section 6</u>

Capital Power was extremely disappointed to see that the exemption from the clearing requirement that was made available to Crown corporations, or entities whose obligations are guaranteed by the federal or provincial governments, under section 11 of the Draft Model Rule, survived as section 6 of the Proposed National Instrument. As we stated in our March 19, 2014 comment letter to the Draft Model Rule, we strongly believe that this exemption would give such entities, to the extent they participate in derivatives markets, a significant competitive advantage over "non-Crown" entities that will be required to comply with the clearing mandate.

The clearing compliance requirement will undoubtedly result in additional costs compared to transacting derivatives over-the-counter. Non-Crown entities will have to incur these additional costs while Crown entities will avoid them, thereby giving Crown entities a competitive cost advantage. Based on Capital Power's market experience several Crown entities are active and sophisticated derivatives market participants and do not need competitive enhancements from the CSA's derivatives regulatory regime.

To better ensure transparency and a "level playing field" in derivatives markets Capital Power submits that all derivatives market participants should be subject to the same requirements with respect to mandatory clearing, or exemptions from it, and special treatment should not be afforded to one particular class of market participant to the potential detriment of other classes. Alternatively, if special treatment is to be

given to particular classes of derivatives market participants, that treatment should be based on objective criteria, such as credit rating metrics, market capitalization, derivatives portfolio size, etc., that are evenly applied to all market participants.

We note the CSA's comments in connection with this issue at pages 19-20 of the Clearing Rule Notice, namely that provincial regulators may at some point in the future modify the applicability of all exemptions, including the Crown entity clearing exemption. In response to those comments, Capital Power respectfully submits that (i) now is the time for the CSA to get these rules right, rather than deferring to potential future action by provincial regulators, and (ii) to the utmost extent possible the rules should be consistent across Canada, rather than a patch-work of different provincial rules. Leaving this issue to potentially be addressed and modified by provincial regulators at some future date appears to undermine the rationale for the Proposed National Instrument approach in the first place.

Another concern that Capital Power has with the language in section 6 is the potential availability of a clearing exemption to foreign governments and entities owned and controlled by foreign governments under sub-section 6(a). Capital Power respectfully submits that providing a clearing exemption, *ab initio* and without further qualifying criteria, to foreign governments and their commercial entities is entirely arbitrary, unreasonable and unjustifiable. The Committee appears to have assumed that just because a derivatives market participant is either a foreign government, or a commercial entity of a foreign government, that market participant's derivatives trading activities would pose no systemic risk to Canada's financial system.

Capital Power would respectfully point out to the Committee that many foreign governments, and by extension their commercial entities, have extremely poor credit ratings. In addition, they may have laws in place in their respective countries that restrict the enforcement of guarantees by foreign beneficiaries against companies owned by the respective home governments. As a result, participation by such foreign governments and their commercial entities in Canadian derivatives markets could indeed pose serious systemic risk to those markets. Capital Power strongly urges the Committee to reconsider and remove the non-application of the clearing requirement to foreign governments and their commercial entities unless such governments and entities can demonstrate that: (i) they satisfy certain objective and quantifiable financial metrics, such as credit ratings; and (ii) their Canadian derivatives trading activities do not in fact pose systemic risk within Canada.

6. <u>End-User Exemption-Section 9</u>

Capital Power respectfully submits that sub-paragraph 9(2)(c) of the Proposed National Instrument should be deleted in its entirety because it is illogical and unnecessary. The provisions in sub-paragraphs 9(2)(a) and (b) are adequate to ensure that the end-user clearing exemption is not abused.

In the context of a corporate family centralizing its derivatives trading activity through one affiliate (the "**Trading Agent**") that transacts on behalf of its other affiliates (the "**Trading Principal(s)**"), Capital Power does not understand why the status of the Trading Agent as a "registrant", or not, under Canadian securities law, should be relevant to determining whether an end-user clearing exemption is available, or not, with respect to derivative trades pertaining to the Trading Principals? It should be the Trading Principal's status as a registrant, or not, that determines whether a clearing exemption is available to it with respect to derivative transactions entered into either by it directly, or on its behalf by its Trading Agent.

That determination is adequately addressed in sub-paragraphs 9(2)(a) and (b) of the Proposed National Instrument and accordingly, the Trading Agent's registrant status should be irrelevant to the issue.

7. Intragroup Exemption-Section 10

Concerning sub-paragraph 10(2)(a), Capital Power asks that the CSA please clarify that the "agreement" between affiliated counterparties to rely on the intragroup clearing exemption, referred to in that sub-paragraph, need not be a written agreement on a transaction by transaction basis. Capital Power submits that requiring that level of agreement specificity would be both extremely onerous on market participants and do little to address systemic risk. Instead, Capital Power submits that the "agreement" requirement in sub-paragraph 10(2)(a) should be considered satisfied as long as the two affiliates have written documentation between them, for example, either an express agreement or joint policies and procedures, that address the circumstances under which they will rely on the intragroup clearing exemption for derivative trades between them that qualify for that exemption.

Concerning the requirement for *"… a written agreement setting out the terms of the transaction between the [affiliated] counterparties"* in sub-paragraph 10(2)(c), Capital Power asks that the CSA clarify that the requirement would be satisfied by there being one or more written master forms of agreements in place between the affiliated counterparties, under which they are enabled to enter into specific derivative transactions, but that there need not be written confirmations for each such specific transaction. Capital Power submits that requiring written confirmations on a trade by trade basis for affiliated counterparties whose financial statements are prepared on a consolidated basis is unnecessary, overly onerous and does not contribute to reducing systemic risk.

Capital Power respectfully requests that the CSA consider its comments and again expresses its gratitude for the opportunity to provide comments. If you have any questions, or if we may be of further assistance, please contact Mr. Zoltan Nagy-Kovacs, Senior Counsel, at 403-717-4622 (znagy-kovacs@capitalpower.com)

Yours Truly,

"***CAPITAL POWER***"

Per: *"Zoltan Nagy-Kovacs"*

Zoltan Nagy-Kovacs
Senior Counsel

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May 13, 2015

Alberta Securities Commission
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British Columbia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Ontario Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

c/o

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Dear Mesdames:

This letter is in response to Proposed National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives and Proposed Companion Policy 94-101CP Mandatory Central Counterparty Clearing of Derivatives (collectively, the "Proposed National Instrument"). We thank the OTC Derivatives Committee (the "Committee") for its consideration of our submission on CSA Notice 91-303 Proposed Model Provincial Rule on Mandatory Central Counterparty Clearing of Derivatives (the "Draft Model Rule"). The comments below build upon our position in that letter.

Central 1 Credit Union ("Central 1") is the central financial facility, liquidity manger, payments settlement centre, and trade association for all credit unions in British Columbia and its member credit unions in Ontario. Central 1's active member credit unions, which number 43 in B.C. and 84 in Ontario, deliver a wide range of financial services to more than 3.2 million members.

The Unique Central 1-Credit Union Relationship

Credit unions engage in OTC derivatives for hedging purposes and Central 1 is the primary counterparty in OTC derivatives to its member credit unions. It holds liquidity reserves of its member credit unions and also holds a general security agreement (GSA) with each member. These GSAs include a first claim on assets in the event of liquidation of a credit union. Thus, in the highly unlikely event of a credit union failure, Central 1 as the OTC counterparty would be made whole because of its relationship with the credit union. Derivatives transactions between a credit union and its central represent no external risk to third parties.

The dual public policy objectives of (1) encouraging prudent market participation and (2) reducing exposure and risk of failure are at the forefront of Central 1's recommendations below.

Intragroup and End-User Exemptions

In its present form, neither the end-user, nor the intragroup exemption applies to the special relationship between Central 1 and its credit unions.

Central 1 notes that the Committee did not accept the recommendation that the end-user exemption be extended to small financial entities such as credit unions and instead deferred to the proposed *Phase-in of the requirement to clear a mandatory clearable derivative*. While we appreciate that smaller financial entities would not be required to clear for at least six months following implementation, we urge the local regulators to extend the policy rationale for this decision to a permanent exemption. Please see our comments below on the *de minimus* exemption.

Similarly, Central 1 is disappointed that the Committee did not recommend a change to allow the intragroup exemption to apply to credit unions and their Centrals. The intragroup exemption is worded ambiguously, indicating that the entities must be "prudentially supervised on a consolidated basis". We note the explanatory table notes "prudentially supervised" can refer to a regulator other than the Office of Superintendent of Financial Institutions, but it is not clear if the "consolidated basis" requirement applies to the same or similar regulators. For example, Central 1 is regulated in British Columbia, but provides services to its member credit unions in Ontario, which are regulated solely by Ontario.

***De minimus* Exemption**

As noted in our past submission, we continue to believe that the Committee should implement a *de minimus* exemption. From a public policy perspective, implementing such an exemption would continue to protect Canadians from systemic market risk, while continuing to encourage prudent, healthy and productive hedging by smaller entities.

In our discussions with our provincial regulators, Central 1 explored a traditional "belt and suspenders" approach that we feel would best satisfy this policy objective. An exemption based on both size and exposure would ensure that small organizations are not overly burdened by clearing requirements, while still capturing any outliers (i.e. unusual situations where small entities were engaging in high levels of OTC derivatives activity).

As such, Central 1 proposes that institutions below $5 billion in assets should qualify for a *de minimus* exemption, which currently comprises 73.2% of the system assets nationally[1]. Presently, the aggregate gross notional exposure (GNE) of Canadian credit unions with assets over $5 billion is $999 million, whereas the GNE of credit unions over $10 billion is $630 million.

In addition, as an institution holding $13.1 billion in balance sheet assets that provides services to more than 300 credit unions and institutional clients, all of the OTC transactions conducted by Central 1 on its own behalf with other capital market participants would continue to be subject to mandatory clearing. Thus, combining these tools would capture the bulk of trading activity in the Canadian credit union system outside Quebec.

Conclusion

In closing, Central 1 would be pleased to provide the Securities Administrators with any additional information as may be required in consideration of comments provided above.

Should you have any questions please do not hesitate to contact me at cmilne@central1.com or by telephone at 604-730-6307.

Yours truly,

Charles Milne
Chief Investment Officer
Central 1 Credit Union

cc

Don Wright, President and CEO, Central 1 Credit Union

Martha Durdin, President and CEO, Credit Union Central of Canada

Carolyn Rogers, President and CEO, Financial Institutions Commission, British Columbia

Andy Poprawa, President and CEO, Deposit Insurance Corporation, Ontario

[1] Outside of Quebec.

INCLUDES COMMENT LETTERS RECEIVED

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May 13, 2015

Via electronic mail

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Josée Turcotte
Secretary
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comments@osc.gov.on.ca

Dear Mmes. Beaudoin and Turcotte:

CLS Bank International ("CLS"), the operator of the CLS settlement system (the "CLS System"), appreciates the opportunity to comment on (i) Proposed National Instrument 94-101 (the "Clearing Rule") and (ii) Proposed Companion Policy 94-101CP, which together address *Mandatory Central Counterparty Clearing of Derivatives*.

Background

CLS is a special purpose corporation organized under the laws of the United States of America and is supervised by the Board of Governors of the Federal Reserve System and the Federal Reserve Bank of New York. CLS also is subject to cooperative oversight by 22 central banks, including the Bank of Canada, pursuant to the Protocol for the Cooperative Oversight Arrangement of CLS.[1] The

[1] The Protocol is available at http://www.federalreserve.gov/paymentsystems/files/cls_protocol.pdf.

CLS System is a designated system in Canada under the Payment Clearing and Settlement Act, and CLS Bank also is an exempt clearing agency in Ontario.[2]

CLS's Comments

A key definition in the Clearing Rule is "regulated clearing agency," which relates to a clearing agency in a local jurisdiction other than Québec or a clearing house in Québec.[3] However, depending upon how a local jurisdiction defines clearing agency or clearing house, those terms could include a person or entity that provides clearing or settlement services but does not act as a central counterparty.

In its description of the Clearing Rule, the OTC Committee states that "[t]he purpose of the Clearing Rule is to propose mandatory *central counterparty* clearing of certain standardized over-the-counter (OTC) derivatives transactions…."[4] To the extent that a person or entity qualifies as a clearing agency or clearing house but does not act as a central counterparty, subjecting that person or entity to the Clearing Rule as a regulated clearing agency would exceed the Clearing Rule's stated purpose. Accordingly, CLS requests that the final version of the Clearing Rule be clarified to provide that a "regulated clearing agency" is a person or company that acts as a central counterparty.

Please do not hesitate to contact us if you have any questions or otherwise would like to discuss this letter.

Sincerely,

David A. Trapani,
Executive Director and
Associate General Counsel

cc: Alan Marquard, Group General Counsel
Dino Kos, Head of Global Regulatory Affairs

---

[2] Additionally, CLS has been designated under finality legislation in various other jurisdictions and also has been designated as a systemically important financial market utility by the United States Financial Stability Council.

[3] Specifically, as proposed a "regulated clearing agency" means,

(a) except in Québec, a person or company recognized or exempted from recognition as a clearing agency in the local jurisdiction, and

(b) in Québec, a person recognized or exempted from recognition as a clearing house.

Clearing Rule, Part 1(1).

[4] *See* CSA Notice and Request for Comment, Proposed NI 94-101 Mandatory Central Counterparty Clearing of Derivatives and Proposed Companion Policy 94-101CP Mandatory Central Counterparty Clearing of Derivatives (Feb. 12, 2015), at pg. 2 (emphasis added).

Concentra®

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May 13, 2015

Alberta Securities Commission
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Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Ontario Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
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Dear Mesdames:

This letter is in response to proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (the **Clearing Rule**), and proposed Companion Policy 94-101CP *Mandatory Central Counterparty Clearing of Derivatives* (the **Clearing CP**).

Concentra Financial Services Association ("Concentra") thanks the Canadian Securities Administrators for the opportunity to comment on these proposed model rules.

Concentra is Canada's only retail association, defined and governed by the *Cooperative Credit Associations Act*. Concentra is federally-regulated deposit taking institution, supervised by the Office of the Superintendent of Financial Institutions ("OSFI"). It is a national financial institution with assets over $7 billion, primarily consisting of residential and commercial mortgages and securities. The company offers a variety of services to credit unions across the country, which includes loan syndication and securitization, deposits, foreign exchange and financial consulting, including interest rate derivatives Concentra has.

Concentra uses derivatives as a risk mitigation tool for hedging purposes only. The company may use interest rate derivatives, foreign exchange forwards and cross currency swaps to manage interest rate and foreign currency exposures.

Concentra also supports Canadian credit unions with their access to financial derivatives. As individual credit unions do not have the business volume to be supported by the major derivative sell-side participants, Concentra operates as an intermediary to facilitate the interest rate risk and foreign exchange risk mitigation activities of credit unions and their members/clients.

On average, Concentra transacts with approximately 20 credit union clients in plain vanilla interest swaps with terms generally under 5 years. The number of transactions varies, but typically 1-5 derivative positions are booked per annum per client and each transaction being between $5 and $10 million in size. Each derivative transaction entered into by Concentra with a credit union ("Customer Transaction") is hedged fully with a back-to-back trade ("Hedge Transaction") that Concentra enters into with a Canadian Schedule 1 bank ("Bank Counterparty").

Concentra is supportive of increasing transparency, mitigating risk, and improving the OTC derivatives market. In the same vein, we are mindful that these new rules may overwhelm smaller market participants including credit unions, thereby hindering market activity. It is with this in mind that we frame our response to these proposed rules.

Concentra supports the phased in approach that is proposed in the Clearing Rule. However, Concentra respectfully suggests that both the registration regime is finalized and the trade reporting rule is in full effect for counterparties across Canada before imposing the mandatory clearing requirement for OTC derivative market participants. Implementation under the Clearing Rule would be a significant undertaking and could potentially force changes to business models when there was little or no systemic risk to the Canadian or global OTC derivative market.

Concentra and its credit union clients face a number of operational changes and increasing transactional costs under the proposed clearing requirements including costs to set up agreements with central clearinghouses, clearing members, and re-negotiation of CSA Master Agreements and collateral support annexes in some cases. Other fees may include clearing member fees, clearinghouse fees, execution fees and the requirement for initial and variation margin. Furthermore, with no access to a central clearinghouse in Canada, the impacts to day-to-day operations for Concentra, its credit union clients and other smaller market participants would be so substantial and costly that hedging becomes uneconomical. Consequently, a relatively simple transaction between two local counterparties becomes overly complex and international in nature creating significant barriers to entry for the smaller Canadian market participants.

These additional operational requirements and increased costs to transact in OTC derivatives along with some market participants potentially being exempt from the rule including Crown

corporations or entities and other end-users that are not "financial entities" will lead to an un-level playing field. Concentra suggests that all market participants be subject to the same clearing requirements and / or exemptions from it to provide better transparency and a more equitable playing field within the Canadian OTC derivative market.

Securities regulators in the United States of America and the European Union have included *de minimus* exemptions for financial institutions that fall below a certain threshold. Concentra suggests that a similar policy would be appropriate in the Canadian context given the Canadian OTC derivative markets' comparatively small size and because the majority of credit unions do not pose a systemic risk to the system. Moreover, unlike other small entities that would be subject to these new rules, credit unions are subject to rigorous regulatory supervision that ensures they adhere to sound financial practices.

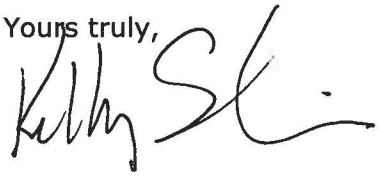
Concentra is concerned that, should a *de minimus* exemption not be granted, mandatory clearing requirements would result in unnecessary burdens on smaller financial institutions. For example, Concentra transacts in derivatives as an end-user for the purposes of hedging and mitigating commercial risk. In contrast to other end-users, Concentra and its credit union clients cannot rely on either the end-user hedging and intra-group transactions as per the proposed Clearing Rule, placing the organizations at a competitive disadvantage. The relatively low volume and small notional dollar value of these trades, in comparison to the global derivative landscape, would most likely pose little to no systemic risk potential. Please note that the majority of these trades are not yet being reported to a trade repository since the trade reporting rule is not in effect in the applicable jurisdictions.

To conclude, Concentra respectfully requests that these comments be considered by the Committee as potential negative impacts of the proposed Clearing Rule to the OTC derivative market.

Concentra would be pleased to provide the Committee with further comments and any additional information with respect to its participation in the OTC derivative market that may be useful in consideration of the proposed Clearing Rule.

Should you have any questions, please do not hesitate to contact me at kelly.sanheim@concentrafinancial.ca

Yours truly,



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May 12, 2015

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Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Ontario Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

c/o:
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Dear Sirs/Mesdames:

RE: Comment Letter to CSA Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (the "Proposed Clearing Rule") and Proposed Companion Policy 94-101CP *Mandatory Central Counterparty Clearing of Derivatives* (the "Proposed Clearing CP")

This comment letter is in response to the Canadian Securities Administrators' ("**CSA**") OTC Derivatives Committee (the "**Committee**") request for comments regarding the proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives (*the **"Proposed Clearing Rule")** and its proposed Companion Policy94-101 CP (the **"Proposed Clearing CP").**

We appreciate the opportunity to comment on the Proposed Clearing Rule and the Proposed Clearing CP, and we greatly appreciate the opportunity afforded us by the Committee to provide comment. Though we strongly support the importance of harmonization across Canada by the Committee opting to develop a national instrument so that "the substance of the rules be the same across jurisdictions, and that market

participants and derivatives products will receive the same treatment across Canada, both in terms of participants (similar exemptions) and products (same determinations)", we strongly urge the Committee to be cognizant that harmonization is not an end to itself. As the Committee is well aware the nature of OTC derivatives markets is international and this plays an important role in a framework to develop a Canadian approach to central counterparty clearing. As noted in the December 2012 *Financial System Review*[1] published by the Bank of Canada, "transactions in OTC derivatives frequently involve counterparties in different jurisdictions, and market participants regularly trade in several currencies and across various types of OTC derivatives. For example, the majority of trades in Canadian-dollar OTC interest rate derivatives (measured in notional amount outstanding) involve at least one offshore counterparty, and Canadian dealers have large portfolios of derivatives that are not denominated in Canadian dollars". Thus, it is imperative that the Committee interprets the G20 commitments to mean that Canadian market participants of all types can continue to fulfill their risk management obligations by having access to the global liquid derivatives markets.

As counsel to counterparties ranging from energy producers, energy transporters, and energy trading and marketing organizations to global financial institutions; financial market infrastructures such as exchanges and clearing agencies and derivatives market intermediaries, Dentons Canada LLP **("Dentons")** has extensive involvement with all asset classes involved derivatives transactions from a legal and regulatory perspective. Dentons advises a number of market participants' vis-à-vis the current and impending derivatives regulation in Canada. In this letter, we would comment from a legal and regulatory standpoint, as opposed to a business and implementation standpoint on certain of the provisions in the Proposed Clearing Rule as our clients are commenting on those provisions

This letter reflects the general comments of certain members of Dentons energy transactions and derivatives practice groups and does not necessarily reflect the overall views of our firm or our clients.

1. **Definitions; Terminology used and the lack of meaning thereof**

One of the complexities of constructing and interpreting statutes is that more and more activity such as derivatives trading (a technical subject) is made subject to government regulation. As a result, technical language would feature prominently in legislative texts and rules. This creates a problem of interpretation for market participants to decipher between the ordinary and technical meanings of a term. This ambiguity is intensified when a term is not defined in a rule such as some of the terms used in the Proposed Clearing Rule. The Committee has used terms such as "Clearing member"; "Head Office"; "Principal Place of Business"; and "Affiliate" to name a few without defining these terms.

The Committee has stated in Annex A of the Proposed Clearing Rule– *Comment Summary and CSA Responses*, that it had made no change to the request by commenters to the draft model rule it published on December 19, 2013 CSA Notice 91-303 *Proposed Model Rule Provincial Rule on Mandatory Central Counterparty Clearing of Derivatives* (the **"Draft Model Rule"**) , seeking additional guidance on concepts such as "head office"; "principal place of business" and "affiliate" or more specifically what is meant by "responsible for the liabilities of that affiliated party",, as these are "longstanding legal concepts". It is well settled by the Supreme Court of Canada that words contained in a statute are to be given their ordinary

[1] http://www.bankofcanada.ca/wp-content/uploads/2012/12/fsr-1212-chande.pdf

meaning. Other principles of statutory interpretation only come into play where the words sought to be defined are ambiguous.

The Courts have long used the governing principles in interpreting legal terms that (1) "legal terms that have no ordinary, non-technical meaning must be given their technical meaning; and (2) if a word or expression has both a legal and a non-technical meaning, the technical meaning is presumed". Though it is plausible that the use of legal concepts in legislation such as the Proposed Clearing Rule means they are meant to be used in a legal context, we urge the Committee to define these terms or provide guidance when it finalizes the companion policy to prevent a blurring of the distinction between the ordinary and legal meaning as it adds to the terminological confusion that has occurred in the interplay of considering the ordinary meaning versus the legal; meaning in various decisions of the Supreme Court of Canada.

On the other hand, the term clearing member would not be found in an ordinary dictionary and as a technical term, unless defined by the Committee, market participants would interpret this term by the specialized use by a distinct portion of the community.

2. Definition of Local Counterparty

As noted by the Committee, a commenter to the Draft Model Rule already noted that the local counterparty definition in the TR Rules differs from the local counterparty definition in the Draft Model Rule. The Committee also stated that it made no change as "the inclusion of registrants in the local counterparty definition of the Clearing Rule would result in requiring foreign registrants to clear even where there is no local counterparties involved in the transaction". We understand that the Committee wants to ensure that the clearing obligation applies to foreign entities similar to what the EU has done; ensuring that the "clearing obligation will apply directly to certain third country entities when they enter into derivatives subject to the clearing obligation with certain EU derivatives market participants".

However, the European Union and the U.S. legislation have uniform definitions in all their rules implementing the G20 commitments. As the Committee has stated in the rules it has published and the consultation papers, Canada has a very small derivatives market and putting in different definitions for the same term in different rules causes uncertainty among market participants especially foreign participants seeking to enter into derivatives transactions with Canadian counterparties.

We urge the Committee to harmonize its definitions in all its rules and find a way to adapt a similar approach as the European Union and the US that extended their clearing obligations to third country entities whose contracts have a direct, substantial and foreseeable effect in the EU or the US respectively and in the EU are aimed at evading EMIR's clearing and risk mitigation obligations (i.e. derivatives contracts or arrangements concluded without any business substance or economic justification).

3. Legal Uncertainty regarding Determining the Applicability of the Phase-In Period

Without wanting to be repetitive, we urge the Committee to finalize the Registration Rule before it determines that certain derivatives be subject to mandatory central counterparty clearing. The committee has stated that it intends to follow a phase-in-approach and despite its assertion that counterparties that are not financial entities would benefit from an 18-month grace period, this grace period cannot be relied

upon unless counterparties know definitely what entities would fall into definite categories. A non-financial counterparty might fall in the fourth and final; phase in and its privately administered employee pension plan might fall somewhere else if the financial entity definition is left as is.

4. Conclusion

We thank you for the opportunity to comment on the Proposed Clearing Rule and Proposed Clearing CP and would be pleased to discuss our thoughts with the Committee further. If you have any questions or comments, please contact the undersigned

Yours truly,
Dentons Canada LLP

Priscilla Bunke
Associate

PPB

May 13, 2015

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Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Ontario Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Yukon Superintendent of Securities
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Dear Sirs/Mesdames:

Re: Comment Letter to CSA Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* and Proposed Companion Policy 94-101CP *Mandatory Central Counterparty Clearing of Derivatives*

Enbridge Inc. ("**Enbridge**") hereby respectfully submits these comments below in response to Canadian Securities Administrators' ("**CSA**") Derivatives Committee ("**Committee**") request for comments in connection with the Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* ("**Proposed Clearing Rule 94-101**") and Proposed Companion Policy 94-101CP *Mandatory Central Counterparty Clearing of Derivatives* ("**Proposed Clearing Companion Policy**") which outline the CSA's requirements for central counterparty clearing of over-the-counter ("**OTC**") derivative transactions. All comments are from the point of view that the Committee has drafted these regulations not only to regulate derivative participants, but to also "strike a balance between proposing regulation that does not unduly burden participants in the derivatives market". Enbridge commends the CSA for choosing to develop a national instrument rather than proceeding with CSA Notice *91-303 – Proposed Model Provincial Rule on Mandatory Central Counterparty Clearing of Derivatives* ("**Proposed Model Rule 91-303**"). Harmonization of the clearing rules across Canada was a major concern for Enbridge being a company that conducts its business across many jurisdictions.

I. INTRODUCTION OF ENBRIDGE

Enbridge is a transporter of energy, operating the world's longest, most sophisticated crude oil and liquids pipeline system in Canada and the United States, shipping on average more than 2.2 million barrels every day. Enbridge's natural gas gathering and transmission system transports natural gas throughout North America, moving billions of cubic feet of gas per day. It also operates Canada's largest natural gas distribution company in Ontario, and provides distribution services in Quebec, New Brunswick, and New York State. Like many other "end-users", Enbridge transacts in both OTC and cleared derivatives to manage and mitigate the risks associated with its core business of transporting and processing energy commodities.

Enbridge appreciates the opportunity to comment on the Proposed Clearing Rule 94-101 and the Proposed Clearing Companion Policy and commends the CSA's efforts to support Canada in meeting its G-20 commitments and establish a regulatory regime for the over-the-counter derivatives market in Canada. Enbridge continues to be very concerned about compliance requirements that are too burdensome for the Canadian market and the implications for liquidity in the derivatives market in Canada.

II. ENBRIDGE'S GENERAL COMMENTS ON THE PROPOSED CLEARING RULE 94-101

A) Part 1 – Definitions and Interpretation

Section 1 - Definitions

With respect to the definition of "***financial entity***" in Section 1, since the registration rule has not been finalized, parties will be unable to determine whether or not they or their counterparty are required to clear a derivative. For this reason, the Proposed Clearing Rule 94-101 should not come into force until the registration rule is in force. In addition, privately administered company pension funds are caught by financial entity definition as they may be regulated by the Office of the Superintendent of Financial Institutions (Canada) or some other regulatory body in Canada. Being a regulated pension fund should not automatically result in a privately administered company pension fund being categorized as a financial entity. If a company such as Enbridge is administering pension funds for its employees and management, and if Enbridge itself is able to utilize the End-User Exemption, how does it then follow that the hedging activities of the pension fund cannot also utilize the End-User Exemption? In addition, there are more than just clearing costs associated with clearing transactions. Additional cash margin may be required for clearing transactions.

The "***local counterparty***" definition needs further guidance in the Proposed Clearing Companion Policy. It is not clear what is meant by "responsible for liabilities of that affiliated party". Some criteria as to what the Committee believes would satisfy the requirement of "being responsible for liabilities" would be of great value. Given that several commenters had concerns with this section in the previous round of comments to the Proposed Model Rule 91-303, it would seem appropriate for the Committee to provide further guidance beyond, "these are longstanding legal concepts" as an explanation.

Section 4 - Interpretation of hedge or mitigation of commercial risk

This section and guidance respecting "hedging or mitigating commercial risk" was improved with the removal of "closely correlated".

In Section 4(2)(a), the term "*speculate*" should be defined so that companies can properly categorize their derivatives as hedges and in turn comply with the final clearing rule.

B) Part 2 - Mandatory Central Counterparty Clearing

Section 5 – Duty to Submit for Clearing

Enbridge reiterates that the clearing rules should be harmonized across Canada. Allowing the designation of a "mandatory clearable derivative" to be different across jurisdictions creates operational and compliance challenges for end-users that transact throughout Canada.

Section 6 – Non-application

Providing that a crown corporation or an entity owned by a government (whether in Canada or in a foreign jurisdiction) does not have to clear their derivatives gives those entities a competitive advantage in the market, both with respect to clearing costs as well as margin. In addition, by not applying the clearing rules to entities owned by foreign governments, an assumption is made that those entities will not create systemic risk in Canada with their derivatives trading. Before granting an exemption, an objective analysis should be conducted of both the entities involved and the financial stability of their governments that are guaranteeing their derivative trading activity, including the ability to collect on those guarantees from the foreign governments.

C) Part 3 – Exemptions and Application

Section 9 – End-user Exemption

Enbridge appreciates the many revisions to the end-user exemption made by the Committee, in particular, the removal of the reference to "acting as agent" and the additional affiliated entity sections that allow parties to use affiliated entities to be their market facing entities with respect to derivative transactions.

Section 10 – Intragroup Exemption

Section 10(2)(c) of the intragroup exemption requires a "written agreement setting out the terms of the transaction between the counterparties". Enbridge would request that the Committee confirm that this does not require detailed written confirmations between the counterparties for each and every transaction, but that an underlying master agreement between the counterparties is sufficient. It is not an efficient use of time or cost effective for internal entities to generate additional written confirmations by internal confirmation personnel resources and then store that documentation. Unrelated counterparties that transact derivatives with each other OTC are prudent to exchange written confirmations to ensure the terms of the transaction are understood by both counterparties. Internal counterparties that are managed under a consolidated risk framework would not require written confirmations to clarify the terms of a transaction.

Enbridge appreciates the removal of the requirement to file Form F-1 on an annual basis.

Section 11 – Recordkeeping

Enbridge commends the CSA in not requiring entities to seek board or other committee approval with respect to the use of the End-User Exemption.

The "reasonable supporting documentation" required to be kept as per the Proposed Clearing Companion Policy is too onerous on a transaction-by-transaction basis for every type of derivative transaction that may become a "mandatory clearable derivative". Hedging strategies are generally managed at a portfolio level and this type of detail may require further modification of risk systems and processes to comply depending on the type of derivative and may also not be practical from a volume perspective. For example, commodity derivatives may be executed on a daily basis depending on the conditions in the market. To create records that capture all the information required in the Proposed Clearing Companion Policy for each transaction would not be an effective use of resources. Enbridge urges the CSA to modify the Proposed Clearing Companion Policy to clarify that documentation on a portfolio level is acceptable to the regulators, as this reflects the reality of how risk is managed within companies. The additional reporting capability on a transaction level basis for all derivatives is not necessary for day to day business and will substantially increase costs for end-users.

Enbridge appreciates the further revision of this section which allows a counterparty to rely on counterparty's representations as to whether or not an exemption is available as long as there are no reasonable grounds to believe the representations are false.

D) Part 6 – Transition and Effective Date

Section 15 – Effective Date

The phased in approach for clearing including the proposed time lines seems appropriate.

III. CONCLUSION

Enbridge thanks the CSA and the Committee again for the opportunity to submit our comments on the Proposed Clearing Rule 94-101 and Proposed Clearing Companion Policy. We would be pleased to discuss our thoughts with you further. If you have any questions or comments, please contact the undersigned.

Respectfully submitted,

Enbridge Inc.

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13 May 2015

Re: Canadian Securities Administrators (CSA)
CSA Proposed National Instrument 94-101 and Companion Policy – Mandatory Central Counterparty Clearing of Derivatives

The Global Foreign Exchange Division (GFXD) of the Global Financial Markets Association (GFMA) welcomes the opportunity to comment on behalf of its members on the proposed National Instrument and Companion Policy issued by the Canadian Securities Administrators on 12 February 2015.

The GFXD was formed in co-operation with the Association for Financial Markets in Europe (AFME), the Securities Industry and Financial Markets Association (SIFMA) and the Asia Securities Industry and Financial Markets Association (ASIFMA). Its members comprise 24 global FX market participants,[1] collectively representing more than 90% of the FX inter-dealer market.[2] Both the GFXD and its members are committed to ensuring a robust, open and fair marketplace and welcome the opportunity for continued dialogue with global regulators.

Introduction

The FX market is the world's largest financial market. Effective and efficient exchange of currencies underpins the world's entire financial system. Many of the current legislative and regulatory reforms have had, and will continue to have, a significant impact upon the operation of the global FX market, and the GFXD wishes to emphasise the desire of our members for globally co-ordinated regulation which we believe will be of benefit to both regulators and market participants alike.

The FX market is the basis of the global payments system. The volume of transactions is therefore very high and these transactions are often executed by market participants across geographical borders. As reported by the Bank of International Settlements in their 'Triennial Central Bank Survey: Foreign Exchange Turnover in April 2013'[3] over 75% of the FX activity was executed by market participants across 5 global jurisdictions, hence the continued view from the GFXD that regulations should be harmonised at the global level. Cross border markets cannot operate in conflicting regulatory landscapes and the natural outcome, should this be the case, is unwanted fragmentation of what is an already highly automated and transparent FX market. Canada presents a more granular harmonisation challenge and we recommend that the CSA prioritises the harmonisation of legislation, both across provinces and at the international level. On this note, the GFXD welcomes the CSA's decision to make the conversion to National Instrument from Model Provincial Rule for the purposes of harmonisation.

Achieving a globally harmonised mandatory clearing regime is of particular importance. Where there are jurisdictional differences in the clearing regimes, a party conducting a cross-border trade may be required to centrally clear that trade, when in their home jurisdiction they would not necessarily be mandated to do so. This lack of consistency not only results in increased complexity of trade flows and execution decisions for market participants (with associated increased transaction costs) but also does nothing to mitigate the greatest risk involved in FX trading, which as discussed below is settlement risk, not mark-to-market risk as seen with other products.

Many of the current legislative and regulatory reforms will have a significant impact upon the operation of the global FX market. The GFXD feels it is vital that the potential consequences are fully understood and that new regulation improves efficiency and reduces risk. The GFXD welcomes the opportunity to set out its views in response to the proposed National Instrument and Companion Policy.

****

[1] Bank of America Merrill Lynch, Bank of New York Mellon, Bank of Tokyo Mitsubishi, Barclays Capital, BNP Paribas, Citi, Credit Agricole, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JP Morgan, Lloyds, Mizuho, Morgan Stanley, Nomura, RBC, RBS, Société Générale, Standard Chartered Bank, State Street, UBS, Wells Fargo and Westpac.

[2] According to Euromoney league tables

[3] http://www.bis.org/publ/rpfx13fx.pdf

Proposed National Instrument 94-101: GFXD Comments

We have no additional comments on the text of parts 1-3. In parts 4-6 we would like to bring to the CSA's attention the following concerns:

1. Clearing obligation determination

The GFXD is concerned by the removal of text relating to the clearing obligation determination from the text of this proposed National Instrument.

In the previous draft text (Proposed Model Provincial Rule 91-303) of this proposed National Instrument, it was understood that both a 'top down' and a 'bottom up' approach to the determination of the clearing obligation could be used. This was apparent from the Model Provincial Rule Part 4 (13) and the Companion Policy Parts 4&6 (12&14). However, these sections of 91-303 do not appear in the draft text of 94-101 Annex B, or in Annex A, which outlines the textual changes that have been made following comments received on 91-303.

Whilst we understand that the process for determining the clearing obligation may be implicit in the proposed National Instrument, and that the CSA reserves the right to use a 'top down' approach even where one is not specified, we respectfully suggest that, to provide certainty and to promote harmonisation with other jurisdictions, the procedures for determining a clearing obligation are clearly drafted and aligned as closely as possible with the existing approaches of Dodd Frank in the US[4] and European Markets Infrastructure Regulation (EMIR) in Europe[5]. Specifically these two jurisdictions have similar processes for determination of the clearing obligation, utilising the 'top down' and 'bottom up' approaches as briefly outlined in Figure 1

Figure 1: Comparison of US and European clearing determination procedures

Europe		US	
'Bottom Up' ***EMIR 5 (1-2)***	**'Top Down'** ***EMIR 5 (3)***	**'Bottom Up'** ***17 CFR part 39.5 (b)***	**'Top Down'** ***17 CFR part 39.5 (c)***
CCP applies to NCA to clear a class of OTC derivatives	ESMA proposes that a class of derivatives should be subject to the clearing obligation	CCP applies to CFTC to clear a class of OTC derivatives by at least the start of the preceding business day from intended start date	CFTC regularly reviews all derivatives not subject to clearing obligation and decides to propose a class
kNCA grants authorisation	↓	CFTC grants determination	↓
NCA immediately notifies ESMA	↓	↓	↓
Within 6 months, ESMA conducts public consultation, and consults ESRB and relevant 3rd country NCAs	ESMA conducts public consultation, and consults ESRB and relevant 3rd country NCAs	CFTC conducts 30 day public consultation	CFTC conducts 30 day public consultation
ESMA publishes determination	ESMA publishes determination	No more than 90 days after submission, CFTC makes determination	CFTC makes determination
	If no CCP clears that class of derivative, ESMA publishes call for development of clearing proposals. [For exchange of collateral on OTC derivatives see EMIR 11 (14)]		If no CCP clears that derivative, CFTC will investigate and take necessary action e.g. imposing margin requirements

[4] 17 CFR part 39.5 (b-c)
[5] EU Regulation 648/2012 (EMIR) 5 (1-3)

GFXD also notes that in the original text of 91-303, the consultation/comment period was set to 60 days. GFXD agreed with this proposal, and further agrees with the clarification requested by the International Swaps and Derivatives Association (ISDA) in their response to 91-303[6]: that even in cases where no public consultation is to be held, there should still be a minimum 60 day notice/comment period of intention to make that class of derivatives subject to mandatory clearing.

2. Public register

The GFXD notes that the text relating to the public register has been removed from the proposed National Instrument itself, and is now mentioned in the introductory text as follows: *"the list of mandatory clearable derivatives will be included in the Clearing Rule as Appendix A, amended from time to time. In Québec the determination process will be made by decision and the list of mandatory clearable derivatives will appear on a public register kept by the Autorité des marchés financiers"*. In the interests of transparency and clarity, and to allow for ease of comparison between jurisdictions, we recommend that the list of mandatory clearable derivatives is kept in one place on behalf of all the Canadian securities regulators, including Québec.

The GFXD also seeks additional clarity on the determination process 'by decision' which is mentioned in relation to Québec. Specifically, that it includes the minimum 60 day comment period as described in ISDA's response (see footnote 6), to ensure consistency across provinces.

Implementation

The GFXD suggests that the CSA leverages the approaches used within Europe and the US when considering the thresholds for the phased implementation of mandatory clearing.

A gradual approach to the introduction of clearing to the Canadian market would allow the CSA to fully assess the impact of mandatory clearing rules in the US and Europe, as these rules are not yet in action. In the interests of global harmonisation and to prevent market fragmentation, we suggest that the CSA looks to the clearing regimes of these major jurisdictions first and draws upon them in creating a Canadian clearing regime. This extends, for example, to excluding from the clearing regime products that are not clearable in the US or Europe.

FX OTC Clearing – Market Characteristics

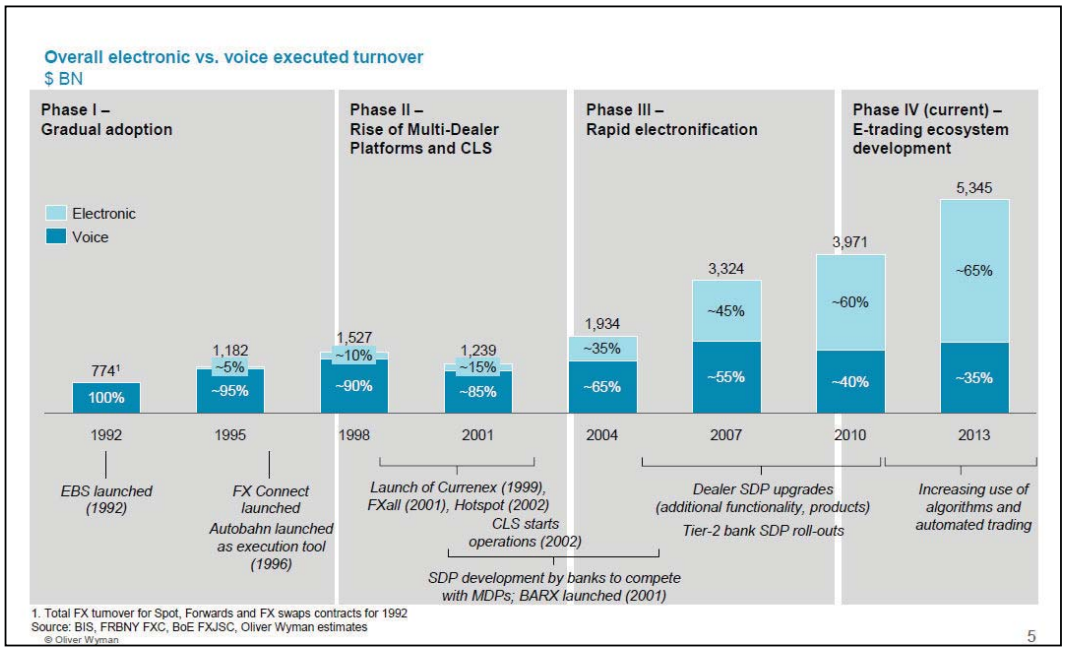
In addition to our comments on the text of the proposed National Instrument, we would like to bring to the CSA's attention a number of characteristics of the FX market, which are relevant to the discussions on mandatory clearing. For more information, we refer the CSA to our responses to 91-303 (Proposed Model Provincial Rule on Mandatory Central Counterparty Clearing of Derivatives[7]) and 91-406 (Derivatives: OTC Central Counterparty Clearing[8]).

In its introduction to the proposed National Instrument, the CSA says that the purpose of mandatory clearing is *"to improve transparency in the derivatives market and enhance the overall mitigation of systemic risk"* [9]. To the first point, the FX market already has a **high degree of transparency**. Transparency for regulators comes in the form of trade reporting to a trade repository, which in Canada is required for FX forwards, swaps, NDFs and options. For market participants, transparency is in the form of public reporting of price and volume, which is already in force for bilateral transactions reported to

[6] http://www2.isda.org/regions/canada/page/2 or http://www.osc.gov.on.ca/en/SecuritiesLaw_com_91-303_index.htm
[7] http://gfma.org/correspondence/item.aspx?id=582
[8] http://gfma.org/correspondence/item.aspx?id=364
[9] Substance and Purpose of the Proposed National Instrument, page 2

trade repositories[10], and which the CSA has proposed for venue trades in its consultation paper 92-401 on derivatives trading facilities. Additionally, a recent study by the GFXD and Oliver Wyman showed that the FX market is ~65% electronically traded – see Figure 2 – which results in diverse availability of pricing information. Given the above, it is therefore not apparent how mandatory clearing will increase the already high level of FX market transparency for either regulators or market participants.

Figure 2: Overall electronic v voice executed turnover in the Global FX market (GFXD/Oliver Wyman 2015)



With regards to the CSA's second point, mitigation of systemic risk, it should be noted that the **predominant risk in the FX market is settlement risk** (i.e. the risk that one counterparty delivers their side of the currency exchange while the other counterparty does not), and not mark-to-market risk. According to the BIS 1993 Noël Report *"the loss of principal in settling, for instance, a foreign exchange trade would dwarf any gain or loss that might have accrued to the counterparties to the original transaction"* [11]. Clearing agencies, on the other hand, are designed to mitigate the 'mark-to-market' risk, which is managed in the FX markets through Credit Support Annexes between counterparties. Settlement risk has also been virtually eliminated due to the creation of CLS Bank in 2002, an organisation which is subject to a cooperative oversight protocol arrangement between the banks of the 17 currencies that settle through CLS, including the Bank of Canada.

The FX market is mostly physically settled (i.e. trades settle by full exchange of currencies), whereas other derivatives markets settle trades largely financially. In 2013, the FX market was sized at $5.3 trillion per day[12]. When combined with physical settlement of trades, this results in very **large currency and capital needs**, which would have to be met by clearing agencies if physically settled FX products were to be made subject to mandatory clearing. This can be contrasted with most other OTC derivative markets, where trades are settled on the basis of net cash settlement in a single

[10] 91-507 Trade Repositories and Derivatives Data Reporting, 39 (3)
[11] BIS *Central Bank Payment and Settlement Services with respect to Cross-Border and Multi-Currency Transactions,* 1993 (Noël Report) available at http://www.bis.org/publ/cpss07.pdf. See also See BIS CPSS *Settlement Risk in Foreign Exchange Transactions,* 1996 (Allsopp Report) available at http://www.bis.org/publ/cpss17.pdf.
[12] Bank for International Settlements (BIS) Triennial Survey: http://www.bis.org/publ/rpfx13fx.pdf

currency that only reflects the mark-to-market value of the trade. As noted in the US Treasury's Fact Sheet on its exemption of FX forwards and FX swaps from mandatory clearing in November 2012, *"settlement of the full principal amounts of the contracts would require substantial capital backing in a very large number of currencies, representing a much greater commitment for a potential clearinghouse in the FX swaps and forwards market than for any other type of derivatives market"*[13].

In 2014 the GFXD produced the results of research[14] into the size of the FX options market, which accounts for ~6% of the global FX market, to establish the scale of the liquidity challenge of clearing physically settled FX options. The study, which covered over 90% of OTC FX dealer flow, estimated the size of the same-day liquidity risk (in order to credibly guarantee full and timely settlement of the currencies traded for this product) to be the equivalent of $161 billion for each day, across 17 currencies. At present, the market infrastructure for the clearing of physically settled FX options is not equipped to meet this substantial funding challenge. However the industry is collectively working together to meet this challenge.

It should also be noted that **voluntary clearing for FX products is still in its early stages**. For example, ESMA cited the immaturity of FX non-deliverable forward (NDF) clearing in its February 2015 determination that FX NDFs are not appropriate for mandatory clearing at this time[15]. By way of comparison, while an estimated 0.4%-3.6% FX NDF contracts (which account for ~3% of the overall FX market) are currently being cleared, the introduction of the clearing mandate for IRS and CDS was predicated on far more developed markets, with many start-up issues addressed while clearing of these products was still voluntary. At the time of introduction of clearing mandates for IRS (in 1999) and CDS (in 2009), approximately 60% and 30% respectively of contracts were being voluntarily cleared.

FX clearing services need time to mature, for their practices to be properly bedded down and "battle-tested" and for fundamental unresolved issues to be properly addressed. In Europe, for example, only two clearing agencies are currently authorised for the clearing of NDFs. Additionally, voluntary clearing for FX products as a whole is still limited to the inter-bank market. As a result, premature introduction of mandatory clearing in FX products may unnecessarily introduce additional risk to this global currency market and, as a result, undermine the benefits of central clearing.

Finally, we note that **FX products are not homogenous**, and must therefore be considered separately by product, by tenor and by currency pair. In particular, liquidity by currency pair and tenor varies significantly. If clearing is to be introduced for any products in the FX market, it is crucial that it should be limited to only the most liquid currencies. Furthermore, we recommend that the CSA requires specific information from any clearing agency applying to clear a product, on the end-to-end testing conducted with its clearing members for that market. This information should cover two areas: (1) the scenario analyses / stress testing performed by the clearing agency, the default management processes for the clearing agency and resulting impact on the underlying liquidity in the FX product(s) that the clearing agency clears or plans to clear, and the arrangements in place to address management of sovereign risk events (e.g. suspension of trading, sovereign default, unexpected bank holiday or other significant disruption to valuation, payment or settlement processes); and (2) a description of the manner in which the clearing agency has provided information to the central banks of the relevant currencies on its clearing of FX products, including but not limited to (1) above, and a summary of any views expressed by the central banks to this

[13] US Treasury Press Release 'Fact Sheet: Final Determination on Foreign Exchange Swaps and Forwards' http://www.treasury.gov/press-center/press-releases/Pages/tg1773.aspx
[14] http://gfma.org/Initiatives/Foreign-Exchange-%28FX%29/FX-Options-Clearing/
[15] http://www.esma.europa.eu/system/files/2015-esma-234_-_feedback_statement_on_the_clearing_obligation_of_non_deliverable_forward.pdf

information – especially if the clearing agency's services were extended to deliverable OTC FX contracts, whether forwards, swaps and even options. Because the deliverable FX market is a central component of the global payment system, central banks have expressed a need to understand and evaluate the impact of clearing by clearing agencies, individually and collectively, on the deliverable OTC FX market from a broad policy perspective.

****

We appreciate the opportunity to share our views on this consultation paper issued by Canadian Securities Administrators. Please do not hesitate to contact Fiona McKane on +44 207 743 9317, email fmckane@gfma.org or Andrew Harvey on +44 207 743 9312, email aharvey@gfma.org should you wish to discuss any of the above.

Yours sincerely,

James Kemp
Managing Director
Global Foreign Exchange Division, GFMA

IBC BAC | Insurance Bureau of Canada
Bureau d'assurance du Canada

Gregor Robinson
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Vice-président principal, Établissement des politiques et économiste en chef

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13 May 2015

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Re: Proposed National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives

Dear Ms. Turcotte and Me. Beaudoin:

On behalf of Insurance Bureau of Canada's (IBC) Financial Affairs Committee (FAC), I am writing to provide industry comments on the Canadian Securities Administrators' proposed *National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives*.

IBC is an industry association representing the private property and casualty (P&C) insurance companies of Canada. The P&C insurance industry, which employs over 118,000 people across Canada, has over $152 billion in total assets of which $106.6 billion is in invested assets. In 2013 alone the industry contributed over $6.7 billion in taxes and levies to federal and provincial governments.

We would like to raise some concerns regarding the CSA's proposed rule that "a local counterparty to a transaction in a mandatory clearable derivative must submit that transaction for clearing to a regulated clearing agency". This rule would apply to all financial entities, including P&C insurers, with the only two exemptions being non-financial entities hedging a commercial risk and intragroup transactions. The proposed rule introduces adverse implications for P&C insurers.

Our main concern with mandating central counterparty clearing on P&C insurers is that it will make the use of mandatory clearable derivatives much more expensive, both in terms of the actual fees paid and by increasing the compliance burden. It is likely that these implications will discourage the use of derivatives within the context of companies' risk management strategies which we view as highly problematic.

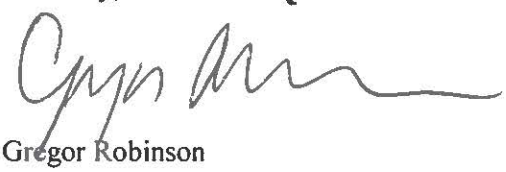
The use of derivative instruments by Canadian P&C insurers is limited and primarily associated with risk-mitigating, hedging activities. P&C insurers typically use standard, non-complex derivatives that hedge against common market risks such as interest rate risk and foreign exchange risk. Thus, it is important to understand that the business goal served by P&C insurers' derivatives activity is non-speculative in nature, but rather serves the objective of sound risk management. Given this relationship, we see multiple benefits in extending the end-user exemption to mandatory central counterparty clearing to P&C insurers using derivatives to implement risk hedging strategies.

We also believe there are additional issues with the proposal as it relates to the existing market infrastructure and the fact that central counterparty clearing is currently not widely available or easily accessible by P&C insurers.

IBC appreciates the opportunity to comment on the Clearing Rule and we look forward to participating in further discussions.

Please contact my colleague Nadja Dreff, Director, Economics and Assistant Chief Economist (ndreff@ibc.ca or at 416-362-2031) or myself if you wish to discuss further any of the matters raised in this letter.

Sincerely,



Gregor Robinson
SVP Policy & Chief Economist

cc: Jonathan Turner, CFO, Canada & SVP, Finance Reinsurance, Swiss Reinsurance Company Canada, IBC Financial Affairs Committee Chair
Joanne Marsden, Senior Analyst, Capital Banking, OSFI

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May 13, 2015

DELIVERED VIA ELECTRONIC MAIL
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Nunavut Securities Office
Ontario Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

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Dear Sirs/Mesdames:

RE: Comment Letter to CSA Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (the "Proposed Clearing Rule") and Proposed Companion Policy 94-101CP *Mandatory Central Counterparty Clearing of Derivatives* (the "Proposed Clearing CP")

The International Energy Credit Association **("IECA")** hereby submits the comments contained in this letter on behalf of its members in response to the solicitation for comments made by the Canadian Securities Administrators' (**"CSA"**) OTC Derivatives Committee (the **"Committee"**) in respect of the following published documents:

- The Proposed CSA National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (the "**Proposed Clearing Rule**"); and

- The Proposed Companion Policy 94-101CP *Mandatory Central Counterparty Clearing of Derivatives* (the "**Proposed Clearing CP**")

I. Introduction

The IECA is not a lobbying group. Rather, we are an association of several hundred energy company credit management professionals grappling with credit-related issues in the energy industry.

The IECA seeks to protect the rights and advance the interests of the commercial end user community that makes up its membership. IECA membership includes many small to large energy companies, few of whom would be deemed to be derivatives dealers in Canada, but all of whom have a fundamental mission of providing safe, reliable, and reasonably priced energy commodities that Canadian businesses and consumers require for our economy and our livelihood.

Correspondence with respect to this comment letter and questions should be directed to the following individuals:

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The IECA thanks the Committee for considering and making changes based on, public comments to the CSA Notice 91-303 Proposed Model Provincial Rule on Mandatory Counterparty Clearing of Derivatives (the "**Draft Model Rule**"), which the CSA published on December 19, 2013, and which is the basis for the Proposed Clearing Rule. In particular, the IECA commends the CSA for the following changes from the Draft Model Rule to the Proposed Clearing Rule: (i) developing a national instrument, rather than province-specific model provincial rules, with respect to mandatory clearing of derivatives, which would create a uniform Clearing Rule across Canada; (ii) removing the requirement for market participants to obtain board approval to qualify for the end-user exemption; (iii) allowing counterparties to rely on representations made to each other in determining whether clearing exemptions are available; (iv) providing clarifications with respect to completing and filing proposed Form F1; and (v) proposing a phased-in approach with respect to the clearing requirement. Despite these and other positive changes however, the IECA still has concerns about the provisions of the Proposed Clearing Rule and offers the following specific comments below for the CSA's further consideration.

II. Specific Comments

1. Definition of "financial entity

The IECA notes that the definition of a "*financial entity*", in sub-section 1(e) of the Proposed Clearing Rule, includes persons or companies that are either: (i) subject to a registration requirement; (ii) registered; or (iii) exempt from the registration requirement, under securities legislation of a Canadian jurisdiction. The IECA respectfully asks the Committee to clarify how derivatives market participants are supposed to determine if they fall under one of the registration elements, in the financial entity definition, unless or until the CSA has finalized rules with respect to derivatives markets participant registration?

The IECA notes that, in response to comments about the registration issue at page 11 of the CSA's covering notice document to the Proposed Clearing Rule, the Committee states that it believes that the proposed phase-in approach to the clearing requirement under the Proposed Clearing Rule will allow provincial regulators time to clarify the developing registration regime. Although the IECA fully supports a phased-in approach to the clearing requirement and agrees that more clarity is required about the registration regime, the IECA submits that the clearing requirement should not become effective at all until, or unless, the registration regime is finalized. If per chance the registration regime is not finalized before the first clearing requirement becomes effective under the proposed phase-in approach, how would the Committee suggest that market participants determine their status as "financial entities" or not under the registration elements within that definition? The IECA respectfully submits that such determination is impossible unless, or until, the registration requirements are finalized.

2. Definition of "local counterparty"

With respect to sub-paragraph (b) of the "local counterparty" definition in Section 1 of the Proposed Clearing Rule, the IECA requests that the Committee please clarify what it intends the words *"...is responsible for the liabilities of the counterparty;"* to mean? In particular, does the Committee intend those words to mean responsible for: (i) all of such affiliated entity's liabilities of any kind whatsoever; (ii) just liabilities with respect to derivatives trades; (iii) liabilities on a trade by trade, or counterparty by counterparty basis; or (iv) some other meaning?

In addition, the IECA notes that derivatives regulators in the United States and the European Union have adopted mandatory clearing requirements that may extend to entities organized outside of the U.S. or the EU (e.g. Canada), but whose head-offices or principal places of business may be in the U.S. or the EU. Similarly, the definition of *"local counterparty"* in the Proposed Clearing Rule appears to capture entities that may be organized in a third country (e.g., the United States or the EU), but that have their "head office" or "principal place of business" in a Canadian "local jurisdiction." The IECA requests that the Committee please clarify if they intended such potential extra-territorial reach within the definition of "*local counterparty*" or not? If extra-territorial application was intended, the IECA further requests that the Committee please clarify how derivatives market participants are to interpret the words "head office" and/or "principal place of business"? Should market participants rely on common law definitions of those terms or did the Committee intend the terms to have some other specific meaning and if so, what meaning?

To the extent that any Canadian definitions (common law and/or statutory) of "head office" and/or "principal place of business" differ materially from the approaches taken by the U.S. and the EU with

respect to mandatory clearing, the IECA urges the Committee to adopt meanings for those terms that are harmonized with the U.S. and EU approaches. For example, entities that have already determined the location of their head offices and/or principal places of business under the U.S. and/or EU clearing rules should not have to re-evaluate those issues under materially different definitions in Canada to potentially arrive at a different result with respect to whether or not they would be a "local counterparty" under the Proposed Clearing Rule.

The IECA believes that clear, harmonized definitions and approaches are important for regulatory consistency, facilitating compliance and preventing regulatory arbitrage, particularly across the G-20 jurisdictions. To that end, the IECA urges the Committee to craft the Proposed Clearing Rule (and indeed all CSA proposed derivatives rules) in such a way as to maximize inter-jurisdictional recognition, harmonization and substituted compliance among the G-20.

3. Interpretation of hedging or mitigating commercial risk

The IECA commends the Committee for revising the interpretation of "*hedging or mitigating commercial risk*", found in sub-section 4(1) of the Proposed Clearing Rule, from the definition that was found in the Draft Model Rule, in particular the deletion of the "closely correlated" and "highly effective" language that was vague and confusing. We also find the revised explanatory guidance on this point in the Proposed Clearing CP to be helpful.

The IECA requests however that the Committee please provide additional guidance with respect to its understanding of the phrase *"... intended to reduce risk..."* in sub-section 4(1). The IECA submits that the word "*intended*" is very subjective and should be clarified. In particular, we ask that the Committee please clarify by what evidence or criteria the apparent "intent" requirement within that sub-section would be satisfied? In other words, how is a derivatives market participant supposed to demonstrate that it has satisfied the requisite intent for the purposes of its derivatives transactions being considered as being for the purposes of hedging or mitigating commercial risk?

The IECA recognizes that the concept of "*intended to reduce risk*", in the context of the derivatives trading activities of market participants, may mean very different things to different market participants. The IECA and its members would be very happy to discuss this concept with the Committee by telephone or through in person meetings.

4. "Speculate" should be defined or clarified

The IECA requests that the Committee either define, or further clarify, what it considers the term "speculate" to mean for the purposes of the Proposed Clearing Rule? Because derivative positions held for speculation may not benefit from any of the exemptions to mandatory clearing contained in the Proposed Clearing Rule, the IECA submits that "speculate" needs to be clearly defined so that market participants can properly comply with the clearing requirement. The IECA suggests that a reasonable definition of "speculate" could be framed in terms of derivatives trading activity that does not have a direct or indirect connection to hedging or mitigating commercial risks faced by the party engaged in such trading, but is solely entered into for the purposes of investing for potential gain or potentially generating profit.

5. Duty to submit for clearing

In connection with the duty to submit a transaction in a mandatory clearable derivative for clearing pursuant to Section 5 of the Proposed Clearing Rule, the IECA would like to reiterate its earlier comments about the importance of harmonization, inter-jurisdictional recognition and substituted compliance among the G-20 and within Canada. The IECA believes it is critically important to effective compliance and regulatory oversight that inter-provincially and internationally harmonized criteria be applied to the determination of when a derivative transaction would be mandated for clearing and which counterparty would have the duty to submit such transaction for clearing.

6. Crown Corporations Exemption Section 6

The IECA strongly disagrees with the exemption from the clearing requirement that is made available to Crown corporations, or entities whose obligations are guaranteed by the federal or provincial governments, under Section 6 of the Proposed Clearing Rule. The IECA submits that such exemption will give such entities a significant competitive advantage over non-Crown entities that will be required to comply with the clearing mandate because of the increased transaction and compliance costs that the clearing mandate will undoubtedly bring to derivatives market participants. Some IECA members transact derivatives with the types of Crown entities that would benefit from the proposed exemption. In our members' experience such Crown entities are often large and sophisticated Canadian derivatives market participants. The IECA respectfully submits that such entities do not need competitive advantages handed to them by the CSA through a derivatives regulatory regime to the detriment of other market participants.

To better ensure transparency and a "level playing field" in derivatives markets the IECA submits that all derivatives market participants should be subject to the same requirements with respect to mandatory clearing, or exemptions from it, and special treatment should not be afforded to one particular class of market participant to the potential detriment of other classes. Alternatively, if special treatment is to be given to particular classes of derivatives market participants, that treatment should be based on objective criteria, such as credit rating metrics, market capitalization, derivatives portfolio size, etc., that are evenly applied to all market participants.

The IECA notes the Committee's comments in connection with this issue at pages 19-20 of the covering notice to the Proposed Clearing Rule, namely that provincial regulators may at some point in the future modify the applicability of all exemptions, including the Crown corporation clearing exemption. In response to those comments, the IECA respectfully submits that (i) now is the time for the CSA to get these rules right, rather than deferring to potential future action by provincial regulators, and (ii) to the utmost extent possible the rules should be consistent across Canada, rather than different from province to province. Leaving this issue to potentially be addressed and modified by provincial regulators at some future date appears to undermine the rationale for the Committee adopting a National Instrument approach for the Proposed Clearing Rule in the first place.

A further concern that the IECA has with the language in section 6 is the potential availability of a clearing exemption to foreign governments and entities owned and controlled by foreign governments under sub-section 6(a). With utmost respect, the IECA submits that providing a clearing exemption, *ab initio* and without further qualifying criteria, to foreign governments and their commercial entities to be patently arbitrary, unreasonable and unjustifiable. The Committee appears to have assumed that just because a

derivatives market participant is either a foreign government, or a commercial entity of a foreign government, that market participant's derivatives trading activities would pose no systemic risk to Canada's financial system.

The IECA would respectfully point out to the Committee that many foreign governments, and by extension their commercial entities, have extremely poor credit ratings. Additionally, such governments may have regulations and case law in their respective countries that undermine the ability of guarantees to be enforced against companies, owned by the foreign governments, by entities outside their jurisdiction. As a result participation in the Canadian derivatives markets by such foreign governments and/or their commercial entities could indeed pose serious systemic risk to those markets. The IECA strongly urges the Committee to reconsider and remove the non-application of the clearing requirement to foreign governments and their commercial entities unless such governments and entities can demonstrate that (i) they satisfy certain objective and quantifiable financial metrics, such as credit ratings, and (ii) their Canadian derivatives trading activities do not in fact pose systemic risk within Canada.

7. End-User Exemption-Section 9

The IECA respectfully submits that sub-paragraph 9(2)(c) of the Proposed Clearing Rule should be deleted in its entirety because it is illogical and unnecessary. The provisions in sub-paragraphs 9(2)(a) and (b) are adequate to ensure that the end-user clearing exemption is not abused. We believe that 9(2)(c) is illogical and unnecessary because the status of the "affiliated entity", referred to in that sub-paragraph, as a "financial entity" or not should be irrelevant to the issue of whether the end-user exemption should be available or not to the affiliated counterparty on whose behalf the affiliated entity is acting with respect to derivatives transactions. The germane question should be whether the affiliated counterparty itself is, or isn't, an end-user. If it is an end-user then why should it matter whether or not its derivatives trading affiliate, that is merely acting as a disclosed or undisclosed agent, is itself an end-user or not? The agent's status should be irrelevant to determining whether the principal is an end-user or not and therefore whether the end-user clearing exemption is available to it or not.

8. Intragroup Exemption Section 10

With respect to sub-paragraph 10(2)(a) of the "Intragroup exemption", the IECA respectfully requests that the Committee clarify that the "*agreement*" between affiliated counterparties to rely on the intragroup clearing exemption, referred to in that sub-paragraph, need not be a written agreement on a transaction by transaction basis. The IECA submits that requiring that level of agreement specificity would be both extremely onerous on market participants and do little to address systemic risk. Instead, the IECA submits that the "agreement" requirement in sub-paragraph 10(2)(a) should be considered satisfied as long as the two affiliates have written documentation between them, for example, either an express agreement or joint policies and procedures, that address the circumstances under which they will rely on the intragroup clearing exemption for derivative trades between them that qualify for the intragroup exemption.

With respect to the requirement for "*... a written agreement setting out the terms of the transaction between the [affiliated] counterparties*" in sub-paragraph 10(2)(c), the IECA ask that the Committee please clarify that the requirement would be satisfied by there being one or more written master forms of agreements in place between the affiliated counterparties, under which they are enabled to enter into specific derivative

transactions, but that there need not be written confirmations for each such specific transaction. The IECA submits that requiring written confirmations on a trade by trade basis for affiliated counterparties whose financial statements are prepared on a consolidated basis is unnecessary, overly onerous and does not contribute to reducing systemic risk.

9. Record Keeping under Section 11

In connection with the record keeping requirements in section 11 of the Proposed Clearing Rule, and the associated explanatory guidance at page 42 of the Proposed Clearing CP, in particular the commentary about "*...reasonable supporting documentation should be kept for each transaction where the end-user exemption is relied upon...*", the IECA respectfully submits that the requirement to keep the kinds of documentation enumerated on page 42 on a transaction by transaction basis is unreasonably onerous and unnecessary. Rather, the IECA submits that keeping such documentation on a portfolio wide basis should suffice.

The Committee has rightly recognized, in the commentary on page 42, that hedging strategies or programs are typically at a macro or portfolio level. Accordingly, documentation of such strategies or programs would also typically be at macro or portfolio levels and not necessarily at the granularity of specific transactions. The IECA respectfully submits that the objective of addressing systemic risk would be adequately addressed by requiring derivatives market participants to keep, and if required to produce, portfolio wide documentation to evidence that their hedging strategies satisfy the requirements of the end-user, intragroup and/or any other exemptions that are or may become available to mandatory clearing under the Proposed Clearing Rule.

10. Including a "Treasury Affiliate" Exemption

The IECA thanks the Committee for including the end-user and intragroup exemptions at sections 9 and 10 of the Proposed Clearing Rule. The IECA believes that those exemptions will benefit many market participants while at the same time not undermining the important goal of reducing systemic risk. In the interests of international regulatory harmony and consistency, particularly as between Canada and the United States, the IECA also urges the Committee to consider and adopt an exemption similar to what the CFTC in the U.S. has coined as the "treasury affiliate exemption" to mandatory clearing through no-action relief.

The CFTC published CFTC Letter No. 14-144[1] ("**Letter 14-144**") on November 26, 2014. Letter 14-144 amended and restated the CFTC's earlier No-Action letter 13-22[2] ("**Letter 13-22**") published on June 4, 2013. Letter 14-144 removed or amended several of the restrictive conditions on the relief from mandatory clearing provided to certain "treasury affiliates" by Letter 13-22. The industry had commented on the impracticality of several of the conditions of Letter 13-22, and the CFTC responded to these comments by modifying certain conditions to make the relief available to a broader spectrum of market participants acting as treasury affiliates. As in Letter 13-22, the treasury affiliate exemption in Letter 14-144 allows treasury affiliates undertaking hedging activities on behalf of non-financial affiliates within a corporate group to elect the end-user exception from mandatory clearing even if such treasury affiliates are not acting

[1] http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-144.pdf
[2] http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/13-22.pdf

as agents of their non-treasury affiliates. As stated above, the IECA respectfully urges the CSA to adopt a clearing exemption similar to the treasury affiliate exemption adopted by the CFTC.

11. Exemptions under Section 13 and Compliance Phase-in

The IECA notes that under section 13 of the Proposed Clearing Rule it is contemplated that provincial securities regulators may grant exemptions to the Proposed Clearing Rule *"...in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption."* Although the IECA recognizes that the discretion to grant exemptions lies with provincial securities regulators, for the sake of consistency across Canada, the IECA submits that the Proposed Clearing Rule should, at a minimum, provide uniform guidelines and/or a harmonized process under which market participants could apply for and obtain exemptions. In particular, to the extent that exemptive relief application processes, and the criteria under which relief may be granted, may be more or less onerous across various Canadian jurisdictions, the IECA respectfully submits that the CSA should attempt to harmonize disparate provincial application process and relief criteria to the greatest extent possible, in light of the different securities legislative regimes across Canada. Having harmonized exemptive relief processes and criteria would greatly facilitate ease of compliance by market participants and discourage regulatory arbitrage.

As a further point with respect to exemptive relief applications under section 13 and in connection with the proposed phase-in periods for compliance with the clearing mandate, set forth in Appendix A of the Proposed Clearing Rule, the IECA asks that the Committee please clarify that the clearing mandate would not begin, or continue to apply to, a market participant during the pendency of any exemptive relief application under section 13? For example, if a market participant has made an application to its local provincial securities regulator for exemptive relief from all or part of the clearing mandate and the start date, to be set forth in Appendix A, for mandatory clearing has begun for such market participant and/or a particular class of derivatives, then, with respect to that market participant the clearing requirement should be held in abeyance until the exemptive relief application has been finally determined by the relevant securities regulator? The IECA respectfully submits that such abeyance pending the outcome of the exemptive relief application is both just and logical and asks the Committee to please clarify, either in the Proposed Clearing Rule or the Proposed Clearing CP, whether it agrees with this submission or not?

III. Conclusion

The IECA appreciates the opportunity to table our members' comments and concerns to the Authorities. This letter represents a submission of the IECA, and does not necessarily represent the opinion of any particular member.

Yours truly,

INTERNATIONAL ENERGY CREDIT ASSOCIATION

Priscilla Bunke
Dentons Canada, LLP

ISDA Safe, Efficient Markets

BY EMAIL **May 13, 2015**

Alberta Securities Commission
Autorité des marchés finaciers
British Columbia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Ontario Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

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Re: Canadian Securities Administrators
Notice and Request for Comment on Proposed National Instrument 94-101 and Proposed Companion Policy 94-101CP (*Mandatory Central Counterparty Clearing of Derivatives*)

On behalf of its members, the International Swaps and Derivatives Association, Inc. (**ISDA**)[1] appreciates the opportunity to comment on (i) Proposed National Instrument 94-101 (the

[1] Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 64 countries. These members include a broad range of OTC derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure including

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Clearing Rule) and (ii) Proposed Companion Policy 94-101CP (the **Clearing CP**), which together address *Mandatory Central Counterparty Clearing of Derivatives* (together, the **Clearing Rule** and the **Clearing CP**, the **Proposed National Instrument**).

ISDA has long been a proponent of safe and efficient markets. As such, ISDA has been deeply engaged in the implementation of the G-20 commitments, both across G-20 jurisdictions and within each jurisdiction where ISDA members are located. ISDA comments, on mandatory clearing and other G-20 commitments, strive to reflect both (i) the breadth of ISDA experience and (ii) the depth of ISDA membership. On mandatory clearing in particular, ISDA is grateful to the Canadian Securities Administrators (**CSA**) for considering its input since 2012.[2] ISDA welcomes the prospect of continued dialogue as CSA moves towards finalizing the Proposed National Instrument.

1. *Product Determinations: General Thoughts*

Parts 4 and 6 of the Clearing CP set forth a non-exhaustive list of criteria that CSA members will consider in determining whether mandatory clearing shall apply to a particular derivative product or class of product (such determinations, the **Product Determinations**). ISDA notes that Parts 4 and 6 of the Clearing CP appear to broadly accord with the criteria employed by the United States[3] and the European Union to make Product Determinations. The derivatives markets are global in nature, and ISDA generally supports harmonization across the G-20 jurisdictions.

Harmonization, however, is not an end in itself. It is meant to ensure that the G-20 jurisdictions achieve the systemic risk reduction that lies at the heart of the Pittsburgh and Cannes Commitments (the **Commitments**),[4] while minimizing costs and maximizing operational feasibility for all market participants. In other words, the purpose of harmonization is to make sure that, within the supervisory and regulatory frameworks anticipated by the Commitments, the maximum number of market participants (including, *e.g.*, Canadian pension plans and insurance

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exchanges, clearinghouses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

[2] *See, e.g.*, the Letter from ISDA to the CSA, dated September 21, 2012, on Consultation Paper 91-406 (Derivatives: OTC Central Counterparty Clearing), the Letter from ISDA to the CSA, dated March 26, 2014, on CSA Staff Notice 91-303 (the Proposed Model Provincial Rule on Mandatory Central Counterparty Clearing of Derivatives), and the Letter from ISDA to the CSA, dated March 26, 2014, on CSA Staff Notice 91-304 (the Proposed Model Provincial Rule on Derivatives: Customer Clearing and Protection of Customer Collateral Positions). All such Letters may be found at: http://www2.isda.org/regions/canada/.

[3] For purposes of this comment letter, the "United States" mainly refers to the Commodity Futures Trading Commission (**CFTC**).

[4] *See* Leaders' Statement, Pittsburgh Summit, September 24-25, 2009 (stating that: "All standardized OTC derivative contracts should be…cleared through central counterparties...We ask the FSB and its relevant members to assess regularly implementation and whether it is sufficient to improve transparency in the derivatives markets, mitigate systemic risk, and protect against market abuse") and Cannes Summit Final Declaration, November 4, 2011 (stating that: "We call on the Basel Committee on Banking Supervision (BCBS), the International Organization for Securities Commission (IOSCO) together with other relevant organizations to develop for consultation standards on margining for non-centrally cleared OTC derivatives by June 2012…"). Both the Statement and the Final Declaration are available on: http://www.treasury.gov/resource-center/international/g7-g20/Pages/g20.aspx.

companies) can continue to satisfy their risk management imperatives by accessing deep and liquid derivatives markets.

Therefore, while ISDA encourages harmonization, ISDA also recognizes that the G-20 jurisdictions may legitimately differ in implementation. In some cases, disparate legal frameworks may drive such differences. In other cases, local market conditions may result in such differences. ISDA believes in evidence-based regulation. Supervisors and regulators should examine all applicable facts, including costs and benefits, before making decisions. Consequently, ISDA supports the CSA statement that the "goal is to harmonize, *to the greatest extent appropriate*, the determination of mandatory clearable derivatives or classes of derivatives across Canada and with international standards" (emphasis added).

ISDA supports the two preliminary steps that the CSA has taken to decide what is appropriate. First, as noted above, Parts 4 and 6 of the Clearing CP set forth criteria for Product Determinations that appear to broadly accord with those in the United States and the European Union. However, ISDA also recognizes that Parts 4 and 6 of the Clearing CP contain more granularity than similar criteria in the United States and the European Union.[5] Second, ISDA understands that CSA members expressly intend to look to "derivatives transaction data reported pursuant to local derivatives data reporting rules" for "key information in the determination process." ISDA has worked extensively with the CSA on derivatives data reporting.[6] ISDA believes that the CSA, in taking these two preliminary steps (*i.e.*, espousing more granular criteria and analyzing trade data), has positioned itself well to make Product Determinations that would best balance (i) the reduction of systemic risk at the center of the Commitments and (ii) the legitimate risk management needs of market participants.

2. *Product Determinations: Comments on Specific Provisions*

a. *Approach*

In both the United States and the European Union, relevant authorities have two methods of making mandatory clearing determinations.[7] First, the relevant authorities can employ a "bottom-up" approach. In this approach, CCPs provide information to the relevant authorities on the derivatives products that they already clear (or that they contemplate clearing in the future). Through this information, CCPs substantiate why certain products are suitable for mandatory clearing. The relevant authorities then make a determination based on CCP information. Second, the relevant authorities can employ a "top-down" approach. In this approach, relevant authorities may decide that certain derivatives products or classes of products are suitable for mandatory clearing, even when no CCP is clearing (or contemplating clearing) those products or classes.

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[5] For example, Parts 4 and 6 specifically mention "the existence of third-party vendors providing pricing services." Neither Section 2(h)(2)(B) of the United States Commodity Exchange Act (the **CEA**) nor Chapter IV of the European Market Infrastructure Regulation (**EMIR**) specifically mentions "third-party." Section 2(h)(2)(B) of the CEA simply references "adequate pricing data," whereas Chapter IV of EMIR references "fair, reliable and generally accepted pricing information."

[6] *See, e.g.*, the Letter from ISDA to CSA members, dated March 24, 2015, on Proposed Multilateral Instrument 91-101 (Derivatives Product Determination) and Proposed Multilateral Instrument 96-101 (Trade Repositories and Derivatives Data Reporting), available at: http://www2.isda.org/regions/canada/.

[7] For the United States, *see* 17 CFR Parts 39.5(b) ("bottom up") and 39.5(c) ("top down"). For the European Union, *see* EMIR 5(1-2) ("bottom up") and EMIR 5(3) ("top down").

ISDA seeks clarification on the process by which CSA members may make mandatory clearing determinations. Parts 4 and 6 of the Clearing CP state: "NI 94-101 *includes* a bottom-up approach for determining whether a derivative or classes of derivatives will be subject to the mandatory clearing obligation." The Proposed National Instrument remains silent on whether it *includes* or *excludes* a "top-down" approach. To avoid confusion, ISDA requests that the CSA explicitly state whether its members intend to only follow a "bottom-up" approach, or may additionally follow a "top-down" approach. If the latter, then ISDA requests that the CSA provide more detail on the manner in which the "top-down" approach would operate, including the circumstances under which CSA members would consider utilizing a "top-down" determination.

b. *Public Consultation*

ISDA welcomes the CSA statement that: "As part of the determination process, we will publish for comment the derivatives we propose to be mandatory clearable derivatives and invite interested persons to make representations in writing." As mentioned above, ISDA believes in evidence-based regulation, and a combination of trade repository data, CCP submissions (assuming a "bottom-up" approach), and public comment would provide CSA members with the most holistic view of whether any particular derivatives product (or class thereof) is suitable for mandatory clearing, given the criteria articulated in Parts 4 and 6 of the Clearing CP.

ISDA does seek clarification on the amount of time afforded to the public for comment. The CSA states: "Except in Québec, the determination process is expected to follow our typical rule-making or regulation making process…In Québec, the determination process will be made by decision…". For a "bottom-up" Product Determination, ISDA requests that the CSA confirm that the public will have a minimum of 90 days to comment, consistent with normal-course rulemaking, regulation making, or decision making processes. For a "top-down" determination, ISDA requests that CSA members afford the public more than 90 days to comment. Any lesser amount of time would compromise comment quality.

c. *Public Register*

ISDA is in favour of minimizing operational burdens on members. As noted above, the CSA states: "Except in Québec, the determination process is expected to follow our typical rule-making or regulation making process. The list of mandatory clearable derivatives will be included in the Clearing Rule as Appendix A, as amended from time to time. In Québec, the determination process will be made by decision and the list of mandatory clearable derivatives will appear on a public register kept by the Autorité des marchés finaciers." ISDA respectfully requests that CSA members coordinate to enable market participants to quickly access a list of all Product Determinations on one webpage. ISDA notes that this result could be achieved through hyperlinks between different websites.

3. *Mandatory Clearing Obligation: Scope.*

a. *Non-Systemic Entities.*

Subsection 5(1) of the Proposed National Instrument states: "A local counterparty to a transaction in a mandatory clearable derivative must submit, or cause to be submitted, that transaction for clearing to a regulated clearing agency that provides clearing services for that mandatory clearable derivative" (the **Mandatory Clearing Obligation**).

Part 3 of the Proposed National Instrument then sets forth two exemptions to the Mandatory Clearing Obligation. The first is the end-user exemption. The second is the intra-group exemption. Pursuant to Part 5 of the Proposed National Instrument, provincial regulators retain the authority to grant further exemptions. Indeed, the CSA contemplates that provincial regulators would "use trade repository data to investigate whether thresholds or carve-outs are appropriate for certain types of entities," and that phasing in the Mandatory Clearing Obligation would provide provincial regulators enough time for such investigation.

As described in greater detail below, ISDA supports the phasing in of any Mandatory Clearing Obligation. However, ISDA notes that a phasing-in regime, coupled with the potential for *ad hoc* or categorical exemptions before Mandatory Clearing Obligations become effective still creates regulatory uncertainty. That uncertainty may have the greatest impact on those market participants whose derivatives activities are not systemic to either (i) the global derivatives markets or (ii) the markets within CSA jurisdiction (the **Non-Systemic Entities**). Under the phasing in contemplated in the Proposed National Instrument, the Non-Systemic Entities will assume that the Mandatory Clearing Obligation applies until a CSA member states otherwise. That assumption can easily result in unanticipated consequences, including for the real Canadian economy, as market participants decide whether and how to spend their capital.

ISDA respectfully suggests that there are benefits to the CSA explicitly exempting the Non-Systemic Entities from the Mandatory Clearing Obligation concurrently with finalizing the Proposed National Instrument or, in any case, well before proposing any Product Determination for public comment. ISDA observes that the United States and the European Union both contain broader exemptions for Non-Systemic Entities than those in the Proposed National Instrument. Of course, supervisors and regulators may legitimately differ in their implementation of the Commitments. Nevertheless, the United States and the European Union each have a larger presence in the global derivatives markets than all Canadian provinces combined. Hence, ISDA finds it surprising that the Canadian provinces would apply the Mandatory Clearing Obligation to more types of Non-Systemic Entities than the United States and the European Union.

ISDA notes that there is more than one way for the CSA to exempt the Non-Systemic Entities from the Mandatory Clearing Obligation. For example, in both the United States and under the Proposed National Instrument, if one party to a derivatives transaction is a "financial entity," then any existing Mandatory Clearing Obligation would apply to that transaction. However, as compared to the Proposed National Instrument, the United States has a more restrictive "financial entity" definition. Specifically, the definition excludes certain "small financial institutions." Therefore, those institutions may rely on the end-user exemption, as long as they meet certain other requirements (*i.e.*, hedging or mitigating commercial risk).[8]

The European Union takes a slightly different approach than the United States and the Proposed National Instrument. First, with respect to financial entities, the European Union exempts certain pension schemes from the Mandatory Clearing Obligation (i) for a defined period of time (*i.e.*, three years after the effective date of EMIR) and (ii) for derivatives transactions that reduce investment risk. Second, the European Union exempts non-financial entities from the

[8] *See* 17 CFR 39.6(d).

Mandatory Clearing Obligation that fall below the "clearing threshold," which is calibrated by asset class.[9]

ISDA acknowledges that the CSA may wish to take a different approach than the United States or the European Union in defining Non-Systemic Entity. ISDA believes that the CSA would be well positioned to develop such an approach after CSA members complete analyzing trade repository data.

ISDA understands the CSA position that "...the G20 has also committed to impose capital and collateral requirements on OTC derivative transactions that are not centrally cleared; the related costs *may well exceed* the costs associated with clearing OTC derivatives" (emphasis added). ISDA notes that the G-20 meant for increased capital and collateral requirements to incentivize clearing. Analysis of trade repository data may provide the CSA with a reasonable basis for concluding that Non-Systemic Entities should be incented to clear rather than being subject to a Mandatory Clearing Obligation.

b. *Governmental Entities, Central Banks, and Supra-National Agencies.*

ISDA supports Section 6 of the Proposed National Instrument, which exempts from the Mandatory Clearing Requirement derivatives transactions with (i) the Bank of Canada or a central bank of a foreign jurisdiction and (ii) the Bank for International Settlements. Nevertheless, ISDA would like to re-emphasize the importance of expanding Section 6 of the Proposed National Instrument to cover derivatives transactions with:

- Crown corporations that may be agents of the Crown. As agents, any liabilities of Crown corporations may in fact be those of the Crown in law, but the CSA jurisdictions in which Crown corporations were constituted do not necessarily guarantee such liabilities.
- Entities wholly-owned by the government of Canada, the government of a jurisdiction of Canada, or the government of a foreign jurisdiction, but which may not benefit from a guarantee from the relevant government.
- Recognized supra-national agencies, such as the International Monetary Fund.

Although not dispositive, both the United States and the European Union have advanced similar exemptions, based in part on considerations of comity and the traditions of the international financial system.

c. *Intra-Group Entities.*

ISDA supports Section 10 of the Proposed National Instrument, which exempts from the Mandatory Clearing Requirement certain transactions between "affiliated entities." First, ISDA notes that the "affiliate entity" definition is not the same in the Proposed National Instrument as compared to the recent proposed multilateral instrument on trade reporting. ISDA understands that the CSA may be seeking to effectuate policy objectives by defining the same term differently in two separate proposals. However, ISDA respectfully submits that the CSA should weigh (i) the benefits of such objectives against (ii) the detriments that inhere to defining the same term differently (*e.g.*, increased confusion and operational difficulties).

[9] *See* EMIR 11.

Second, ISDA would encourage the CSA to consider permitting two "affiliated entities" that are neither required to consolidate nor are supervised on a prudential basis to rely on the intra-group exemption, so long as such entities can demonstrate, through the Form 94-101F1 filing, that they satisfy the conditions set forth in Subsection 10(2) of the Proposed National Instrument. ISDA notes that this approach appears consistent with CSA intent in promulgating the intra-group exemption. For example, in Section 10 of the Clearing CP, the CSA states: "The exemption for intragroup transactions is based on the premise that the risk created by these transactions is expected to be managed in a centralized manner to allow for the risk to be identified and managed appropriately. Entities using this exemption should have appropriate legal documentation between the affiliated entities and detailed operational material outlining the robust risk management techniques used by the overall parent entity and its affiliated entities when entering into the intragroup transactions." The CSA further states that: "We are of the view that a group of affiliated entities may structure its centralized risk management according to its unique needs, provided that the program reasonably monitors and manages risks associated with non-centrally cleared derivatives."

Finally, pursuant to Section 3 of the Proposed National Instrument, one "affiliated entity" in each pairing must file a Form 94-101F1 to relevant provincial regulators. It is highly likely that Section 3 of the Proposed National Instrument would result in the "affiliated entity" making submissions to multiple provincial regulators. ISDA is in favor of the CSA exploring a more efficient procedure for "affiliated entities" to make Form 94-101F1 filings. For example, the CSA could allow "affiliated entities" to make one submission to an approved trade repository. Alternatively, "affiliated entities" could file one Form 94-101F1 with the CSA, which would then be shared with all applicable provincial regulators.

4. *Phase-In.*

a. *Evidence-Based Regulation.*

ISDA supports the phasing-in of the Mandatory Clearing Obligation. As mentioned above, ISDA believes that the CSA may maximize the benefits of phasing-in by taking a number of preparatory actions. In taking these actions, ISDA urges CSA members to coordinate to the maximum extent possible. ISDA suggests the following sequence:

- CSA members start collecting trade repository data.

- After a certain period of time, CSA members deem that trade repository data is sufficient, at a minimum, to support (i) categorization of entities that participate in the derivatives markets within CSA jurisdiction (*e.g.*, (i) market makers, (ii) non-market makers (financial and non-financial), and (iii) participants hedging and/or mitigating commercial risk), (ii) analysis of the patterns of participation, including the volume of derivatives transactions (both cleared and uncleared), and (iii) assessment of the risks posed by such patterns, including whether those risks are likely to be systemic.

- Based on its exploration of trade repository data, CSA members identify the universe of Non-Systemic Entities. CSA members then consider whether it would be appropriate to exempt Non-Systemic Entities from the Mandatory Clearing Obligation.

- Ideally, the CSA would wait to finalize the Proposed National Instrument until after it reaches a uniform decision on whether an exemption should be afforded to Non-Systemic Entities.

However, if that does not occur, CSA members should still wait to propose Product Determinations until after they have made decisions on such exemption(s).

- The public has at least 90 days (more for a "top-down" determination) to comment on any Product Determination proposal.

- CSA members digest public comments and finalize a Product Determination.

- Using trade repository data, CSA members decide which entities should fall within which phase-in categories (*e.g.*, Category One – Clearing members).

- CSA members then set the phase-in time periods for each category.

ISDA recognizes that CSA members may need to adjust the above sequence to reflect certain legal and practical obstacles to phasing in the Mandatory Clearing Obligation. Such obstacles are described in greater detail below.

b. *Interconnection with Amendments to Personal Property Security Law*

In considering whether and how the Mandatory Clearing Obligation should apply to entities outside of Category One, the CSA should consider the obstacles that such entities face in accessing client clearing services. As ISDA has noted previously, one such obstacle is the current state of provincial law governing security interests in personal property (the **Provincial Laws**). With the exception of Québec, the Provincial Laws do not permit security interests in cash collateral to be perfected through control. For uncleared derivatives, the Provincial Laws have negatively impacted the willingness of a counterparty to deal with, *e.g.*, a Non-Systemic Entity. Similarly, the Provincial Laws may negatively impact the willingness of clearing members to provide services to, *e.g.*, a Non-Systemic Entity. ISDA reiterates the importance of amending all Provincial Laws to permit perfection through control for cash collateral, before the Mandatory Clearing Obligations become effective for entities outside of Category One. In general, ISDA respectfully requests that the CSA consider the manner in which CSA Staff Notice 91-304 and the Proposed Model Provincial Rule on *Derivatives: Customer Clearing and Protection of Customer Collateral Positions* interact with Mandatory Clearing Obligations for entities outside of Category One.[10]

c. *Interconnection with Mutual Recognition and Substituted Compliance*

i. *Within Canada*

Within Canada, the derivatives markets cross CSA jurisdictions. Therefore, ISDA supports the CSA intent behind the following statement: "The Clearing Rule provides substituted compliance for transactions involving a local counterparty where the transaction is submitted for clearing pursuant to the laws of a jurisdiction of Canada other than the jurisdiction of the local

[10] *See* Letter from ISDA to the CSA, dated March 26, 2014, on CSA Staff Notice 91-304 (the Proposed Model Provincial Rule on Derivatives: Customer Clearing and Protection of Customer Collateral Positions), available at: http://www2.isda.org/regions/canada/.

counterparty…". Nevertheless, ISDA requests clarification on how the CSA has expressed this intent in the actual text of the Clearing Rule.

- First, Subsection 5(4) of the Clearing Rule references only (i) Newfoundland and Labrador, (ii) the Northwest Territories, (iii) Nunavut, (iv) Prince Edward Island, and (v) Yukon.

- Second, Section 1 of the Clearing Rule defines "regulated clearing agency" as (i) "a person or company recognized or exempted from recognition as a clearing agency in the local jurisdiction," in all jurisdictions other than Québec and (ii) "a person recognized or exempted from recognition as a clearing house" in Québec.

- Together, Section 1 and Subsection 5(4) of the Clearing Rule should let a "local counterparty" in one CSA jurisdiction satisfy its Mandatory Clearing Obligation by clearing with a "regulated clearing agency" in any other CSA jurisdiction.

- ISDA respectfully suggests that the CSA ensure substituted compliance within Canada before finalizing any Product Determination.

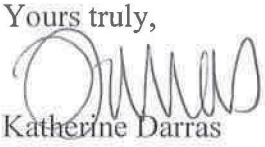
ii. *Between Canada and Other G-20 Jurisdictions.*

As referenced above, the derivatives markets are global in nature. Often times, two counterparties to one derivatives transaction are located in separate G-20 jurisdictions. As more G-20 jurisdictions implement mandatory clearing, there must be a working framework between such jurisdictions for mutual recognition and substituted compliance. ISDA believes that such a framework should focus on regulatory outcomes, rather than a *pro* forma, granular comparison of regulatory language. ISDA submits that such a framework is evolving between, *e.g.*, the United States and the European Union. In the same vein, the Proposed National Instrument states: "…the Committee continues to monitor the development of cross-border guidance with respect to substituted compliance on clearing requirements." The CSA may reasonably wait to articulate its stance on mutual recognition and substituted compliance after the dialogue between, *e.g.*, the United States and the European Union, has completed. However, ISDA believes that no Product Determination should become effective, regardless of Category, until the CSA details its stance on mutual recognition and substituted compliance.

*****

ISDA appreciates the opportunity to provide input on the Proposed National Instrument. ISDA would be pleased to work with CSA further it moves towards finalizing the Proposed National Instrument. Please feel free to contact me or ISDA staff at your convenience.

Yours truly,



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May 13, 2015

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Re: CSA Notice and Request for Comment – Proposed National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives and Proposed Companion Policy 94-101CP Mandatory Central Counterparty Clearing of Derivatives (the Proposed NI and Notice).

The Investment Industry Association of Canada (IIAC) appreciates the opportunity to provide comments on the Proposed NI and Notice. An industry working group of IIAC member firms active in derivatives assisted in commenting the Proposed Rules and Notices.

Some IIAC members or their affiliates, and other industry groups in which they participate, may address in separate letters to the CSA issues raised by the Proposed NI and Notice, based on their role in the market and their regulatory situation. Our comments relate only to the activities of our members in CFDs and FX derivatives (Retail OTC Derivatives) and do not apply to the activities of our members in other products or to the activities of their affiliates.

As mentioned in our March 18, 2014 response letter to CSA Staff Notice 91-303 Proposed Model Provincial Rule on Mandatory Central Counterparty Clearing of Derivatives (our 91-303 Letter), we agree with the objectives pursued by the CSA in implementing a regulatory framework for OTC derivatives.

We agree with the bottom-up approach as well as the factors the CSA intends to consider for determining whether a derivative or class of derivatives will be subject to the mandatory clearing obligation. We commend the CSA for confirming that, as part of the determination process, it will publish for comment the derivatives it proposes to be mandatory clearable derivatives and invite interested persons to make representations in writing.

Clearing agencies recognized by the CSA have not made Retail OTC Derivatives available for clearing. Furthermore, an analysis of Retail OTC Derivatives based on the factors outlined in the CP will lead the CSA to conclude that central clearing would have no effect on systemic risk mitigation, because of the negligible notional value, in absolute terms as well as a percentage of the overall OTC market and underlying asset classes. As argued in our 91-303 Letter, we believe the CSA will also find that mandated central clearing would harm competition by adding significant costs that would have to be passed on to investors. That would cause many Investors to turn to unregulated entities that offer similar products online.

We welcome the opportunity for an ongoing dialogue with the CSA on this important initiative and would be pleased to discuss this submission should you have any questions.

Best regards,

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submitted via Email

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Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Ontario Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
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››› CSA Notice and Request for Comments – Proposed National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives, dated February 12, 2015

Date: 11-05-2015

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Ladies and Gentlemen:

We are submitting this comment letter in response to the Notice and Request for Comments on the Proposed National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives (the "Clearing Rule") and the Proposed Companion Policy 94-101CP Mandatory Central Counterparty Clearing of Derivatives (the "Clearing CP"), both dated February 12, 2015 (together the "Proposed National Instrument"), issued by the Canadian Securities Administrators (the "CSA"). We appreciate the opportunity to further comment on the proposed requirements on mandatory central counterparty clearing and, in particular, on the non-application rule of section 6 of the Clearing Rule set forth in the Proposed

National Instrument. This letter should be read together with our letter relating to the CSA Staff Notice 91-303 – Proposed Model Provincial Rule on Mandatory Central Counterparty Clearing of Derivatives, dated December 19, 2013, which we submitted on March 18, 2014.

We have reviewed both the Clearing Rule and the Clearing CP and have noted that the CSA propose to extend the scope of non-application of section 5 of the Clearing Rule to transactions to which a "*government of a foreign jurisdiction*" (section 6 paragraph (a) of the Clearing Rule) or "*an entity wholly owned by a government referred to in paragraph (a) whose obligations are guaranteed by that government*" (section 6 paragraph (c) of the Clearing Rule) is a counterparty. We also note that these amendments have been made to address the requests of two commenters (Comment Summary and CSA Responses to Former Section 10 – Non-Application). We very much appreciate the responsiveness of the CSA in this respect.

However, we think that section 6 of the Clearing Rule requires some more clarification with respect to the following aspects:

1. Section 6 paragraph (a) of the Clearing Rule excludes the "*government of Canada, the government of a jurisdiction of Canada or the government of a foreign jurisdiction*" from application of section 5 of the Clearing Rule. We would interpret the term "*a government of a foreign jurisdiction*" to include both governments on the sovereign/central government level in a foreign jurisdiction as well as governments on the sub-sovereign level (i.e. province, state or equivalent political sub-division) in that foreign jurisdiction. This interpretation rests on the observation that in the case of Canada both the "*government of Canada*" and the "*governments of a jurisdiction of Canada*" are referred to in paragraph (a) of the Clearing Rule.

2. With respect to the expression "*wholly owned by a government referred to in paragraph (a)*" in section 6 paragraph (c) of the Clearing Rule, we would like to suggest to adjust that expression so that it clearly includes entities wholly owned by one *or more* governments referred to in paragraph (a), since a literal interpretation of the term "*a government*" would not serve the purpose of excluding government owned entities that are wholly owned by more than one of the governments referred to in paragraph (a). However, we think that there is no reason why entities that are wholly owned by more than one government of a foreign jurisdiction should not be eligible for the exclusion from applicability of section 5 of the Clearing Rule, if full ownership by each and any of those governments of that foreign jurisdiction would make that entity eligible therefor.

3. Regarding the provision that requires the obligations of the entity referred to in section 6 paragraph (c) of the Clearing Rule to be guaranteed by the government referred to in section 6 paragraph (a) of the Clearing Rule that wholly owns the entity, we would interpret that the entity could be guaranteed by one or more of the government(s) that fully own(s) the entity as long as all or substantially all the liabilities of the entity are covered by one or more government(s) referred to in paragraph (a).

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Based on the foregoing, we respectfully request that the CSA clarify the above described aspects of section 6 of the Clearing Rule either by appropriately adjusting the relevant paragraphs in the Clearing Rule or by giving appropriate interpretative guidance in the Clearing CP.

Thank you very much for your consideration of our comments and please do not hesitate to contact us if you have questions or would find further background helpful. We have sent a copy of this letter to the Federal Ministry of Finance of Germany in its capacity as KfW's owner and in its capacity as KfW's legal supervisory authority.

Sincerely,

KfW

Name: Andreas Müller
Title: Senior Vice President

Name: Dr. Frank Czichowski
Title: Senior Vice President and Treasurer

LCH.CLEARNET

VIA E-MAIL TO: comments@osc.gov.on.ca and consultation-en-cours@lautorite.qc.ca

April 22, 2015

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Me Anne-Marie Beaudoin
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Dear Madams:

LCH.Clearnet Group Limited ("LCH.Clearnet" or "The Group") is pleased to file a response to the request for comment from the Canadian Securities Administrators ("the CSA" or "the Committee") on proposed National Instrument 94-101, *Mandatory Central Counterparty Clearing of Derivatives* ("Instrument") and related proposed Companion Policy 94-101CP ("Companion Policy" or "CP").

LCH.Clearnet Overview

The LCH.Clearnet Group is the leading multi-asset class and multi-national clearinghouse, serving major international exchanges and platforms as well as a range of OTC markets.[1] It clears a broad range of asset classes including securities, exchange-traded derivatives, commodities, energy, freight, foreign exchange derivatives, interest rate swaps, credit default swaps, and euro and sterling denominated bonds and repos. LCH.Clearnet works closely with market participants and exchanges to continually identify and develop innovative clearing services for new asset classes. LCH.Clearnet Limited is recognized as a clearing agency by the Ontario Securities Commission ("OSC") and the Autorité des marchés financiers ("AMF") Quebec. LCH.Clearnet Limited's SwapClear service is designated as systemically important by the Bank of Canada. LCH.Clearnet LLC is permitted to clear for Ontario-based clearing members pursuant to an OSC exemption. LCH.Clearnet Group Limited is

[1] LCH.Clearnet Group Limited consists of three operating entities: LCH.Clearnet Limited, the UK entity, LCH.Clearnet SA, the Continental European entity, and LCH.Clearnet LLC, the US entity. Link to Legal and Regulatory Structure of the Group:
http://www.lchclearnet.com/about_us/corporate_governance/legal_and_regulatory_structure.asp

majority owned by the London Stock Exchange Group, a diversified international exchange group that sits at the heart of the world's financial community.

The Committee proposes an Instrument and Companion Policy to provide a harmonized statutory approach across Canada for the proposal of mandatory clearing of certain standardized over-the-counter ("OTC") derivatives transactions, in order to improve transparency in the derivatives market and enhance the overall mitigation of systemic risk. The development of the proposed Instrument and Companion Policy follows the Committee's proposal of a draft model provincial rule ("Draft Model Rule") in December 2013. The provisions of the proposed Instrument and Companion Policy build on the Draft Model Rule and the comments submitted on that consultation. LCH.Clearnet submitted a comment letter on the Draft Model Rule. LCH.Clearnet is pleased that the Committee has taken these comments into account in developing the proposed Instrument and Companion Policy.

LCH.Clearnet strongly supports the Committee's decision to develop a uniform Instrument and Companion Policy applicable across Canada. LCH.Clearnet also commends the Committee for working to harmonize the mandatory clearing determination process in Canada with relevant international standards. This approach recognizes that the market for OTC derivatives is truly global, and will make compliance with any Canadian clearing determination more cost-effective and efficient for local counterparties, their global counterparties and regulated clearing agencies.

In LCH.Clearnet's comment letter on the Draft Model Rule, LCH.Clearnet urged the Committee to require a local securities regulator to seek public comment on a proposed mandatory clearing determination. An opportunity for public comment provides market participants with notice about which derivatives may be subject to mandatory clearing, and helps to focus attention on the need to prepare for mandatory clearing.

In its description of the proposed Instrument and Companion Policy, the Committee states

> As part of the determination process, we will publish for comment the derivatives we propose to be mandatory clearable derivatives and invite interested persons to make representations in writing. Except in Québec, the determination process is expected to follow our typical rule-making or regulation making process. The list of mandatory clearable derivatives will be included in the Clearing Rule as Appendix A, as amended from time to time. In Québec, the determination process will be made by decision and the list of mandatory clearable derivatives will appear on a public register kept by the Autorité des marches financiers.[2]

Similarly, in the comment summary and CSA response table in consultation document, the discussion of comments on implementation "notes that a requirement to clear would not be triggered until a proposed determination has been published for comment and a final determination made."[3]

[2] CSA Notice and Request for Comments – Proposed NI 94-101 Mandatory Central Counterparty Clearing of Derivatives and Proposed Companion Policy 940101CP Mandatory Central Counterparty Clearing of Derivatives (Feb. 12, 2015) at p. 3.

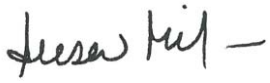
[3] CSA Notice and Request for Comments at p. 6.

However, neither the proposed Instrument nor Companion Policy explicitly states that a public comment period will precede a mandatory clearing determination. LCH.Clearnet requests that the final version of the Instrument or Companion policy contain such a statement to insure that future regulators and market participants are aware of the clear intent of the Committee to seek public comment prior to any mandatory clearing determination.

We hope that our comments will assist the Committee as it develops the Instrument and Companion Policy.

Please do not hesitate to contact us regarding any questions raised by this submission or to discuss our comments in greater detail.

Yours sincerely,



Susan Milligan
Head of US Public Affairs

Pension Investment
Association of Canada

Association canadienne des
gestionnaires de caisses de retraite

May 13, 2015

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Dear Ms. Turcotte and Me Beaudoin,

Re: Proposed NI 94-101 – Mandatory Central Counterparty Clearing of Derivatives

This submission is made by the Pension Investment Association of Canada ("PIAC") in reply to the request for comments by the Canadian Securities Administrators (the "CSA") regarding 94-101 – Mandatory Central Counterparty Clearing of Derivatives (the "Clearing Rule").

Background

PIAC has been the national voice for Canadian pension funds since 1977. Senior investment professionals employed by PIAC's member funds are responsible for the oversight and management of over $1.3 trillion in assets on behalf of millions of Canadians. PIAC's mission is

to promote sound investment practices and good governance for the benefit of pension plan sponsors and beneficiaries.

Comments on Clearing Rule

Pension Plans do not Increase Systemic Risk

PIAC welcomes the opportunity to comment on the Clearing Rule. It is not PIAC's intention to provide comments on every point raised within the Clearing Rule, rather, PIAC's comments will be centered on specific matters concerning pension plans and the establishment of the appropriate clearing regime within Canada. Specifically, PIAC is concerned with the definition of a "financial entity" and the inclusion of pension funds within such definition.

In terms of systemic risk, it is important to understand that pension plans, whether large or small, primarily use derivatives for hedging purposes. This means that aggregate derivatives exposure will overstate the risk from derivatives positions as it will only capture one side of the investment strategy. This basic defensive orientation, combined with the pension industry's very high implicit credit ratings and long-term investment horizon, allows pension plans to assume the risks of derivatives exposures that might be more difficult for other derivatives market participants to support during periods of market stress. Pension plans, even the largest ones, are neither highly levered nor heavily reliant on short-term financing, which are key characteristics of market participants most likely to pose systemic risks. Additionally, pension plans are not subject to redemptions by their members.It is PIAC's opinion that the use of derivatives by pension plans is more likely to reduce systemic risk and increase liquidity for the overall market as pension plan counterparties allow derivative dealers to offset some of their risk with high-quality, low risk entities.Requiring pension plans to clear their transactions, while allowing other entities to remain outside of the clearing regime with respect to their hedged transactions could discourage participation in OTC derivatives markets, which could undermine investment risk management objectives as well as be detrimental to overall market robustness.

In support of the notion that pension plans do not add to systemic risk, PIAC notes the consultative document from the Financial Stability Board and the International Organization of Securities Commissions dated March 4, 2015, Proposed Assessment Methodologies for Identifying Non-Bank Non-Insurer Global Systemically Important Financial Institutions (the "Consultation Document"). The purpose behind the Consultation Document is to outline the characteristics of those entities that are systemically important. Within the Consultation Document, the FSB and IOSCO have asked whether pension plans should be excluded from the definition of Non-Bank Non-Insurer financial entity, stating one rationale for a pension plan exclusion "is that they pose low risk to global financial stability and the wider economy due to their long-term investment perspective."

The Consultation Document also outlines five basic indicators regarding systemically important institutions: size, interconnectedness, substitutability, complexity and global activities. It is

PIAC's opinion that no pension plan exhibits the five basic indicators and consequently, pension plans are not institutions that increase systemic risk within the global financial system.

PIAC would also note that Canadian pension plans are subject to comprehensive regulation by federal and provincial governments, in terms of solvency, governance and risk management.

Pension Plans that are Small Market Participants

PIAC submits that the inclusion of pension plans within the Financial Entity definition is extremely burdensome for pension plans, especially pension plans with little or limited participation within the derivatives market. The actions of these smaller market participant pension plans are extremely similar to derivatives transactions entered into by corporate end-users. These pension plans are typically hedging a valid commercial risk within their business, which varies from foreign exchange transactions related to international investments, to ultimately the risk of being able to pay pensions to the beneficiaries of the pension plan. PIAC notes the exemption provided to corporate end users that is not available to pension plans due to the inclusion of pension plans within the Financial Entity definition within the Clearing Rule. PIAC would suggest that all pension plans should be able to avail themselves of the end user exemption and pension plans should be removed from the definition of Financial Entity. However, if the CSA does not agree with this approach, at a minimum the Clearing Rule should be amended so that smaller market participant pension plans are exempt from the clearing mandate within the Clearing Rule.

PIAC notes that smaller market participants may have a difficult time obtaining services from a clearing member, a necessary relationship required for market participants to clear derivatives transactions. This issue is compounded if the number of clearing members offering client clearing services is reduced.

We appreciate the opportunity to comment on the Model Rule. Please do not hesitate to contact Robert Cultraro, Chair of the Investment Practices Committee (416-345-5476; Robert.Cultraro@HydroOne.com) if you wish to discuss any aspect of this letter in further detail.

Yours sincerely,

Dan Goguen
Chair

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May 13, 2015

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Ontario Securities Commission

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Dear Sirs/Mesdames:

RE: CSA Notice and Request for Comment, Proposed National Instrument 94-101: *Mandatory Central Counterparty Clearing of Derivatives*

SaskEnergy Incorporated ("SaskEnergy") and TransGas Limited ("TransGas") welcome the opportunity to comment on Proposed National Instrument 94-101 and the Companion Policy thereto.

About SaskEnergy and TransGas

SaskEnergy is a Saskatchewan Crown Corporation and operates as a natural gas distribution utility. TransGas is a wholly owned subsidiary of SaskEnergy and operates primarily as a natural gas transmission and storage utility.

SaskEnergy serves in excess of 380,000 customers in approximately 93% of Saskatchewan's communities.

Executive Summary of Rule

The purpose of the proposed rule is to impose central counterparty clearing of certain standardized over-the-counter ("OTC") derivatives transactions, "in order to improve transparency in the derivatives market and enhance the overall mitigation of systemic risk."

The rule itself address two rule making areas: (1) rules relating to mandatory central counterparty clearing, and (2) rule relating to the determination of what derivatives are to be subject to mandatory central counterparty clearing.

Comments

More regulation creates more cost to the utility consumer, and cost to the economy, whether it is through mandatory clearing, mandatory reporting, mandatory record keeping, mandatory capital or collateral requirements or otherwise. It is very important that regulatory obligations not be disproportionate to potential benefits gained, and if the benefit is uncertain SaskEnergy and Transgas would prefer less regulation, at least initially.

We understand from the Committees' replies to previous comments (Annex A) that it is the intention of the Committee that the clearing requirement will not include derivatives that are outside the scope of the local *Derivatives: Product Determination* rules. Removal from scope of OTC derivative transactions involving intended delivery of physical commodities such as natural gas is an important mitigation measure from SaskEnergy's perspective, and we support same.

As noted in our previous submissions, we do not understand (from our own experience and perspective) the requirement for a Crown guarantee for bodies which are agencies of the Crown, and whose assets are assets of the Crown, by statute. A guarantee has not been a requirement imposed by the market in our experience, and the need for same and legal effect of same may vary. The Committee seems to suggest in its replies to previous comments that each Province will have the right to modify the applicability of exemptions, presumably based on a more refined picture of provincially active Crown corporations, their roles, statutes and circumstance, but the need to do business interprovincially, and how those rules will interact, remains troublesome.

We are again grateful for the opportunity to comment.

Respectfully submitted,

SASKENERGY INCORPORATED

Terry D. Jordan
Senior Legal Counsel

cc: Mark H. J. Guillet, Vice President, General Counsel & Corporate Secretary
Christine Short, Vice President, Finance and CFO
Dean Reeve, Executive Vice President
Lori Christie, Executive Director, Gas Supply, Marketing & Rates
Dan Parent, Director, Gas Supply and Marketing
Dennis Terry, Senior Vice President, TransGas Business Services
David Wark, Director, TransGas Policy, Rates & Regulation
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May 13, 2015

VIA EMAIL

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Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Ontario Securities Commission

Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

Dear Sirs/Mesdames:

Re: CSA Notice on Proposed National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives - Comments

TMX Group Limited ("TMX Group") welcomes the opportunity to comment on proposed National Instrument 94-101 - Mandatory Central Counterparty Clearing of Derivatives (the "Clearing Rule") and related Companion Policy (the "Clearing CP", and together "NI 94-101"). TMX Group is supportive of all efforts to make Canada's derivatives-related regulatory framework more efficient and transparent. Subsequent to the TMX Group's March, 2014, comment letter on CSA Notice 91-303 - Proposed Model Provincial Rule on Mandatory Central Counterparty Clearing of Derivatives ("Draft Model Rule"), we are especially pleased to learn that the regulators have proposed a National Instrument that harmonizes regulations across all jurisdictions. We would, however, like to address some key elements of the Draft Model Rule in respect of which TMX Group commented and which do not appear to have been reflected in NI 94-101 as well as some additional issues. Most specifically to that end, TMX Group would like to reiterate the importance of developing a cohesive OTC framework which satisfies the primary objective of mitigating systemic risk and ensures that Canadian markets remain attractive and competitive for global participants.

1. **Harmonization & Mandatory Clearable Derivative Determination**

The two-pronged definition of "mandatory clearable derivative" in the proposed Clearing Rule indicates that the process of determining whether a product must be cleared will differ between Quebec and the other CSA jurisdictions. Furthermore, the notice accompanying proposed NI 94-101 (the "Clearing Notice") specifies that, in the CSA jurisdictions (other than Quebec), the process is expected to follow the typical rule-making or regulation making processes, whereas in Quebec the decision will be made by the Autorité des marchés financiers ("AMF").

TMX Group would like to stress the critical importance of a uniform process: the mere possibility of different provincial interpretations creates legal uncertainty which adversely affects markets. We are concerned that the filing and determination processes will be duplicated across jurisdictions and we request that the CSA further clarify this point. If the determination of mandatory clearing of a derivative varies between jurisdictions, for instance, it may create conflicting obligations for some participants, may add unnecessary complexity and costs for

stakeholders, and may, ultimately, both deter new entities from entering the Canadian markets and drive existing entities away. We urge the regulators to balance any benefits of this approach against the costs. For many entities operating across Canada, or those entering the market, tracking, interpreting and navigating multiple regulatory frameworks may be extremely burdensome.

We understand that part of the reason why the AMF may be taking a different approach to the determination process is because deeming derivatives to be mandatory clearable derivatives requires regulators to undergo a full rule-making or regulation making process in order to amend the National Instrument to add a new mandatory clearable derivative to the list in the appendix while the AMF's regulation making process may be different. The AMF, for example, may not require Quebec ministerial approvals, while at least some other provincial regulators will require such approvals, making the determination process much longer in those jurisdictions.

We question whether there might be a way to structure this rule such that determinations are not subject to the full rule-making or regulation making process so that all regulators may make the determination jointly at the same time.[1] A full rule-making or regulation making process should not be required as this determination will flow from rules that will be set out in the National Instrument that will have received the relevant approvals.

A simplified approach that does not require each determination to go through a full rule-making or regulation making process and which could be standardized across all provinces, including Quebec, would:

i. Address the concerns we have raised with respect to the divergence in approach between Quebec and the other provinces and related unpredictability of the determination outcome;
ii. Be more consistent with how provincial securities regulators make certain other comparable determinations (i.e. recognition/exemption of exchanges and associated terms and conditions);
iii. Allow regulators to provide more concrete guidance regarding the timeframe for the determination process (and address concerns related to this issue which we have set out in subsection 2.c as it removes the uncertainty of when ministerial approvals/other regulatory amendment approvals will be made); and
iv. Free up government and regulator resources for matters that are more appropriately in need of ministerial approval or a full regulatory amendment process.

[1] In the US, for instance, under regulation §50.6 of 17 CFR Part 50 on Clearing Requirement determination pursuant to Section 2(h)(3) of the CEA, a delegation of authority has been adopted. CFTC itself has delegated the authority to the Director of the Division of Clearing and Risk to make the determination under the rule under certain cases. Such approach ensures a timely and efficient determination.

2. Determination

a. Bottom-Up Approach

NI 94-10 appears to have maintained only the bottom-up approach with respect to determining the mandatory clearing of derivatives. Section 12 of the Clearing Rule indicates that no later than the 10th day after a regulated clearing agency first provides or offers clearing service for a derivatives, it must submit to the regulator a completed Form F2 identifying the derivatives. Thus, this indicates that the only method for determining mandatory clearing is for a clearing agency to submit a notice making such a request to the regulators.

This approach diverges from most foreign jurisdictions, where regulators have adopted a combination of bottom-up and top-down approaches. CFTC regulations, for example, state that "the Commission on an ongoing basis shall review each swap, or any group, category, type, or class of swaps to make a determination as to whether the swap or group, category, type, or class of swaps should be required to be cleared." Any determination would still be subject to a public comment period.[2] EMIR states that "ESMA shall, on its own initiative, after conducting a public consultation (…) notify to the Commission the classes of derivatives that should be subject to the clearing obligation...Following the notification, ESMA shall publish a call for a development of proposals for the clearing of those classes of derivatives."[3]

While a newly offered derivative might not warrant from the outset a determination of mandatory clearing, this situation could evolve over time. The Clearing Rule does not provide grounds for the regulators to take into account such market developments.

TMX Group respectfully requests further clarification with respect to how systemic risk mitigation objectives would be met if a specific derivative, or class of derivatives, was to pose a systemic risk but had not otherwise been submitted for a determination of mandatory clearing. We understand that securities regulators may have the authority to initiate their own determination processes, should it be necessary, pursuant to their general authority under securities legislation. We would submit, however, that it would be in the best interest of market stability and predictability, and provide greater regulator process transparency, if the existence of such authority with respect to the determination process was clearly provided for in the national instrument.

Provisions with respect to this matter should make clear that such authority exists and, should regulators choose to exercise it, describe the applicable process. We note, for clarity, that this should not have the consequence of mandating that clearing agencies clear certain products they do not wish to or cannot clear.

[2] CFTC Regulation § 39.5(a)(2) under 17 CFR Part 39 on the Review of swaps for Commission determination on clearing requirement. ("CFTC Regulation 39.5").
[3] Article 5(3) of Regulation (EU) No 648/2012 ("EMIR").

b. Facilitated Determination for Products Offered for Clearing

In the transition period, regulated clearing agencies would have 30 days to submit a completed Form F2 for all products that are already offered for clearing. The Clearing Rule does not appear to grandfather existing products which are already centrally cleared whereas several foreign jurisdictions have incorporated this mechanism. Furthermore, TMX Group questions whether, for products already offered for clearing, part of the information covered under Form F2 might not directly be available from international organizations, trade repositories and/or already reported to the regulators.

The OICV-IOSCO recommends that "the bottom-up approach uses the offering of products for clearing at a CCP [Central counterparty] as the starting point" [4] and although the regulatory authorities may determine that mandatory clearing should not be applicable, many foreign jurisdictions have adopted a presumption of clearing eligibility for products already offered for clearing by a clearing agency.[5]

Considering the significant burden that this process will entail, TMX Group strongly urges the regulators to adopt an approach by which derivatives already offered for clearing be deemed submitted for determination so as to simplify the process during transition.

c. Rule-Making Process Timeframe

In contrast to other jurisdictions, such as the United States (through the CFTC), no timeframe is prescribed for the rule-making process pursuant to NI 94-101. TMX Group would like to reiterate the substantial impact that such legal uncertainty and indeterminate timing has on our ability to be reactive and competitive in a global market. We believe that our participants will also need certainty with respect to the determination and be able to predict when they can expect such determination so they can make appropriate business decisions accordingly. The OICV-IOSCO recommends that the "determining authority should verify the appropriate timeframe for reaching its determination and communicate this clearly to the CCPs in question."[6] The CFTC, for example, has adopted a maximum 90 day timeframe[7]. TMX Group specifically and strongly requests that the regulators specify a maximum timeframe for the product determination process.

d. Form F2 and Factors of Determination

Although the regulators may have different considerations when assessing whether a derivative or class of derivatives should be subject to mandatory clearing as opposed to permitting new

[4] « Requirements for Mandatory Clearing », OR05/12, OICV-IOSCO, Technical Committee of the IOSCO, February 2012 ("IOSCO Requirement") at p. 13.
[5] CFTC Regulation 39.5(a) and EMIR Article 5(2).
[6] IOSCO Requirement, p. 16.
[7] CFTC Regulation 39.5 (b) (6).

derivatives to clear, TMX Group questions whether some of the information requested under Form F2 may be directly available from international organizations, trade repositories and/or already disclosed to the regulators. In view of the above consideration and the timing required under section 12 of the Clearing Rule when a regulated clearing agency first provides or offers a clearing services for a derivative, TMX Group calls on the regulators to adopt a streamlined process which would avoid any duplicative or additional regulatory burden on clearing agencies.

3. Substituted Compliance and Efficiency of the Canadian Markets

Under Section 5(5) of the Clearing Rule, the clearing obligation can be satisfied by certain local counterparties by submitting for clearing in another Canadian jurisdiction or in a foreign jurisdiction. Notwithstanding that such substituted compliance may align with the regulators' territorial oversight objectives, TMX Group would like to reiterate its concern with the potential impact of such exemptions. Most particularly, to the extent that a foreign regulatory framework is more flexible, and allows foreign CCPs to launch new clearable products more rapidly,[8] it may create an unlevel playing field and impede Canadian clearing agencies' ability to compete with foreign CCPs. The indeterminate timeframe with respect to both approving new products and associated rules (pursuant to NI 24-102) and the determination process for mandatory clearing derivatives, may make it exceedingly difficult for market participants to predict when a clearing agency will be entitled to clear new products and when such clearing will become mandatory. Once a clearing service becomes available, considering the capital requirement advantage to clear such product, a local participant may be incentivized to clear it abroad and avail itself to substituted compliance. The foregoing are, in TMX Group's view, clear and unacceptable obstacles for Canadian clearing agencies' competitive participation in global markets. TMX Group strongly recommends that the regulators adopt a more flexible and efficient approach to this process.

4. Derivative Definition

We believe that under "Specific Comments" in the Clearing CP, reference should be made to the definitions in Proposed Multilateral Instrument 91-101 *Derivatives: Product Determination* to ensure that the definition of derivative is consistent across provinces. Further, we note that under existing Canadian legislation, unlike legislation in other jurisdictions such as the United States, there is no concept of futures contracts which are required to be exchange-traded and cleared. We believe that there should be legislation requiring certain exchange-traded contracts to be cleared in addition to legislation relating to OTC derivatives as similar policy reasons for clearing of OTC derivatives would apply to clearing of exchange-traded derivatives.

[8] TMX Group has raised concerns with respect to the material change approvals required pursuant to National Instrument 24-102 *Clearing Agency Requirements* ("NI 24-102") as, as currently drafted, it may take longer to receive regulatory approvals to launch new products.

5. Derivatives Trading Facilities

TMX Group would appreciate further clarity with respect to how the Clearing Rule will work with rules regarding derivatives trading facilities. For example, would a mandatory determination under one set of regulations result in an automatic determination or automatic consideration under the determination process under the other? Consideration should be given as to how these two set of regulations will compare and work together before finalization and greater clarity regarding this matter should be provided to the market.

We thank you for the opportunity to provide our comments on the Proposed NI 94-101. We hope that you will consider our suggestions and we would be happy to discuss our comments further at your convenience. Please feel free to contact Marlène Charron-Geadah, Legal Counsel, TMX Group at mcharron-geadah@m-x.ca if you have any questions regarding our comments.

Respectfully submitted,

Alain Miquelon
President and Chief Executive Officer
Montréal Exchange
Group Head of Derivatives

Jim Oosterbaan
President
Natural Gas Exchange Inc.
Group Head of Energy

TransCanada
450 – 1st Street SW, Calgary, Alberta, Canada T2P 5H1

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In business to deliver

May 13, 2015

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Nova Scotia Securities Commission
Nunavut Securities Commission
Ontario Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

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Dear Sirs/Mesdames:

TransCanada Corporation (**TransCanada**) is pleased to submit its comments in response to Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (the **Proposed Clearing Rule**) and Proposed Companion Policy 94-101CP *Mandatory Central Counterparty Clearing of Derivatives* (the **Proposed Clearing CP** and together with the Proposed Clearing Rule, the **Proposed Rules**) as published and solicited for comment by the Canadian Securities Administrators (the **CSA**).

TransCanada appreciates the opportunity to provide its comments on the Proposed Rules. The comments below are provided with the goals of achieving effective regulatory oversight of the OTC market while not unduly burdening market participants and ensuring that the Proposed Rules contain the necessary clarity to be effectively applied. TransCanada's comments include:

- A request that the CSA finalize the registration framework prior to implementing mandatory clearing requirements;
- Clarification regarding the use of intragroup exemptions;
- Clarification on the term "clearing member";
- A request for acknowledgement that local counterparties do not necessarily need to use clearing members to clear transactions;

- Clarification on the term “straight-through processing”, and a request to address time delays in clearing derivatives transactions that are not executed on electronic platforms;
- A request to address potential advantages to certain crown corporations and government entities under the Non-Application section;
- Clarification on record keeping requirements with respect to groups of transactions vs. individual transactions; and
- Clarification on record keeping requirements with respect to assessing hedge effectiveness,

all as more fully described below.

I. TransCanada

With more than 60 years’ experience, TransCanada is a leader in the responsible development and reliable operation of North American energy infrastructure including natural gas and oil pipelines, power generation and gas storage facilities. TransCanada operates a network of natural gas pipelines that extends more than 68,000 kilometres (42,100 miles), tapping into virtually all major gas supply basins in North America. TransCanada is one of the continent's largest providers of gas storage and related services with more than 368 billion cubic feet of storage capacity. A growing independent power producer, TransCanada owns or has interests in over 10,900 megawatts of power generation in Canada and the United States. TransCanada is developing one of North America's largest oil delivery systems. TransCanada’s common shares trade on the Toronto and New York stock exchanges under the symbol TRP. For more information visit www.transcanada.com.

TransCanada constructs and invests in energy infrastructure projects, purchases and sells energy commodities, issues short-term and long-term debt, including amounts in foreign currencies, and invests in foreign operations. Certain of these activities expose the company to market risk from changes in commodity prices, foreign exchange rates and interest rates. TransCanada uses derivatives as part of its overall risk management strategy to assist in managing the exposure to market risk that results from these activities.

II. Comments

TransCanada respectfully submits the following concerns and observations with regard to the Proposed Rules:

1. **Registration** – The definition of “financial entity” under section 1(e) of the Proposed Clearing Rule, includes “*a person or company, other than an individual, that under the securities legislation of a jurisdiction of Canada is any of the following: (i) subject to the registration requirement; (ii) registered; (iii) exempted from the registration requirement*”. As a result, the requirements of the Proposed Clearing Rule are dependent on whether a company is required to register. Because the registration regime remains unclear at the present time, it is difficult for derivatives market participants to determine if they fall under the “financial entity” definition in the Proposed Clearing Rule. TransCanada recognizes the CSA commented on this concern raised previously by commenters including TransCanada in its February 12, 2015 Notice and Request for Comment on the Proposed Rules by referring commenters to the phase-in approach. However, TransCanada respectfully submits that it is necessary that the registration regime is finalized and implemented prior to any requirement to clear a mandatory clearable derivative becomes effective to allow market participants to determine if they are in fact, a “financial entity”. An inability for a company to accurately determine its status under the regulations creates significant compliance risk for it and other market participants, and may result in numerous initial reporting errors, unreported transactions and duplicate reporting on an industry-wide basis.

2. **Intragroup exemption** – TransCanada thanks the CSA for the interpretation of the term “affiliated entity” provided in Section 3(1) of the Proposed Clearing Rule. TransCanada also requests that the CSA provide clarification on the nature and level of detail of the written agreement required under Section 10 (2) (c) of the Proposed Clearing Rule. TransCanada respectfully suggests that a blanket agreement between

affiliated entities acknowledging that such transactions may occur from time to time would be sufficient with the specific terms and conditions of each transaction captured in the entities' deal capture system.

3. **Clarification on 'clearing member'** – Appendix A to the Proposed Clearing Rule identifies "a local counterparty that is a member of a regulated clearing agency that offers clearing services for the derivative or class of derivatives and subscribes to such service" as the first entity type to which section 5 will apply. Is this description analogous to the term "clearing member" used in the Proposed Clearing Rule and the Proposed Clearing CP? TransCanada respectfully requests that the CSA provide specific clarity on how to distinguish a clearing member from a local counterparty who is not a clearing member, but who transacts directly with regulated clearing agencies.

4. **Duty to submit for clearing** – Part 2, section 5 of the Proposed Clearing CP elaborates on the phrase "cause to be submitted". In doing so, the Proposed Clearing CP directs local counterparties that are not clearing members of a regulated clearing agency to have arrangements in place with a clearing member before entering into a transaction. However, this instruction does not consider the possibility that local counterparties that are not clearing members may have the ability to access regulated clearing agencies directly as a customer, thus rendering a relationship with a clearing member unnecessary. The Natural Gas Exchange is an example of a clearing agency that provides clearing services directly to local counterparties that are not necessarily clearing members. TransCanada suggests that this section of the Proposed Clearing CP be revised to acknowledge methods of clearing a transaction that do not require local counterparties to have arrangements in place with a clearing member.

5. **Duty to submit for clearing** – In Annex A of the Proposed Clearing CP, the CSA has provided feedback to comments on "Former subsection 4(1) – Duty to submit for clearing". In response to concerns about local counterparties not having enough time to clear a transaction before the end of the day if the transaction is executed shortly before the clearing agency closes, the CSA states that "…this issue should not materialize where straight-through processing is implemented". TransCanada respectfully requests the CSA provide clarity in the Proposed Clearing CP on the meaning of "straight-through processing", and how this would apply when clearable derivatives transactions are entered into verbally (over the phone, speaker box, or by email). TransCanada suggests that the concern expressed in the comment may be valid as "straight-through processing" may not be viable for all methods of executing a transaction.

6. **Non-application** – Section 6 of the Proposed Clearing Rule exempts certain government entities and Crown corporations from the requirement to submit mandatory clearable derivatives for clearing. TransCanada reiterates its earlier comments that many Crown corporations in the power industry are very active participants in derivative markets and should be subject to the same requirements as all other market participants to ensure transparency and to maintain a level playing field. The clearing compliance requirement will result in additional costs compared to transacting derivatives over-the-counter. Non-Crown corporations will have to incur these additional costs while Crown corporations will avoid them, thereby giving Crown corporations a competitive cost advantage. We do acknowledge that the majority of transactions undertaken by most players in the power industry, including Crown corporations, would likely qualify for the end-user exemption but to the extent transactions are entered into that are not for hedging purposes, the same standards should apply to all entities. The exemption may also capture certain foreign companies transacting in Canada, also giving them a competitive advantage.

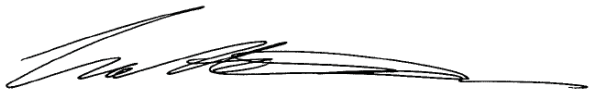
7. **Record Keeping** – Section 11 of the Proposed Clearing CP outlines that supporting information is required for 'each transaction' where the end-user exemption is relied on. The section also makes reference to "documentation of the end-user's macro, proxy or portfolio hedging strategy or program". TransCanada requests that the CSA confirm that documentation of a general hedging strategy can be used to support the use of the end-user exemption for certain groups of transactions or portfolios, as opposed to documentation on a transaction by transaction basis. TransCanada respectfully suggests that documentation of a general strategy can provide sufficient support for use of the end user exemption for certain groups of transactions or portfolios.

8. **Record Keeping** – The Proposed Clearing CP indicates that the Proposed Clearing Rule requires supporting documentation be kept that defines the basis on which the end-user exemption is relied upon. Specifically, hedge effectiveness is to be assessed, measured and corrected as appropriate, and regular compliance audits are to occur to ensure the strategy continues to be relevant for hedging purposes. The

Proposed Clearing CP also states that only new transactions will be subject to mandatory central counterparty clearing, and that the obligation to submit transactions for clearing only exists at the time the transaction is executed. TransCanada requests the CSA confirm that transactions that are initially deemed eligible for the end-user exemption (and thus not cleared), but are later determined to be ineligible for the exemption, need not be cleared. Alternatively, if this is not the case, TransCanada requests that the CSA provide guidance on how this scenario should be treated.

TransCanada hopes these comments will be useful to the CSA in their deliberations. If you have any questions or would like to discuss any of these matters, please do not hesitate to contact me.

Yours very truly,



Matthew Davies
Compliance Manager, Western Power
TransCanada Corporation

2015-05-13

To each of:
Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission
Ontario Securities Commission

By e-mail:

Josée Turcotte, Secretary
Ontario Securities Commission
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Anne-Marie Beaudoin, Corporate Secretary
Autorité des marchés financiers
consultation-en-cours@lautorite.qc.ca

Re. CSA Staff Notice and Request for Comment Proposed National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives and Proposed Companion Policy 04-101CP Mandatory Central Counterparty Clearing of Derivatives

Ladies and Gentlemen:

TriOptima AB (**"TriOptima"**) is pleased to submit the following comments in connection with CSA Staff Notice and Request for Comment Proposed National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives (the

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"**Proposal**") and Proposed Companion Policy 04-101CP Mandatory Central Counterparty Clearing of Derivatives. As discussed below in further detail, TriOptima is a provider of post-trade services to major market participants in the OTC derivatives markets.

Any defined terms used have the meaning prescribed to them in the Proposal, unless otherwise specified herein.

TriOptima

TriOptima offers post-trade services in the OTC derivatives markets. TriOptima is headquartered in Stockholm and also conducts its business through its four subsidiaries in New York, London, Singapore and Tokyo. The company's client base is made up of major broker/dealer banks and other financial institutions globally.

TriOptima currently offers three post-trade services for the OTC markets:

- *triReduce*: a service for early termination of OTC derivatives - so called portfolio compression;[1]
- *triResolve*: a service for the reconciliation of counterparty positions in OTC derivatives and other financial products, margin management and operational risk management; and
- *triBalance*: a service for the mitigation of portfolio risk imbalances across bilateral and cleared OTC derivative exposures.[2]

TriOptima's comments on the Proposal

As a provider of post-trade risk reduction services for the OTC-market and for reasons described below, TriOptima encourages the Committee to clarify that transactions which are not subject to mandatory clearing when entered into, will remain exempted from the mandatory clearing requirement if these transactions are amended or replaced in a compression cycle. TriOptima also encourages the provincial regulators of the Committee (the "**Canadian Regulators**") to not include certain transactions that participants enter into as part of post-trade risk reduction services[3] in the clearing mandate.

Amended or replaced trades resulting from a compression exercise

As defined in the Commodities Futures Trading Commission's (CFTC) rule on Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 77 Fed. Reg. 55904 (September 11, 2012), a portfolio compression exercise is

> *"an exercise in which multiple swap counterparties wholly terminate or change the notional value of some or all of the swaps submitted*

[1] See Annex 1.
[2] See Annex 2.
[3] See "Certain transactions resulting from post-trade risk reduction services should not be subject to the clearing mandate" below.

by the counterparties for inclusion in the portfolio compression exercise and, depending on the methodology employed, replace the terminated swaps with other swaps whose combined notional value (or some other measure of risk) is less than the combined notional value (or some other measure or risk) of the terminated swaps in the compression exercise."

As noted, compression can be accomplished through amending existing transactions, "amended trade" method, or termination and entering into replacement trade(s) which reflects the net notional exposures between the counterparties, "replacement trade" method. In the vast majority of situations there is a reduction in the notional exposures due to netting, however, in some situations there is merely an aggregation of outstanding gross exposures arising from multiple transactions into one replacement trade with no net change in notional exposures. There is no change in the counterparties, underlying, or maximum maturity in either the "amended trade" or "replacement trade" method.

Imposing a clearing obligation on amended trades or replacement trades that result from a compression exercise will impact the effectiveness of compression as a risk reduction tool. Specifically, it would not be appropriate to require clearing of amended trades or replacement trades that result from a compression exercise, where the transactions subject to compression had been entered into prior to the effective date of the mandatory clearing obligation (and consequently were outside scope of the clearing requirement). This is because the compression cycle would shift the counterparty credit risk as the replacement trade or amended trade would be required to face a clearing agency instead of the original counterparty.

It is very likely that firms would simply withhold from compressing uncleared transactions if – when they were replaced or amended in the compression exercise – the replacement trade or amended trade would have to be cleared. This is e.g. because compression is performed on the basis that the economic value of transactions terminated in a compression exercise must be identical to the economic value of the replacement trade in the compression exercise. If the replacement trades face a new counterparty (the clearing agency) the economic value will change and the exposure to the original counterparty may go up.

The transactions represent risk that participants had on their books prior to the compression exercise and during the course of compression no change of ownership occurs. Therefore we would encourage the Committee to clarify that in relation to any non-cleared transactions that were entered into prior to the effective date of the mandatory clearing obligation relating to such transactions, such transactions and their compression replacement trades or compression amended trades shall not be subject to mandatory clearing as a result of a compression exercise.

Support for clarification

Fundamentally, TriOptima believes that transactions which were not subject to a clearing obligation before a compression exercise, should not have to be cleared upon completion of the exercise because they represent risk that the participants already had on their books prior to the compression exercise (albeit risk reduced thanks to the exercise).

TriOptima notes that the Proposal states that entering into and a material amendment to a transaction would subject the transaction to the clearing obligation. The direct consequence of having amended trades or replacement trades resulting from a compression exercise becoming subject to a change in their clearing obligation status, would be for the compression result to potentially violate counterparty credit risk limits, since amended trades and replacement trades would be required to face a clearing agency instead of the original bilateral counterparty. As participants would not know in advance which transactions may be subject to a notional change or replacement, or the amount of notional to be changed or replaced, this would represent an uncontrollable risk that would force participants to reconsider their participation in these industry-wide risk reduction exercises.

TriOptima has been approached by a number of dealers, seeking clarity on this point so that they may continue to participate in portfolio compression as effectively as possible. Moreover, compressions are now required under the EU rules (EMIR Regulatory Technical Standards) and US CFTC rules. In particular, the EU rules require regular analysis of compression opportunities with all counterparties.

TriOptima would also like to refer to the CFTC No Action Relief from Required Clearing for Swaps Resulting from Multilateral Portfolio Compression Exercises (No. 13-01, dated March 18, 2013) where relief is granted for amended trades and replacement trades. It should be noted that this is not a time limited relief.

Compression exercises

Transactions entered into prior to the effective date for clearing may be submitted for compression. A compression exercise requires a number of derivatives to be notionally changed or replaced, in order that participants remain market risk neutral.

For amended trades, this should just be regarded as a life-cycle event, where those transactions already in participants' portfolios prior to the clearing mandate becoming effective will continue to exist between the same parties, but with a changed notional and reduced overall risk.

Equally, the counterparties to a replacement trade remain the same counterparties that faced each other on the transactions originally submitted for compression, but with a reduced overall risk.

The compression methodology does not allow participants to specify which derivatives may be notionally changed or replaced.

Conclusion

Amended trades and replacement trades resulting from compression exercises involving two or more participants should not require the affected trades to be subject to a change in clearing obligation status in Canada. This clarification would enable the industry to continue to use portfolio compression for such trades.

Certain transactions resulting from post-trade risk reduction services should not be subject to the clearing mandate

TriOptima is of the view that it is not appropriate to make all types of OTC derivatives subject to mandatory clearing. As further described below, it would not be appropriate to include certain transactions that participants enter into as part of post-trade risk reduction services in the clearing mandate.

The objective of the G20 commitments is to mitigate systemic risk, and the actions supported by the G20 (including mandatory clearing) are means toward that end. While many OTC derivatives will be suitable for central clearing, some OTC derivatives will remain bilateral and not be cleared, and the combination of cleared and uncleared components in a portfolio may create risk imbalances within such portfolios. The portfolio imbalances can however be effectively rebalanced by lowering portfolio risk/DV01 characteristics of the portfolio and, thus, systemic risks, by appropriate injections of new bilateral non-cleared trades as well as cleared trades. Injections of off-setting trades which are not cleared can help to rebalance and stabilize the bilateral portfolio by eliminating risk sensitivities in such uncleared portfolio and injection of cleared trades can help to rebalance and stabilize the cleared portfolio and lower risk in the CCP. In a multilateral context, all these trades can be generated while the overall "compound transaction" (containing all new proposed bilateral trades as well as new cleared trades) is market risk neutral for each of the participants.

TriOptima offers this type of post-trade risk reduction service under the name triBalance. The "compound transaction" package of trades proposed in a triBalance cycle is market risk and funding risk neutral as a whole for each participant. In order to be effective, however, the new risk off-setting trades must be added to the netting sets from where the risk they are off-setting arose. In order to off-set bilateral risks these new trades must thus remain bilateral and non-cleared themselves.

As mandatory clearing requirements are primarily aimed at reducing systemic risk, it is important that they are not applied in a way which effectively limits the opportunity for market participants to reduce such risk through the use of compound transaction post-trade risk reduction services. If portfolio risk reducing/off-setting trades are to

fulfill their purpose, it is essential that they are not made subject to mandatory clearing requirements.

Keeping in mind that the purpose of the Proposal is "*to propose mandatory central counterparty clearing of certain standardized over-the-counter (OTC) derivatives transactions, in order to improve transparency in the derivatives market and enhance the overall mitigation of systemic risk*",[4] we would encourage the Canadian Regulators to make clear that any class of OTC derivatives (as prescribed by Canadian Regulators) that will be subject to mandatory clearing requirements through a clearing agency should not include those derivatives (i) whose sole purpose is to reduce systemic risk and portfolio risk between more than two counterparties, and (ii) which do not change the overall market risk for the counterparties. Such derivatives should accordingly be outside any clearing mandate imposed by the Canadian Regulators.

We are happy to provide further information on the above, if and as required.

Yours faithfully,

TriOptima AB

Per Sjöberg
Chief Executive Officer

Christoffer Mohammar
General Counsel

[4] See page 2 of CSA Notice and Request for Comment, Draft Regulation 94-101 respecting Mandatory Central Counterparty Clearing of Derivatives and Draft Policy Statement to Regulation 94-101 respecting Mandatory Central Counterparty Clearing of Derivatives.

Annex 1

Because of the interconnectedness of derivatives trading, active market participants have at any one time large numbers of contracts outstanding with multiple counterparties, each creating counterparty credit risk and an operational burden to manage and oversee. However, when these risks are viewed on a portfolio basis and compared against the portfolios of other participants, there are ready opportunities to reduce certain risks without changing one's market risk. triReduce compression allows participants to terminate contracts early in order to eliminate counterparty credit risk, lower the gross notional value of outstanding contracts, and reduce operational risks by decreasing the number of outstanding contracts. triReduce is operated for rates, credit and commodity derivatives and has helped remove in excess of $600 trillion of gross notional exposure from the financial system since its launch in 2003 including, more recently, cleared transactions. triReduce has approximately 210 subscribing legal entities.

Annex 2

The objective of the G20 commitments adopted in Pittsburgh 2009 is to mitigate systemic risk, and the actions supported by the G20 (including mandatory clearing) are means toward that end. While many OTC derivatives will be suitable for central clearing, some OTC derivatives will remain bilateral and not be cleared, and the combination of cleared and uncleared components in a portfolio may create risk imbalances within such portfolios and increase initial and variation margin requirements. The portfolio imbalances can however be efficiently rebalanced by lowering counterparty risk/DV01 in a portfolio.

Injections of off-setting trades between specific counterparties can rebalance risk exposures across multiple CCPs and bilateral counterparties alike. Proactive risk rebalancing helps reduce systemic risk and is a valuable tool for both CCPs and their members in the administration of their default recovery and resolution situations. In a multilateral context, these trades can be generated without changing participants' market risk and funding risk. TriOptima's triBalance (counterparty risk rebalancing) service was launched to enable rectification of such portfolio imbalances.

May 13, 2015

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Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

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Dear Sirs / Mesdames:

Re: CSA Notice and Request for Comment ("CSA Notice") on Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* ("94-101") and Proposed Companion Policy 94-101CP *Mandatory Central Counterparty Clearing of Derivatives* ("94-101 CP")

Custom House ULC operating as Western Union Business Solutions ("Western Union") appreciates the opportunity to comment on 94-101 and 94-101 CP. Capitalized terms used in this letter and not defined herein will have the same meaning as in the CSA Notice.

In respect of the Intragroup Exemption, Western Union would like to repeat the comments made by commenters on the Draft Model Rule that the current drafting of paragraph 10(1)(b) limits the applicability of the Intragroup Exemption even from

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affiliated entities that do manage risk on a centralized basis. Although, the CSA's response to the Draft Model Rule commenters says that paragraph 10(1)(b) is drafted broadly enough to include affiliated entities that do not prepare consolidated financial statements, the wording of the paragraph is unclear and redrafting the language would make it more apparent that affiliated entities with centralized risk management could use the Intragroup Exemption whether or not they prepared consolidated financial statements. In particular, the current drafting of section 10(1)(b) would restrict the exemption to companies who prepared IFRS consolidated financial statements, and would appear to preclude corporations with ultimate parent companies located in the United States which prepare consolidated US GAAP financial statements. We therefore propose that section 10(1)(b) be replaced to adopt the securities laws definition of "affiliates", or, that section 10(1)(b) be amended to also refer to consolidated financial statements prepared in accordance with US GAAP.

In respect of the derivatives or classes of derivatives to be subject to mandatory central clearing, while Western Union recognizes that 94-101CP states that "existence of a clearing obligation in other jurisdictions" is one of the criteria used to determine if a class of derivatives will be subject to mandatory clearing in Canada, it should be made explicit that the default position for Canadian derivatives regulators will be not to require clearing for classes of derivatives that are not subject to clearing in other jurisdictions.

There should also be a presumption that there will not be mandatory clearing for a derivative or class of derivatives which is not required to be cleared in that foreign counterparty's home jurisdiction. For instance, if a European counterparty enters into a non-deliverable foreign exchange forward with a Canadian counterparty in respect of Euros or another European currency such a transaction would not be subject to mandatory clearing under the European requirements, Canadian derivatives regulators should be forced to overcome a strong presumption against mandating clearing under the rules of a Canadian jurisdiction for that transaction. This type of requirement would encourage consistency on a global basis while recognizing that there may be rare circumstances where Canada-specific situations require Canada-specific responses.

Further we would note that "jurisdiction" is a defined term under National Instrument 14-101 *National Definitions* and refers specifically to a province or territory of Canada. Since 94-101CP is proposed to be identical in all jurisdictions and mandatory clearing determinations are to be made on a national basis, it is difficult to see how there would be a clearing obligation in one province or territory of Canada, but not in another. If this criterion is meant to prompt Canadian derivatives regulators to review the clearing determinations made by non-Canadian jurisdictions, it may be clearer to state "the existence of a clearing obligation in <u>foreign</u> jurisdictions".

In respect to record-keeping, a number of commenters stated that parties should be able to rely on representations made by their counterparties. The Committee responded by including additional language in 94-101CP stating that local counterparties could rely on

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factual representations made by their counterparties so long as they had no reasonable grounds to believe those representations were false. While this language is very much welcome, Western Union believes that it could be made more explicit to state that a local counterparty can rely on its counterparty's representation as to clearing status specifically. For instance, a local counterparty should be able to rely on its counterparty stating that it is an end user because it is (a) not a financial institution; and (b) entering into the transaction for the purpose of hedging or mitigating commercial risk, rather than have to obtain a set of factual representations about the counterparty's existing positions with respect to the underlying risk and how the proposed transaction is correlated to those risks. This would be in keeping with the recordkeeping requirements in place in foreign jurisdictions.

Concluding Remarks

We thank you for the opportunity to provide these comments. We would be happy to address any questions you may have and appreciate the time you are taking to consider our points of view. Please feel free to contact us at shannon.seitz@westernunion.com, on this or any other issue in future.

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