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and Health Insurance
Association Inc.

Association canadienne
des compagnies d'assurances
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June 17, 2013

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Dear Sir/Madam:

Canadian Securities Administrators Consultation Paper 91-407- Derivatives: Registration

The Canadian Life and Health Insurance Association is pleased to provide comments on the Canadian Securities Administrators ("CSA") Consultation Paper 91-407 *Derivatives: Registration* ("CP 91-407").

Established in 1894, the Canadian Life and Health Insurance Association (CLHIA) is a voluntary trade association that represents the collective interests of its member life and health insurance insurers, and many of the members are participants in the Canadian derivatives market, as further discussed below. The industry, which provides employment to almost 135,000 Canadians and has investments in Canada of $514 billion, protects more than 26 million Canadians through products such as life insurance, annuities, Registered Retirement Savings Plans, and disability insurance and supplementary health plans. It pays benefits of almost $65 billion a year to Canadians and administers over one-half of Canada's pension plans. Canadian life insurance companies participate as end-users in Canadian and foreign derivatives markets.

The CLHIA is in general agreement with the CSA's suggested approach to registration and the criteria outlined for considering when registration is required, although further information is needed regarding how the registration requirements would apply in a life insurance company context. CLHIA has several comments which are outlined below.

Large Derivative Participants Registration

CP 91-407 states that registration as large derivative participants (LDPs) will be required where the entity is a Canadian resident entity that maintains a substantial position in a derivative or a category of derivatives and the entity's exposure in Canadian derivatives markets results in counterparty exposure that could pose a serious risk to Canadian financial markets or to the financial stability of Canada or a province or territory of Canada. The CLHIA agrees that LDPs which pose a systemic risk as a result of derivatives trading activity should be regulated. The CLHIA agrees that additional work should be undertaken in consultation with other Canadian authorities, including OSFI, to establish the thresholds for registration as a LDP.

CP 91-407 notes that in the United States the CFTC defines a major swap participant as a person who is not a swap dealer and that maintains a substantial position in any major category of swaps excluding positions held to hedge or mitigate commercial risk. The CLHIA recommends that an approach similar to that in the United States which takes into consideration positions held to hedge or mitigate commercial risk should be used in Canada, which would further the goal of greater international harmonization. As it is a common practice for life insurers to use derivatives to hedge or mitigate commercial risk, Canadian life insurers that must comply with regulatory requirements more stringent than foreign regulatory requirements would face a competitive disadvantage compared to their United States and other foreign counterparts. If positions held to hedge or mitigate commercial risk are excluded in calculating whether a market participant maintains a "substantial position" in derivatives, similar to the hedging exclusion in the United States regulatory scheme, then generally speaking, we would expect the Canadian life insurance companies to not fall within the LDP category since the dominant purpose for which life insurance companies use derivative instruments is to hedge or mitigate commercial risk.

Advisor Registration

Life insurance companies may have investment management subsidiaries with employees who are also registered as portfolio managers or advisers who provide advice with respect to investments in segregated funds, mutual funds and purchases for general account holdings of life insurers. CP 91-407 states that persons registered as securities dealers or securities advisers may also be subject to registration as derivative dealers or derivative advisers and will be subject to compliance with both regimes. We agree that it is important that steps be taken to streamline all regulatory processes as much as possible so that a minimum of additional compliance burden is added. The creation of a new registration category with overlapping regulatory requirements seems unnecessarily burdensome. In many cases, the derivative activities of investment managers would be minimal. Proficiency requirements should be linked to the extent and complexity of the derivatives activity used by the investment manager. We would suggest that the regulators begin by gathering information from existing registrants as to their derivatives activities which would assist the regulator in determining the scope and purpose of any additional regulatory requirements.

Exemption from Registration Requirements

CP 91-407 notes that some persons triggering registration as a derivatives dealer, a derivatives adviser or LDPs, will be subject to regulation by other entities with regulatory responsibilities. Where such a regime provides for equivalent supervision and regulatory requirements that are monitored and enforced to the satisfaction of Canadian securities regulators, those persons should not be subject to overlapping requirements. The CLHIA agrees that exemptions from registration requirements should be adopted where equivalent regulatory regimes are in place.

In this context, it would be appropriate for life insurance companies which are prudentially regulated by OSFI to be exempted from the LDP registration requirement. OSFI actively regulates life insurance companies with respect to solvency and the risks associated with derivatives exposure. We understand that OSFI is currently working on updating its guidance with respect to derivatives usage by federally regulated life insurance companies. Regulation under provincial securities legislation for such institutions would amount to duplicate regulation.

Exemption from Registration Requirements – De Minimis Participants

CP 91-407 notes that while the CSA's suggested registration requirements applicable to a derivatives dealer will be comparable to the requirements in the United States as mandated under the Dodd Frank Act, it will not recommend a comparable de minimis exemption. The Committee reasoned that the recommendation to exclude such de minimis exemption is to provide the same protections regardless of the size or the total derivatives exposure of the dealer.

The CLHIA believes that the focus on financial market stability and transparency should not be achieved without also preserving commercial end users' access to derivatives used to hedge or mitigate commercial risks, and we believe the de minimis exemption, if implemented judiciously and incrementally, would achieve this goal. Our primary concern with the registration requirement without de minimis exemption is that such regulatory scheme will affect the availability of derivative-based non-traditional risk management products offered by some of the CLHIA members to Canadian end users. Such products serve a beneficial purpose to Canadian end users by allowing them to hedge commercial risk that cannot be hedged through traditional insurance.

Without de minimis exemption, the insurers that offer such derivative-based products to Canadian end users could potentially be considered derivatives dealers even though such products are not traded for speculative purposes, and the increased compliance cost may drive such companies to cease offering such derivative-based products to Canadian end users, which would leave the end users to resort to a handful of large dealers such as large banks. With less competition, the cost of risk management for Canadian end users is likely to increase.

Finally, the de minimis exemption would allow regulators to maximize limited resources to achieve the goal of financial market stability and transparency more effectively by allowing regulators to first focus on regulating the large systemically significant derivatives dealers, who account for vast majority of the derivatives market. Then, the regulators can weigh the incremental costs with incremental benefits of regulating smaller derivatives market participants whose derivatives activity fall below the de minimis threshold.

The CLHIA believes that the de minimis exemption found in the United States regulatory framework is based on sound public policy, and for the foregoing reasons, we respectfully request that the Committee include a comparable exemption in Canada.

The CLHIA appreciates the opportunity to provide its comments on the Consultation Paper. 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

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June 17, 2013

TO: Alberta Securities Commission
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RE: CSA CONSULTATION PAPER 91-407 (DERIVATIVES: REGISTRATION)

Ladies and Gentlemen,

The Canadian Securities Administrators Derivatives Committee (the "Committee") has recommended that Canadian federal, provincial and even municipal governments should not be subject to an obligation to register or be subject to registration requirements for derivatives dealers, derivatives advisers and large derivative participants in any circumstances. Federal and provincial crown corporations, whose obligations are guaranteed by the federal or provincial government, on the other hand, will not be required to register or be subject to registration requirements only when dealing with qualified parties (i.e., registered securities or derivatives counterparties or other sophisticated participants with adequate resources to absorb losses from derivatives trades) and not intermediating any trades for clients.

The Committee recognizes that an exemption is appropriate for governments and Crown corporations whose obligations are guaranteed as they represent little risk to the market, given that they can rely on government resources to satisfy their obligations. However, no exemption is contemplated for other Crown mandated and backed entities and programs. In addition, instead of treating all Canadian Crown obligations the same, the Committee distinguishes where Crown corporations are acting as a derivatives adviser or as a derivatives dealer intermediating trades or trading with non-qualified counterparties. It is unclear why the distinction is being made or what is the substantive difference in terms of risk or policy between different government entities whose obligations and mandates are all Crown obligations and mandates. We recommend that such distinction be removed.

It is also not clear whether employees of governments or Crown corporations that are exempted from registration would themselves be exempted from registration as derivatives advisers when acting in the course of their employment. There should be clear exemption in this regard, as the government/Crown employer is responsible and liable for the action of its employees when they are acting in the course of their business.

Having regulatory requirements for derivatives related activities by any party whose actions or obligations are guaranteed by an exempted government is not necessary to carry out the purposes of the proposed regulations, which are principally to protect other parties from risks related to derivative transactions. Excluding swap transactions for government guaranteed programs and entities from the regulatory requirements when they are to carry out legitimate governmental purposes is desirable to ensure the governmental mandates and programs involved can continue to be carried out effectively.

Government-backed entities enter into interest rate, currency, credit default and total return swaps for hedging, portfolio management and funding purposes. The Committee appears to agree that such entities and their activities are not and should not be viewed as presenting material risk concerns to their counterparties, and certainly not risks that should cause them to be regulated the same way as other types of private sector entities. This would certainly be true in the case of Canada Mortgage and Housing Corporation (CMHC) and Canada Housing Trust (CHT), whose obligations are obligations of and by Canada or whose obligations are guaranteed by Canada. The long-term debt securities of Canada, CMHC and CHT are rated triple-A by each of Moody's Investors Service, Inc., Standard & Poor's Financial Services LLC and Fitch, Inc.

CMHC is a Canadian agent crown corporation. All acts of CMHC are acts of Canada and all obligations issued by CMHC are obligations of and by Canada. CMHC is Canada's leading provider of residential mortgage insurance. CMHC also administers a mortgage-backed securities guarantee program, funds assisted housing programs for lower-income Canadians and offers housing-related loans and investments. CMHC enters into interest-rate and cross-currency swap transactions with banks and other counterparties primarily to manage its assisted housing funding obligations.

CHT is a special purpose trust used to issue Canada Mortgage Bonds ("CMBs"). While it is not an affiliate of CMHC and does not fit within the definition of a Crown corporation or of a qualified party (as proposed by the Committee), CHT was created under a mandate approved by the Government of Canada through the Department of Finance and is consolidated on CMHC's balance sheet. CHT was created to help ensure competition in the residential mortgage market and to help ensure an adequate supply of mortgage funding to financial institutions. CHT invests in mortgaged-backed securities guaranteed as to principal and interest by CMHC, as well as other obligations issued or guaranteed by Canada. CHT issues CMB notes that are also fully guaranteed as to principal and interest by CMHC and, as such, represent obligations guaranteed by Canada.

CMHC advises CHT on its derivative transactions. CHT uses swaps with counterparties to transform the sovereign-guaranteed mortgaged-backed securities' cash inflows into the required non-amortizing bond cash flows on the CMB notes, with fixed or floating interest payments and principal at maturity, through the use of customized interest rate swaps.

Requiring CMHC and CHT to comply with all the requirements of a registrant under the contemplated derivatives regulatory regime would not be possible under CMHC's present authorities and the current CHT structure. For example, all credit support annexes that CMHC and CHT enter into are one-way agreements under which CMHC and CHT accept collateral but do not post collateral. Counterparties in these OTC derivative transactions are comfortable facing the Government of Canada exposure from a credit perspective. It should be further noted, that because CHT is a trust, which by nature has no capital, any requirement to post collateral to a counterparty would likely result in CHT sourcing collateral from that same counterparty, therefore grossing up exposures.

We, therefore, urge the Committee to expand the exemption for government and government backed entities and programs and their employees.

We are available to further discuss.

Thank you.

Sincerely,

Sébastien Gignac
General Counsel and Corporate Secretary

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission

Canadian Market
Infrastructure Committee

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June 17, 2013

Re: Canadian Securities Administrators ("CSA") Staff Consultation Paper 91-407 Derivatives: Registration (the "Consultation Paper")

INTRODUCTION

The Canadian Market Infrastructure Committee ("CMIC") welcomes the opportunity to comment on the Consultation Paper dated April 18, 2013 published by the Canadian Securities Administrators OTC Derivatives Committee (the "Committee") relating to the proposal for the regulation of key OTC derivatives market participants through the implementation of a registration regime.

CMIC was established in 2010 to represent the consolidated views of certain Canadian market participants on proposed regulatory changes. The membership of CMIC consists of the following: Bank of America Merrill Lynch, Bank of Montreal, Caisse de dépôt et placement du Québec, Canada Pension Plan Investment Board, Canadian Imperial Bank of Commerce, Deutsche Bank A.G., Canada Branch, 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, Royal Bank of Canada, 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 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, as well as both domestic and foreign owned banks operating in Canada.

OTC derivatives are an important product class used by both financial intermediaries and commercial end-users to manage risk and exposure. Systemic risk oversight of the OTC derivatives markets is an essential component of the long term financial stability and growth of Canadian financial markets and their participants.

CMIC appreciates the consultative approach being taken by the CSA in considering the proposed registration regime. CMIC believes that this approach will lay the foundation for the development of a Canadian regulatory structure[1] that will satisfy Canada's G-20 commitments by addressing systemic risk concerns in OTC derivatives markets.

Limit on Scope of this CMIC Letter

The Consultation Paper is focussed on the registration of various categories of OTC derivatives market participants. CMIC is not an advocacy group for its members and it is beyond CMIC's mandate to represent or provide commentary to the CSA on the form, if any, of OTC derivative registration regime (and any associated jurisdictional issues) for each category of market participant that is represented within CMIC. As such, this letter will not address the jurisdictional issues raised by the Consultation Paper. Instead, some CMIC members through their respective industry associations may address in separate letters to the CSA the issues raised by this Consultation Paper in relation to their respective regulatory circumstances and jurisdictions. In addition, individual CMIC members may also make separate submissions to the CSA in relation to OTC derivative registration issues based on their unique regulatory circumstances. As it has in all of its submissions, this letter will reflect the consensus of views within CMIC's membership about the proper Canadian regulatory regime for the OTC derivatives market.

OVERVIEW

CMIC supports the regulatory progress that has been made internationally towards meeting the G-20 commitments and we encourage the CSA to continue to work closely with its global counterparts and other international bodies towards the common goal of meeting the G-20 commitments. In this regard, CMIC has consistently supported in its various submissions to the CSA the introduction of a reporting and clearing regime for OTC derivatives. However, the Consultation Paper introduces very significant additional requirements that are outside the G-20 commitments. The development of a registration regime for the regulation of OTC derivatives market participants is not part of the G-20 commitments. The G-20 commitments can be met without a specific registration requirement, as evidenced by the approach taken in Europe,[2] and we urge the CSA to give serious consideration to an OTC derivatives regulatory regime in Canada that does not require registration. In particular, CMIC's strong recommendation is that the CSA should give serious consideration to deferring the decision on whether to implement a registration regime until after a period of two years of trade reporting data is available.

Aside from the fact that a registration regime is not required to meet the G-20 commitments, CMIC submits that a broad-based and burdensome registration regime is unnecessary in purely regulatory terms. We are not aware of any meaningful degree of market misconduct or mischief in the Canadian OTC derivatives market that such registration regime could be intended to address. Further, no evidence has been presented that the imposition of the registration requirements set out in the

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[1] References to "regulation" or "regulators" within this document will be considered to include market, prudential and systemic risk regulators.

[2] While the European Union Markets in Financial Instruments Directive ("MiFiD") recognizes "investment firms" as registrants, which term captures certain OTC derivatives market participants, additional or duplicative registration requirements have not been imposed in connection with the EU approach to meeting its G-20 commitments. Further, certain entities, such as banks, insurance companies and pension funds, are exempt from the application of MiFiD in whole or in part. We note that such categories of exempt entities represent a large proportion of Canadian OTC derivatives market participants.

Consultation Paper will provide a benefit to the Canadian OTC derivatives market, or to Canadian regulators, which is material enough to outweigh the costs and sizable risks. This is of particular concern where it can be predicted, as noted below, that imposing a rigid registration regime in a relatively smaller market such as Canada could significantly impair liquidity – market participants (particularly from outside Canada) may choose to withdraw from the market. Given that the Consultation Paper is outside the G-20 systemic risk objectives of OTC derivatives reform, we strongly urge the CSA to defer the decision on whether to implement an all encompassing registration regime.

In our responses (the “CMIC TR Letter”, the “CMIC S&E Letter”, the “CMIC S&P Letter”, the “CMIC End-User Letter”, the “CMIC CCP Letter” and the “CMIC Model Scope and TR Rules Letter”, respectively, and collectively, the “CMIC Letters”)[3] to the consultation papers issued by the CSA relating to OTC derivatives trade repositories (the “TR Paper”),[4] surveillance and enforcement of the OTC derivatives market (the “S&E Paper”),[5] segregation and portability in OTC derivatives clearing (the “S&P Paper”),[6] the exemption of end-users of OTC derivatives from certain proposed regulatory requirements (the “End-User Paper”)[7], central counterparty clearing (the “CCP Paper”)[8] and model provincial rules for derivatives product determination and trade repositories and derivatives data reporting (the “Model Scope and TR Rules Paper”)[9] we emphasized that a Canadian regulatory framework for OTC derivatives must be harmonized and streamlined to the greatest extent possible across the provinces and territories and with federal authority over systemic risk. We also emphasized the need for rules that are aligned with global standards having due regard for the unique Canadian legal and market characteristics. A related point raised in the CMIC Letters was that, because of Canada’s relative position in the global market, any imposition of regulatory hurdles on OTC derivatives market participants that are unique to Canada could pose a serious risk of placing Canadian participants at a disadvantage by impeding their access to global markets. The CMIC

[3] Response of CMIC dated September 9, 2011 to the TR Paper. Available at http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20110909_91-402_cmic.pdf.
Response of CMIC dated January 25, 2012 to the S&E Paper. Available at http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20120125_91-403_cmic.pdf.
Response of CMIC dated April 10, 2012 to the S&P Paper. Available at http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20120410_91-404_cmic.pdf.
Response of CMIC dated June 15, 2012 to the End-User Paper. Available at http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20120615_91-405_cmic.pdf.
Response of CMIC dated September 21, 2012 to the CCP Paper. Available at http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20120921_91-406_cmic.pdf.
Response of CMIC dated February 4, 2013 to the Model Scope and TR Rules Paper. Available at http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20130204_91-301_cmic.pdf.

[4] CSA Consultation Paper 91-402 – Derivatives: Trade Repositories dated June 23, 2011. Available at http://www.osc.gov.on.ca/documents/en/Securities-Category9/csa_20110623_91-402_trade-repositories.pdf.

[5] CSA Consultation Paper 91-403 – Derivatives: Surveillance and Enforcement dated November 25, 2011. Available at http://www.osc.gov.on.ca/documents/en/Securities-Category9/csa_20111125_91-403_cp-derivatives.pdf.

[6] CSA Consultation Paper 91-404 – Derivatives: Segregation and Portability in OTC Derivatives Clearing dated February 10, 2012. Available at http://www.osc.gov.on.ca/documents/en/Securities-Category9/csa_20120210_91-404_segregation-portability.pdf.

[7] CSA Consultation Paper 91-405 – Derivatives: End-User Exemption dated April 13, 2012. Available at: http://www.osc.gov.on.ca/documents/en/Securities-Category9/csa_20120420_91-405_end-user-exemption.pdf.

[8] CSA Consultation Paper 91-406 - Derivatives: OTC Central Counterparty Clearing dated June 20, 2012. Available at: http://www.osc.gov.on.ca/documents/en/Securities-Category9/csa_20120620_91-406_counterparty-clearing.pdf.

[9] CSA Consultation Paper 91-301 – Model Provincial Rules - Derivatives: Product Determination and Trade Repositories and Derivatives Data Reporting dated December 6, 2012. Available at: http://www.osc.gov.on.ca/documents/en/Securities-Category9/csa_20121206_91-301_model-provincial-rules.pdf.

Letters also recommended that additional information and clarity is needed before a comprehensive regulatory regime for OTC derivatives can be developed.

Consistent with our positions advanced in the CMIC Letters, we submit that the key themes to be considered at the outset of the development of a regulatory regime for OTC derivatives are harmonization, both across Canada and with international jurisdictions, impact on Canadian market participants and available information. Each of these themes is discussed in more detail below, following which are specific responses to the questions posed in the Consultation Paper.

Harmonization

In the CMIC Letters, we have advocated that Canadian regulation of OTC derivatives should be harmonized as much as possible with international regulations. The Canadian market is different from the larger international OTC derivatives markets, both in number and composition of market participants, particularly as compared with the United States. As mentioned above, registration is not a G-20 commitment and it is CMIC's view that, for this smaller Canadian market, this is one area in which Canadian regulations should not be harmonized[10] with the United States under the Title VII of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* ("Dodd-Frank") but instead, Canada should follow the European approach (as discussed in more detail below under "General Comments"). In fact, we do not believe any of the smaller foreign OTC derivatives markets is mandating or contemplating a fulsome registration regime such as the one set out in the Consultation Paper.

As it relates to harmonization within Canada, in developing the Canadian regime for the regulation of OTC derivatives market participants, Canadian regulators should be alert to the risk of imposing duplicative or contradictory requirements. Such a risk is relevant in a number of contexts, including the imposition of redundant or inconsistent requirements across provinces and territories, but also extends to the potential for conflict with or duplication of existing domestic prudential regulation. While CMIC recognizes the importance of ensuring that any gaps in the regulatory framework are adequately addressed, we submit that it is equally important to ensure that overlap and duplication is avoided to the greatest extent possible. In this regard, consideration should be given to passporting and/or equivalency regimes both within Canada and, where applicable, with international regulators. We submit further that in order to avoid duplication of efforts and the potential for inconsistent application, any passporting or equivalency determinations should be made as between the applicable regulators and should not require individual participants to apply for such treatment. For example: (i) Canadian participants that are required to register should be permitted to deal only with their respective primary securities regulator (similar to the existing rules for securities registrants), and (ii) blanket equivalency determinations should be made both for Canadian participants subject to appropriate regulation within Canada (i.e. participants that are registered under the dealer category of Canadian securities laws, or those that are subject to regulation by certain prudential regulators) and for international participants subject to specified international regulatory regimes.

Impact on Canadian Participants

Prior to imposing any registration requirements, we urge the CSA to consider the potential impact of such requirements on the Canadian OTC derivatives market and its participants. Given the global nature of the OTC derivatives market and Canada's relatively small size within that market, Canadian participants routinely transact with international counterparties. In fact, our best available data indicates that over half of the trading in Canadian-dollar interest rate products involves at least one

[10] Though, of course, it is CMIC's view that Canadian regulations should not be *inconsistent* with international regulations.

party that is not a resident of Canada[11] and over 78% of OTC derivatives of the largest Canadian banks are with counterparties outside of Canada.[12] Maintaining ongoing access to this liquidity is of critical importance to the proper functioning of markets. Canada's relative position within the market also makes it difficult for it to impose additional or unique regulatory requirements without creating barriers to access for market participants. If the proposed Canadian regime has extra-territorial effects, international market participants may determine that it is too burdensome to comply with the Canadian requirements and choose to avoid transactions with Canadian counterparties. CMIC stresses the importance of OTC derivatives trading as a tool for the mitigation of systemic risk and wishes to emphasize that the Canadian regulatory regime should not impede the ability of Canadian market participants to access global markets. Any such impediments would disadvantage Canadian participants and have a very material adverse effect on liquidity in the Canadian marketplace (thereby potentially increasing systemic risk).

Critical Information Should be Assembled

As noted in the CMIC End-User Letter, CMIC supports a broad, principles-based exemption framework that encourages end-users to participate in the OTC derivatives market rather than a series of bright-line tests and specified criteria. We wish to reiterate this position in relation to the proposed registration regime while also emphasizing the need for clarity in the establishment of such principles. Further clarity is also required with respect to the key definitions used throughout the Consultation Paper, such as (but not limited to) "derivatives" and "Large Derivative Participant". It is unclear to us at this time which products and participants are meant to be captured by the proposed registration regime. CMIC encourages the CSA to take the time required to study trade repository data as it becomes available prior to the development of any registration regime in Canada. Only with such information will it be possible to determine the appropriate balance between regulation and access to markets. Further, the recommendations set out in the Consultation Paper would, if implemented, place a very high administrative and operational burden, not only on market participants, but also on the members of the CSA. In our view, we do not believe that the regulatory infrastructure to deal with all the requirements set out in the Consultation Paper currently exists, and to put such infrastructure in place would be extremely onerous and costly. Therefore, we strongly recommend a study of at least two years of data from trade repositories to identify any regulatory gaps or concerns before deciding whether to institute a registration regime in Canada in respect of the OTC derivatives market.

SPECIFIC RESPONSES TO CONSULTATION PAPER QUESTIONS

General Comments

As noted above, the Canadian OTC derivatives market is different than the US market. It is a much smaller, less liquid market, with a large majority of transactions entered into with non-domestic participants. As mentioned above, our information supports the view that over half of the trading in Canadian-dollar interest rate products involves at least one party that is not a resident of Canada.[13] Further, the aggregate notional amount of OTC derivatives transactions entered into by the 6 largest

[11] "Curbing Contagion: Options and Challenges for Building More Robust Financial Market Infrastructure" Remarks by Tim Lane, Deputy Governor of the Bank of Canada, Society for Worldwide Interbank Financial Telecommunication, Annual Sibos Conference, Toronto, September 19, 2011.

[12] In 2010, 78% of over-the-counter derivatives of the largest Canadian banks are with counterparties outside of Canada. Source: "Reform of Over-the-Counter (OTC) Derivatives markets in Canada: Discussion Paper from the Canadian OTC Derivatives Working Group", October 26, 2010, page 23 available at: http://www.bankofcanada.ca/wp-content/uploads/2010/10/reform.pdf.

[13] *Supra* note 11.

Canadian banks represent 3% of global OTC derivatives transactions.[14] Accordingly, any regulatory regime proposed by the Committee must be evaluated in the context of the specific characteristics of the Canadian market. If the regime imposes requirements which are too onerous, and is one in which costs outweigh benefits, non-domestic participants may well choose to avoid entering into OTC derivatives with Canadian market participants, thus reducing liquidity in Canada. We have seen this occur in the US where certain non-US banks have stopped trading with US entities in order to avoid registration in the US.[15] If foreign banks take these extreme measures with regard to the US market, which is a much larger market than Canada, it is reasonable to assume that some foreign banks might well take the same position in relation to the Canadian market, particularly if registration is required with multiple Canadian regulators. At a minimum, if non-domestic dealers are required to register, even if they are exempt from a majority of the requirements for registered dealers, market participants may well be motivated to move their OTC derivatives transactions offshore.

CMIC proposes that following a US-type approach to registration therefore is not appropriate in Canada and that MiFID is a more appropriate approach for the Canadian market. CMIC submits that a more useful and effective approach for the Canadian market would be to impose minimum business conduct requirements on all professional derivatives counterparties ("Professional Parties") which would capture all parties that are in the business of (a) making OTC derivatives markets, (b) as specified in the manner below, trading in, or intermediating, OTC derivatives for a fee or for profit, or (c) advising in OTC derivatives.

We provide greater clarity below on (i) which transactions should be defined as a "derivative" for these purposes, (ii) what it means to be "in the business of trading" and "in the business of advising", in each case, in connection with OTC derivatives and (iii) what the minimum business conduct requirements should be for Professional Parties.

> *(i) Definition of "derivative":* As to which transactions should be defined as a "derivative" for these purposes, the Consultation Paper does not provide clarity, although a degree of insight is provided under section 6.1(a). CMIC is of the view that the definition of a "derivative" should, at a minimum, exclude all transactions which are not considered a derivative under the Model Scope and TR Rules Paper. In addition, as referred to and discussed in greater detail on pages 5-7 (inclusive) of the CMIC Model Scope and TR Rules Letter, there are additional transactions that should not be considered a "derivative".[16]
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> *(ii) In the business of trading/advising OTC derivatives:* With respect to what it means to "be in the business of trading" an OTC derivative or "be in the business of advising" in connection with an OTC derivative, the proposal under sections 6.1 and 6.2 of the Consultation Paper is too broad. CMIC submits that (i) the definition of "trading in a derivative" should be limited to the entering into an OTC derivative transaction (including

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[14] Based on published unaudited financial statements for the second quarter of fiscal 2013 for the 6 largest Canadian banks and derivatives market statistics for end-December 2012 published by The Bank for International Settlements. This figure is an approximation only and has not been adjusted to reflect double-counting or timing issues.

[15] See testimony of Christopher Giancarlo before the House Financial Services Subcommittee, noting that U.S. dealers are being shunned by foreign counterparties, who have both publicly and privately declared they will not register with U.S. regulators; available at http://financialservices.house.gov/uploadedfiles/hhrg-112-ba16-wstate-cgiancarlo-20121212.pdf. See also various media reports discussing the withdrawal of foreign counterparties from U.S. markets; available at http://online.wsj.com/article/SB10001424052970203400604578072221988442386.html and http://www.ft.com/intl/cms/s/0/a9a6f1be-ae2b-11e2-82b8-00144feabdc0.html#axzz2VFU6ZMqL.

[16] These include exchange traded derivatives, physical commodity transactions, "long dated" foreign exchange spot transactions, all gaming contracts and all insurance contracts. Please see our complete comments on the definition of a "derivative" in the CMIC Model Scope and TR Rules Letter.

novations of an existing OTC derivative transaction) as principal, and the business trigger should be limited to acting as a market maker or trading with the intention of being remunerated or compensated; and (ii) the definition of "advising" in connection with an OTC derivative transaction should be limited to providing customized, specific investment advice to an individual party in connection with the entering into of an OTC derivative transaction, and the business trigger should be limited to the frequent or regular provision of such advice where the provider of such advice is expected to be remunerated or compensated. It is CMIC's view that all the pension fund members of CMIC would not be considered "Professional Parties" and instead, are "end users" and should not be required to register in any circumstance.

(iii) Minimum business conduct requirements: The minimum business conduct requirements applicable to all Professional Parties would be those set out under section 7.2(b)(iii)(A) *(Know your Client/Counterparty)*, section 7.2(b)(iii)(C) *(Conflicts of Interest)*, section 7.1(c)(i) *(Compliance and Risk Management Systems)*, section 7.1(c)(iii) *(Recordkeeping)* and section 7.1(d) *(Honest Dealing)* of the Consultation Paper.

So long as Professional Parties deal with a qualified party,[17] no further requirements (which form the subject matter of the Consultation Paper)[18] would be imposed. Where Professional Parties deal with non-qualified parties, CMIC submits that suitability and fair dealing requirements (as set out under section 7.2(b)(iii)(B) and (D) of the Consultation Paper) should also be imposed. Additional requirements may also apply in such circumstances (though may not, in all cases, be necessary), such as registration, notice requirements to the relevant securities commission, the additional requirements set out under 7.2(b)(ii) of the Consultation Paper or proficiency requirements relating to a Professional Party or its traders/advisers dealing with non-qualified parties.

CMIC submits that the above approach is appropriate for the Canadian OTC derivatives market. As noted by the Committee in the Consultation Paper, derivatives are different than securities. The goal of a securities regulator is to provide protection to investors from unfair, improper or fraudulent practices and foster fair and efficient capital markets and confidence in capital markets".[19] The Canadian OTC derivatives marketplace has not demonstrated that there are any problems with regard to unfair, improper or fraudulent dealing, nor has there been a need to protect "investors" entering into derivatives transactions. The overwhelming majority of OTC derivatives transactions entered into in Canada are between qualified (sophisticated) parties. There is therefore not the same need to "protect" these "investors" as is the case in the securities market with retail investors.

As noted in our introductory remarks, registration of OTC derivatives counterparties is not listed as one of the G-20 commitments. The goals stated in the G-20 commitments relating to OTC derivatives in Pittsburgh[20] are to improve transparency in the derivatives market, mitigate systemic risk and protect against market abuse. CMIC submits that those goals would be effectively achieved through mandatory requirements for trade reporting, central clearing of standardized trades, minimum business conduct requirements and higher capital and margin requirements for certain non-centrally

[17] CMIC recognizes that different terminology is used in Canada in referring to the concept of a sophisticated party (such as "qualified party", "accredited investor", "accredited counterparty", and "permitted client"). Where the term "qualified party" is used throughout this letter, CMIC is referring to the concept of a sophisticated party generally, and is not advocating the use of one term or definition over another, other than as expressly set out in this letter.

[18] CMIC recognizes that there are different requirements for other areas of OTC derivatives reform, such as those relating to the G-20 commitments of trade reporting, central clearing and capital and collateral requirements.

[19] Statutory mandate of the Ontario Securities Commission. See http://www.osc.gov.on.ca/en/About_about_index.htm.

[20] See paragraph 13. http://www.g20.utoronto.ca/2009/2009communique0925.html.

cleared trades, and not by the imposition of registration requirements as set out in the Consultation Paper. In fact, we strongly believe that such registration requirements would have a negative impact on the liquidity of the Canadian market which could well produce the unintended consequence of increasing systemic risk.

Questions & Responses

Q1: Should investment funds be subject to the same registration triggers as other derivatives market participants? If not, what registration triggers should be applied to investment funds?

There are no investment fund[21] members of CMIC. Accordingly, CMIC has no comment on this and encourages other industry organizations to provide commentary to the Committee on this question.

Q2: What is the appropriate standard for determining whether a person is a qualified party? Should the standard be based on the financial resources or the proficiency of the client or counterparty? If the standard is based on financial resources should it be based on the net assets of the client or counterparty, gross annual revenues of the client or counterparty, or some other factor or factors?

CMIC feels strongly that the standards for determining whether a person is a qualified party should be as objective as possible and should not require any subjective assessments, such as a person's proficiency, experience or knowledge. If such subjective elements were included, it should not apply to all categories of the definition, but should only have limited application, and in every case, parties should be able to rely solely on representations made by a party with respect to such subjective matters. At a minimum, the definition of a "qualified party" under Canadian regulation (i) should capture all persons satisfying the requirements of an "Eligible Contract Participant" under Dodd-Frank, (ii) the definition of "qualified party" should be the same across all Provinces and (iii) include a definition of a "hedger" similar to the one found under the *Derivatives Act* (Quebec).[22]

Q3: Should registration as a derivatives dealer be subject to a *de minimis* exemption similar to the exemption adopted by U.S. regulators? Please indicate why such an exemption is appropriate.

If one of the goals of registration is to address financial stability and systemic risk, the registration process should not capture small derivatives dealers and therefore a *de minimis* exemption is appropriate. In Canada, market participants are limited in number as compared to the United States. Therefore, CMIC submits that it is not appropriate to impose requirements that unnecessarily deter participation in the market where such participant's business does not impact systemic risk.

In addition, if foreign market participants are ultimately required to register in Canada, CMIC is of the view that there should be a *de minimus* exemption. Foreign market participants provide much needed liquidity to the Canadian market, often offering the depth of products to larger market participants, such as pension funds, which Canadian sell-side counterparties are unable to offer. CMIC believes that if Canadian regulators ultimately require foreign market participants to register, liquidity in

[21] CMIC has pension fund members, however, these are large public sector pension funds which, in our view, are not the type of "investment funds" to which this question relates.

[22] Under s. 3(12) *Derivatives Act* (Quebec), a hedger is defined as "a person who, because of the person's activities, (a) is exposed to one or more risks attendant upon those activities, including supply, credit, exchange and environmental risks and the risk related to fluctuations in the price of an underlying interest; and (b) seeks to hedge that risk by engaging in a derivatives transaction, or a series of derivatives transactions, where the underlying interest is the underlying interest directly associated with that risk or a related underlying interest".

Canada would be significantly reduced, which would be harmful to Canadians. Again, a careful review of two years of trade reporting data before determining whether it is advisable to implement a registration regime would ensure a significant compression of liquidity is avoided.

Q4: Are derivatives dealer, derivatives adviser and LDP the correct registration categories? Should the Committee consider recommending other or additional categories?

CMIC is of the view that the LDP category is not appropriate for Canada. For example, some CMIC members that are public sector pension funds could potentially be considered to have substantial positions. However, it is clear that such buy-side end-users do not "make" derivatives markets. It is therefore unclear what risk is being addressed if such participants are required to register. CMIC does not believe that other or additional categories of registration are necessary.

Q5: Are the factors listed the correct factors that should be considered in determining whether a person is in the business of trading derivatives? Please explain your answer.

The factors listed are much broader than those required for a "swap dealer" under Dodd-Frank. The "directly or indirectly soliciting" category is not something that would indicate that a participant is dealing in derivatives. The Consultation Paper refers to advertising on the internet with the intention of encouraging trading as an example of an activity. This type of activity is associated with the retail securities market and is not something that is typically associated with "trading a derivative". CMIC submits that only where a party enters into a derivatives trade as principal should such activity qualify as "the business of trading derivatives". With regard to the factor "providing clearing services to third parties", please see our response to question 7 below.

Q6: The Committee is not proposing to include frequent derivatives trading activity as a factor that we will consider when determining whether a person triggers registration as a derivative dealer. Should frequent derivatives trading activity trigger an obligation to register where an entity is not otherwise subject to a requirement to register as a derivatives dealer or a LDP? Should entities that are carrying on frequent derivatives trading activity for speculative purposes be subject to a different registration trigger than entities trading primarily for the purpose of managing their business risks?

CMIC is of the view that factors should be based on the behaviour of a participant, rather than how often such participant trades. If frequency of trading was included as a factor and frequent hedgers (who are often end-users) are therefore made subject to registration when they otherwise would not be required to register, proper hedging could be discouraged. Such a result would be inconsistent with systemic risk mitigation. In CMIC's view, there is no necessary correlation between frequency of trading and the risks attached to that trading.

Q7: Is the proposal to impose derivatives dealer registration requirements on parties providing clearing services appropriate? Should an entity providing these clearing services only to qualified parties be exempt from regulation as a derivatives dealer?

CMIC submits that it is not necessary, and potentially harmful, to impose derivatives dealer registration requirements on parties providing clearing services. If clearing is mandated, access to central clearing counterparties will become critical. If dealer registration is required for parties providing clearing services, it may discourage entities, particularly foreign entities, from providing clearing services for Canadian market participants. Further, the CCP Paper proposes that central clearing counterparties are required to be recognized in Canada (where clearing for Canadian participants), and part of that recognition process includes a review of the risk management and membership criteria (among other things) of such central clearing counterparty by the Canadian securities regulator. In addition, other rules are being proposed relating to central clearing (in particular, segregation and portability) which will also protect both clients and parties undertaking client clearing.

With regard to the second part of question 7, since CMIC is of the view that all parties dealing with qualified parties should be exempt from registration, our answer is yes.

Q8: Are the factors listed above the appropriate factors to consider in determining whether a person is in the business of advising on derivatives?

None of the CMIC members is in the business of solely providing derivatives advice. Accordingly, CMIC has no comment on this and encourages other industry organizations to provide commentary to the Committee.

Q9: Are the factors listed for determining whether an entity is a LDP appropriate? If not what factors should be considered? What factors should the Committee consider in determining whether an entity, as a result of its derivatives market exposures, could represent a serious adverse risk to the financial stability of Canada or a province or territory of Canada?

Since no equivalent category to the LDP category exists, to our knowledge, in any G-20 jurisdiction (other than the U.S.), we are very concerned about creating a unique registration regime feature in a smaller market like Canada. Therefore, as set out under question 4 above, it is CMIC's view that the LDP category is not appropriate for Canada.

Q10: Is the Committee's proposal to only register derivative dealer representatives where they are dealing with clients or when dealing with counterparties that are non-qualified parties appropriate?

As noted above in the section "General Comments", it is CMIC's view that registration requirements should be imposed only where a Professional Party deals with a non-qualified party. Even in such cases, the registration of individual representatives may not be necessary provided that the Professional Party has sufficient and appropriate compliance procedures in place to ensure that individuals dealing with such non-qualified party are proficient and have proper supervision.

Q11: Is it appropriate to impose category or class-specific proficiency requirements?

CMIC submits that the imposition of proficiency requirements, whether category or class specific requirements or general requirements for individuals, are of no benefit to OTC derivatives market participants and are unnecessary for the integrity of the OTC derivatives market as a whole. CMIC is unaware of any market conduct issues that such requirements are intended to address and no evidence has been presented to justify such requirements. To our knowledge, no other foreign jurisdiction, including under either Dodd-Frank or EMIR,[23] has imposed such detailed proficiency requirements with respect to OTC derivatives market participants. These are requirements that have worked well in, and are appropriate for, the securities market. However, CMIC submits that they are not appropriate or necessary for the Canadian OTC derivatives market where business models have relied upon internal risk management and governance rules to determine proficiency of individuals trading or advising in derivatives products. Further, as mentioned above, the overwhelming majority of OTC derivatives transactions in the Canadian market involve only sophisticated parties, who understand the fundamentals of derivatives markets and do not deal with anyone who does not

[23] European Market Infrastructure Regulation ("EMIR") adopted by the European Parliament on 29 March 2012, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+20120329+SIT-01+DOC+WORD+V0//EN&language=EN at Article 3.

demonstrate proficiency in the area. It may be the case that where a dealer is trading an OTC derivative with a non-qualified party, certain proficiency requirements might be warranted with respect to traders or advisers dealing directly with such non-qualified party.

Q12: Is the proposed approach to establishing proficiency requirements appropriate?

See our answer to question 11 above.

Q13: Is the Committee's proposal to impose a requirement on registrants to "act honestly and in good faith" appropriate?

CMIC is of the view that this requirement to act honestly and in good faith should apply to all market participants, whether they are registered or not.

Q14: Are the requirements described appropriate registration requirements for derivatives dealers, derivatives advisers and LDPs? Are there any additional regulatory requirements that should apply to all categories of registrants? Please explain your answers.

As mentioned above, CMIC strongly urges the CSA to defer the decision on whether to implement a registration regime until it has received and studied at least two years of trade repository information and determined whether there are market conduct issues which are not being addressed from a regulatory perspective. If it is ultimately determined that a registration regime is required, CMIC submits that such a requirement should be imposed only where a derivatives dealer trades (or a derivatives advisor advises in connection with) an OTC derivative transaction with a non-qualified party. In such limited circumstances, CMIC is of the view that the registration requirements are generally appropriate, except for the insurance requirement for the reasons set out below in our response to question 17. However, it would be more appropriate to impose requirements only where the CSA has determined that there are specific market conduct issues which are not being addressed under existing rules.

Q15: Should derivatives dealers dealing with qualified parties be subject to business conduct standards such as the ones described in part 7.2(b)(iii) above? If so, please explain what standards should apply.

Yes. See our commentary under "General Comments".

Q16: Do you have a preference between the two proposals relating to the regulation of a derivatives dealer trading with counterparties that are non-qualified parties? Is there another option to address the conflict of interest that the Committee should consider? Please explain your answer.

CMIC submits that the second alternative is the better approach as it is more transparent. The first alternative may be impossible to implement from a timing perspective when parties need to act quickly from a market perspective. In addition, this first alternative is dependent upon receiving advice from a registered adviser who would provide consultation services to a non-qualified party. It is CMIC's view that it would be difficult to find a registered adviser who would be available to provide such services, in particular as it is unlikely that such non-qualified party would be an existing client of the registered adviser.

With regard to the second alternative, it should be clarified that the derivatives dealer is not providing advice in informing the counterparty that it has the right to obtain independent advice before entering into a transaction. As well, it should be clarified that the non-qualified party can sign the acknowledgement up front as part of normal account opening procedures and protocols and customary know your client processes, as opposed to a requirement to obtain an acknowledgement for every transaction.

Q17: Are the recommended requirements appropriate for registrants that are derivatives dealers? If not please explain. Are there any additional regulatory requirements that should apply to registered derivatives dealers?

See our answer to question 11 for CMIC's views on proficiency requirements. CMIC submits that the insurance requirements under section 7.1(b)(iii) of the Consultation Paper are not appropriate for the OTC derivatives market where the vast majority of collateral held by a dealer would be held in electronic form. The following additional regulatory requirements should apply to registered derivatives dealers: (i) exposure valuations that are consistent with the ISDA definition of "Exposure" should be made available to any non-qualified counterparty on demand, and (ii) timely confirmations of transactions should be provided to counterparties.

Q18: Are the recommended requirements appropriate for registrants that are derivatives advisers? If not please explain. Are there any additional regulatory requirements that should apply to registered derivatives advisers?

None of the CMIC members is in the business of solely providing derivatives advice. Accordingly, CMIC has no comment on this and encourages other industry organizations to provide commentary to the Committee.

Q19: The Committee is recommending that foreign resident derivative dealers dealing with Canadian entities that are qualified parties be required to register but be exempt from a number of registration requirements. Is this recommendation appropriate? Please explain.

Imposing additional registration requirements for foreign resident participants will severely restrict liquidity in the Canadian market. As mentioned in the "General Comments" section above, a significant portion of liquidity in the Canadian market is provided by non-domestic participants.[24] If foreign resident derivatives dealers dealing with qualified parties are required to register, even though they may be exempt from a number of registration requirements, there is a serious risk that they will choose not to deal with Canadian market participants. This will have the effect of reducing liquidity in the Canadian market, making it more difficult for end users to enter into hedges. Further, foreign resident derivative dealers will be regulated by their home jurisdiction and imposing further registration requirements under the Canadian regime for such dealers could be inconsistent with comity and compromise the ability of Canadian market participants to obtain substitute compliance in foreign jurisdictions.

Q20: Is the Committee's recommendation to exempt foreign resident derivatives dealers from Canadian registration requirements where equivalent requirements apply in their home jurisdictions appropriate? Please explain.

It is CMIC's view that the appropriate test here is not that the foreign resident derivatives dealers have "equivalent" requirements in their home jurisdiction, but "comparable" or "similar" requirements. The concept of substitute compliance and reciprocity amongst regulators in respect of G-20 commitments will be made difficult if jurisdictions (especially relatively smaller jurisdictions, such as Canada) require

[24] For example, as of February 1, 2011, almost half of all Canadian dollar denominated interest rate swaps are not entered into by any of the big six Canadian banks. Source: CMIC "Data Analysis Report", February 1, 2011; Bank for International Settlements Triennial Survey June 2010.

that the foreign jurisdiction have “equivalent” requirements. Requirements that achieve comparable results should be sufficient.

Q21: Should foreign derivatives dealers or advisers not registered in Canada be exempt from registration requirements where such requirements solely result from such entities trading with the Canadian federal government, provincial governments or with the Bank of Canada?

Exemption from registration solely on the basis of a derivatives dealer trading with the Canadian federal government, provincial governments or with the Bank of Canada is not appropriate. This bifurcates market liquidity for sovereign entities versus other end-users. However, as stated in the “General Comments”, CMIC is of the view that a Professional Party should be exempt from registration if it deals with any qualified party (and not just a Canadian sovereign entity or the Bank of Canada).

Q22: Is the proposal to exempt crown corporations whose obligations are fully guaranteed by the applicable government from registration as an LDP and, in the circumstances described, as a derivatives dealer appropriate? Should entities such as crown corporations whose obligations are not fully guaranteed, foreign governments or corporation owned or controlled by foreign governments benefit from comparable exemptions? Please provide an explanation for your answer.

As stated above in our response to question 4, CMIC is of the view that there should not be a separate LDP category of registration. Further, as indicated in our response above to question 21, CMIC is of the view that creating special exemptions for specific entity types bifurcates liquidity in the market. Exemptions should be based upon whether a party is a qualified party, which in turn should be determined by objective criteria.

Q23: Are the proposed registration exemptions appropriate? Are there additional exemptions from the obligation to register or from registration requirements that should be considered but that have not been listed?

See responses to questions 21 and 22 above, as well as our submissions in the “General Comments” section of this letter.

CONCLUSION

CMIC believes that continued engagement with the CSA is fundamental to the development of a regulatory framework that meets the G-20 commitments and achieves the intended public policy purposes. Thoughtful inclusion by regulators of the themes set out in the Overview section of this letter will meaningfully contribute to the success of the development of an effective Canadian framework for the regulation of key participants in the OTC derivatives market.

As we have noted in our prior submissions, each subject relating to OTC derivatives regulation is interrelated with all other aspects. As such, CMIC reserves the right to make supplementary submissions relating to the proposed registration regime following publication of further consultation papers and model and draft rules.

CMIC hopes that its comments are useful in the development of the regime for the regulation of the OTC derivatives market and that the CSA takes into account the practical implications for all market participants who will be subject to such regulation. CMIC welcomes the opportunity to discuss this response with representatives from the CSA.

The views expressed in this letter are the views of the following members of CMIC:

Bank of America Merrill Lynch
Bank of Montreal
Caisse de dépôt et placement du Québec
Canada Pension Plan Investment Board
Canadian Imperial Bank of Commerce
Deutsche Bank A.G., Canada Branch
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
Royal Bank of Canada
The Bank of Nova Scotia
The Toronto-Dominion Bank

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Commission des valeurs mobilières du Manitoba
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Le 17 juin 2013

Objet : Document de consultation 91-407 du personnel des Autorités canadiennes en valeurs mobilières (« ACVM ») – Dérivés : inscription (le « document de consultation »)

INTRODUCTION

Le Comité de l'infrastructure du marché canadien (Canadian Market Infrastructure Committee) (« CMIC ») se réjouit de l'occasion qui lui est donnée de présenter des observations sur le document de consultation qu'a publié le Comité des Autorités canadiennes en valeurs mobilières sur les dérivés de gré à gré (le « Comité ») le 18 avril 2013 relativement à la proposition d'assujettir les principaux participants au marché des dérivés à un régime d'inscription.

Le CMIC a été créé en 2010 pour représenter les points de vue consolidés de certains participants au marché canadien sur les changements proposés à la réglementation. Le CMIC est composé des membres suivants : Bank of America Merrill Lynch, la Banque de Montréal, la Caisse de dépôt et placement du Québec, l'Office d'investissement du régime de pensions du Canada, la Banque Canadienne Impériale de Commerce, Deutsche Bank A.G., Canada Branch, Healthcare of Ontario Pension Plan, la Banque HSBC Canada, la succursale de Toronto de JP Morgan Chase Bank, N.A., la Financière Manuvie, la Banque Nationale du Canada, la Société d'administration d'OMERS, le Régime de retraite des enseignantes et des enseignants de l'Ontario, la Banque Royale du Canada, La Banque de Nouvelle-Écosse et La Banque Toronto-Dominion.

Le CMIC apporte une voix unique dans le dialogue concernant le cadre approprié de réglementation du marché des dérivés de gré à gré au Canada. La composition du CMIC a été volontairement établie pour présenter les points de vue aussi bien du côté « achat » que du côté « vente » du marché canadien des dérivés de gré à gré, ainsi que des banques nationales et étrangères actives au Canada.

Les dérivés de gré à gré constituent une importante catégorie de produits utilisés tant par les intermédiaires financiers que par les utilisateurs finaux commerciaux pour gérer le risque et l'exposition au risque. La surveillance du risque systémique sur les marchés des dérivés de gré à gré représente une composante essentielle de la croissance et de la stabilité financières à long terme des marchés financiers canadiens et de leurs participants.

Le CMIC est reconnaissant envers les ACVM de l'approche consultative qu'elles ont retenue pour examiner le régime d'inscription proposé. Le CMIC estime que cette approche posera les fondations pour l'élaboration d'une structure réglementaire canadienne[1] qui honorera les engagements pris par le Canada dans le cadre du G-20 en se penchant sur les inquiétudes relatives au risque systémique sur les marchés des dérivés de gré à gré.

Limite de la portée de la présente lettre du CMIC

Le document de consultation vise avant tout l'inscription de diverses catégories de participants au marché des dérivés de gré à gré. Le CMIC n'est pas un groupe de défense de ses membres et il ne relève pas du mandat du CMIC de faire ou de présenter des observations aux ACVM sur la forme éventuelle du régime d'inscription des dérivés de gré à gré (et les questions de compétence connexes) pour chaque catégorie de participants au marché qui est représentée au sein du CMIC. À ce titre, la présente lettre n'abordera pas les questions de compétence soulevées par le document de consultation. Des membres du CMIC peuvent présenter plutôt, par l'intermédiaire de leurs associations professionnelles respectives, des lettres distinctes aux ACVM qui aborderont les questions soulevées par le document de consultation en ce qui a trait à leur situation et compétence respectives au chapitre de la réglementation. De plus, des membres individuels du CMIC peuvent également présenter des observations distinctes aux ACVM à l'égard des questions d'inscription des dérivés de gré à gré selon leur propre situation en matière de réglementation. Comme dans le cas de toutes ses observations, la présente lettre fait état du consensus au sein des membres du CMIC concernant le régime de réglementation canadien approprié pour le marché des dérivés de gré à gré.

APERÇU

Le CMIC se réjouit de l'évolution de la réglementation internationale en vue de respecter les engagements pris dans le cadre du G-20 et nous encourageons les ACVM à continuer de travailler en étroite collaboration avec les organismes de réglementation analogues mondiaux et autres organismes internationaux à l'objectif commun de respecter les engagements du G-20. À cet égard, le CMIC a toujours appuyé dans ses différentes présentations aux ACVM l'introduction d'un régime de déclaration et de compensation pour les dérivés de gré à gré. Toutefois, le document de consultation introduit de nouvelles exigences très importantes qui dépassent les engagements du G-20. L'élaboration d'un régime d'inscription pour la réglementation des participants au marché des dérivés de gré à gré ne fait pas partie des engagements du G-20. Il est possible de respecter les engagements du G-20 sans imposer une exigence d'inscription spécifique, comme l'atteste l'approche retenue en Europe,[2] et nous prions les ACVM d'envisager sérieusement pour le Canada un régime de réglementation des dérivés de gré à gré qui n'exige pas une inscription. Plus particulièrement, le CMIC recommande fortement aux ACVM d'envisager sérieusement de reporter la décision à savoir s'il y a lieu de mettre en œuvre un régime d'inscription jusqu'à ce que des données relatives à la déclaration des opérations soient disponibles à l'égard d'une période de deux ans.

Mis à part le fait qu'un régime d'inscription n'est pas exigé pour respecter les engagements du G-20, le CMIC est d'avis qu'un régime d'inscription de portée générale et astreignant est inutile du point de vue purement réglementaire. Nous ne sommes au courant d'aucun degré significatif d'inconduite ou de méfait sur le marché canadien des dérivés de gré à gré qui pourrait justifier un tel régime d'inscription. De plus, aucune preuve n'a été présentée selon laquelle l'imposition des obligations d'inscription énoncées dans le document de

[1] Les renvois à la « réglementation » ou aux « organismes de réglementation » dans le présent document seront réputés inclure les organismes de réglementation prudentiels, du marché et du risque systémique.

[2] Bien que la directive concernant les marchés d'instruments financiers (« MiFiD ») de l'Union européenne reconnaisse les « entreprises d'investissement » à titre d'inscrits, expression qui englobe certains participants au marché des dérivés de gré à gré, de nouvelles exigences d'inscription ou des exigences faisant double emploi n'ont pas été imposées dans le cadre de l'approche qu'a retenue l'UE pour respecter ses engagements pris dans le cadre du G-20. De plus, certaines entités, comme les banques, les sociétés d'assurance et les caisses de retraite, sont dispensées de l'application de la MiFID en totalité ou en partie. Nous prenons acte que ces catégories d'entités dispensées représentent une forte proportion des participants au marché canadien des dérivés de gré à gré.

consultation procurera un avantage au marché canadien des dérivés de gré à gré, ou aux autorités canadiennes de réglementation, ce qui est suffisamment important pour l'emporter sur les coûts et les risques appréciables. Cela est particulièrement inquiétant puisque l'on peut prédire, comme il est indiqué plus loin, que l'imposition d'un régime d'inscription rigoureux au sein d'un marché relativement petit comme le Canada pourrait nuire considérablement à la liquidité, poussant les participants au marché (notamment ceux de l'extérieur du Canada) à choisir de se retirer du marché. Étant donné que le document de consultation s'écarte des objectifs de réforme des dérivés de gré à gré du G-20 à l'égard du risque systémique, nous prions avec insistance les ACVM de reporter la décision à savoir s'il y a lieu de mettre en œuvre un régime d'inscription universel.

Dans nos réponses (la « lettre du CMIC sur les référentiels centraux », la « lettre du CMIC sur la surveillance et l'application de la loi », la « lettre du CMIC sur la séparation et la transférabilité », la « lettre du CMIC sur les utilisateurs finaux », la « lettre du CMIC sur la compensation des dérivés de gré à gré par contrepartie centrale » et la « lettre du CMIC sur les modèles de règlement sur le champ d'application et sur les répertoires des opérations », respectivement, et collectivement, les « lettres du CMIC »)[3] aux documents de consultation publiés par les ACVM relativement aux référentiels centraux des dérivés de gré à gré (le « document sur les référentiels centraux »)[4], à la surveillance et à l'application de la loi du marché des dérivés de gré à gré (le « document sur la surveillance et l'application de la loi »)[5], à la séparation et à la transférabilité dans la compensation des dérivés de gré à gré (le « document sur la séparation et la transférabilité »)[6], à la dispense d'un certain nombre proposé d'obligations réglementaires pour les utilisateurs finaux des dérivés de gré à gré (le « document sur les utilisateurs finaux »)[7], à la compensation par contrepartie centrale (le « document sur la compensation par contrepartie centrale »)[8] et au modèle de règlements provinciaux sur la détermination des produits dérivés et sur les répertoires des opérations et la déclaration de données sur les produits dérivés (le « document sur les modèles de règlement sur le champ d'application et sur les répertoires des opérations »)[9], nous avons souligné qu'un cadre réglementaire

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[3] Réponse du CMIC datée du 9 septembre 2011 au document de consultation sur les référentiels centraux de données. Disponible à l'adresse suivante :

http://www.lautorite.qc.ca/files//pdf/consultations/derives/Commentaires_91-402/Comite_infrastucture_91-402.pdf.

Réponse du CMIC datée du 25 janvier 2012 au document de consultation sur la surveillance et l'application de la loi. Disponible à l'adresse suivante :

http://www.lautorite.qc.ca/files//pdf/consultations/derives/Commentaires_91-403/91-403_comite-infrastucture-marche-canadien.pdf.

Réponse du CMIC datée du 10 avril 2012 au document de consultation sur la séparation et la transférabilité. Disponible à l'adresse suivante : http://www.lautorite.qc.ca/files//pdf/consultations/derives/Commentaires_91-404/cmic/91-404_fr.pdf.

Réponse du CMIC datée du 15 juin 2012 au document de consultation sur les utilisateurs finaux. Disponible à l'adresse suivante : http://www.lautorite.qc.ca/files//pdf/consultations/derives/Commentaires_91-405/cmic_fr.pdf.

Réponse du CMIC datée du 21 septembre 2012 au document de consultation sur la compensation des dérivés de gré à gré par contrepartie centrale. Disponible à l'adresse suivante :

http://www.lautorite.qc.ca/files/pdf/consultations/anterieures/derives/91-406/91-406-cmic-fr.pdf.

Réponse du CMIC datée du 4 février 2013 au document de consultation sur les modèles de règlement sur le champ d'application et sur les répertoires des opérations. Disponible à l'adresse suivante :

http://www.lautorite.qc.ca/files//pdf/consultations/derives/91-301/CMIC_91-301_fr.pdf

[4] Document de consultation 91-402 des ACVM – Dérivés : Référentiels centraux de données daté du 23 juin 2011. Disponible à l'adresse suivante : http://www.lautorite.qc.ca/files//pdf/consultations/derives/2011juin23-91-402-cons-paper-fr.pdf.

[5] Document de consultation 91-403 des ACVM – Dérivés : Surveillance et application de la loi daté du 25 novembre 2011. Disponible à l'adresse suivante :
http://www.lautorite.qc.ca/files//pdf/consultations/derives/2011nov25-91-403-cons-fr.pdf.

[6] Document de consultation 91-404 des ACVM – Dérivés : Séparation et transférabilité dans la compensation des dérivés de gré à gré daté du 10 février 2012. Disponible à l'adresse suivante :

http://www.lautorite.qc.ca/files//pdf/consultations/derives/2012fev10-91-404-cons-fr.pdf.

[7] Document de consultation 91-405 des ACVM – Dérivés : Dispense pour les utilisateurs finaux daté du 13 avril 2012. Disponible à l'adresse suivante : http://www.lautorite.qc.ca/files//pdf/consultations/derives/2012avril1391-405-cons-fr.pdf.

[8] Document de consultation 91-406 des ACVM – Dérivés : Compensation des dérivés de gré à gré par contrepartie centrale daté du 20 juin 2012. Disponible à l'adresse suivante :

http://www.lautorite.qc.ca/files//pdf/consultations/derives/2012juin20-91-406-consultation-fr.pdf.

[9] Document de consultation 91-301 des ACVM – Modèle de règlement provincial sur la détermination des produits dérivés et modèle de règlement provincial sur les répertoires des opérations et la déclaration de données sur les produits dérivés daté du

canadien pour les dérivés de gré à gré doit être harmonisé et rationnalisé dans la plus grande mesure possible dans l'ensemble des provinces et territoires et avec l'autorité fédérale sur le risque systémique. Nous avons de plus souligné le besoin d'avoir des règlements qui sont harmonisés avec les normes mondiales en tenant dûment compte des caractéristiques uniques du marché et du droit canadiens. Les lettres du CMIC ont soulevé comme point connexe qu'étant donné la position relative du Canada au sein du marché mondial, l'imposition d'obstacles réglementaires aux participants au marché des dérivés de gré à gré qui sont propres au Canada pourrait poser le grave risque de placer les participants canadiens dans une position désavantageuse en leur entravant l'accès aux marchés mondiaux. Les lettres du CMIC recommandaient également que d'autres renseignements et éclaircissements soient obtenus avant qu'un régime de réglementation globale des dérivés de gré à gré puisse être élaboré.

Conformément aux positions que nous avons défendues dans les lettres du CMIC, nous estimons que les thèmes principaux à examiner au début de l'élaboration d'un régime de réglementation des dérivés de gré à gré sont l'harmonisation, aussi bien d'un bout à l'autre du Canada qu'avec les juridictions internationales, l'incidence sur les participants au marché canadien et les renseignements disponibles. Chacun de ces thèmes est examiné plus en détail ci-après, après quoi des réponses précises sont données aux questions posées dans le document de consultation.

Harmonisation

Dans les lettres du CMIC, nous avons défendu comme point de vue que la réglementation canadienne des dérivés de gré à gré devrait être harmonisée le plus possible avec la réglementation internationale. Le marché canadien se distingue des plus grands marchés internationaux des dérivés de gré à gré tant quant au nombre qu'à l'égard de la composition des participants au marché, particulièrement en comparaison avec les États-Unis. Comme il est mentionné plus haut, l'inscription n'est pas un engagement du G-20 et le CMIC est d'avis que pour le marché canadien relativement petit, c'est l'un des domaines où la réglementation canadienne ne devrait pas être harmonisée[10] avec celle des États-Unis en vertu du Titre VII de la loi intitulée *Dodd-Frank Wall Street Reform and Consumer Protection Act* (« Dodd-Frank »). Le Canada devrait plutôt suivre l'approche européenne (examinée plus en détail ci-après à la rubrique « Observations générales »). En fait, nous ne croyons pas que l'un ou l'autre des plus petits marchés étrangers des dérivés de gré à gré n'envisage ni ne requière un régime d'inscription universel comme il est prévu dans le document de consultation.

En ce qui concerne l'harmonisation à l'intérieur du Canada, au moment d'élaborer le régime canadien de réglementation des participants au marché des dérivés de gré à gré, les autorités canadiennes de réglementation devraient être conscientes du risque d'imposer des exigences contradictoires ou faisant double emploi. Un tel risque se pose dans divers contextes, y compris l'imposition d'exigences incompatibles ou redondantes d'une province ou d'un territoire à un autre, mais comporte aussi la possibilité de conflit avec la réglementation prudentielle intérieure existante ou de chevauchement de cette réglementation. Bien que le CMIC reconnaisse l'importance de veiller à ce que les lacunes du cadre réglementaire soient convenablement comblées, nous croyons qu'il est tout aussi important de veiller à ce que le chevauchement soit évité dans la plus grande mesure possible. À cet égard, il faudrait envisager des régimes de passeport et/ou d'équivalence aussi bien à l'intérieur du Canada qu'auprès des autorités de réglementation internationales, le cas échéant. Nous croyons de plus que pour éviter la duplication des efforts et la possibilité d'une application incohérente, les décisions en matière de passeport ou d'équivalence devraient être prises entre les autorités de réglementation compétentes et ne devraient pas exiger des participants individuels qu'ils demandent un tel traitement. Par exemple : i) les participants canadiens qui sont tenus de s'inscrire devraient être autorisés à traiter uniquement avec leur principale autorité de réglementation des valeurs respective (de façon similaire aux règles existantes applicables aux personnes inscrites du secteur des valeurs mobilières), et ii) les décisions générales en matière d'équivalence devraient être prises tant pour les participants canadiens assujettis à la réglementation appropriée au Canada (c.-à-d. les participants qui sont

6 décembre 2012. Disponible à l'adresse suivante : http://www.lautorite.qc.ca/files//pdf/consultations/derives/2012dec06-91-301-consultations-modelrule-fr.pdf.

[10] Quoique, bien sûr, le CMIC estime que la réglementation canadienne ne devrait pas être *incompatible* avec la réglementation internationale.

inscrits sous la catégorie courtiers de la législation canadienne en valeurs mobilières, ou ceux qui sont assujettis à la réglementation par certains organismes de réglementation prudentielle) que pour les participants internationaux assujettis à des régimes déterminés de réglementation internationale.

Incidence sur les participants canadiens

Avant d'imposer des exigences d'inscription, nous prions les ACVM d'examiner l'incidence éventuelle de ces exigences sur le marché canadien des dérivés de gré à gré et ses participants. Compte tenu de la nature mondiale du marché des dérivés de gré à gré et de la taille relativement petite du Canada au sein de ce marché, les participants canadiens transigent couramment avec des contreparties internationales. En fait, les meilleures données dont nous disposons indiquent que plus de la moitié des opérations sur des produits à taux d'intérêt en dollars canadiens font intervenir au moins une partie qui n'est pas un résident du Canada[11] et plus de 78 % des dérivés de gré à gré des plus grandes banques canadiennes sont transigés avec des contreparties à l'extérieur du Canada.[12] Le maintien d'un accès continu à cette liquidité est d'une importance cruciale pour le bon fonctionnement des marchés. La position relative du Canada au sein du marché rend également difficile l'imposition d'exigences réglementaires supplémentaires ou uniques sans créer d'obstacles à l'accès pour les participants au marché. Si le régime canadien proposé a des incidences extraterritoriales, les participants au marché internationaux pourraient décider qu'il est trop astreignant de se conformer aux exigences canadiennes et choisir d'éviter les opérations avec des contreparties canadiennes. Le CMIC insiste sur l'importance des opérations sur dérivés de gré à gré comme outil d'atténuation du risque systémique et souhaite souligner que le régime réglementaire canadien ne devrait pas entraver la capacité des participants au marché canadien d'accéder aux marchés mondiaux. De telles entraves désavantageraient les participants canadiens et auraient un effet défavorable très important sur la liquidité au sein du marché canadien (pouvant ainsi augmenter éventuellement le risque systémique).

Des renseignements indispensables devraient être réunis

Comme il est indiqué dans la lettre du CMIC sur les utilisateurs finaux, le CMIC donne son appui à un cadre de dispense large reposant sur des principes qui encourage les utilisateurs finaux à participer au marché des dérivés de gré à gré plutôt qu'à une série de critères précis et de tests opérant une démarcation très nette. Nous souhaitons réitérer ce point de vue en ce qui a trait au régime d'inscription proposé tout en soulignant de nouveau le besoin d'éclaircissement pour l'établissement de ces principes. D'autres éclaircissements sont également exigés quant aux principales définitions utilisées dans l'ensemble du document de consultation, comme (notamment) « dérivés » et « grand participant au marché des dérivés ». Pour l'instant, d'après nous, il n'est pas clair quels sont les produits et les participants qui doivent être visés par le régime d'inscription proposé. Le CMIC encourage les ACVM à prendre le temps nécessaire pour examiner les données du répertoire des opérations à mesure qu'elles sont disponibles avant d'élaborer quelque régime d'inscription au Canada. Seuls ces renseignements permettront d'établir l'équilibre approprié entre la réglementation et l'accès aux marchés. De plus, les recommandations énoncées dans le document de consultation imposeraient, en cas de mise en œuvre, un très lourd fardeau administratif et opérationnel, non seulement aux participants au marché, mais aussi aux membres des ACVM. D'après nous, l'infrastructure réglementaire nécessaire pour donner suite à toutes les exigences énoncées dans le document de consultation n'existe pas à l'heure actuelle, et sa mise en place serait extrêmement onéreuse et coûteuse. Par conséquent, nous recommandons vivement une étude des données d'au moins deux ans provenant des répertoires des opérations pour déceler les lacunes réglementaires ou les inquiétudes avant de décider s'il est souhaitable d'introduire un régime d'inscription au Canada à l'égard du marché des dérivés de gré à gré.

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[11] « Limiter la contagion : options et défis liés au renforcement de l'infrastructure des marchés financiers », observations présentées par M. Tim Lane, sous-gouverneur de la Banque du Canada, Society for Worldwide Interbank Financial Telecommunication, Conférence annuelle du Sibos, Toronto, le 19 septembre 2011.

[12] En 2010, 78 % de l'ensemble des opérations sur dérivés de gré à gré des plus grandes banques canadiennes impliquaient une contrepartie située ailleurs qu'au Canada. Source : « La réforme des marchés des dérivés de gré à gré au Canada : document de discussion du Groupe de travail sur les produits dérivés de gré à gré », 26 octobre 2010, page 26, disponible à l'adresse suivante : http://www.bankofcanada.ca/wp-content/uploads/2010/10/reform.pdf.

RÉPONSES PRÉCISES AUX QUESTIONS DU DOCUMENT DE CONSULTATION

Observations générales

Comme il est indiqué plus haut, le marché canadien des dérivés de gré à gré se distingue du marché américain. Il s'agit d'un marché beaucoup plus petit et moins liquide où la grande majorité des opérations impliquent des participants non canadiens. Comme nous l'avons déjà mentionné, les renseignements dont nous disposons donnent à penser que plus de la moitié des opérations sur des produits à taux d'intérêt en dollars canadiens font intervenir au moins une partie qui n'est pas un résident du Canada.[13] De plus, le montant notionnel global des opérations sur dérivés de gré à gré conclues par les six plus grandes banques canadiennes représente 3 % des opérations mondiales sur dérivés de gré à gré.[14] Par conséquent, tout régime de réglementation que propose le comité doit être évalué dans le contexte des caractéristiques propres au marché canadien. Si le régime impose des exigences qui sont trop onéreuses, et que les coûts l'emportent sur les avantages, les participants non canadiens pourraient bien choisir d'éviter de conclure des opérations sur dérivés de gré à gré avec des participants au marché canadiens, ce qui réduira la liquidité au Canada. Nous avons vu cette situation se produire aux États-Unis lorsque certaines banques non américaines ont cessé de transiger avec des entités américaines afin d'éviter l'inscription aux États-Unis.[15] Si des banques étrangères prennent des mesures aussi extrêmes à l'égard du marché américain, qui est un marché beaucoup plus grand que celui du Canada, il est raisonnable de présumer que certaines banques étrangères pourraient bien adopter le même point de vue à l'égard du marché canadien, notamment si l'inscription est exigée auprès de plusieurs autorités canadiennes de réglementation. À tout le moins, si les courtiers non canadiens sont tenus de s'inscrire, même s'ils sont dispensés de la majorité des exigences applicables aux courtiers inscrits, les participants au marché pourraient bien être incités à déplacer leurs opérations sur dérivés de gré à gré à l'étranger.

Le CMIC estime donc qu'il est inopportun au Canada de suivre une approche de type américain en ce qui a trait à l'inscription et que le MiFID représente une approche convenant davantage au marché canadien. Le CMIC estime qu'une approche plus utile et efficace pour le marché canadien serait d'imposer des obligations minimales en matière de conduite des affaires à toutes les contreparties professionnelles aux opérations sur dérivés (« parties professionnelles »), lesquelles engloberaient toutes les parties exerçant des activités a) de maintien de marchés des dérivés de gré à gré, b), de la manière décrite ci-dessous, de négociation ou d'intermédiation à l'égard des dérivés de gré à gré moyennant une commission ou un profit ou c) de conseils sur les dérivés de gré à gré.

Nous présentons ci-après de plus amples éclaircissements i) sur les opérations qui devraient être définies comme un « dérivé » à de telles fins, ii) sur la signification « d'exercer l'activité de courtier » et « l'activité de conseiller », dans chaque cas, à l'égard des dérivés de gré à gré et iii) sur les obligations minimales en matière de conduite des affaires qui devraient s'appliquer aux parties professionnelles.

> *i) Définition de « dérivé » :* Pour ce qui est des opérations qui devraient être définies comme des opérations sur « dérivés » à de telles fins, le document de consultation ne donne pas d'éclaircissement, bien que l'alinéa 6.1a) nous en donne un certain aperçu. Le CMIC est d'avis que la définition d'un « dérivé » devrait à tout le moins exclure toutes les opérations qui ne sont pas considérées comme un dérivé en vertu du document sur les modèles de règlement sur le champ

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13 *Supra, note 11.*

14 D'après les états financiers non audités publiés pour le deuxième trimestre de l'exercice financier 2013 pour les six plus grandes banques canadiennes et des données statistiques sur le marché des dérivés pour la fin décembre 2012 publiées par la Banque des Règlements Internationaux. Ce chiffre n'est qu'approximatif et n'a pas été rajusté pour tenir compte des questions de double comptabilisation ou de temporisation.

15 Voir le témoignage de M. Christopher Giancarlo devant la Sous-commission des services financiers de la Chambre, indiquant que les contreparties étrangères évitent les courtiers américains, lesquelles contreparties étrangères ont déclaré aussi bien publiquement que privément qu'elles ne s'inscriront pas auprès des autorités américaines de réglementation; disponible à l'adresse suivante : http://financialservices.house.gov/uploadedfiles/hhrg-112-ba16-wstate-cgiancarlo-20121212.pdf. Voir également l'information publiée par les médias portant sur le retrait des contreparties étrangères des marchés américains; disponible aux adresses suivantes : http://online.wsj.com/article/SB10001424052970203400604578072221988442386.html et http://www.ft.com/intl/cms/s/0/a9a6f1be-ae2b-11e2-82b8-00144feabdc0.html#axzz2VFU6ZMqL.

d'application et sur les répertoires des opérations. De plus, comme il est indiqué et examiné plus en détail aux pages 5 à 7 (inclusivement) de la lettre du CMIC sur les modèles de règlement sur le champ d'application et sur les répertoires des opérations, il y a d'autres opérations qui ne devraient pas être considérées comme un « dérivé ».[16]

ii) L'activité de courtier/conseiller en dérivés de gré à gré : Pour ce qui est de la définition de « l'activité de courtier » en dérivés de gré à gré ou de « l'activité de conseiller » en dérivés de gré à gré, la proposition faite aux articles 6.1 et 6.2 du document de consultation est trop large. Le CMIC estime i) que la définition de « l'activité de courtier en dérivés » devrait être limitée à la conclusion d'une opération sur dérivés de gré à gré (y compris les novations d'une opération sur dérivés de gré à gré existante) pour son propre compte, et l'élément déclencheur de l'activité devrait se limiter au fait d'agir comme un teneur de marché ou de négocier dans l'intention d'être rémunéré ou rétribué; et ii) que la définition de « conseil » à l'égard d'une opération sur dérivés de gré à gré devrait se limiter à la prestation de conseils en placements spécifiques et personnalisés à une personne physique dans le cadre de la conclusion d'une opération sur dérivés de gré à gré, et l'élément déclencheur de l'activité devrait se limiter à la prestation fréquente ou périodique de ces conseils lorsque le fournisseur de ces conseils s'attend à être rémunéré ou rétribué. Le CMIC estime que tous ses membres qui sont des caisses de retraite ne devraient pas être considérés comme des « parties professionnelles » mais plutôt comme des « utilisateurs finaux » et qu'ils ne devraient être en aucun cas tenus de s'inscrire.

iii) Obligations minimales en matière de conduite des affaires : Les obligations minimales en matière de conduite des affaires applicables à toutes les parties professionnelles seraient celles qui sont énoncées au sous-alinéa 7.2b)iii)A) (*Connaissance du client ou de la contrepartie*), au sous-alinéa 7.2b)iii)C) (*Conflits d'intérêts*), à l'alinéa 7.1c)i) (*Systèmes de conformité et de gestion du risque*), à l'alinéa 7.1c)iii) (*Tenue de dossiers*) et à l'alinéa 7.1d) (*Honnêteté*) du document de consultation.

Tant que les parties professionnelles traitent avec une partie qualifiée[17], aucune autre obligation (parmi celles qui font l'objet du document de consultation)[18] ne serait imposée. Lorsque des parties professionnelles traitent avec des parties non qualifiées, le CMIC estime que des obligations relatives à la convenance et à l'équité (comme il est prévu aux sous-alinéas 7.2b)iii)B) et D) du document de consultation) devraient être également imposées. Des obligations supplémentaires pourraient aussi s'appliquer dans de telles circonstances (bien qu'elles puissent ne pas être nécessaires dans tous les cas), comme les obligations d'inscription, les obligations de donner un avis à la Commission des valeurs mobilières compétente, ou les obligations supplémentaires énoncées au sous-alinéa 7.2b)ii) du document de consultation, ou les obligations en matière de compétence relativement à une partie professionnelle ou à ses négociants/conseillers traitant avec des parties non qualifiées.

Le CMIC considère que l'approche qui précède convient au marché canadien des dérivés de gré à gré. Comme le souligne le comité dans le document de consultation, les dérivés se distinguent des valeurs mobilières. L'objectif d'une autorité de réglementation des valeurs mobilières est de « protéger les investisseurs contre les pratiques déloyales, irrégulières ou frauduleuses et favoriser des marchés financiers

[16] Ces opérations comprennent les opérations sur dérivés négociés en Bourse, les opérations sur marchandises physiques, les opérations de change au comptant « à long terme », tous les contrats de jeux et tous les contrats d'assurance. Veuillez vous reporter à l'ensemble de nos observations sur la définition d'un « dérivé » dans la lettre du CMIC sur les modèles de règlement sur le champ d'application et sur les répertoires des opérations.

[17] Le CMIC reconnaît qu'une terminologie différente est utilisée au Canada pour désigner le concept de partie avertie (comme « partie qualifiée », « investisseur qualifié », « contrepartie qualifiée » et « client autorisé »). Lorsque l'expression « partie qualifiée » est utilisée dans la présente lettre, le CMIC renvoie au concept d'une partie avertie en général et ne défend pas l'emploi d'une expression ou d'une définition plutôt qu'une autre, sauf tel qu'il est expressément indiqué dans la présente lettre.

[18] Le CMIC reconnaît qu'il y a des obligations différentes pour d'autres aspects de la réforme des dérivés de gré à gré, comme les obligations relatives aux engagements du G-20 en matière de déclaration des opérations de compensation par une contrepartie centrale et de fonds propres et de garantie.

justes et efficaces en plus de promouvoir la confiance en ceux-ci ».[19] Le marché canadien des dérivés de gré à gré n'a pas démontré qu'il existe des problèmes en matière d'opérations inéquitables, inconvenantes ou frauduleuses ni un besoin de protéger les « investisseurs » concluant des opérations sur dérivés. La vaste majorité des opérations sur dérivés de gré à gré sont conclues au Canada entre des parties qualifiées (averties). Il n'y a donc pas le même besoin de « protéger » ces « investisseurs » comme dans le cas du marché des valeurs mobilières avec les petits investisseurs.

Comme nous l'avons indiqué dans nos observations préliminaires, l'inscription des contreparties à des dérivés de gré à gré ne figure pas dans la liste des engagements pris dans le cadre du G-20. Les objectifs déclarés dans les engagements du G-20 à l'égard des dérivés de gré à gré à Pittsburgh[20] sont d'améliorer la transparence sur les marchés des produits dérivés, d'atténuer les risques systémiques et d'assurer une protection contre les abus des marchés. Le CMIC estime que ces objectifs seraient atteints de façon efficace en imposant des obligations relatives à la déclaration des opérations, à la compensation d'opérations normalisées par une contrepartie centrale, des obligations minimales en matière de conduite des affaires et des obligations relatives à un capital et à une marge supérieurs pour certaines opérations non compensées par une contrepartie centrale, et non en imposant des obligations d'inscription comme il est prévu dans le document de consultation. En fait, nous croyons fermement que ces obligations d'inscription auraient une incidence négative sur la liquidité du marché canadien, ce qui pourrait bien entraîner comme conséquence involontaire l'augmentation du risque systémique.

Questions et réponses

Q1 : Les fonds d'investissement devraient-ils être soumis aux mêmes critères d'inscription que les autres participants au marché des dérivés? Dans la négative, quels critères d'inscription devraient s'appliquer aux fonds d'investissement?

Le CMIC ne compte pas de fonds d'investissement parmi ses membres[21]. Par conséquent, le CMIC n'a pas d'observations à présenter sur cette question et il encourage les autres organisations de l'industrie à présenter des observations au Comité sur cette question.

Q2 : Quel est le critère approprié pour déterminer si une personne est une partie qualifiée? Ce critère devrait-il reposer sur les ressources financières ou sur la compétence du client ou de la contrepartie? S'il repose sur les ressources financières, devrait-il porter sur l'actif net du client ou de la contrepartie, ses revenus annuels bruts ou d'autres facteurs?

Le CMIC soutient vigoureusement que les normes servant à établir si une personne est une partie qualifiée devraient être les plus objectives possible et ne devraient pas exiger d'évaluations subjectives, comme la compétence, l'expérience ou les connaissances d'une personne. Si de tels éléments subjectifs étaient inclus, ils ne devraient pas s'appliquer à toutes les catégories de la définition, mais ne devraient être que d'une application limitée, et dans chaque cas, les parties devraient être en mesure de se fier uniquement aux déclarations qu'a faites une partie à l'égard de ces questions subjectives. À tout le moins, la définition d'une « partie qualifiée » en vertu de la réglementation canadienne i) devrait englober toutes les personnes respectant les critères d'un « contractant qualifié » (*Eligible Contract Participant*) en vertu de Dodd-Frank, ii) devrait être la même dans toutes les provinces, et iii) devrait inclure un « opérateur en couverture » comparable à la définition que l'on retrouve dans la *Loi sur les instruments dérivés* (Québec).[22]

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[19] Mandat de la Commission des valeurs mobilières de l'Ontario prévu par la loi. Voir http://www.osc.gov.on.ca/fr/About_about_index.htm.

[20] Voir le paragraphe 13. http://www.G-20.utoronto.ca/2009/2009communique0925-fr.html.

[21] Le CMIC compte toutefois des caisses de retraite parmi ses membres. Il s'agit de grandes caisses de retraite du secteur public qui, à notre avis, ne sont pas le type de « fonds d'investissement » que vise cette question.

[22] En vertu du paragraphe 12 de l'article 3 de la *Loi sur les instruments dérivés* (Québec), un opérateur en couverture est défini comme une « personne qui, compte tenu de son activité : *a)* est exposée à un ou plusieurs risques se rapportant à cette activité, dont des risques d'approvisionnement, de crédit, de change, environnementaux ou de fluctuation de prix d'un sous-jacent; *b)* recherche la couverture d'un tel risque en réalisant une opération ou une série d'opérations sur dérivés dont le sous-jacent est celui qui est directement associé à ce risque, ou un autre sous-jacent qui lui est apparenté ».

Q3 : L'inscription à titre de courtier en dérivés devrait-elle faire l'objet d'une dispense *de minimis* similaire à celle adoptée par les organismes de réglementation américains? Dans l'affirmative, expliquez pourquoi.

Si l'un des objectifs de l'inscription est de s'attaquer aux questions de la stabilité financière et du risque systémique, le processus d'inscription ne devrait pas englober les petits courtiers en dérivés et une dispense *de minimis* est donc opportune. Au Canada, les participants au marché sont d'un nombre limité comparativement aux États-Unis. Par conséquent, le CMIC estime qu'il n'est pas opportun d'imposer des obligations qui découragent inutilement la participation au marché lorsque les activités du participant n'ont pas d'incidence sur le risque systémique.

De plus, si les participants au marché étrangers sont finalement tenus de s'inscrire au Canada, le CMIC est d'avis qu'il devrait y avoir une dispense *de minimis*. Les participants au marché étrangers procurent au marché canadien une liquidité très souhaitable, offrant souvent une large gamme de produits aux plus grands participants au marché, comme les caisses de retraite, que les contreparties canadiennes du côté vente ne sont pas en mesure d'offrir. Le CMIC estime que si les autorités canadiennes de réglementation obligent finalement les participants au marché étrangers à s'inscrire, la liquidité au Canada serait grandement réduite, ce qui serait nuisible pour les Canadiens. Là encore, un examen attentif des données de déclaration des opérations sur deux ans avant de décider s'il est souhaitable de mettre en œuvre un régime d'inscription permettrait d'éviter une compression importante de la liquidité.

Q4 : Les catégories « courtier en dérivés », « conseiller en dérivés » et « grand participant au marché des dérivés » sont-elles adéquates? Le comité devrait-il songer à recommander des catégories différentes ou supplémentaires?

Le CMIC est d'avis que la catégorie « grand participant au marché des dérivés » ne convient pas au Canada. Par exemple, certains membres du CMIC qui sont des caisses de retraite du secteur public pourraient éventuellement être considérés comme détenant des positions importantes. Toutefois, il est évident que ces utilisateurs finaux du côté achat n'exercent pas des activités de maintien du marché des dérivés. On ne peut ainsi établir clairement quel risque est abordé si ces participants sont obligés de s'inscrire. Le CMIC ne croit pas que des catégories différentes ou supplémentaires soient nécessaires.

Q5 : Les facteurs énumérés sont-ils les facteurs appropriés à considérer pour déterminer si une personne exerce l'activité de courtier en dérivés? Expliquez pourquoi.

Les facteurs énumérés sont beaucoup plus larges que ceux prévus à l'égard d'un « courtier en swap » en vertu de Dodd-Frank. La catégorie « faire du démarchage direct ou indirect » ne ressemble à rien qui indiquerait qu'un participant exerce des activités de courtier en dérivés. Le document de consultation mentionne la publicité sur Internet destinée à encourager les résidents locaux à effectuer des opérations sur dérivés comme exemple d'une telle activité. Ce type d'activité est relié au marché des valeurs mobilières de détail et n'a rien à voir avec ce que l'on associe habituellement à une « activité de courtier en dérivés ». Le CMIC estime que dans le seul cas où une partie conclut une opération sur dérivés pour son propre compte, une telle activité devrait être considérée comme l'«exercice de l'activité de courtier en dérivés ». Pour ce qui est du facteur « fournir des services de compensation à des tiers », se reporter à notre réponse à la question 7 ci-après.

Q6 : Le Comité ne propose pas d'inclure la fréquence élevée des opérations sur dérivés comme facteur à considérer pour déterminer si une personne est tenue de s'inscrire à titre de courtier en dérivés. La fréquence élevée des opérations sur dérivés devrait-elle entraîner l'obligation d'inscription lorsqu'une entité n'est pas assujettie par ailleurs à l'obligation d'inscription à titre de courtier en dérivés ou de grand participant au marché des dérivés? Le facteur entraînant l'obligation d'inscription des entités qui effectuent fréquemment des opérations sur dérivés à des fins de spéculation devrait-il être différent de celui applicable aux entités qui les effectuent principalement dans le but de gérer leurs risques commerciaux?

Le CMIC est d'avis que les facteurs devraient reposer sur la conduite d'un participant, plutôt que sur la fréquence des opérations de ce participant. Si la fréquence des opérations était incluse en tant que facteur et que les opérateurs en couverture exerçant fréquemment des activités (qui sont souvent des utilisateurs finaux) étaient donc assujettis à l'inscription alors qu'ils ne seraient par ailleurs pas tenus de s'inscrire, cela pourrait les décourager de faire des opérations appropriées de couverture. Un tel résultat serait incompatible avec l'atténuation du risque systémique. Le CMIC estime qu'il n'y a pas de corrélation nécessaire entre la fréquence des opérations et les risques rattachés à de telles opérations.

Q7 : La proposition d'obliger les parties qui fournissent des services de compensation à s'inscrire à titre de courtiers en dérivés est-elle pertinente? L'entité qui fournit ces services uniquement à des parties qualifiées devrait-elle être dispensée de l'application de la réglementation des courtiers en dérivés?

Le CMIC estime qu'il est inutile, voire nuisible, d'obliger les parties qui fournissent des services de compensation à s'inscrire à titre de courtiers en dérivés. Si la compensation est obligatoire, l'accès aux contreparties centrales de compensation deviendra crucial. Si l'inscription à titre de courtier est obligatoire pour les parties fournissant des services de compensation, elle pourrait décourager des entités, notamment des entités étrangères, de fournir des services de compensation aux participants au marché canadiens. De plus, le document sur la compensation par contrepartie centrale propose que les contreparties centrales de compensation soient tenues d'être reconnues au Canada (lorsque la compensation vise des participants canadiens) et une partie de ce processus de reconnaissance comprend un examen de la gestion du risque et des critères d'adhésion (entre autres choses) de cette contrepartie centrale de compensation par les autorités canadiennes de réglementation des valeurs mobilières. Par ailleurs, d'autres règles sont proposées relativement à la compensation par contrepartie centrale (notamment, la séparation et la transférabilité) lesquelles protégeront également aussi bien les clients que les parties faisant la compensation pour les clients.

Quant à la deuxième partie de la question 7, puisque le CMIC est d'avis que toutes les parties traitant avec des parties qualifiées devraient être dispensées de l'inscription, notre réponse est oui.

Q8 : Les facteurs répertoriés ci-dessus sont-ils les facteurs appropriés à considérer pour déterminer si une personne exerce l'activité consistant à conseiller autrui en matière de dérivés?

Aucun des membres du CMIC n'exerce d'activités consistant uniquement en la prestation de conseils en matière de dérivés. Par conséquent, le CMIC n'a pas d'observations à présenter sur cette question et encourage les autres organisations de l'industrie à présenter des observations au comité.

Q9 : Les facteurs répertoriés pour déterminer si une entité est un grand participant au marché des dérivés sont-ils appropriés? Dans la négative, quels facteurs devraient être pris en compte? Quels facteurs le Comité devrait-il examiner pour déterminer si une entité, étant donné son exposition au marché des dérivés, pourrait représenter un risque important pour la stabilité financière du Canada ou d'une province ou d'un territoire du Canada?

Étant donné qu'il n'y a pas de catégorie équivalente à la catégorie « grand participant au marché des dérivés », à notre connaissance, dans quelque territoire du G-20 (autre que les États-Unis), nous nous inquiétons sérieusement de la création d'un régime d'inscription qui constituerait une caractéristique unique dans un plus petit marché comme le Canada. Par conséquent, comme il est indiqué sous la question 4 plus haut, le CMIC est d'avis que la catégorie « grand participant au marché des dérivés » ne convient pas au Canada.

Q10 : La proposition du Comité d'inscrire les représentants de courtiers en dérivés seulement lorsqu'ils font affaire avec des clients ou avec des contreparties qui sont des parties non qualifiées est-elle pertinente?

Comme il est indiqué plus haut à la rubrique « Observations générales », le CMIC estime que les obligations d'inscription ne devraient être imposées que lorsqu'une partie professionnelle fait affaire avec une partie non qualifiée. Même dans de tels cas, l'inscription de représentants individuels peut ne pas être nécessaire à la condition que la partie professionnelle dispose de procédures de conformité appropriées et suffisantes pour veiller à ce que les personnes faisant affaire avec une telle partie non qualifiée soient compétentes et dûment supervisées.

Q11 : Serait-il opportun d'imposer des obligations de compétence particulières aux catégories ou aux classes?

Le CMIC estime que l'imposition d'obligations de compétence, que ce soit des obligations spécifiques aux catégories ou aux classes ou des obligations générales pour les particuliers, ne présente pas d'avantages pour les participants au marché des dérivés de gré à gré et est inutile pour l'intégrité du marché des dérivés de gré à gré en tant qu'ensemble. Le CMIC n'a pas connaissance de questions relatives à la conduite sur le marché auxquelles ces obligations sont censées s'attaquer et aucune preuve n'a été présentée pour justifier de telles obligations. À notre connaissance, aucun autre territoire étranger, notamment en vertu de Dodd-Frank ou de l'EMIR[23] n'impose de telles obligations détaillées de compétence à l'égard des participants au marché des dérivés de gré à gré. Il s'agit d'obligations qui ont bien fonctionné au sein du marché des valeurs mobilières et qui sont appropriées pour celui-ci. Toutefois, le CMIC estime qu'elles ne conviennent pas ou qu'elles sont inutiles pour le marché canadien des dérivés de gré à gré où les modèles d'entreprise se fient à des règles de gouvernance et de gestion du risque internes pour déterminer la compétence des personnes exerçant des activités de courtiers ou de conseillers en produits dérivés. De plus, comme il est indiqué plus haut, la vaste majorité des opérations sur dérivés de gré à gré sur le marché canadien sont conclues uniquement avec des parties averties, qui comprennent les caractéristiques fondamentales des marchés des dérivés et ne font pas affaire avec quiconque ne fait pas preuve de compétence dans le domaine. Il se peut que dans le cas où un courtier conclut une opération sur dérivés de gré à gré avec une partie non qualifiée, certaines obligations de compétence soient justifiées à l'égard des courtiers ou conseillers faisant directement affaire avec cette partie non qualifiée.

Q12 : Les obligations de compétence proposées sont-elles appropriées?

Voir notre réponse à la question 11 ci-dessus.

Q13 : La proposition du Comité d'imposer aux personnes inscrites l'obligation d'« agir avec honnêteté et de bonne foi » est-elle appropriée?

Le CMIC est d'avis que cette obligation d'agir avec honnêteté et de bonne foi devrait s'appliquer à tous les participants au marché, qu'ils soient inscrits ou non.

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23 Le Règlement sur l'infrastructure du marché européen (*European Market Infrastructure Regulation*) (« EMIR ») que le Parlement européen a adopté le 29 mars 2012, disponible à l'adresse suivante : http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+20120329+SIT-01+DOC+WORD+V0//FR&language=FR, à l'article 3.

Q14 : Les obligations d'inscription décrites sont-elles appropriées pour les courtiers en dérivés, les conseillers en dérivés et les grands participants au marché des dérivés? Y a-t-il d'autres obligations réglementaires qui devraient s'appliquer à l'ensemble des catégories de personnes inscrites? Expliquez vos réponses.

Comme il est indiqué plus haut, le CMIC prie avec insistance les ACVM de reporter la décision à savoir s'il y a lieu de mettre en œuvre un régime d'inscription avant d'avoir obtenu et étudié les données d'au moins deux ans provenant des répertoires des opérations et d'avoir établi s'il y a des questions relatives à la conduite sur le marché qui ne sont pas abordées du point de vue réglementaire. S'il est finalement décidé qu'un régime d'inscription est exigé, le CMIC estime qu'une telle obligation ne devrait être imposée que dans le cas où un courtier en dérivés conclut (ou un conseiller en dérivés donne des conseils concernant) une opération sur dérivés de gré à gré avec une partie non qualifiée. Dans de telles circonstances limitées, le CMIC est d'avis que les obligations d'inscription sont en général appropriées, si ce n'est de l'obligation d'assurance pour les motifs décrits ci-après dans notre réponse à la question 17. Toutefois, il serait plus approprié d'imposer des obligations uniquement lorsque les ACVM auront établi qu'il y a des questions précises relatives à la conduite sur le marché qui ne sont pas abordées en vertu des règles existantes.

Q15 : Les courtiers en dérivés qui réalisent des opérations avec des parties qualifiées devraient-ils être soumis à des normes de conduite comme celles abordées au sous-alinéa 7.2b)iii) ci-dessus? Dans l'affirmative, indiquez les normes qui devraient s'appliquer.

Oui. Voir notre commentaire à la rubrique « Observations générales ».

Q16 : Avez-vous une préférence pour l'une ou l'autre des deux propositions de réglementation des courtiers en dérivés qui réalisent des opérations avec des contreparties qui sont des parties non qualifiées? Le Comité devrait-il examiner d'autres options pour la résolution des conflits d'intérêts? Expliquez votre réponse.

Le CMIC est d'avis que la seconde proposition est préférable parce qu'elle est plus transparente. La première proposition peut être impossible à mettre en œuvre du point de vue des délais lorsque des parties doivent agir rapidement du point de vue du marché. De plus, la première proposition est tributaire de la réception de conseils d'un conseiller inscrit qui fournirait des services de conseils à une partie non qualifiée. De l'avis du CMIC, il serait difficile de trouver un conseiller inscrit qui serait disponible pour fournir de tels services, plus particulièrement parce qu'il est peu probable que cette partie non qualifiée soit un client existant du conseiller inscrit.

Pour ce qui est de la seconde proposition, il faudrait énoncer clairement que le courtier en dérivés ne fournit pas des conseils parce qu'il informe la contrepartie qu'elle a le droit d'obtenir des conseils indépendants avant de conclure une opération. De plus, il devrait être énoncé clairement que la partie non qualifiée peut signer la reconnaissance dès le départ dans le cadre de la procédure et du protocole normaux d'ouverture du compte et du processus usuel de connaissance du client, plutôt que d'exiger l'obtention d'une reconnaissance à l'égard de chaque opération.

Q17 : Les obligations recommandées conviennent-elles aux personnes inscrites qui sont des courtiers en dérivés? Dans la négative, expliquez pourquoi. Est-ce que d'autres obligations réglementaires devraient s'appliquer aux courtiers en dérivés inscrits?

Voir notre réponse à la question 11 pour connaître le point de vue du CMIC sur les obligations de compétence. Le CMIC estime que les obligations d'assurance prévues à l'alinéa 7.1b)iii) du document de consultation ne conviennent pas au marché des dérivés de gré à gré où la grande majorité des garanties détenues par un courtier seraient détenues sous forme électronique. Les obligations réglementaires supplémentaires suivantes devraient s'appliquer aux courtiers en dérivés inscrits : i) des évaluations de l'exposition au risque qui sont compatibles avec la définition d'« *Exposure* » de l'ISDA devraient être offertes à toute contrepartie non qualifiée sur demande, et ii) des confirmations des opérations devraient être remises en temps utile aux contreparties.

Q18 : Les obligations recommandées conviennent-elles aux personnes inscrites qui sont des conseillers en dérivés? Dans la négative, expliquez pourquoi. Est-ce que d'autres obligations réglementaires devraient s'appliquer aux conseillers en dérivés inscrits?

Aucun des membres du CMIC n'exerce d'activités consistant uniquement en la prestation de conseils en matière de dérivés. Par conséquent, le CMIC n'a pas d'observations à présenter sur cette question et encourage les autres organisations de l'industrie à présenter des observations au comité.

Q19 : Le Comité recommande que les courtiers en dérivés étrangers qui réalisent des opérations avec des entités canadiennes qui sont des parties qualifiées soient tenus de s'inscrire, mais dispensés de certaines obligations d'inscription. Cette recommandation est-elle judicieuse? Expliquez pourquoi.

Le fait d'imposer des obligations d'inscription supplémentaires aux participants qui sont des résidents étrangers limitera gravement la liquidité du marché canadien. Comme il est mentionné à la rubrique « Observations générales » plus haut, une forte tranche de la liquidité du marché canadien provient de participants non canadiens.[24] Si les courtiers en dérivés étrangers qui réalisent des opérations avec des parties qualifiées sont tenus de s'inscrire, même s'ils peuvent être dispensés de certaines obligations d'inscription, on court sérieusement le risque de les voir choisir de ne pas réaliser des opérations avec des participants au marché canadiens. Cela aura comme effet de réduire la liquidité au sein du marché canadien et qu'il sera donc plus difficile pour les utilisateurs finaux de conclure des opérations de couverture. Par ailleurs, les courtiers en dérivés étrangers seront assujettis à la réglementation de leur territoire d'origine et l'imposition d'obligations d'inscription additionnelles en vertu du régime canadien à l'égard de ces courtiers pourrait être incompatible avec le principe de l'adhésion courtoise et porter atteinte à la capacité des participants au marché canadiens d'obtenir une conformité de substitution dans des territoires étrangers.

Q20 : La recommandation du Comité de dispenser les courtiers en dérivés étrangers de certaines obligations d'inscription applicables au Canada s'ils sont assujettis à des obligations équivalentes dans leur territoire d'origine est-elle judicieuse? Expliquez pourquoi.

Selon le CMIC, le critère approprié dans le présent cas n'est pas le fait que les courtiers en dérivés étrangers aient des obligations « équivalentes » dans leur territoire d'origine, mais des obligations « comparables » ou « similaires ». Le concept de conformité de substitution et de réciprocité entre les autorités de réglementation à l'égard des engagements du G-20 sera difficile à appliquer si des territoires (particulièrement des territoires relativement petits comme le Canada) exigent que le territoire étranger ait des obligations « équivalentes ». Des obligations qui donnent des résultats comparables devraient être suffisantes.

Q21 : Les courtiers et les conseillers en dérivés étrangers qui ne sont pas inscrits au Canada devraient-ils être dispensés des obligations d'inscription s'ils sont soumis à ces obligations uniquement parce qu'ils réalisent des opérations avec le gouvernement fédéral, les gouvernements provinciaux du Canada ou la Banque du Canada?

Il n'est pas opportun d'accorder une dispense d'inscription sur la seule base qu'un courtier en dérivés réalise des opérations avec le gouvernement fédéral, les gouvernements provinciaux du Canada ou la Banque du Canada. Cela fait bifurquer la liquidité du marché vers des entités souveraines comparativement à d'autres utilisateurs finaux. Toutefois, comme il est indiqué à la rubrique « Observations générales », le CMIC est d'avis qu'une partie professionnelle devrait être dispensée de l'inscription si elle réalise des opérations avec une partie qualifiée (et non uniquement avec une entité souveraine canadienne ou la Banque du Canada).

Q22 : La proposition visant à dispenser les sociétés d'État dont les obligations sont pleinement garanties par le gouvernement concerné de l'obligation d'inscription à titre de grand participant au marché des dérivés et, dans les circonstances susmentionnées, de courtier en dérivés est-elle

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24 Par exemple, au 1er février 2011, près de la moitié de l'ensemble des swaps de taux d'intérêt libellés en dollars canadiens ne sont pas conclus par l'une ou l'autre des six grandes banques canadiennes. Source : CMIC « Data Analysis Report », 1er février 2011; enquête triennale de juin 2010 de la Banque des Règlements Internationaux.

pertinente? Les entités telles que les sociétés d'État dont les obligations ne sont pas pleinement garanties, les gouvernements étrangers et les sociétés leur appartenant ou sous leur contrôle devraient-elles avoir droit à des dispenses comparables? Expliquez votre réponse.

Comme il est indiqué plus haut à notre réponse à la question 4, le CMIC est d'avis qu'il ne devrait pas y avoir une catégorie d'inscription distincte à titre de grand participant au marché des dérivés. De plus, comme il est indiqué dans notre réponse à la question 21 ci-dessus, le CMIC est d'avis que la création de dispenses spéciales pour des types d'entités précis fait bifurquer la liquidité au sein du marché. Les dispenses devraient reposer sur le fait qu'une partie est une partie qualifiée ou non, ce qui devrait en soi être établi par des critères objectifs.

Q23 : Les dispenses d'inscription proposées conviennent-elles? D'autres dispenses d'inscription ou des obligations d'inscription n'ayant pas été mentionnées dans le présent document devraient-elles être envisagées?

Voir les réponses aux questions 21 et 22 ci-dessus, ainsi que nos observations à la rubrique « Observations générales » de la présente lettre.

CONCLUSION

Le CMIC considère qu'un engagement continu auprès des ACVM est déterminant pour l'élaboration d'un cadre réglementaire qui respecte les engagements du G-20 et atteint les objectifs prévus de politiques publiques. L'inclusion judicieuse par les organismes de réglementation des thèmes énoncés à la rubrique « Aperçu » de la présente lettre contribuera sensiblement à la réussite de l'élaboration d'un cadre canadien efficace de réglementation des principaux participants du marché des dérivés de gré à gré.

Comme nous l'avons souligné dans nos observations antérieures, chaque sujet relatif à la réglementation des dérivés de gré à gré est en corrélation avec tous les autres aspects. À cet égard, le CMIC se réserve le droit de présenter des observations supplémentaires relativement au régime d'inscription proposé après la publication d'autres documents de consultation et de modèles et de projets de règlements.

Le CMIC espère que ses observations seront utiles à l'élaboration du régime de réglementation du marché des dérivés de gré à gré et que les ACVM tiendront compte des incidences pratiques pour tous les participants au marché qui seront assujettis à cette réglementation. Le CMIC se réjouit de la possibilité de discuter de la présente réponse avec des représentants des ACVM.

Les points de vue exprimés dans la présente lettre sont ceux des membres du CMIC indiqués ci-dessous :

Bank of America Merrill Lynch
Banque de Montréal
Caisse de dépôt et placement du Québec
L'Office d'investissement du Régime de pensions du Canada
Banque Canadienne Impériale de Commerce
Deutsche Bank A.G., Canada Branch
Healthcare of Ontario Pension Plan
Banque HSBC Canada
Succursale de Toronto de JP Morgan Chase Bank, N.A.
Société Financière Manuvie
Banque Nationale du Canada
Société d'administration d'OMERS
Régime de retraite des enseignantes et des enseignants de l'Ontario
Banque Royale du Canada
La Banque de Nouvelle-Écosse
La Banque Toronto-Dominion

CPP
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BOARD

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Alberta Securities Commission
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British Columbia Securities Commission
Manitoba Securities Commission
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June 17, 2013

Re: Canadian Securities Administrators ("CSA") Consultation Paper 91-407 Derivatives: Registration (the "Consultation Paper")

INTRODUCTION

Canada Pension Plan Investment Board ("CPP Investment Board") is pleased to provide its comments on the Consultation Paper dated April 18, 2013 published by the Canadian Securities Administrators Derivatives Committee (the "Committee") relating to the proposal for the regulation of key OTC derivatives market participants through the implementation of a registration regime.

CPP Investment Board is a member of the Canadian Market Infrastructure Committee ("CMIC"). CPP Investment Board is a signatory to the CMIC letter being submitted in relation to the Consultation Paper, as it has been to all previous CMIC letters to the CSA. However, this particular Consultation Paper raises a number of issues of serious and unique concern to CPP Investment Board. Accordingly, CPP Investment Board concluded that it was important to submit its own letter in addition to the CMIC letter in order to address the unique issues raised for CPP Investment Board by the CSA registration proposals.

SUMMARY OF SUBMISSION

CPP Investment Board does not believe that the Large Derivative Participant (LDP) category is either necessary or appropriate for Canada given the characteristics of the Canadian market. No evidence supporting the need to create such a registration category has been provided. Specifically, CPP Investment Board strongly urges the CSA to reconsider any proposal that would cause CPP Investment Board to be subject to registration as a LDP. We do not see any need for CPP Investment Board to be designated as a LDP. Our reasons, in summary, are as follows:

1. CPP Investment Board is a unique organization created by an Act of Parliament to manage the assets of the Canada Pension Plan. The activities of the CPP Investment Board are overseen by an independent board of directors and the CPP Investment Board is accountable to the Parliament of Canada and to the federal and provincial finance ministers.

2. CPP Investment Board is subject to a comprehensive statutory framework pursuant to which the assets it manages are required to be invested in accordance with the provisions of the *Canada Pension Plan Investment Board Act* and the accompanying regulations, as well as with the by-laws and investment policies of CPP Investment Board.

3. CPP Investment Board adheres to the highest form of best practices in both its risk management and corporate governance.

4. CPP Investment Board is only engaged in OTC derivatives as a buy-side end-user, enters into transactions only with other sophisticated counterparties and conducts no market-making activities of any nature.

5. No reasons for imposing various possible registration requirements on CPP Investment Board have been provided in the Consultation Paper or elsewhere.

6. There has been no evidence, anecdotal or otherwise, that would suggest or require the imposition of a registration regime on CPP Investment Board with respect to its involvement in the OTC derivatives market.

In summary, the existing accountability to federal and provincial finance ministers, the existing statutory framework to which the CPP Investment Board is subject, the best practices standards adopted by the CPP Investment Board in relation to both corporate governance and risk management represent, as a whole, a robust and complete legal, regulatory and compliance regime which has been recognized globally as setting a world class standard for national pension plans and funds. As a result of these characteristics, we submit that there is no need for provincial securities regulators to impose a registration regime on the CPP Investment Board in relation to its OTC derivatives activities.

In addition, CPP Investment Board is very concerned about the creation of a burdensome Canadian registration regime as a whole. CPP Investment Board has a global investment mandate in order to achieve the returns required to support the retirement needs of Canadians and does so in a manner that is not constrained by or overly dependent upon Canadian economic growth. Our ongoing access to global OTC derivative products is a critical component of executing, at attractive pricing, on that global investment mandate, and foreign banks are often the only providers of many of these derivative products. Canada should not develop a registration regime that deters foreign counterparties from offering these OTC derivatives to sophisticated Canadian counterparties like CPP Investment Board. Market liquidity is essential to mitigate systemic risk. CPP Investment Board submits that registration requirements for foreign counterparties could materially compromise liquidity (and attractive pricing) in the small Canadian market, and thereby, actually, inadvertently increase systemic risk.

BACKGROUND AND DESCRIPTION OF CPP INVESTMENT BOARD

General

CPP Investment Board was incorporated as a federal crown corporation by the *Canada Pension Plan Investment Board Act* (the "CPPIB Act") and manages the assets of the Canada Pension Plan (the "CPP") transferred to it (the "CPP Fund"). CPP Investment Board invests the assets of the CPP not immediately required to pay benefits. CPP Investment Board is responsible for managing the CPP Fund in accordance with the CPPIB Act.

CPP Investment Board received its mandate from the Canadian federal and provincial governments. In addition to being accountable to the Parliament of Canada and to the federal and provincial finance ministers who serve as the CPP`s stewards, the CPP Investment Board also reports to Parliament through the federal finance minister who tables our annual report in the House of Commons. The CPP Investment Board is governed and managed independently of the CPP and at arm's length from governments with a singular objective: to maximize returns without undue risk of loss. CPP Investment Board is not an agent of the Canadian federal government or of any provincial governments.

Governance Model and Risk Management

The aim of CPP Investment Board is to preserve and enhance the maximum-strength governance model in which the CPP Investment Board operates at arm's length from governments with an investment only mandate, overseen by an independent board of qualified professionals. CPP Investment Board and its Board of Directors take very seriously their responsibilities to execute this governance model transparently and with the highest standard of care in order to preserve the model's exceptional advantages in managing the assets of the CPP Fund solely for the benefit of CPP participants and beneficiaries.

CPP Investment Board is very focused on maintaining best practice standards in respect of its governance policies and authorities. The CPP Investment Board operates with extremely high levels of disclosure and transparency, including publishing its investment policy and public equity holdings on its website and reporting publicly to Canadians in line with regulatory requirements for public companies even though it is not a reporting issuer.

With CPP Investment Board gaining an increasingly global investment profile, our Board of Directors focuses particular attention on the management of the various risks to which the organization may be exposed. The Board ensures that all key risks of the CPP Investment Board enterprise are identified, that effective processes are in place to manage these risks, that the highest calibre personnel are hired to comply with such enterprise risk management and that the processes are diligently executed by management. All risks are managed within an Enterprise Risk Management (ERM) framework with the goal of ensuring that the risks we take are commensurate with and rewarded by long-term benefits.

Our ERM framework is based on: a strong governance structure including a risk-aware culture, risk policies, defined risk appetite and risk limits; processes for identifying, assessing, measuring, mitigating, monitoring and reporting all key existing and emerging risks; and control practices with independent assurance that these practices are working properly. Risk governance at CPP Investment Board is accomplished by individual officers and committees. Our systems ensure close adherence to internal approval thresholds depending on size and scope of risks pursuant to total active risk limit policies and protocols. The Board of Directors is responsible for oversight of CPP Investment Board's efforts to achieve the mandated maximum rate of return, without undue risk of loss. To this end, the Board of Directors is responsible for ensuring that management has identified all key risks and established appropriate strategies to manage them. Committees of our Board of Directors also have risk-related responsibilities.

The President and CEO is, by way of delegation by the Board of Directors, accountable for all risks beyond those explicitly controlled by the Board. The responsibility for risk management is distributed throughout the organization starting with the Senior Management Team (SMT), which consists of the President and CEO and the CEO's direct reports. The SMT considers the full spectrum of inherent and emerging risks and ensures close alignment of our risk management efforts with our business strategy and plans. The leaders of each department are responsible for appropriately managing the risks assumed within their areas of responsibility and within their risk limits. The Chief Operations Officer is accountable for the Investment Risk department which measures, monitors and reports investment risks independently from the investment departments. This separates risk monitoring from investment management. The Chief Financial Officer, on behalf of the SMT, oversees the ERM framework. The Internal Audit department also plays an important role as it provides independent assurance that controls and mitigants are properly designed and operating effectively. The culture of CPP investment Board is by nature very risk aware, with staff constantly considering risks in their daily activities.

Use of Derivatives

OTC derivatives are a very important product used by CPP Investment Board to generate value-added investment returns and to limit or adjust market, credit, interest rate, currency and other financial exposures.

The global investing mandate of CPP Investment Board will be critical in helping to sustain the CPP. The provision of adequate retirement income to a growing Canadian population that is both aging and living longer is vitally important to Canadians. Using OTC derivatives to invest globally and manage risks is essential to ensure that investment returns are not limited to growth in the relatively small Canadian economy. Enhancing liquidity available to Canadian OTC derivatives end-users such as CPP Investment Board is an important objective to preserve attractive pricing and thereby enhance investment returns but is also an important goal for regulators seeking to manage systemic risk. Regulatory measures that inhibit liquidity will compromise CPP Investment Board's global mandate and could also lead to the unintended consequence of increasing systemic risk.

However, as set forth above, our use of OTC derivatives and our management of the associated risks is effected within a risk aware culture by enterprise risk management systems, subject to a best practices corporate governance model. In addition, we deal only with sophisticated counterparties. These carefully constructed "checks and balances" produce, in our view, a regime which represents "state of the art" and responsible usage of OTC derivative products.

Highest Creditworthiness

The *Canada Pension Plan* (the "CPP Act") established the Canada Pension Plan Account (the "CPP Account") within the Consolidated Revenue Fund of the federal government. The CPP Act provides that any amounts standing for the credit of the CPP Account that exceed the immediate obligations of the CPP Account are transferred to the CPP Investment Board. The federal government can make a request for payment by the CPP Investment Board into the Consolidated Revenue Fund out of the CPP Fund assets held by the CPP Investment Board. Under the statutory framework, however, CPP Investment Board is at all times legally entitled to retain and maintain assets that have a fair market value of not less than the liabilities of the CPP Investment Board. As a result, under the statutory framework, only assets having a fair market value in excess of the liabilities of the CPP Investment Board are available to the federal government to satisfy the obligations of the federal government under the CPP.

Furthermore, CPP Investment Board has received the highest possible credit ratings from ratings agencies; it is currently rated "AAA" by Standard & Poor's, "Aaa" by Moody's and "AAA" by DBRS.

Summary

In summary, therefore, CPP Investment Board operates in a robust risk management environment with very significant and sophisticated internal corporate governance procedures, monitored closely by its Board of Directors and various committees of its Board, is subject to a unique and carefully constructed statutory framework, is fully accountable to the Parliament of Canada and operates with full public transparency and with the highest creditworthiness. Furthermore, since CPP Investment Board only participates in the OTC derivatives market as a buy-side end-user dealing with other sophisticated parties, and does not engage in market-making activities, we strongly submit that CPP Investment Board does not require the imposition of a registration regime by provincial securities commissions.

SPECIFIC RESPONSES TO THOSE CONSULTATION PAPER QUESTIONS OF DIRECT RELEVANCE TO CPP INVESTMENT BOARD

The answers below primarily address those specific CSA questions that raise unique issues for the CPP Investment Board and supplement the answers provided in the CMIC letter to which we are a signatory.

Questions & Responses

Q2: What is the appropriate standard for determining whether a person is a qualified party? Should the standard be based on the financial resources or the proficiency of the client or counterparty? If the standard is based on financial resources should it be based on the net assets of the client or counterparty, gross annual revenues of the client or counterparty, or some other factor or factors?

Based on the description of CPP Investment Board presented above, we submit that CPP Investment Board clearly should meet an objective definition of a qualified party without any inquiry into or specific requirements relating to proficiency.

Q4: Are derivatives dealer, derivatives adviser and LDP the correct registration categories? Should the Committee consider recommending other or additional categories?

CPP Investment Board submits that the LDP category is not an appropriate registration category for Canada. It would appear possible that CPP Investment Board could be considered a LDP. However, as solely a buy-side, end-user market participant dealing only with other sophisticated counterparties, CPP Investment Board plays no role in "making" derivatives markets. It is therefore unclear what risk is being addressed if CPP Investment Board was required to register as an LDP. As fully described elsewhere in this letter, the existing accountability to federal and provincial finance ministers, full public transparency of its operations, robust risk management and corporate governance practices, and unique and carefully constructed statutory framework, mean, in total, that designation as an LDP is inappropriate and unnecessary for CPP Investment Board.

Q6: The Committee is not proposing to include frequent derivatives trading activity as a factor that we will consider when determining whether a person triggers registration as a derivative dealer. Should frequent derivatives trading activity trigger an obligation to register where an entity is not otherwise subject to a requirement to register as a derivatives dealer or a LDP? Should entities that are carrying on frequent derivatives trading activity for speculative purposes be subject to a different registration trigger than entities trading primarily for the purpose of managing their business risks?

CPP Investment Board is of the view that the factors to be considered for registration purposes should be based on the role of a participant rather than how often a participant trades. The frequency with which an end-user participates in the market is not relevant. If frequency of trading was included as a factor and therefore frequent hedgers (who are often end-users) are caught, this would have the result of discouraging hedging (which is inconsistent with minimizing systemic risk).

Q9: Are the factors listed for determining whether an entity is a LDP appropriate? If not what factors should be considered? What factors should the Committee consider in determining whether an entity, as a result of its derivatives market exposures, could represent a serious adverse risk to the financial stability of Canada or a province or territory of Canada?

Since no equivalent category exists, to our knowledge, in any G-20 jurisdiction other than the U.S., we are concerned about creating a unique registration regime feature in a smaller market like Canada. Therefore, as set out in our answer to question 4 above, it is CPP Investment Board's view that the LDP category is not appropriate for Canada.

Q11: Is it appropriate to impose category or class-specific proficiency requirements?

CPP Investment Board strongly submits that proficiency requirements, whether by way of category or class-specific requirements or general requirements for individuals, should not be imposed on an OTC derivatives non-market making, purely buy-side, end-user market participant such as CPP Investment Board. Given CPP Investment Board's robust risk management, corporate governance and well developed human resource policies, such requirements are unnecessary and would impede our ability to execute on our global mandate. We can see no benefit in imposing such requirements and we are not aware of such requirements being required of end-users in any jurisdiction around the world. Furthermore, CPP Investment Board is not aware of any market conduct issues that such requirements would be intended to address. Such requirements are appropriate for the retail securities market with respect to individuals within securities firms that are dealing with unsophisticated investors. Proficiency is not an issue that requires regulation among sophisticated counterparties.

Q12: Is the proposed approach to establishing proficiency requirements appropriate?

See our answer to question 11 above.

Q14: Are the requirements described appropriate registration requirements for derivatives dealers, derivatives advisers and LDPs? Are there any additional regulatory requirements that should apply to all categories of registrants? Please explain your answers.

CPP Investment Board is of the view that the registration requirements relating to LDPs are not appropriate. The goals of the G-20 commitments relating to OTC derivatives are to improve transparency in the derivatives market, mitigate systemic risk and protect against market abuse. Those risks are addressed by appropriate trade reporting and clearing requirements. See also our answers above to questions 4 and 9.

Q19: The Committee is recommending that foreign resident derivative dealers dealing with Canadian entities that are qualified parties be required to register but be exempt from a number of registration requirements. Is this recommendation appropriate? Please explain.

We do not believe that registration of foreign resident derivative dealers is an appropriate requirement. Imposing additional registration requirements for foreign resident participants may well severely restrict liquidity in the Canadian market. Canadian regulators should be respectful of home jurisdiction regulatory compliance. A significant portion of liquidity in the Canadian market is provided by non-domestic participants.[1] If foreign resident derivative dealers dealing with qualified parties are required to register, even though they may be exempt from a number of registration requirements, there is a serious risk that they will choose not to deal with Canadian market participants. Such an outcome could very well mean that a number of important derivative products would no longer be available, at attractive pricing, to CPP Investment Board since in certain cases such products are only offered by foreign banks. This would have the effect of reducing liquidity in the Canadian market, making it more difficult for non-market making end-users like CPP Investment Board to enter into hedges and, thereby, lead to the unintended consequence of increasing systemic risk in Canada.

Q21: Should foreign derivatives dealers or advisers not registered in Canada be exempt from registration requirements where such requirements solely result from such entities trading with the Canadian federal government, provincial governments or with the Bank of Canada?

Exemption from registration solely on the basis of a derivatives dealer trading with the Canadian federal government, provincial governments or with the Bank of Canada is not appropriate. Such an approach would bifurcate market liquidity for sovereign entities versus other end-users. Having said that, if the CSA chooses to introduce an exemption for sovereign entities, then CPP Investment Board should receive equal treatment. Although CPP Investment Board is not a sovereign entity, CPP Investment Board is, as noted above, a crown corporation under its incorporating federal statute. Furthermore, the presence of credit ratings at the highest available level combined with the statutory right of CPP Investment Board to at all times maintain assets that will satisfy its liabilities places it in a very favourable position from a creditworthiness perspective. On this basis, any such exemption should extend to the CPP Investment Board. Such a result would parallel the qualification of CPP Investment Board as an accredited investor under National Instrument 45-106 as a result of the fact that it is a crown corporation.

Q22: Is the proposal to exempt crown corporations whose obligations are fully guaranteed by the applicable government from registration as an LDP and, in the circumstances described, as a derivatives dealer appropriate? Should entities such as crown corporations whose obligations are not fully guaranteed, foreign governments or corporations owned or controlled by foreign governments benefit from comparable exemptions? Please provide an explanation for your answer.

As mentioned above in our responses to questions 4, 9 and 14, CPP Investment Board does not agree with the creation of an LDP category of registration. However, if exemptions are provided, then CPP Investment Board should be included in the exempt category because of its status as a crown corporation, its highest available credit ratings and the unique statutory right of the CPP Investment Board (only relevant in exceedingly remote circumstances) to maintain sufficient funds at all times to meet CPP Investment Board liabilities.

Q23: Are the proposed registration exemptions appropriate? Are there additional exemptions from the obligation to register or from registration requirements that should be considered but that have not been listed?

See responses to questions 21 and 22 above.

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[1] For example, as of February 1, 2011, almost half of all Canadian dollar denominated interest rate swaps are not entered into by any of the big six Canadian banks. Source: CMIC "Data Analysis Report", February 1, 2011; Bank for International Settlements Triennial Survey June 2010.

Thank you for the opportunity to provide our comments to the CSA on this important subject.

CPP Investment Board hopes that its comments are useful in the development of the regime for the regulation of the OTC derivatives market and that the CSA takes into account the practical implications for all market participants who will be subject to such regulation.

CPP Investment Board would be pleased to discuss the contents of this response with representatives from the CSA.

Canada Pension Plan Investment Board

Per: ____________________________

Kevin Cunningham
Vice President – Global Capital Markets

June 14, 2013

To: British Columbia Securities Commission
Alberta Securities Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Nova Scotia Securities Commission

John Stevenson, Secretary, Ontario Securities Commission
Email: comments@osc.gov.on.ca

Me Anne-Marie Beaudoin, Directrice du secrétariat, Autorité des marchés financiers
Email: consultation-en-cours@lautorite.qc.ca

Dear Mr. Stevenson and Me Beaudoin,

The Canadian Securities Institute (CSI) welcomes the opportunity to submit the following remarks in response to the CSA's April 18, 2013 request for comments on Consultation Paper 91-407 – Derivatives: Registration.

CSI is the leading provider of accredited financial services proficiency learning solutions in Canada. We have been setting the standard for world-class, life-long education for financial professionals for more than 40 years. Our focus on leading educational and ethical standards means that our graduates and designation holders have met the highest level of proficiency and certification.

We will focus our comments on proficiency requirements and specifically questions:

11. Is it appropriate to impose category or class specific proficiency requirements?
12. Is the proposed approach to establishing proficiency requirements appropriate?

Question 11 It is appropriate to impose category or class specific proficiency requirements?

It is our position that there should be one robust proficiency standard that covers all competencies required for the trading of derivatives and all of the products that fall under the general category of "derivatives". Our rationale being that evaluating the appropriateness of a particular derivatives solution that is being offered to a client requires a breadth of knowledge of all available derivative products, in order to evaluate the best recommendation. For example both swap and option based solutions could be used towards a risk management solution for a client, but unless the representative providing advice and/or trading services relating to derivatives understands the features and pros and cons of each they may not be sufficiently well-informed to recommend the structure that is most appropriate for the client.

As well, having a common proficiency standard that is inclusive of all derivative products and is thus applicable to all individuals dealing and/or advising in derivatives (institutional or retail), allows for a base proficiency that is efficient, not costly and can be recognized by all regulators (providing mobility of registrants) not only in Canada, but also internationally through possible future reciprocity agreements with other jurisdictions with similar proficiency regimes. For example, in the retail space both FINRA in the United States and the FCA in the United Kingdom currently provide registrants with advance standing for examination purposes in recognition of completion of CSI's Derivatives and/or Options Licensing courses. Ensuring that Canadian proficiency requirements meet international standards is particularly important when it comes to OTC derivatives particularly in light of the G-20 effort to ensure a common structure and processes for OTC derivatives activity.

In the case of derivatives trading, we recommend that a proficiency licensing course requirement similar to that of the standard currently set by IIROC for futures and options trading registrants (the CSI Derivatives Fundamentals Course - DFC) would be appropriate. The DFC is a course that includes coverage of all different types of derivative products including those that trade on an exchange and those that trade over-the-counter. OTC derivatives are covered so that retail advisors could, if appropriate, recommend that the client (corporate in this case) deal with the dealer's institutional derivatives desk for an OTC derivatives solution. CSI is currently making plans to revise the DFC such that it reflects recent developments, related to the G-20 OTC derivatives reform initiative.

12. Is the proposed approach to establishing proficiency requirements appropriate?

The derivatives trading market is a dynamic one with complex products. The systemic risk associated with the lack of understanding of these products (and new emerging ones) suggests that a more prescriptive proficiency requirement be implemented. The regulators have however suggested that the proficiency requirements be principle based.

Recent regulatory initiatives have generally been principles based with the exception of the inclusion of prescriptive proficiency requirements. For example, NI 31-103 is principled based regulation that includes specific proficiency requirements outlined for each registration category. IIROC also follows this approach for proficiency. This prescribed approach towards proficiency has served the Canadian securities industry well over the years and is also used by FINRA in the United States. If we were to introduce a more principled based approach, it would likely be seen as a weaker standard than that taken for other registration requirements.

If the firms are not given a specific standard to be met it will be difficult for the firms and the regulators to certify that all registrants are meeting the required proficiency standard and possess the knowledge and competency level to assess and recommend the full range of suitable solutions. As part of our role as an educator charged with the development of proficiency courses for derivatives, CSI worked with IIROC to determine the base competencies as well as the product knowledge required for derivative sales for IIROC registered representatives. These form the base of our Derivatives Fundamentals Course and we believe that this base standard would be relevant for the purpose of the proposed proficiency requirements set out in this consultation. As it does with IIROC, CSI is certainly open to working with the CSA to assist with setting the standard for this category of registration.

The CSA has also recommended proficiency requirements for supervisors, Chief Compliance Officers, Ultimate Designated Persons and a new category of Chief Risk Officer. For these registrants we recommend that principles set out in NI 31-103 and IIROC's rule 2900 should be taken into consideration where all those with supervisory oversight for registered persons should also meet a proficiency requirement based on the type of product sales being overseen and should therefore meet minimum proficiency standards for a registered person as well as a supervisor. An example of how this could be implemented is set out below.

Category	Proficiency Requirement
Representative providing advice and/or trading services related to Derivatives	Base Minimum similar to DFC
Supervisors	Base Minimum plus Branch Managers Course
Ultimate Designated Person	Base Minimum plus Partners, Directors and Officers Course
Chief Compliance Officer	Base Minimum plus Chief Compliance Officer Course
Chief Risk Officer	Base Minimum similar to DFC

CLOSING COMMENTS

In closing we reiterate the importance of introducing a proficiency requirement that meets the requirements of a professional dealing in derivatives. To meet this goal the regulator must consider not only product knowledge but also the proficiencies to enable the registrant to appropriately assess and determine suitability of a product. This requires not just knowledge of one or two product options, but a breadth of product knowledge and competency that can be applied in each client situation appropriately. In addition, the regulator should also consider the mobility of registrants within Canadian firms and also internationally.

We would welcome the opportunity to provide further insight into proficiency requirements.
Please contact me if you have any questions.

Regards,

Marc Flynn
Sr. Director, Regulatory Relations and Certification
Canadian Securities Institute
Moody's Analytics
Certification and Training Division

Cc: Debbie Bell, Associate Director, Regulatory & Credentialing Policy

DENTONS

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June 6, 2013

DELIVERED VIA ELECTRONIC MAIL

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Ontario Securities Commission
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Dear Sirs/Mesdames:

Re: Comment Letter to CSA Staff Consultation Paper 91-407 - Derivatives Registration

Dentons Canada LLP on behalf of the Canadian Energy Derivatives Working Group (the "**Working Group**"), hereby submits these comments in response to the *CSA Staff Consultation Paper 91-407 Derivatives: Registration* (the "**Derivatives Registration Paper 91-407**") drafted by the Canadian Securities Administrators' (the "**CSA**") Derivatives Committee (the "**Committee**"). The Working Group appreciates the opportunity to engage the CSA as it seeks to support Canada meeting its G-20 commitments and establishing a regulatory framework for the over-the-counter ("**OTC**") derivatives market in Canada. The Working Group foresees an ongoing dialogue with the CSA in connection with these initiatives.

I. INTRODUCTION

The Working Group is a diverse group of Canadian energy market participants whose primary business activities include the building of energy infrastructure, the exploration, development, production and physical delivery of one or more energy commodities (crude oil, natural gas, electricity, emissions offsets, etc.) to other energy market participants and commodity end-users including industrial, commercial and residential consumers.

Members of the Working Group comprise Canadian, U.S. and other international corporate families that primarily use both exchange traded and over-the-counter ("OTC") derivatives (forward contracts, futures contracts, and swaps and options, as understood in the industry), and other contracts that reference energy commodities, to hedge commercial risks that arise in the conduct of their businesses, and for the purposes of optimizing assets, including through commodity price discovery and market intelligence.

The Working Group has formed to consider the Canadian regulatory and legislative developments with respect to the trading of energy commodities, including derivatives and other contracts that reference energy commodities, and to respond to requests for public comment regarding such aforementioned Canadian regulatory and legislative developments.

II. GENERAL COMMENTS

The Working Group believes that its members are commercial hedging end-users and traders of derivatives (both exchange traded and OTC) primarily for the purposes of hedging commercial risks and asset optimization. These hedging activities foster the development and continued operations of energy infrastructure, the production of energy, the marketing of Canadian natural resources to domestic and international markets and the insulation of customers from price volatility in energy markets. Although the Working Group also believes that its members are likely not "derivatives dealers", "derivatives advisers" or "large derivatives participants", as defined in Derivatives Registration Paper 91-407, the Working Group is offering the following comments in the event that the CSA finalizes the proposals contained in Derivatives Registration Paper 91-407 (the "**Proposals**"), into model provincial rules in which those terms are construed too broadly, so as to apply to members of the Working Group. The Working Group respectfully submits that such a broad construction of the Proposals would have a materially adverse impact on Canadian energy commodity trading and Canadian energy derivatives markets.

The Working Group has other general comments regarding the CSA rule-making process as follows:

The CSA Rule-Making Process- Evaluation of Comments and Implementation of the Eventual Model Provincial Rules

In all the published CSA Staff consultation papers to regulate the OTC derivatives market in Canada, including Derivatives Registration Paper 91-407, the Committee has sought comments and input from stakeholders on its proposals but has never explained how it evaluates and treats such comments. As stated by the Canadian OTC Derivatives Working Group[1] in its Discussion Paper: *Reform of Over-the-Counter (OTC) Derivatives Markets in Canada* (the "**Discussion Paper**"), "the fulfillment of the G-20 commitments is a public-sector initiative that will require significant engagement of the industry". The Working Group respectfully asks that the Committee bears in mind that Working Group members and

[1] An interagency group chaired by the Bank of Canada, composed of members from the Office of the Superintendent of Financial Institutions (OSFI), the federal Department of Finance, the Ontario Securities Commission, the Autorité des marchés financiers, the Alberta Securities Commission and the Bank of Canada. The Bank of Canada, OSFI and the federal Department of Finance represent Canada on the Financial Stability Board and are responsible for Canada meeting its G20 commitments

other interested stakeholders are new to the CSA process. Accordingly, an explanation about the CSA rule-making process would significantly help market participants engage in and understand the process and anticipate future regulatory developments.

Most members of the Working Group, because of their cross-border, or intra-U.S., OTC derivatives trading activities are already subject to some of the requirements of the United States ("**U.S.**") Dodd–Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**"). As such, most Working Group members are familiar with the public participation process in the U.S., under the U.S. *Administrative Procedure Act,* that guides the rulemaking procedures by U.S. regulators and advances rulemaking quality and legitimacy by promoting transparency[2] and public participation[3]. The Working Group respectfully recommends that the CSA look at emulating the tenets of the US rulemaking procedures of transparency and public participation and seek to promote quality decisions by helping generate rules that advance the efficiency of the Canadian capital markets, provide investor protection, reduce systemic risk and comport with the respective CSA members' statutory mandates.

In CSA Consultation Paper 91-301 – *Model Provincial Rules – Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting* ("**Model Rules 91-301**") published on December 6 2012, the Committee gave a brief explanation of the CSA rule-making process. The Working Group notes however that the explanation was limited only to the rule-making process regarding Model Rules 91-301 and how the Committee would evaluate the comments it would receive regarding Model Rules 91-301. The Working Group kindly requests that the Committee consider providing a detailed explanation of the CSA's rulemaking process in all its future staff consultation papers.

In addition, the Working Group kindly requests that the Committee provide a detailed explanation about how it plans to implement final model provincial rules including how much time it proposes to give market participants to comply?

In connection with timing generally, the Working Group is of the understanding that the Committee has been surprised and/or disappointed with the relatively few comment letters received from industry in connection with the various Consultation Papers published by the Committee to date. The Working Group respectfully draws the Committee's attention to the fact that most of its members have had their limited internal resources focused on monitoring and complying with Dodd-Frank requirements since before 2010. It was not until the Committee's recent efforts, particularly since the publication of Model Rules 91-301 in December 2012, to create general public awareness of Canadian derivatives regulatory reform, that most Working Group members became aware of the Committee's initiatives and desire for industry input. In the Working Group's view, industry would benefit from an extended comment period after all consultation papers and proposed model rules have been released in order to have an opportunity to assess the implications of the entire proposed new regulatory framework to our businesses on a holistic basis.

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[2] Transparency in this case "refers to public access to information held by government rulemakers as well as information about their decision making".
[3] Public participation "encompasses varied opportunities for members of the public, market participants, businesses and others outside the regulatory agencies to contribute to and comment on proposed rules with the regulators addressing openly why they agree or disagree with the comments made".

III. SPECIFIC COMMENTS

The Working Group has the following specific substantive comments regarding Derivatives Registration Paper 91-407

Is Registration needed for key derivatives market participants?

The Committee states in Derivatives Registration Paper 91-407 that "it believes it is necessary **to impose registration requirements on key derivatives market participants**" without stating why it holds that belief and why it feels it is necessary to require registration of key derivatives market participants.

In its Discussion Paper, the Canadian OTC Derivatives Working Group, which is composed of some members of the CSA, chaired by the Bank of Canada and tasked (along with other Canadian federal financial agencies) with ensuring that Canada meets its G-20 commitments related to the reform of the OTC derivatives market in Canada, made five recommendations (the "**Five Recommendations**") that covered five areas of reform as follows:

i. capital incentives and standards;
ii. standardization;
iii. central counterparties and risk management;
iv. trade repositories and
v. trading venues

The Working Group respectfully draws the Committee's attention to the Canadian OTC Derivatives Working Group statements, made in conjunction with the Five Recommendations, that:

> "[the Canadian OTC Derivatives Working Group] viewed the initiatives for reform of OTC derivatives markets contained in the G-20 commitments as important to the resilience and stability of the Canadian financial system and concluded that these ***five*** recommendations would be enough to implement all elements of the G-20 commitments.".

Nowhere in the Discussion Paper did the Canadian OTC Derivatives Working Group mention or discuss the need to regulate key derivatives market participants through the implementation of a registration regime.

Further, the CSA, in its first Consultation Paper 91-401 on Over-the-Counter Derivatives Regulation in Canada ("**CSA Paper 91-401**"), set out high-level proposals for the regulation of OTC derivatives, but the CSA did not address the issue of the applicability of registration exemptions and postponed the scope of registration requirements to be the subject of future consultations.

The Working Group respectfully requests that the Committee pause and open a consultation process with market participants and the public, as the CSA stated it would do in CSA paper 91-401, and provide a detailed rationale for the Proposals in Derivatives Registration Paper 91-407. Such action would help members of the Working Group, and other market participants, understand the Committee's belief that it is necessary to impose registration requirements on key derivatives market participants. The Committee should explain why it holds that belief particularly given that the Canadian OTC Derivatives Working Group did not see the need to recommend imposing a registration regime?

The Working Group also respectfully requests that the Committee's explanation of the Proposals should include a cost-benefit analysis of how the Proposals would impact the market. Specifically the Committee should provide all information about its owns projections on the costs: (i) for compliance and risk management personnel; (ii) of the person-hours necessary to comply with the Proposals; (iii) of required technology expenditures; and (iv) any other compliance costs forecast or foreseen by the Committee that market participants may have to bear to comply with the Proposals.

Why is the CSA proposed regulatory regime regarding OTC derivatives going beyond the recommendations made by the Canadian OTC Derivatives Working Group?

The Canadian OTC Derivatives Working Group stated its rationale for making the Five Recommendations contained in the Discussion Paper by saying that: ""Reforms" [to the OTC derivatives market] "are therefore important to i) reduce systemic risk, ii) improve market efficiency, and iii) improve market integrity and investor protection". They also said that "Reforms should be designed with a view to their potential unintended adverse consequences, including those associated with regulatory arbitrage".

The Working Group respectfully requests that the Committee, as part of the consultation process requested above, provide an explanation to market participants and the public about how the Proposals align with the Canadian OTC Derivatives Working Group's rationale for making the Five Recommendations to reform Canada's OTC derivatives markets.

On the issue of regulatory arbitrage, the Working Group is fearful that implementation of the registration requirements, as currently proposed by the Committee, would put Canadian companies, and particularly Canadian energy companies, at a competitive disadvantage to U.S. energy companies. The Working Group notes that as of the date of this letter no U.S. energy companies have yet been required to register as either a "Swap Dealer" or a "Major Swap Participant". This suggests that the vast majority of energy companies are "end-users" under the Dodd-Frank Act.

By contrast, if the Proposals were implemented as currently proposed, many Canadian energy companies would likely be required to register as "derivatives dealers" or "derivatives advisers", thereby incurring a much greater compliance burden: (i) than their U.S. peers; or (ii) with respect to their Canadian-based derivatives trading activity than with respect to their U.S. based derivatives trading activity; and (iii) for essentially the same type of trading activity on either side of the Canada-U.S. border. The Working Group respectfully submits that these entirely opposing and contradictory results could not have been intended by the G-20 leaders, or by Canadian or U.S. regulators, in respect of the same trading activities and common goals to address similar market risks. In addition, such stark differences will put Canadian energy companies at a competitive disadvantage in cross-border transactions from a cost of business perspective and willingness of foreign counterparties to transact in a Canadian jurisdiction that has an entirely different regulatory regime from other larger and more significant derivatives markets.

The Working Group respectfully asks if the Committee intended such consequences for the Canadian energy sector resulting from the Proposals, and if yes, we would like to understand the reasons for the Committee's proposed more onerous treatment in Canada, than has happened in the U.S. for example, even though both regulatory regimes grew out of the same G-20 commitments in respect of regulation of OTC derivatives markets worldwide.

IV. CONCLUSION

The Working Group supports customized regulation of the OTC derivatives market in Canada that takes into consideration the unique characteristics of Canadian OTC derivatives market participants, in particular Canadian energy companies whose businesses are focused on developing and marketing Canadian natural resources in domestic and global markets. The Working Group also applauds the CSA's efforts to establish a regulatory regime over the OTC derivatives markets in Canada that would bring transparency and ensure efficiency of the markets. We appreciate that the CSA must strike a balance between imposing effective regulation and not inadvertently damaging the ability of Canadian energy corporations to use OTC derivatives to hedge their operational risks and optimize their assets. The Working Group offers its advice and expertise and welcomes the opportunity to work with the CSA in striking such a balance and in connection with crafting an effective and reasonable regulatory regime for OTC derivatives in Canada.

Respectfully submitted,
Dentons Canada LLP

Priscilla Bunke

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Counsel for the Canadian Energy Derivatives Working Group

PPB

cc: Capital Power Corporation
Direct Energy
Enbridge Inc.
Suncor Energy Inc.
TransAlta Corporation
TransCanada

June 24, 2013

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Ontario Securities Commission
Saskatchewan Financial Services Commission

VIA ELECTRONIC MAIL

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Re: CSA Consultation Paper 91-407- Derivatives-Registration

Dear Members of the Canadian Securities Administrators:

I. INTRODUCTION.

Direct Energy Marketing Limited ("**Direct**") hereby submits comments to the Canadian Securities Administrators ("**CSA**" or the "**Administrators**") with respect to CSA Consultation Paper 91-407 – *Derivatives: Registration*, published on April 18, 2013 (the "**Consultation Paper**").[1] Direct appreciates this opportunity to submit comments, and looks forward to maintaining a dialogue with the CSA as it works to develop a workable and appropriately-tailored regulatory framework for the regulation of the derivatives marketplace in Canada.

Direct is one of North America's largest energy and energy-related service providers with over 6 million residential and commercial customer relationships. A subsidiary of Centrica plc (LSE: CNA), one of the world's leading integrated energy companies, Direct operates in 10 provinces in Canada and 46 states in the United States, plus the District of Columbia. In addition

[1] *See* Canadian Securities Administrators, CSA Consultation Paper 91-407 – Derivatives: Registration (April 18, 2013).

to owning and operating over 4,600 wells in Alberta with total natural gas production of 172 MMcfe per day, Direct's Midstream and Trading group performs a variety of physical and financial energy management activities, including production marketing and hedging, wholesale energy supply, transportation, and storage in Canada, much of which is necessary to support Direct's extensive consumer facing business. As a consequence, Direct has a clear interest in this proceeding.

II. COMMENTS OF DIRECT ENERGY MARKETING LIMITED.

A. General Comments.

1. <u>The CSA's Focus Should Be on Identifying the Criteria that Would Require Registration</u>

The CSA and the Consultation Paper should focus solely on identifying the criteria that would require an entity to register as Derivatives Dealer or Derivatives Advisor. The threshold questions of what activity would cause an entity to register and what entities should register are important and should be answered prior to designing the regulatory structure that would apply to those entities. To do otherwise may lead to a regulatory framework that is not appropriate for the markets and entities to which it is applied.

The registration triggers and requirements proposed in the Consultation Paper largely mirror those set forth in the securities context by National Instrument 31-103[2] ("NI 31-103"). While parts of that framework may be appropriate for derivatives markets, that framework should not be adopted using a "one-size-fits-all" approach. For example, many of the requirements imposed on Derivatives Dealers are appropriate in retail securities markets, but generally have no place in derivatives markets where trading relationships are traditionally principal-to-principal.

Direct urges the CSA to promulgate a definition of "Derivatives Dealer" that applies to firms commonly viewed as dealers in Canadian derivatives markets. As discussed further below, to do otherwise could cause risk and market share in energy derivatives markets to concentrate in large financial institutions and could increase cost for energy firms, which may ultimately raise energy cost for Canadian consumers.

With this in mind, the CSA should focus its initial efforts on (i) developing an appropriately-tailored definition of "Derivatives Dealer," (ii) developing a set of well-defined and workable factors (including any related interpretive guidance) that can be used to help market participants to determine whether they must register as a Derivatives Dealer ("Registration Factors"), and (iii) ensuring that it has the data necessary to understand (a) the types of entities that transact derivatives, (b) the nature and purpose of the derivatives transactions carried out by each type of entity, and (c) the systemic risk that exists in Canada's derivatives markets.[3]

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[2] Canadian Securities Administrators, National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (July 17, 2009).

[3] Direct respectfully suggests that the CSA consider adopting a phased process for implementing the registration requirements set forth in the Consultation Paper. In this respect, the CSA should work with provincial securities regulators to implement derivatives reporting regulations and gather data from trade repositories over a

2. Derivatives Reform Should Not Adversely Impact Canadian Energy Markets

The ongoing derivatives reforms effective in Canada will result in significant changes to Canadian derivatives markets. This transformation must be undertaken in a manner that avoids unintended consequences that could adversely impact domestic energy markets, including, but not limited to: (i) a loss of liquidity and corresponding increase in volatility resulting from regulations that are not appropriately tailored for derivatives markets; and (ii) uncertainty regarding the ultimate regulatory status of market participants.

Energy markets possess unique characteristics in terms of instruments, the market participants themselves, and the underlying physical products. Distinct from banks and financial institutions, which play an intermediary role in financial markets, energy firms typically do not play intermediary roles in such markets, and their derivatives trading activity is generally related to their respective physical businesses. In this respect, energy firms are "non-financial" in nature and, absent a significant engagement in identified derivatives dealing activity, should not be subject to comprehensive regulation as a "Derivatives Dealer."

Unlike financial institutions, energy firms primarily trade as principles by transacting energy-related derivatives to, among other things, hedge the risk associated with their core business of providing electricity, crude oil, natural gas, propane, gasoline, and other energy commodities to customers. The CSA should recognize that certain energy firms, while primarily engaged in hedging activities may also trade derivatives on a speculative basis or may be engaged in limited and discrete dealing transactions. However, these trading activities are ancillary and incidental to their primary physical business. In short, active participation in derivatives markets should not constitute derivatives dealing.

Equally, the CSA should recognize that, in energy markets, derivatives transactions are routinely executed *without* the involvement of dealers. This is because producers and users of a commodity generally have opposite risk profiles and can make natural hedging counterparties. In these transactions, neither counterparty is engaged in dealing activity, as such transactions are not entered into (i) as a service to, or for the benefit of, their counterparty, (ii) to collect a fee, or (iii) as a service to, or for the benefit of, the market generally, *i.e.*, to create or enhance liquidity.

Direct is concerned that the adoption of an overly broad definition of "Derivatives Dealer" will needlessly disrupt energy markets in Canada, as well as impair the operations of energy firms in Canada whose primary business involves the production, refining, marketing, transportation, and selling of physical commodities. Adopting a definition of "Derivatives Dealer" that captures energy firms that are active derivatives market participants will likely lead such firms to either (i) register as Derivatives Dealers, or (ii) reduce their use of financial derivatives markets to avoid registration as Derivatives Dealers. Both outcomes will increase

minimum of a 12 month period. Such data will help provide the CSA with a thorough understanding of Canadian derivatives markets and facilitate the adoption of an appropriately-tailored framework for the regulation of Derivatives Dealers. *See* Canadian Securities Administrators, Multilateral CSA Staff Notice 91-302 – Updated Model Rules: Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting (June 6, 2013).

costs for those market participants. Registering as a Derivatives Dealer will increase compliance costs. Reducing trading activity likely will reduce such firms' ability to hedge or hedge efficiently, increasing risks and, consequently, costs.

For example, if a broad definition of "Derivatives Dealer" requires Direct to register as such, mandatory margin and capital requirements would divert valuable working capital from Direct's physical business, reducing its ability to invest in new projects. In the alternative, if a broad definition of "Derivatives Dealer" causes Direct to limit its participation in derivatives markets, it will become increasingly reliant on large financial institutions for its hedging needs. If a number of energy firms make a similar choice to avoid registration as a Derivatives Dealer, risk will become increasingly concentrated in a small number of market participants and the number of possible counterparties for non-Derivatives Dealers likely will decrease significantly. In addition to concentrating risk in the financial sector, these scenarios will result in higher prices for energy and energy-related products consumed by Canadian citizens. These outcomes would seem to be in direct conflict with the CSA's goals of reducing risk and protecting Canadian market participants.

B. Definition of "Derivatives Dealer."

1. The Proposed Definition of "Derivatives Dealer" Should Be Narrowly and Precisely Defined

The express language proposed by the CSA stating that "persons carrying on the business of **trading** in derivatives"[4] (emphasis added) should be deemed Derivatives Dealers is overly-broad and, without further definitional clarity, could be interpreted to capture all active participants in derivatives markets. As an initial matter, the definition of "Derivatives Dealer" should focus exclusively on those types of activities that are routinely regarded within derivatives markets as *de facto* "dealing activity."

Although Direct understands that similar language is used in the context of determining whether an entity is a securities dealer,[5] the concept of a "Derivatives Dealer" implicates different markets and different products and should be defined in an appropriate and precise manner. The phrase "trading in derivatives" confuses the scope and applicability of this definition by arguably capturing non-dealing trading activities, particularly speculative trading activity, which, as discussed below, is a separate and distinct form of market behavior from dealing activity.

Market participants trading for their own account and profit are commonly thought to be engaged in "trading activity," while market participants entering into derivatives transactions for express purposes of making markets, providing liquidity, or functioning as an intermediary on behalf of a customer are engaged in "dealing activity." With this in mind, the CSA should consider modifying the proposed definition of "Derivatives Dealer" to refer to "persons carrying on the business of **dealing** in derivatives" (emphasis added).

[4] *Consultation Paper* at 4,125.

[5] *Companion Policy to NI 31-103* (July 17, 2009) at 269.

The Derivatives Dealer registration determination must ultimately focus on whether, and to what extent, an entity engages in *dealing* activity. As discussed further in Sections II.B.3. and II.B.4. below, the definition of "Derivatives Dealer" should contain explicit language carving out any non-dealing trading activity engaged in by a market participant for its own account. In addition, a *de minimis* threshold up to which an entity may engage in dealing activity without having to register as a Derivatives Dealer should be expressly incorporated in the definition.

2. The CSA Should Provide More Guidance Regarding the Factors For Determining Whether a Person is "In the Business of Trading Derivatives"

The definition of "Derivatives Dealer" is qualitative in nature in that it is based on the functional role a participant plays in the market. As such, this definition should only cover a limited set of market participants engaged in specific types of activity. Direct is concerned that the proposed definition of "Derivatives Dealer," when read in conjunction with certain of the factors listed in Section 6.1(b) of the Consultation Paper will capture a set of derivatives market participants much larger than those entities engaged in the business of dealing derivatives as their primary business.

That said, Section 6.1(b) contains certain "Registration Factors" that appear to correctly identify general types of behavior that are generally characterized as "dealing activity." These factors broadly align with Direct's understanding of what constitutes dealing activity in derivatives markets. In particular, the key Registration Factors include those focused on derivatives market participants that

- act as an intermediary, rather than trading for its own hedging, investment, or other permissible objective;
- act as market maker; or
- provide clearing services.

When engaging in each of the activities listed above, Derivatives Dealers typically remain neutral to price movements in the relevant derivatives instrument, as they are compensated through fees and through the difference in the bid/ask spread.

While the activities identified above are appropriate for determining whether and entity is acting as a Derivatives Dealer, to ensure that the scope of the definition of "Derivatives Dealer" is appropriately tailored, further clarification of what specifically constitutes the enumerated types of dealing activity is required. Direct highlights three distinct areas where such clarification is required.

a. Market-Making.

The use of the term "market-making" without further definition and clarification is susceptible to overly broad and potentially conflicting interpretations. A hallmark of market making activity is that a market participant is continually ready, willing, and able to take either side of a derivatives transaction. In general, market makers seek to remain neutral to price movements with respect to the derivative at issue, as well as the underlying commodity. They profit, in large part, from the bid/ask spread, intermediation fees, or ancillary services related to their dealing activity (*e.g.*, providing investment advice), not from realizing changes in the value of the derivatives transacted or the underlying commodities.

Although a commercial energy firm may, on occasion, take either side (*i.e.*, short or long) of a particular derivatives transaction, this behavior may be distinguished from market-making activity as it is driven by the commercial energy firm's primary physical business.[6] Such activity is generally carried out for the purpose of (i) a function of changes in the risk associated with underlying physical positions, or (ii) discovering a price for a derivatives transaction or, in the case of physical commodities, the underlying commodity.

To avoid the overly broad application of the term "market maker," Direct recommends that the CSA develop interpretive guidance, such as enumerated criteria, that clarifies the meaning and scope of this language. For example, an entity would be engaged in market making in derivatives markets if it provided two-sided pricing (i) for a customer and such pricing does not take a distinct view on the market (*i.e.*, the pricing largely reflects the current bid/ask spread), or (ii) pursuant to a contractual obligation (*i.e.*, an obligation to buy when there is excess of sell order s and to sell when there is an excess of buy orders.)

Further, the CSA should note that offering two-sided pricing should not be treated as sole indicia of whether an entity is engaged in market making. Rather, offering an occasional two-way price quote, when done for customary commercial purposes, such as price discovery, does not fall within the type of "continuous ready, willing, and able" trading activity that is key indicium of a dealer engaged in market making in derivatives markets.

b. Trading Compensation.

The CSA should clarify that "trading with the intention of being remunerated or compensated" refers explicitly to (i) fees for acting, or providing services, on behalf of customers, (ii) money made in a market making function, or (iii) a payment for fulfillment of a contractual obligation to act as a market maker. The language as written, even when read in conjunction with the Companion Policy to NI 31-103,[7] opens up the possibility that trading profits generated by beneficial markets could be indicia of dealing activity.

c. Solicitation of Interest.

The CSA should make clear that "directly or indirectly soliciting" includes scenarios in which an entity does ***not*** have a view of the market and seeks out a counterparty to facilitate the goals of that counterparty. This language should cover legal entities or functional business units

6 As discussed further in Section 3(d), below, in certain derivatives markets, particularly those tied to physical locations, only a few firms trade. This applies in Canada with respect to certain energy-related derivatives (notably swaps). Any interpretive guidance developed or proposed by the CSA should recognize that providing or eliciting two-way pricing in non-liquid or episodically liquid markets does not, by itself, constitute dealing activity, as such activity is necessary to efficiently hedge the risks unique to that specific location.

7 Direct Energy has been instructed by various regulators to consider the Companion Policy to NI 31-103 as pertinent guidance for the Consultation Paper.

of a legal entity whose primary strategic objective is to solicit new business from customers pursuant to which it will act as an intermediary by providing access to derivatives markets, or as a maker of derivatives markets, for the benefit of their customers. It should not cover scenarios in which one market participant asks another market participant to enter into a derivatives transaction on a principle-to-principle basis, and where each counterparty is (i) acting for its own account and economic benefit (not the benefit of its counterparty), and (ii) not agnostic to changes in price of the derivative at issue or the underlying physical commodity.

3. <u>The Definition of "Derivatives Dealer" Should Expressly Exclude "Non-Dealing Activity"</u>

The definition of "Derivatives Dealer" should be drafted in a manner that recognizes that a large portion of commodity derivative market participants engage in (i) trading activity that is not derivatives dealing activity, and/or (ii) limited derivatives dealing. These trading activities are incidental or ancillary to their underlying primary, physical business operations. With this in mind and to provide regulatory certainty that such market participants are not Derivatives Dealers, the CSA should explicitly recognize that:

- Hedging is not dealing activity;
- Speculation is not dealing activity;
- Anonymous on-facility transactions generally are not dealing activity;
- Providing two-sided pricing in markets with limited or episodic liquidity is not dealing activity; and
- Frequent trading activity in derivatives markets is not dealing activity.

Direct urges the CSA to create an explicit exemption from registration as a Derivatives Dealer for market participants that predominantly engage in any non-dealing activity, including (but not limited to) the activities outlined above. Such an exemption would be consistent with the approach to regulation under the Companion Policy to NI 31-103, which directs regulators to look to the business purpose of an activity to determine whether that activity should require registration.[8] The rationale for including these activities in a general exemption from the definition of "Derivatives Dealer" is set forth below.

a. Hedging.

Many commodity market participants (including energy firms) enter into derivatives to hedge the commercial risk that arises from their physical operations. Hedging is a legitimate risk management activity. When hedging, an entity acts for its own account and not as an intermediary for the benefit of third parties. Hedging, in and of itself, does not pose a risk to the market. In the context of commodity markets, the general objective of hedging is to reduce the risk inherent in a business that is dependent on production, processing, merchandizing, or consumption of physical commodities. For example, an airline may choose to fix the price of its

8 *Companion Policy to NI 31-103* at 268.

fuel purchases so it has price certainty and can focus on the business of running an airline. Or, an electricity generator that sells to customers at unfixed prices may choose to hedge a fixed price contract for natural gas (*i.e,* convert the natural gas contract into a floating rate contract using a swap) so its floating rate revenue is matched to correlated floating rate costs. In each example, the hedging activity is net risk reducing. Net risk reducing trading activity is the type of market behavior that is appropriately excluded from the definition of "Derivatives Dealer."

b. Speculative Trading.

Speculation is also a legitimate, non-dealing market activity. Distinct from entities engaged in dealing activity, market participants engaged in speculative trading are not neutral to price movements in derivatives markets and underlying commodity markets. An entity engaged in speculative trading acts for its own account, not as an intermediary for the benefit of unaffiliated third-parties. Such trading activity is entered into specifically for purposes of benefiting from changes in the price of the instrument.

Additionally, speculative trading can perform a price discovery function. In this respect, speculative trading (i) provides price information that allows a market participant to hedge more effectively, and (ii) prevents counterparties from anticipating the trading needs of entities that also use commodity derivatives to hedge. If the CSA is concerned that speculative trading may introduce systemic risk into the derivatives markets, then this issue should be addressed as part of the Large Derivatives Participant ("LDP").

c. Trading "On-Facility."

Additionally, transacting derivatives "on-facility" (*i.e.*, on an electronic trading facility or centralized market) generally is not viewed as dealing activity unless a market participant is contractually obligated to perform a dealer-type function, such as that of a market maker. In order to provide regulatory certainty and clarity, the CSA should explicitly state in the final version of its model rules on registration that derivatives transactions in which counterparties are anonymously matched are not "dealing" activity.

d. Providing Two-Sided Pricing in Markets with Limited or Episodic Liquidity.

The CSA should make explicitly clear that providing two-sided pricing in markets with limited or episodic liquidity either for the purpose of (i) discovering a price for a derivative or underlying commodity, or (ii) eliciting bids and offers from other market participants does not constitute derivatives dealing activity. Such activity is not dealing because the fundamental purpose is price discovery. This activity should not be considered "market making" given that the market participant providing the two-sided pricing is doing so to facilitate its own derivatives trading to further its commercial business and is not continuously standing ready, willing, and able to engage in such conduct.

e. Frequent Trading Activity in Derivatives Markets.

Finally, in response to Question 6 in the Consultation Paper, Direct strongly encourages the CSA to include "***frequent derivatives dealing activity***" and not "frequent derivatives trading activity" as a factor to consider in determining whether an entity triggers the registration requirement. More importantly, Direct urges the CSA to provide clarity as to the "frequency" of dealing activity that would give rise to the Derivatives Dealer registration requirement. Without such guidance, market participants will grapple with the concept of being "in the business" of dealing derivatives. At a minimum, the CSA should clarify that nominal or irregular dealing activity or dealing activity that is ancillary to an entity's primary physical business, has a business purpose of supporting such primary business and will not lead to the entity's categorization as a Derivatives Dealer.

4. Registration as a Derivatives Dealer Should Be Subject to a *De Minimis* Exception

In keeping with the importance of developing an appropriately scoped definition of "Derivatives Dealer," the CSA should create an exception from the definition for market participants that engage in a *de minimis* amount of derivatives dealing activity. A *de minimis* exception is necessary for two major reasons:

First, imposing a registration requirement on market participants that enter into a small amount of derivatives dealing activity that is incidental and ancillary to their core business will likely result in their discontinuing such activity. Forcing these entities out of the market will have the consequence of concentrating risk within large financial institutions and reducing market liquidity. This will limit choice and increase volatility – both of which could increase the cost of hedging, potentially increasing the costs of energy consumers.

Second, without a *de minimis* exception, a single dealing transaction or several small dealing transactions could trigger a registration obligation. A *de minimis* exception would limit that possibility and provide market participants with certainty as to their non-dealer status.

To the extent that the CSA adopts the precedent, facts and circumstances approach similar to the approach set forth in NI 31-103,[9] then a *de minimis* exception may only be necessary temporarily as an adequate precedent for what kind of activity constitutes "carrying on the business of dealing in derivatives" is developed as entities that are clearly derivatives dealers register as such.

Further, any *de minimis* threshold level proposed by the CSA should not be set at an unduly restrictive level. For example, natural gas prices are depressed compared to prior periods of strong and sustained economic growth. If a proposed *de minimis* threshold is set at an unduly restrictive level, market participants transacting natural gas derivatives that currently fall below such a threshold could easily violate it in the future simply due to rising energy prices.

Finally, adopting a *de minimis* exception would, at a high-level, structurally align the Canadian derivatives regulatory paradigm with the regulatory infrastructure in the United States. In general, Direct believes that where alignment between the two regulatory regimes is possible, the CSA should make the effort to do so. A large percentage of derivatives market participants in Canada trade in the United States as well, and aligning the regulatory requirements in the two countries will minimize opportunities for regulatory arbitrage and will reduce compliance burdens on market participants.

[9] One of the primary factors relied upon in determining if an entity has engaged in "securities trading for a business purpose" is whether that entity is engaged in activities similar to those of a registered securities dealer. *Companion Policy to NI 31-103* at 268. The Consultation Paper includes a similar factor in the Derivatives Dealer context. *Consultation Paper* at 4,127.

C. The Consultation Paper Should Address How the Proposed End-User Exemption Would Operate in Conjunction with the Derivatives Dealer Registration Regime.

In order to ensure market certainty, Direct also urges the CSA to provide more guidance on how this Consultation Paper operates in conjunction with *Consultation Paper 91-405 – Derivatives: End-User Exemption*, published on April 13, 2012,[10] and how entities falling outside the registration regime and End-User Exemption would be regulated under this framework. Direct intends to provide separate comments on the breadth (or lack thereof) of the CSA's End-User Exemption, but generally believes that the Consultation Paper should clearly and succinctly operate in tandem with the End-User Exemption, such that all Canadian derivatives market participants have the ability to understand their regulatory classification with respect to their derivatives activities.

Currently, entities that are "in the business of trading derivatives" will be required to register as Derivatives Dealers, while entities that, generally speaking, solely transact in derivatives for hedging purposes will be eligible for the End-User Exemption. This overlapping, dual approach creates uncertainty for entire classes of market participants (*i.e.* those that engage in some dealing or speculative activity) as to how they would be regulated under the CSA's proposed reforms. The CSA should assure that *all* market participants understand the implications of these regulatory reforms and have an opportunity to comment on proposed regulations that stand to impact their businesses.

Further, Direct encourages the CSA to allow for all non-registered entities (*e.g.*, those entities that are not Derivatives Dealers, Derivatives Advisers, LDPs, etc.) to qualify for the End-User Exemption. Direct believes that market participants that (i) predominantly engage in non-dealing activity and (ii) are not required to register with the CSA in any derivatives-related capacity should be able to use the End-User Exemption.

D. The CSA Should Provide Clarity with Respect to Certain Jurisdictional Issues Under the Consultation Paper.

Under the Consultation Paper, entities that meet the definition of "Derivatives Dealer" would be required to register as such in *each* Canadian province and territory where they conduct derivatives trading business, unless an exemption is available. However, the goal of the CSA in undertaking this process is to ensure a uniform set of rules and obligations. Applying conflicting or duplicative requirements on entities transacting in multiple provinces would be contrary to that goal. As such, Direct encourages the CSA to provide that an entity registered as a Derivatives Dealer should be subject to the regulatory obligations imposed upon it by its principal jurisdiction and should only be required to make a notice filing with a foreign jurisdiction's regulator when transacting outside of their principal jurisdiction.

Foreign entities that are registered as the equivalent of a "Derivatives Dealer" or LDP in a foreign jurisdiction, and that are subject to a regulatory regime equivalent to that of a Canadian jurisdiction in which they operate, would be exempt from certain regulatory requirements under the CSA framework. Such foreign dealers would in all cases be required to:

[10] *See* Canadian Securities Administrators, CSA Consultation Paper 91-405 – Derivatives: End-User Exemption (April 13, 2012).

(i) Register in the Canadian jurisdiction where their counterparty resides;
(ii) Comply with certain business conduct standards;
(iii) Comply with certain disclosure and reporting requirements; and
(iv) Provide the "relevant Canadian authorities" with adequate information to enable them to determine that the foreign dealer is subject to substantially equivalent regulations.

These requirements would apply even where both parties have operations in a foreign jurisdiction and the transaction is booked outside Canada.

Direct believes that this regulatory regime for foreign dealers is overly burdensome. As a starting point, Direct strongly encourages the CSA to create no more than one registration requirement (and one set of ensuing regulatory obligations) for foreign dealers that transact with counterparties in more than one Canadian province. Foreign dealers, like domestic dealers, should be subject to only a notice in provinces other than their principal jurisdiction in which they transact.

The CSA also should clarify that foreign dealers entering into derivatives transactions with non-Canadian affiliates of Canadian entities that are booked outside Canada will not be subject to regulation by any Canadian regulatory authority.

Finally, in its regulatory reform efforts, Direct respectfully requests that the CSA address jurisdictional issues for *all* foreign entities transacting with Canadian counterparties, and not just foreign *dealers* transacting with Canadian counterparties or clients. Direct cautions the CSA that any jurisdictional overreach in derivatives regulation has the potential to create a barrier to entry for non-Canadian entities to transact in Canada. Any such deterrent to doing business in Canada may lead to fewer market participants, which in turn may lead to less liquidity and higher prices for the remaining Canadian market participants. As such, Direct urges the CSA to carefully and narrowly structure a cross-border regime as part of Canada's derivatives reform efforts.

E. LDP Registration Requirements Should Be Addressed in its Own Consultation Paper.

Direct would like to offer comment on the LDP paradigm proposed in the Consultation Paper. However, this paradigm as set forth therein is incomplete. The Consultation Paper defines a "Large Derivatives Participant" as "a Canadian resident entity that maintains a substantial position in a derivative or a category of derivatives." Other than looking to the Major Swap Participant standard in the United States, which uses similar language,[11] it is difficult to determine the scope of the LDP standard.

Although the CSA states that it will undertake the determination of registration thresholds for LDPs in a separate effort,[12] prior to doing so, the CSA should make clear the underlying purpose of the LDP regulatory paradigm. Direct believes that LDP registration should be required of entities that have large uncollateralized derivatives exposures. It should not be

[11] Commodity Futures Trading Commission Final Rule on *Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant*." 77 Fed. Reg. 30596 (May 23, 2012).

[12] *Consultation Paper* at 4,129.

required of entities that predominantly use derivatives to hedge. Hedging is a risk reducing activity. It creates so-called “right way risk.” That is to say that when an entity hedges any losses on its derivatives, positions are typically offset by gains on the underlying position being hedged. As such, Direct requests that hedge positions be excluded from the LDP analysis. At the very least, the lower-risk nature of hedge positions should be accounted as the LDP paradigm is created.

III. CONCLUSION.

Direct supports the adoption of an appropriately-tailored regulatory framework for Canadian derivatives markets and respectfully requests that the Administrators consider the comments set forth herein.

If Direct can offer any assistance to the Administrators as regulatory reform efforts move forward, please contact me at 403-776-2246.

Sincerely,

*/s/ Bill Rutherford*_____

Bill Rutherford
Credit Risk Officer
Direct Energy Marketing Limited

June 17, 2013

DELIVERED VIA ELECTRONIC MAIL

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Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
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Dear Sirs/Mesdames:

Re: Comment Letter to CSA Staff Consultation Paper 91-407 - Derivatives Registration

Enbridge Inc. ("**Enbridge**") hereby respectfully submits these comments below in response to Canadian Securities Administrators' (the "**CSA**") Derivatives Committee (the "**Committee**") request for comments in connection to the *CSA Staff Consultation Paper 91-407 Derivatives: Registration* (the "**CSA Paper 91-407**") published on April 18, 2013, which outlines the CSA's proposals to impose registration requirements on key derivatives market participants.

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 more than two million barrels every day. Enbridge's natural gas gathering and transmission system extends from Northern British Columbia to the Gulf of Mexico, 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 derivatives to hedge the risks associated with its core business of transporting and processing energy commodities, where it is "economically appropriate to the reduction of risks in the conduct and management of its commercial enterprise"[1] where the risks arise from numerous sources including risk associated with energy commodities as well interest rate and foreign exchange risks. Enbridge transacts in derivatives on its own behalf, which clearly is meant to mitigate its own risks.

Enbridge is a member of the Canadian Energy Derivatives Working Group (the "**Working Group**") and fully supports the comments recently submitted by the Working Group with respect to the CSA Paper 91-407.

Enbridge appreciates the opportunity to comment on the CSA Paper 91-407 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. However, while Enbridge supports the CSA's general intentions to "protect participants in the derivatives markets from unfair, improper and fraudulent practices; protect the soundness of Canadian financial markets and reduce risks, including systemic risks, resulting from the derivatives activities of key market participants", Enbridge is very concerned that some of the key requirements the CSA is proposing to impose in the CSA Paper 91-407 on key derivatives market participants are over reaching and should not be imposed on market participants such as Enbridge who enter into derivatives transactions for purely commercial hedging purposes. In addition, as these proposals in the CSA Paper 91-407 (the "**Proposals**") are part of the mechanisms the CSA is recommending to put in place to establish a regulatory regime for the over-the-counter ("**OTC**") derivatives market in Canada and support Canada in meeting its G-20 commitments, Enbridge respectfully submits that these Proposals are not consistent with the regulations being adopted in the United States (the "**U.S.**") and in the European Union (the "**EU**"). As a result, if these Proposals are adopted, entering into derivatives transactions with Canadian energy market participants would become onerous, burdensome and very costly, thereby putting Canadian energy market participants at a competitive disadvantage and would cause a freeze in the liquidity available in Canadian OTC derivatives marketplace, which would increase systemic risk and defeat one of the CSA's intentions as enumerated in CSA Paper 91-407 and in other CSA staff consultation papers.

II. ENBRIDGE'S GENERAL COMMENTS ON THE CSA PAPER 91-407

With regard to the Proposals in CSA Paper 91-407, Enbridge respectfully urges the CSA to re-evaluate its intentions and revisit its Proposals by starting with defining what would be considered an OTC derivative or OTC derivatives trading activities i.e. a **Product Determination Rule** (that is applicable in all circumstances (as opposed to a product determination rule for reporting and another for registration) and should be uniform in all the CSA staff consultation papers). This should then drive what entities should be subject to a registration regime (if then needed), i.e. an **Entity Definitions Rule**. In other words, the CSA should define and provide guidance about whether a company's OTC derivatives trading activities would cause it to fall within the definition of "dealing" or "trading". This is a distinction that has been made in the U.S. that impacts Canadian energy market participants. Enbridge submits that the CSA must also make this distinction to prevent the imposition of different regulatory regimes for the same transactions entered into on different sides of the border.

The U.S. Commodity Futures Trading Commission (the "**CFTC**") in its implementation of the enabling Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**") provided

[1] See the CFTC's Final Rule on *End-User Exception to the Clearing Requirement for Swaps* published in July of 2012.

a definition of "hedging" in distinguishing between "dealing" and "trading" activities for the purpose of excluding certain "swaps" transactions from "dealing" activity under the swap dealer definition to ensure that it provides clarification whether a company's "swaps" activities would cause it to fall within the definition of a swap dealer.[2] The CFTC concluded in its further interpretation that "swaps" entered "for the purposes of hedging [are] inconsistent with swap dealing.' The CFTC further noted that "swaps" entered into "for the purposes of hedging one's own risks generally would not be indicative of making a market in "swaps" or swap dealing as a regular business".[3] We strongly recommend that the CSA adopt the same approach.

In addition, Enbridge submits that to be consistent with other global regulators, the CSA if it decides to press on with a requirement to register as a 'derivatives dealer', should provide a *de minimis* exemption similar to what the U.S. regulators have adopted and is also being implemented by the EU[4].

Regarding the third category of large derivative participant category ("**LDP**") being proposed by the CSA because the "Committee believes that, similar to the U.S., there may be entities, other than derivatives dealers, that may have positions in derivatives that represent or could represent a significant systemic risk to Canadian markets or to the national or local economies". And a result the Committee believes "the registration of these entities would facilitate regulatory oversight that would assist in the management of systemic risk". Enbridge is very concerned that unlike the U.S. the CSA has not defined or analyzed what would amount to a "substantial aggregate derivatives exposure" that would make entities fall under the LDP category. Enbridge is very concerned that because the CSA has not established a definite registration threshold, it leaves participants in a world of limbo and uncertainty in determining if they are included in this category or not, thereby creating a regulatory risk for such entities. Enbridge respectfully and strongly recommends that as aforementioned, before borrowing a category from the U.S., the CSA should provide a definition for an OTC derivative as the U.S. has done by defining what constitutes a "swap", which drives the assessment of what is counted in "substantial positions" assessment of a major swap participant ("**MSP**"). Without this definition, it is impossible for market participants to determine what would be counted in determining a "substantial aggregate derivatives exposure", a figure that CSA has also yet to provide.

III. <u>ENBRIDGE'S SPECIFIC COMMENTS ON THE PROPOSALS IN CSA PAPER 91-407</u>

1. Business Trigger for Advising

With respect to the second item (ii) of the proposed 'business trigger for advising', the CSA proposes that "*being, or expecting to be, remunerated or compensated* – receiving, or expecting to receive, any form of compensation for providing advice about derivatives" would be one of the specific factors that the CSA would consider when determining whether a person is "in the business" of providing derivatives advice. Enbridge notes that the CSA has borrowed the business trigger factors from securities law and Enbridge submits that legal counsel in the area of energy commodities and derivatives trading are not familiar with applicable securities laws in Canada as it applies to registrants under the securities

[2] Further Definition of a "Swap Dealer" "security-Based Dealer" "major Swap Participant" "major security-Based Swap participant" and "Eligible Contract participant" 77 Fed Reg, 30596 (May 23, 2012) the "Entity Definitions Final Rule".
[3] *Id* at n.214
[4] The EU has implemented a threshold value on non-financial counterparties whose positions in OTC derivative contracts exceed a clearing threshold of Euro 3 billion notional value for each interest rate, foreign exchange and commodity derivatives. Such a non-financial counterparty who exceeds this threshold must register.

regime. Enbridge plans to get familiar with securities case law as it relates to how the CSA borrows from it to establish a regulatory regime for the OTC derivatives market. Nevertheless, Enbridge respectfully submits that the CSA, in borrowing this aforementioned factor from securities regulation, has not taken into account the energy industry wide commercial practices that exist, which include commercial transportation arrangements on pipelines. A specific example is the "asset management arrangements" ("**AMA**") practices under the U.S. Federal Energy Regulatory Commission ("**FERC**") Rule 712.

This FERC Final Rule Order 712 -*Promotion of a More Effective Capacity Release Market* governs capacity release transactions[5] on interstate natural gas pipelines. FERC permits market-based pricing for short-term capacity releases and facilitates asset management arrangements to enhance competition in the secondary capacity release market and to increase shipper gas supply options. In general AMAs are "commercial contractual relationships where a party agrees to *manage* gas supply and delivery arrangements, including transportation and storage capacity for another party for a *payment*".

With such AMAs and other prevalent commercial contracts and agency agreements in place with third parties, Enbridge is very concerned such arrangements might be interpreted to constitute advising if this specific factor (ii) under the "business trigger for advising" is broadly construed. Enbridge is very concerned about this prospect and we strongly again recommend that the CSA defines an OTC derivative, which would definitely exclude such commercial transportation contracts. In the U.S. these contracts are categorically not "swaps" and outside the purview of the CFTC's jurisdiction.

2. Trading Derivatives: a Material Amendment

The CSA is proposing that the making a 'material amendments to a derivatives contract" be considered to be a trade in a derivative. Enbridge submits that the CSA define what it considers to be a 'material amendment'. The CSA refers to the definition of a trade in the Ontario Securities Act to provide guidance, but Enbridge respectfully submits that it will be very difficult for Canadian energy market participants and other market participants to keep track of the different provincial definitions and monitor if there are inconsistencies in different provincial legislation. Enbridge reiterates that Canadian energy market participants are not familiar with securities regulation, and as a result, Enbridge recommends that the CSA provide assurances that the different provincial regimes would be harmonized and would be consistent, to provide legal certainty to all market participants in the Canadian OTC derivatives marketplace.

3. Categories of Registration

In assessing the OTC derivatives trading activity of an entity to determine what would amount to "substantial aggregate derivatives exposure", the CSA is proposing that "entities can be categorized as LDPs, and subject to regulation regardless of *whether their derivative trading activity is for* hedging *purposes or for speculative purposes*". Since the CSA stated that its rationale in creating this category is the same as the U.S., Enbridge strongly recommends that the CSA adopt the U.S. position that allows market participants to expressly exclude all OTC derivatives transactions which hedge or mitigate commercial risk from the calculation that would make up the "substantial aggregate derivatives exposure".

4. Registration Requirements

Enbridge submits that the CSA please clarify what it requires under the proposed 'Maintenance of Financial Records and Periodic Financial Reporting' - calculations of the 'value and risk exposure relating to each position and the value and exposure of the registrant's aggregate position'. Enbridge is confused as about the possible implications of this filing.

In addition Enbridge questions why the Committee requires registrants to file reports to the board

[5] These transactions are influenced by the development of the market and the ability to hedge physical obligations using basis and capacity instruments to avoid the risk of extreme price volatility.

of directors as opposed to a designated audit, risk or finance committees of the board that have assigned this role by the board. Enbridge strongly recommends that the CSA consider the alternative of report to an audit, finance or risk committee as sufficient as it is extremely difficult to call a full board meeting for a public traded company such as Enbridge.

Enbridge is also particularly concerned about the CSA's requirement for a Chief Compliance Officer ("**CCO**") and a Chief Risk Officer ("**CRO**") for all would be registrants. Enbridge submits that the CSA clarify why it is asking for both the registration of these two positions where no other jurisdiction has made this double requirement. In addition, the CFTC in its final regulations limited the scope of the duties and responsibilities of the chief compliance officer of a swap dealer or an MSP in to only the "swaps" activities of the swap dealers and MSPs. Enbridge reiterates that the CSA define what OTC derivatives activities are and limit the scope of any registration requirements to only such activities as the U.S. and the EU have done.

5. Equivalent Regulation and Substituted Compliance

Enbridge submits that the CSA should create an exemption for market participants that are already in compliance with Dodd-Frank Act for the same OTC derivatives transactions.

IV. ENBRIDGE RESPONSE TO CERTAIN QUESTIONS POSED IN CSA PAPER 91-407

Q2. What is the appropriate standard for determining whether a person is a qualified party? Should the standard be based on the financial resources or the proficiency of the client or counterparty? If the standard is based on financial resources should it be based on the net assets of the client or counterparty, gross annual revenues of the client or counterparty, or some other factor or factors?

Enbridge recommends that the CSA adopt a similar approach to what the U.S. did in the Dodd-Frank Act that makes it illegal for anyone to enter into a swap with anyone or any entity that does not fall into the definition of an "eligible contract participant"[6]. The current list of qualified parties in applicable Alberta Securities Commission and the British Columbia Securities Commissions' blanket orders and the list of "accredited counterparties" in the Quebec derivatives act should be harmonized.

Q3. Should registration as a derivatives dealer be subject to a *de minimis* exemption similar to the exemption adopted by U.S. regulators? Please indicate why such an exemption is appropriate

Enbridge submits that such an exemption would be appropriate to provide clarity to market participants and activity-based hedging should be excluded from any such *de minimis* calculation.

Q4. Are derivatives dealer, derivatives adviser and LDP the correct registration categories? Should the Committee consider recommending other or additional categories?

Enbridge reiterates its arguments in the comments above and submits that the CSA should only create registration categories after it has defined an OTC derivative; distinguished between "dealing" and "trading" and then base any such categories on activity-based; the market structure; the nature of the trading excluding hedging activities and the existence of these kinds of participants in the Canadian OTC derivatives marketplace.

[6] Further Definition of a "Swap Dealer" "security-Based Dealer" "major Swap Participant" "major security-Based Swap participant" and "Eligible Contract participant" 77 Fed Reg, 30596 (May 23, 2012) the "Entity Definitions Final Rule

Q5. Are the factors listed the correct factors that should be considered in determining whether a person is in the business of trading derivatives? Please explain your answer.

Enbridge submits that the factors listed are based on the trading of securities and are inapplicable in determining whether a person is trading derivatives as the rationale for trading derivatives are different. Derivatives are risk management tools and not investment tools like securities.

Q8. Are the factors listed above the appropriate factors to consider in determining whether a person is in the business of advising on derivatives?

Enbridge refers to its answer in Q5.

Q9. Are the factors listed for determining whether an entity is a LDP appropriate? If not what factors should be considered? What factors should the Committee consider in determining whether an entity, as a result of its derivatives market exposures, could represent a serious adverse risk to the financial stability of Canada or a province or territory of Canada?

Enbridge submits that in light of the recent designation by the Office of the Superintendent of Financial Institutions Canada ("**OSFI**") of Royal Bank of Canada, Toronto-Dominion Bank, Bank of Nova Scotia, Bank of Montreal, Canadian Imperial Bank of Commerce and National Bank of Canada as systemically important banks in Canada under the framework of the Basel Committee on Banking Supervision ('**BCBS**") , the factors that have been listed by the CSA are not clear and it is difficult to determine for Enbridge to comment on their appropriateness. The BCBS framework contains detailed criteria which OSFI employed in its determination.

Q13. Is the Committee's proposal to impose a requirement on registrants to "act honestly and in good faith" appropriate?

Enbridge submits that the CSA explain what it means to "act honestly and in good faith".

V. CONCLUSION

Enbridge thanks the CSA and the Committee again for the opportunity to submit our comments on CSA Paper 91-407 and hope the Committee would consider our comments and recommendations as the Committee drafts its model rules to establish a regulatory regime for the OTC derivatives market in Canada. 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.

Kari Olesen
Legal Counsel

June 17, 2013

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Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission OTC Derivatives Committee

Dear Sirs/Mesdames:

RE: Encana Corporation – Comments on CSA Consultation Paper 91-407 – Derivatives: Registration

Encana Corporation ("Encana") is pleased to respond to your request for comments with respect to the above captioned.

General Comments

We believe that the following principles should be reflected in the regulatory framework:

1) One transacting entity, one jurisdiction

- Encana agrees that it is sometimes appropriate to require entities to register as active in multiple jurisdictions, based on their counterparties, but we believe that the approach for the majority of transacting entities should be to require them to register in one jurisdiction only.
- We appreciate the Committee's efforts to ensure entities are not subject to the requirements associated with derivatives regulations of multiple "deemed equivalent" jurisdictions in such situations.
- Encana believes that additional clarity is required regarding the appropriate actions of a party to a financial derivative transaction when its counterparty is not subject to "deemed equivalent" derivatives regulations.

2) Transactions do not have jurisdictions, only transacting entities do

- We respectfully suggest that it is not practical to define the jurisdiction of financial transactions. While the physical location of an exchange may define the jurisdiction of exchange-traded instruments, many OTC transactions are not readily associated with a unique jurisdiction.
- Regulatory rules will function more effectively if they focus on the jurisdiction of the transacting entities rather than on the jurisdiction of the financial transaction.

3) Derivatives regulations of exchange-traded and over-the-counter (OTC) instruments

- The Committee stated the purpose of registration is to fulfill part of Canada's commitment to the G20 to reform OTC derivatives markets. However, the registration requirements described in 91-407 do not appear to distinguish between exchange-traded and OTC instruments. We suggest clarity be given as to whether derivatives registration requirements are to encompass activity in both exchange-traded and OTC instruments or only OTC instruments.

<u>Specific Comments and Responses to Questions</u>

Part 6 REGISTRATION REQUIREMENT AND CATEGORIES OF REGISTRATION

"The Committee understands that participants in the derivatives market include a variety of entities ranging from very large and sophisticated entities to individuals and small entities that may have little experience in trading derivatives. <u>The Committee believes that participants that do not have the experience necessary to understand the obligations and risks related to a derivatives transaction or the resources necessary to easily meet their obligations may benefit from additional protection</u> that is not appropriate for large, sophisticated participants." ((2013) 36 OSCB 4124, emphasis added)

*"**Q2:** What is the appropriate standard for determining whether a person is a qualified party? Should the standard be based on the financial resources or the proficiency of the client or counterparty? If the standard is based on financial resources should it be based on the net assets of the client or counterparty, gross annual revenues of the client or counterparty, or some other factor or factors?"*

ENCANA COMMENT: We do not believe that unsophisticated parties are best protected through the imposition of additional protections for those parties in the regulations; rather, we suggest that the best way to protect unsophisticated parties is by limiting or excluding their participation in the derivatives market. We suggest that categorization of parties both by status as "qualified" vs. "unqualified" and by type of market participant (Derivatives Dealer, Derivatives Advisor, etc.) is redundant. The Committee should adopt a single set of defined categories of market participants and exclude parties in categories deemed insufficiently sophisticated to participate in the derivatives market. Concepts and definitions set out in documents promulgated by provincial securities commissions, such as the Alberta Securities Commission Blanket Order 91-505, may be helpful in developing and articulating appropriate categories.

6.1 Derivatives Dealer

"The Committee believes that persons carrying on the business of trading in derivatives or holding themselves out to be carrying on that business, should be regulated." ((2013) 36 OSCB 4125)

ENCANA COMMENT: As mentioned above, the Committee does not appear to distinguish between exchange-traded and OTC derivatives. We feel this distinction is important as we believe the intention of these regulations is to focus on the OTC markets.

Within the OTC markets, we suggest regulations distinguish "Derivatives Traders" from "Derivatives Dealers." We recommend defining "Derivatives Traders" as entities in the business of generating profits from speculating in OTC derivatives markets. We recommend defining "Derivatives Dealers" as "Derivatives Traders" that also engage in such activities as:

i. Acting as a market maker;
ii. Intermediating trades; or
iii. Providing clearing services to third parties.

We believe the distinction between "Derivatives Traders" and "Derivatives Dealers" is important because each group raises different concerns for regulators. We further suggest the Committee only focus on participants with positions or activity beyond an appropriate de minimus threshold. Calculation of this de minimus threshold should exclude OTC transactions that can legitimately be claimed to be "hedges" in that they offset underlying commercial risk. We also suggest that the Committee should reconsider some of its recommended triggers for classifying OTC derivative market participants. Specifically ((2013) OSCB 4126, 4127):

"(iii) *Trading with the intention of being remunerated or compensated*"

ENCANA COMMENT: This trigger is ambiguous because it seems to cover every possible rationale for entering into a derivative transaction. For example, a common objective of a company executing a derivative transaction to offset its underlying risk in a physical market is to reduce the volatility of its cash flows. How would the Committee consider the person executing this derivative transaction if the person is rewarded for how effectively cash flow volatility is mitigated? The trigger, as currently articulated, does not seem to be helpful in identifying conduct that should be subject to regulation.

"(iv) *Directly or indirectly soliciting*"

ENCANA COMMENT: This trigger appears to encompass any activity undertaken with the intention of entering into a derivative transaction, regardless of the type of entity, the business purpose behind the derivative or the sophistication of the entity. This trigger, as currently articulated, is overly broad.

"(vi) *Trading with a counterparty that is a non-qualified party that is not represented by a derivatives dealer or adviser on a repetitive basis*"

ENCANA COMMENT: As mentioned above, Encana suggests that designating parties as "qualified" or "unqualified" is redundant with a more accurate categorization of market participants based on size and sophistication.

Moreover, as long as a party is permitted to participate in the OTC derivatives market, this proposed trigger is problematic because it does not address the situation where two non-qualified counterparties (or two counterparties in the same derivatives market category) enter into derivative transactions. We recommend that some form of master agreement be established before two entities are allowed to execute OTC derivative transactions. We suggest that the category or status of each party should be ratified between each pair of transacting entities through this master agreement governing their derivative transactions. Within this ratification and where agreeable to both parties, contracting parties should have the freedom to waive their category-appropriate rights.

6.3 Large Derivative Participant

ENCANA COMMENT: The reference to *"…the entity's exposure in Canadian derivatives markets…"* ((2013) 36 OSCB 4129, emphasis added) assumes it is possible to define a nationality for derivative markets. We do not believe this is possible for OTC derivative markets. Accordingly, we suggest that the Committee should instead focus on defining the derivatives jurisdiction of derivative markets participants.

"***Q9:*** *Are the factors listed for determining whether an entity is a LDP appropriate?*"

ENCANA COMMENT: We agree that the definition of an LDP should include (1) Canadian resident entities, and (2) foreign resident entities with positions with Canadian resident entities. However, LDP designation should not be based the "residency" of the derivatives market because the residency of a market can be impossible to define. Additionally, the LDP designation should be based on an "appropriate level" of net exposure to derivatives markets (i.e., offsetting long positions against short positions). The "appropriate level" should be set by each regulator. Derivative transactions intended to mitigate an underlying physical or commercial exposure should be excluded from the calculation of this net position.

"***Q13:*** *Is the Committee's proposal to impose a requirements on registrants to "act honestly and in good faith" appropriate?*"

ENCANA COMMENT: The requirement to act honestly and in good faith should be a requirement of all market participants, regardless of their category or classification. This requirement goes to the very integrity of the market.

"***Q14****: Are the requirements described appropriate registration requirements for derivatives dealers, derivatives advisers and LDPs? Are there any additional regulatory requirements that should apply to all categories of registrants? Please explain your answers.* "

encana

ENCANA COMMENT: Given the unique nature of OTC derivatives markets, we recommend a proficiency requirement for derivative market participants that falls outside the definitions of Derivatives Dealers, Derivatives Traders, Derivative Advisers and LDPs. The traders and/or supervisors at all derivative market participants should be able to demonstrate a certain level of proficiency. Only Derivative Dealers, Derivative Advisers and LDPs should be subject to financial and solvency requirements.

"***Q15:*** *Should derivatives dealers dealing with qualified parties be subject to business conduct standards such as the ones described in part 7.2(b)(iii) above? If so, please explain what standards should apply.* "

ENCANA COMMENT: We support business conduct standards, but are concerned with how they will be implemented in practice. Typical OTC derivative transactions are executed in a matter of seconds between the traders of two counterparties. This is typically the case even for transactions involving non-qualified entities. Providing pre-trade reports or obtaining independent advice before entering into each individual transaction is problematic when multiple transactions can be executed in a matter of minutes. Conversely, prohibiting transactions between a non-qualified counterparty and a derivatives dealer with a conflict of interest is likely too restrictive. We suggest an alternative where several levels of business conduct standards are formulated and each pair of counterparties are able to adopt the level of business conduct standards most conducive to their level of transacting activity. We suggest that the Committee should define a series of alternative business conduct standards, any one of which could be incorporated into an ISDA amendment between two counterparties.

"***Q16:*** *Do you have a preference between the two proposals relating to the regulation of a derivatives dealer trading with counterparties that are non-qualified parties? Is there another option to address the conflict of interest that the Committee should consider? Please explain your answer.* "

ENCANA COMMENT: Please refer to the above comment to Q15.

"***Q22:*** *Is the proposal to exempt crown corporations whose obligations are fully guaranteed by the applicable government from registration as a LDP and, in the circumstances described, as a derivatives dealer appropriate?*"

ENCANA COMMENT: Encana respectfully submits that governments and crown corporations should not be exempt from registration. Governments and crown corporations engender the same concerns regarding derivatives transactions as all other parties. Recent events in California, Greece, Cyprus and Ireland, among others, show the impacts governments can suffer as a result of participating in derivatives transactions. Additionally, branches of government can be privatized, which could create a question of whether a newly privatized entity would be required to register when it already has a significant portfolio of existing derivative transactions from its formerly exempt status.

Please contact me at (403) 645-7519 or by email at scott.dalton@encana.com if you have any questions.

Yours very truly,

ENCANA CORPORATION

Per: Scott Dalton
Advisor, Market Risk

CC: David Sheridan (david.sheridan@encana.com);
Ryan Edwards (ryan.edwards@encana.com).

Tom Phillips
Manager, Investment Compliance, Canada

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June 17, 2013

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Alberta Securities Commission
Nova Scotia Securities Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission

John Stevenson, Secretary
Ontario Securities Commission
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Me Anne-Marie Beaudoin
Corporate Secretary
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Dear Sirs / Madames:

RE: CSA Consultation Paper 91-407 Derivatives: Registration

Thank you for the opportunity to provide comments to the Canadian Securities Administrators ("CSA") regarding Consultation Paper 91-407 Derivatives: Registration ("CP 91-407") related to the registration and regulation of market participants trading Over-the-Counter derivatives.

Fidelity Investments Canada ULC ("Fidelity Canada") is a fund management company in Canada and part of the Fidelity Investments organization in Boston ("Fidelity Investments"), one of the world's largest financial services providers. Fidelity Canada manages a total of $74 billion in mutual funds and institutional assets (the "Funds"). It offers approximately 150 mutual funds and pooled funds to Canadian investors.

Fidelity Canada supports the Canadian Securities Administrators Derivatives Committee's (the "Committee") efforts to implement registration requirements as a means to regulate derivative market participants. Fidelity Canada is registered under National Instrument 31-103 ("NI 31-103") as an investment fund manager and portfolio manager ("advisor") in all provinces and territories in Canada, and as a Commodity Trading Manager under the Commodity Futures Act (*Ontario*). As a registrant, Fidelity Canada is subject to many of the regulatory requirements proposed in CP 91-407 for derivatives. From a practical standpoint, NI 31-103 generally addresses the concerns of the Committee related to compliance and risk management, supervision and oversight. Our primary concerns with the proposed regulations thus relate to elements that are not consistent with the content and scope of registrant obligations under NI 31-103.

Fidelity Canada's responses to the CP 91-407 proposals that apply to Fidelity Canada in its capacity as investment fund manager and advisor are noted below.

A. Registration Triggers

Fidelity Canada appreciates the Committee's consideration on the impact registration might have on investment funds. In our view the application of "business triggers" to investment funds is not appropriate since investment funds are generally not "in the business of trading derivatives" as discussed in CP 91-407. Investment funds are managed and distributed for the benefit of investors and the "business trigger" concept is more appropriately applied to dealers and advisers that might intermediate trades, act as market maker, trade with the intention of being remunerated or compensated, or directly or indirectly solicit derivatives trades or provide advice with respect to derivatives.

B. Registration Categories

We believe the recommendation to implement a derivatives dealer and derivatives adviser registration category are appropriate. While CP 91-407 states "the Committee believes that most investment funds, particularly investment funds that are reporting issuers, will not trigger an obligation to register", we note that investment funds may be caught by a Large Derivative Participants ("LDP") registration category. While we understand the defining characteristics of an LDP are still being assessed by the Committee, CP 91-407 states that it may apply to entities that, in part, maintain a "substantial position in a derivative" and where "the entity's exposure in Canadian derivatives markets results in counterparty exposure that could pose a serious risk to Canadian financial markets or to the financial stability of Canada ..."

If the intent of the LDP registration category is to identify and regulate derivatives users who are "systemically important" but do not otherwise fit into another registration category, we are concerned that investment funds may be caught under the LDP category and subject to regulatory requirements that are inappropriate to the risks associated with derivative use in investment funds. For example, under National Instrument 81-102 ("NI 81-102"), a Canadian mutual fund is not permitted to use leverage, must maintain sufficient asset coverage for all derivative positions, and is subject to counterparty risk monitoring requirements. These requirements serve to mitigate the systemic risk that we believe the LDP category is intending to address.

We acknowledge that the Committee is recommending additional work be undertaken to establish appropriate thresholds for LDP registration and we encourage regulatory authorities to consider finding an appropriate balance between the systemic risk mitigation intent of the LDP registration category and the manner in which derivative risk is managed and mitigated in investment funds. In our view it is not appropriate to introduce a registration category specific to investment funds when the advisers and dealers responsible for providing derivatives advice and trading to an investment fund are themselves required to register.

C. Proficiency

We note that the Committee proposes that registrants "have procedures to ensure that all of their directors, officers, employees or agents involved in trading or advising on derivatives, including supervisors and managers of those responsible for trading in or advising activity, have the appropriate education, training and experience to carry out their responsibilities." We do not think it appropriate to require derivatives proficiency for all directors and officers, and recommend that the Committee narrow the scope of this proposal to include only those responsible for providing advice on, or trading in, derivatives and those responsible for the direct supervision of those individuals. While it is incumbent on directors to oversee the management of a firm's derivatives program, we consider it impractical and inappropriate to expect directors to fulfill derivatives course requirements or be required to comply with a proficiency standard specific to derivatives. The role of a director is to provide oversight, ensure firms implement appropriate policies and procedures, and ensure those engaged in advising activities at the firm have the appropriate knowledge and experience relative to derivatives use. The director's role is not to act in a capacity where they are reappraising decisions made by a portfolio advisor. In addition, introducing proficiency requirements will reduce the number of directors available to portfolio advisors thus negatively impacting overall governance effectiveness.

Due to the complex nature of derivative instruments and the derivatives market generally, we agree that registered entities should establish minimum proficiency standards to ensure the prudent use and oversight of derivatives. In our view, and based on the current registration requirements under the Commodity Futures Act (*Ontario*), a prescriptive regulatory approach to proficiency may not effectively address the risks associated with derivatives use in all circumstances. Alternatively, we suggest that responsibility for defining proficiency standards and assessing the proficiency of those engaged in derivatives activity rest with a registrant's Board of Directors. However, general guidance from regulatory authorities as to what constitutes a minimum proficiency standard with respect to derivatives may be helpful if proficiency is to be a prerequisite for registration.

D. Capital, Margin, Insurance and Record Requirements

As we await further recommendations from the Committee relative to capital requirements for derivatives users, we recommend that no additional capital requirements be imposed on derivatives advisors and investment fund managers already required to maintain minimum excess capital under NI 31-103. We acknowledge that maintaining sufficient capital is a key element in seeking to ensure stability in the derivatives market, but as noted above, mutual funds use derivatives in a non-levered manner and in complying with NI 81-102 are thus able to fulfill their obligations under each derivatives contract. As such, we recommend that investment funds subject to NI 81-102 and firms registered under NI 31-103 be explicitly excluded from any proposals related to providing additional capital.

We also recommend that the Committee consider NI 31-103 provisions related to margin, insurance and recordkeeping and seek to minimize or eliminate inconsistencies between NI 31-103 and proposed derivatives regulation. In our view, NI 31-103 requirements adequately address the risks associated with derivatives use, and any additional requirements may introduce unnecessary cost through added complexity to existing compliance and business practices.

E. Compliance Systems and Internal Business Conduct Requirements

We agree with the Committee's recommendation that derivatives registrants establish, maintain and apply compliance and risk management systems appropriate to their derivatives business and note this requirement is consistent with the Compliance System requirements in NI 31-103. As such, we recommend that registered firms subject to NI 31-103 be permitted to rely on compliance with NI 31-103 provisions to satisfy derivatives regulatory requirements. In our view the NI 31-103 Compliance System requirements serve as an appropriate framework for addressing the risks associated with derivatives use. We also recommend that the characterization of compliance programs as "robust" in CP 91-407 be excluded in any proposed rule as the term is subjective and the standard is unclear.

We agree that board-level approval of compliance and risk management systems and ongoing reporting on actions pursuant to derivatives policies and procedures is appropriate. However, we note that in the investment fund context under NI 31-103, the compliance system requirement applies to registered firms, not investment funds themselves and we ask that the Committee consider applying the compliance system requirements to firms that provide derivatives services to an investment fund, not the fund itself under registration as an LDP or otherwise.

We also note that the Committee recommends that each registrant "will be required to prepare a report describing the registrant's derivatives activities, their derivatives compliance and risk management systems and issues related to derivatives compliance and risk management for presentation to the registrant's board" and that "a copy of this report should be filed with the market regulators in each jurisdiction in which it is registered after it has been approved by the registrant's board." Under NI 31-103, registrants are required to make annual compliance presentations to their boards that include an assessment of the registrants' compliance and risk management systems. We strongly oppose the proposal that a similar report on derivatives programs be made public through a filing with regulatory authorities. Compliance system and control reporting is key to the effective oversight of registrants, and we consider the contents of these reports should be available only for the rigorous review of boards, and to regulatory authorities upon request. We encourage the Committee to consider alternative options including the provision of a certificate of compliance or other such assurance to regulatory authorities.

F. Appointment of an Ultimate Designated Person, Chief Compliance Officer and Chief Risk Officer

We agree that derivatives registrants should appoint and register an Ultimate Designated Person ("UDP") and Chief Compliance Officer ("CCO") provided the responsibilities assigned to these roles are consistent with the UDP and CCO requirements under NI 31-103. In the investment funds context, we also agree with the proposal that where derivatives use is not a "primary business" registrants have flexibility with respect to assigning derivatives UDP responsibilities. However, we ask that this flexibility not be based solely on "the arm of the business that conducts derivatives trading or advising". Derivatives may be used very selectively in investment funds and in order to maintain appropriate levels of proficiency and streamline supervision processes, advisor firms should be able to assign derivatives UDP responsibility according to where the expertise resides in their organization, consistent with the UDP proficiency principle for securities in NI 31-103.

We also agree that derivative registrants should appoint and register a derivatives CCO, and encourage the Committee to ensure the responsibilities of the derivatives CCO are consistent with those under the securities framework in NI 31-103. For firms currently registered under NI 31-103, we recommend they be permitted to rely on compliance with NI 31-103 CCO registration provisions to satisfy derivatives CCO requirements.

Under NI 31-103, CCO's are responsible for "establishing a system of controls and supervision sufficient to … manage the risks associated with its business in accordance with prudent business practices", and the appointment and registration of a derivatives Chief Risk Officer ("CRO") is not required. While in principle we agree with the premise of assigning responsibility for risk monitoring and management relative to the use of derivatives, we encourage the Committee to clarify how the CCO and CRO roles and responsibilities related to risk management might differ.

CP 91-407 does not propose proficiency requirements for the derivatives UDP, CCO and CRO roles. As noted above, we suggest that responsibility for defining proficiency standards and assessing the proficiency of the UDP, CCO and CRO rest with a registrant's Board of Directors. General guidance from regulatory authorities as to what constitutes a minimum proficiency standard for the UDP, CCO and CRO with respect to derivatives may be helpful if proficiency is to be a prerequisite for registration.

G. Foreign Derivatives Advisors

Fidelity Canada agrees with the Committee's recommendation that foreign derivatives advisors be required to register in Canadian jurisdictions where they carry on business but be exempted from specific regulatory requirements in Canada where they are subject to an equivalent regulatory regime in their local jurisdiction.

H. Conclusion

Fidelity Canada supports the Committee's efforts to establish a registration regime for derivatives market participants in order to implement and enforce consistent regulatory standards and address systemic risk issues on an ongoing basis. It is evident throughout CP 91-407 that the Committee has considered existing regulatory frameworks for securities in making its recommendation. While the objective of implementing a derivatives registration regime is clear, we encourage the Committee to consider granting exemptions to firms required to comply with the same provisions in the securities framework (i.e. NI 31-103) on the basis that these firms are already required to establish registration, compliance and risk programs that are substantively the same as those contemplated in CP 91-407.

We thank you for the opportunity to comment on these matters. As always, we are more than willing to meet with you to discuss any of our comments.

Yours truly,

Tom Phillips
Manager, Investment Compliance

c.c. Rob Strickland, President
W. Sian Burgess, Senior Vice-President, Head of Legal and Compliance, Canada
Fidae Abbas, Vice-President, Compliance, Canada

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June 19, 2013

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Dear Mr. John Stevenson and Ms. Anne-Marie Beaudoin:

In response to the Canadian Securities Administrators ("**CSA**") OTC Derivatives Committee ("**Committee**") request for comment issued with CSA Staff Consultation Paper 91-407 ("**CSCP 91-407**"), FIRMA Foreign Exchange Corporation ("**FIRMA**") wishes to provide the CSA with commentary on the Committee's overview proposal on implementing a registration regime for derivatives market participants in Canada (the "Commentary Items").

We are appreciative of the opportunity to provide our feedback to the Committee on the Commentary Items in advance of the implementation of corresponding legislation and policies, and recognize that the Commentary Items remain subject to revision.

The content of this letter is similar in parts to FIRMA's commentary letter provided on February 5, 2013 with regards to Staff Consultation Paper 91-301. We feel that these statements remain pertinent to the Commentary Items, and we have further augmented our letter with specific commentary on the impact to FIRMA and similar companies if they are required to register as derivatives dealers under the proposed regime.

ABOUT FIRMA

As an industry participant, we believe that a brief explanation of FIRMA's business model is important for the purpose of providing context to our responses on the Commentary Items. FIRMA is an international leader in corporate foreign exchange as well as large-scale personal foreign currency exchange transactions. FIRMA targets a niche customer base that is underserved by banks by providing more favorable exchange rates, lower transaction costs, and a differentiated level of personalized service.

FIRMA has grown significantly since its inception in 1998. Beginning with three employees and increasing into the multi-national firm it is today, employing over 220 people world-wide. FIRMA's growth has been largely attributed to organic growth via the addition of new offices and expansion into multiple geographies. Today, FIRMA operates across nineteen branch locations in Canada, along with four branches in the United Kingdom, the United States, Australia, and New Zealand. FIRMA has a strong financial track record, reporting profitable and significant growth since its inception in 1998.

FIRMA provides foreign exchange solutions for retail and wholesale customers. The services we provide are founded on a principle of providing cost-effective foreign exchange services to companies that require foreign exchange financial certainty in their business operations. We do not view our services as trades in the traditional securities or derivatives markets because, unlike speculators in these markets, our clients are not looking to capitalize on the fluctuating nature of foreign currency, but rather to remove this variability from being a factor in their pricing models and to ensure cost certainty.

The three ways in which our clients typically utilize FIRMA to achieve these objectives are through (i) Spot Orders, (ii) Market Orders and (iii) Forward Contracts.

(i) Spot Orders are foreign exchange contracts that allow FIRMA clients to instruct us to acquire a fixed amount of foreign currency at any given time for immediate settlement. On a self-directed basis, the client will determine when the exchange rate for a foreign currency has reached a conversion cost that fits their pricing model and they will then execute an immediate transaction on this basis.

(ii) Market Orders are essentially conditional, deferred Spot Orders. Clients that have pre-calculated foreign exchange conversion rates built into their pricing models can instruct FIRMA to acquire foreign currency as soon as the exchange rate for the foreign currency falls within their customized cost parameters. After execution of the Market Order, FIRMA monitors the exchange rates and executes a transaction once the rate matches the client's instructions.

(iii) Forward Contracts (or Deliverable foreign exchange forward contracts) are specialized orders where FIRMA will provide foreign exchange contracts to clients based on present foreign currency exchange conditions for settlement at a future date (no greater than 12 months from the date of order). This service allows FIRMA clients to plan long-term pricing certainty without having to amass and hold unnecessary foreign exchange cash surpluses in advance of needing that foreign currency. On the future settlement date, the transaction is settled and the client purchases the pre-determined amount of foreign currency at the pre-determined price. Forward Contracts may be subject to a deposit requirement as deemed necessary from time to time. The client will be notified of any deposit requirement in advance of entering into any forward contract with us.

All three of these services are non-speculative in nature, and are used by our clients to conduct their own business operations; <u>not to create investment opportunities</u>. Our clients use our Spot Orders and Market Orders because of the service benefits they receive:

- Simple, convenient and competitive foreign currency pricing;
- Industry-leading customer service; and
- A professional/personal business relationships with a FIRMA sales person that understands their business needs.

In addition to these benefits, FIRMA's clients also use our Forward Contract service to ensure price certainty over fixed intervals of up to 12 months. This services allows them to focus on their own business operations rather than the potentially volatile currency markets. FIRMA's clients are typically small to medium sized enterprises in industries that are required to buy or sell foreign currencies in order to buy or sell products or services in foreign jurisdictions. They fit within any number of industries but all share the common business reality of having to acquire foreign currency in order to facilitate cross-border transactions.

CURRENT SECURITIES REGULATORY REGIME

In Alberta, it is our current understanding that Spot Orders and Market Orders are not treated as "OTC Derivatives" under securities legislation and the Forward Contracts are subject to Blanket Order 91-505 ("**BO 91-505**"), which exempts FIRMA from the requirement to register as a securities Dealer (as defined in the Alberta *Securities Act*) and trade subject to a prospectus (or applicable prospectus exemption found in National Instrument 45-106).

Under BO 91-505, the FIRMA Forward Contract transactions are exempted on the basis that both FIRMA and the client are "qualified parties"; persons or companies that sell, buy, trade, produce, market, broker or otherwise use the foreign exchange commodity in their business and enter into over-the counter trades in futures contracts only as a consequence of this business activity.

FIRMA believes that this exemption is appropriate for the foreign exchange services it provides because the trading activity is a business reality of commercially using foreign currency and is not speculative. In fact (and contrary to the traditional nature of a speculative derivative), FIRMA Forward Contracts are being used to <u>limit</u> the client's exposure to the activities of speculative traders and the currency fluctuations that they create.

Based on CSCP 91-407, we were unable to determine whether or not BO 91-505 would remain in force upon publication of the rules proposed in the Commentary Items. FIRMA believes that the qualified party exemption created by transactions among commercial users does not carry a risk of harm to the public, and allowing BO 91-505 to continue in force would not be contrary to the Committee's objectives in meeting its G-20 commitments.

Even if BO 91-505 were to remain in force, the Commentary Items propose new requirements which do not appear to be exempted for "commercial users" and would negatively impact the market segment relying on Forward Contracts for cost-certainty rather than speculative purposes.

In addition, if the CSA were to determine that registration would be required for companies involved in facilitating deliverable foreign exchange Forward Contracts, further clarification on the type of activities that would trigger registration is required. Specific to this issue of regulation of key derivative market participants in the United States ("U.S."), the Dodd-Frank Act provides an exemption from dealer registration for persons who engage in a de minimis quantity of swap dealing activity with or on behalf of customers. The Dodd-Frank Act also specifically recognizes the difference and unique nature with deliverable foreign exchange Forward Contracts and has provided certain exceptions to this product offering. We would request that the CSA also provide clarification.

To provide comments on CSA's question #3: "Should registration as a derivatives dealer be subject to a de minimis exemption similar to the exemption adopted by U.S. regulators? Please indicate why such an exemption is appropriate."

There needs to be exemptions based on deliverable foreign exchange products. The exemptions are appropriate, for reasons described below and above. Deliverable foreign *exchange forward contracts fill a real operational need for a business purpose with small and medium size enterprises (SME's) to facilitate global commerce and secure rates on future payments or receivables. The intent is not for investment purposes. As stated above and to emphasize the point, FIRMA believes that this exemption is appropriate for the foreign exchange services it provides because the trading activity is a business reality of commercially using foreign currency and is not speculative. In fact (and contrary to the traditional nature of a speculative derivative), FIRMA forward contracts are being used to limit the client's exposure to the activities of speculative traders and the currency fluctuations that they create.*

IMPACT OF THE REGISTRATION

Previous Committee publications and the Commentary Items have made it clear that FIRMA Spot Orders for the purchase and sale of currency are a form of excluded derivative because they require (among other things) the counterparties to make or take physical delivery of the currency within 2 business days. We believe that this exclusion will also apply to FIRMA Market Orders because the condition precedent to the agreement is that a pre-determined currency exchange rate occurs, and the delivery of the physical currency is made within 2 business days of the Market Order being perfected by the condition precedent.

Unlike Spot Orders and Market Orders, the FIRMA Forward Contracts do not fit within proposed derivative exclusions and would appear to be subject to the proposed legislative regime. There has been some discussion of end-user exemptions that could benefit FIRMA clients who acquire "derivatives" for a business rather than speculative purpose and we remain optimistic that specific industry exemptions may become available.

Since FIRMA's Spot Orders, Market Orders and Forward Contracts are all targeted towards the same client profile of "commercial end-user", we believe that materially distinguishing how these services are treated under securities legislation will create confusion for public consumers. From the client's perspective, Spot Orders and Forward Contracts are being purchased for the same business purpose however the Scope Rule requires that they be treated differently. FIRMA's clients will need to be provided with significant clarification and disclosure on the differences between these types of services such as:

- the logistics of closing;
- the amount of information that is required to participate in a service; and
- the proportionate cost of each service that is being applied to compliance, legal and reporting obligations rather than to the acquisition of foreign currency to be provided to the client.

FIRMA believes that this has the potential to cause confusion because Forward Contracts are (in our opinion) not traditionally among the class of derivative that the Committee is seeking to regulate through implementation of the new regulations.

In contrast to traditional derivatives, foreign exchange Forward Contracts always require both parties to physically exchange the full amount of currency on fixed terms that are set at the outset of the contract. Market participants know the full extent of their own payment obligations to the other party to a trade throughout the life of the Forward Contract. We do not offer non-deliverable contracts and only deal with the physical exchange of currency.

Because Forward Contract transactions involve the actual exchange of currency, settlement risk (the risk that one party to the foreign exchange transaction will pay the currency it sold but not receive the currency it bought), is the main source of risk in these transactions. There is extensive documented process and restrictions in FIRMA's payment systems that permit the transfer of one currency to take place only if the final transfer of the other currency also takes place and has physical (electronic) delivery of currency to FIRMA. So long as the transaction is being fully executed on the settlement date (which can be ensured, in part because both the client and FIRMA are the only parties to the Forward Contract), we believe that this risk is significantly mitigated.

In the Commentary Items, we appreciate the opportunity to speak to Question #2 proposed by the Committee: "What is the appropriate standard for determining whether a person is a qualified party? Should the standard be based on the financial resources or the proficiency of the client or counterparty? If the standard is based on financial resources should it be based on the net assets of the client or counterparty, gross annual revenues of the client or counterparty, or some other factor or factors? Should registration as a derivatives dealer be subject to a de minimis exemption similar to the exemption adopted by U.S. regulators? Please indicate why such an exemption is appropriate."

An appropriate standard for determining whether a person is qualified should be based on the proficiency of the client or counterparty. This could take the form of representations and warranties which would require there to be an equal responsibility on customers to understand the services they are purchasing once full disclosure is provided. In absence of this proficiency, a minimal financial test should be required. A financial test should include a minimum amount of exception limit, possibly $100,000 in tangible shareholders equity. Please refer to FIRMA's comments on Question #3 above with regards to de minimis exemptions similar to the exemption adopted by U.S. regulators.

In the absence of a commercial end-user exemption to the overall regime, FIRMA believes that it may be appropriate to incorporate acquisition intent into the definition of a qualified party for FIRMA clients who are acquiring commodity derivatives (including currency) as commercial end-users. By creating purely financial "sophistication" tests, the proposed registration regime could disproportionately penalize end-user market participants that are small to medium size enterprises and create unfair competitive advantages for large businesses.

At question #8 of the Commentary Items, the Committee has inquired as to the "advising" business trigger: "Are the factors listed the correct factors that should be considered in determining whether a person is in the business of advising on derivatives?"

The proposed regime has the potential of creating uncertainty on whether or not a participant is "dealing" or "advising". FIRMA wishes to inquire whether or not the Committee intends to enact provisions of the proposed legislation that will create a similar exemption to that found in section 8.23 of National Instrument 31-103 (pertaining to securities dealer registration) which allows certain registered dealers to provide advice <u>without registration</u> so long as this advice is in *connection with a trade for which they are a registered dealer and it is not in respect of a fully managed account. We believe that a similar exemption would ensure that registered derivatives dealers do not inadvertently become unregistered derivatives advisors.*

We also appreciate having the opportunity to provide comments on questions #11 and #12 from the Commentary Items: "Is it appropriate to impose category or class specific proficiency requirements? Is the proposed approach to establishing proficiency requirements appropriate?

FIRMA's comments only relate to the following:

a) capital requirements - namely minimum specified levels;

b) margin calls - namely being consistent with international standards;

c) maintenance of financial records and periodic financial reporting; and

d) proficiency requirements

To begin:

a) *Capital requirements - FIRMA believes that it is important to ensure that once limits are set they do not put undue capital pressure on companies and that consideration be given to existing structures with healthy tangible shareholders equity. The tangible shareholders equity could be a minimum amount as appropriate given size of the company's derivative operations. Capital requirements similar to that of Basel 3 would put undue pressure on non-bank providers like FIRMA or other small market enterprises, again creating regulatory competitive advantages that are not conducive to economic growth (and would further create significant barriers to entry which could harm end-user market participants).*
b) *Margins calls - these should be excluded from consideration in most circumstances with registered dealers. However, if large currency swings occur in the market then margin calls for at least 50% to 75% of the exposure should be secured. We agree that registered derivative advisers that do not hold a position should be excluded.*
c) *Financial reporting – financials should be limited to an annual requirement, not quarterly. In addition, on page 32 of CSCP 91-407 are examples of what the reporting needs to look like to the CSA and Board. Specifically what reports would be required to cover off risk management systems, issues related to derivative compliance, risk management presentations, general control environment and general compliance systems? OR a recommendation would be for a certification process similar to public companies whereby there are sign-offs made by the CEO and CFO to remediate the requirements of filing numerous controls and risk reports with the CSA. The Board can still be provided the required detailed reports on controls and risks for governance purposes.*
d) *Proficiency requirements - registration and certification for our employees or agents who are involved in trading in or advising on derivative otherwise known to FIRMA as our "Customer Service and Account Managers in Sales" will create a significant barrier to finding candidates and would likely result in an increase in salary and training costs. Greater clarity on what aspects of a "trade" constitute dealing or advising activities would ensure that inefficiencies are not created by proficiency requirements casting a wider net than is required to adequately protect market participants.*

In addition, FIRMA believes that a concept of "restricted derivatives dealer" could be borrowed from the registration category of "restricted dealer" as found in National Instrument 31-103. Particularly for industry specific participants such as FIRMA, a category restriction which relieves certain proficiency and/or other requirements under the proposed regime could allow securities regulatory authorities to exercise greater discretionary control over registration requirements where participants create minimal market risk. By limiting their ability to deal outside of a restricted market area (and by requiring appropriate disclosure to purchasers of derivatives), the CSA could ensure that low-risk derivatives businesses are not adversely impacted by a regime that is intended to capture a generally higher risk market.

CONCLUSION AND PROPOSALS

At FIRMA, we believe that the unique nature of non-speculative, deliverable Forward Contracts in the foreign currency market by commercial end-users is a unique subset of the derivatives market that should be excluded from registration because they do not carry the same risk profile. By increasing the compliance costs of small to medium sized enterprises participating in Forward Contract currency activities as a means of achieving cost certainty for their business operations, not only could cross-border competitiveness of Canadian companies be negatively impacted, but these businesses might actually be incentivized to increase their participation in high-risk speculative derivative trading in an effort to hedge against the increased costs.

A commercial end-user exemption similar to that found in BO 91-505 would sufficiently exempt these non-speculative activities under the TR Rule however market protection could be further bolstered by having prohibitions on re-trade to prevent the Forward Contracts from becoming anything other than bilateral business transactions and by implementing cash hold periods to protect against settlement risk.

Nonetheless, in the event that the Commentary Documents are enacted in their current (or a substantively similar) form, we would ask that the Committee consider granting non-traditional derivative participants an increased transition period so that the impact cost to clients can be decreased as much as possible.

Regards,

Michael Zvonkovic, CA

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June 17, 2013

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Email: Mbrady@bcsc.bc.ca

Attention: Mr. Michael Brady, Senior Legal Counsel

Dear Mr. Brady:

RE: Comment Letter to CSA Staff Consultation Paper 91-407 Derivatives: Registration

1. Introduction

FortisBC Energy Inc. and its affiliate FortisBC Inc. (collectively "FortisBC") hereby respectfully submit comments on the Canadian Securities Administrators ("CSA") Staff Consultation Paper 91-407 Derivatives: Registration published by the CSA over-the-counter (OTC) Derivatives Committee (the "Committee") on April 18, 2013. FortisBC appreciates the opportunity to submit these comments on Derivatives: Registration and looks forward to further working with the Committee as it moves forward to implementing Canada's G-20 commitments that relate to the regulation of the trading of derivatives in Canada through the British Columbia Securities Commission.

2. FortisBC Use of Derivatives

In order to mitigate the risk of market price movements on its natural gas rates for customers, FortisBC has actively engaged in OTC natural gas commodity hedging in the past. FortisBC has undertaken hedging to protect customers and not for speculative purposes.
FortisBC has also engaged in physical commodity (gas and electricity) trading for the purposes of managing costs for customers. As will be discussed in this letter, FortisBC believes that these types of transactions by end users should not be classified as derivatives per the Derivatives: Registration categories and therefore not subject to the pending derivative legislation.

FortisBC performs financial hedging and physical trading on behalf of its customers in order to mitigate risks and manage commodity costs for customers; FortisBC believes it should be classified as a derivatives end user, rather than a derivatives dealer, derivatives adviser or large derivatives participant. As such, FortisBC expects to be exempt from the reporting, clearing, and margin, capital and collateral requirements and as well as registration.

3. Comments Regarding Derivatives: Registration

FortisBC understands the registration requirements being consulted on in this paper to apply to derivative dealers, derivative advisers, large derivative participants ("LDPs") and certain individuals who are employed by derivative dealers, advisers or LDPs only. As such, FortisBC believes the regulations flowing out of this consultation should clearly define "derivative dealers", "derivative advisers" and "large derivative participants" so that market participants can easily establish whether they fit within the categories required to register. Further, the regulations should clearly establish that the registration requirements do not apply to market participants who do not fit within the categories of dealer, adviser, or LDP.

FortisBC notes with interest the suggested exemption set out in Section 8.1 for exemption from Registration Requirements for derivative dealers where the dealer is already subject to regulation by other entities with regulatory responsibility. We suggest a similar exemption should be available to end-users with respect to the reporting of trading activities to a trade repository. In the case of FortisBC, our financial hedging and physical commodity purchases and trading strategies and plans are reviewed and approved by the British Columbia Utilities Commission on a regular basis before their implementation. As a result, if FortisBC is also required to report its trades to a trade repository, it will be undertaking duplicative reporting.

FortisBC would like to reiterate its concern regarding the fees that may be charged by trade repositories to cover costs relating to data reporting and access and also those relating to registration. We would like to emphasize that these fees should not be material in amount or change significantly from year to year as they will be costs that our customers will have to pay. As a regulated utility, FortisBC's costs relating to managing costs for customers are passed on to customers through rates.

Q2: What is the appropriate standard for determining whether a person is a qualified party? Should the standard be based on the financial resources or the proficiency of the client or counterparty? If the standard is based on financial resources should it be based on the net assets of the client or counterparty, gross annual revenues of the client or counterparty, or some other factor or factors?

FortisBC does not have any opinion on which standard is used to determine whether a person is a qualified person; however, FortisBC believes this standard should include FortisBC. FortisBC believes that it has both sufficient financial resources and sufficient sophistication to allow it to bear the risk of loss and to make responsible investment decisions when participating in the derivatives markets. However, FortisBC believes that any regulations establishing the definition of a qualified party should not also require end-users to establish whether their counterparties meet this definition. Any such "know your client" obligations should be limited to dealers and advisors who may already have, or would more appropriately have a fiduciary duty to their client or counterparty. Consistent with the foregoing, FortisBC suggests that trades should not be void nor voidable should a counterparty not be a qualified person.

Q13: Is the Committee's proposal to implement a requirement on registrants to "act honestly and in good faith" appropriate?

FortisBC supports a requirement that registrants act honestly and in good faith.

4. Conclusion

FortisBC appreciates the Committee's consideration of comments in developing the derivatives regulation. FortisBC has submitted its concerns and comments in the interests of managing its gas and power supply and costs for its customers. FortisBC welcomes further discussion of these comments and concerns if it is required and would like to have the opportunity to review and comment on future papers and provincial rules.

Please direct any further questions to Nina Virdee at (604) 592-7859.

Yours very truly,

Roger Dall'Antonia

VP, Strategic Planning, Corporate Development & Regulatory Affairs

FortisBC Energy Inc.

Canadian Securities Administrators

CSA Consultation Paper 91-407

Derivatives: Registration

Q1: Should investment funds be subject to the same registration triggers as other derivatives market participants? If not, what registration triggers should be applied to investment funds?

No input.

Q2: What is the appropriate standard for determining whether a person is a qualified party? Should the standard be based on the financial resources or the proficiency of the client or counterparty? If the standard is based on the financial resources should it be based on the net assets of the client or counterparty, gross annual revenues of the client or counterparty or some other factor or factors?

Qualified party determination should be based on a holistic review of the party's financial resources and proficiency of the client or counterparty. Financial resources alone do not impart reasonable assurance of knowledge or proficiency; nor does proficiency alone impart a reasonable assurance of financial resource sufficiency for classification as a qualified party.

Some additional factors that should be considered when determining a relationship definition of derivative dealers and qualified party would include the derivatives dealers ability to mitigate risk, such as the dealers ability to demand up front cash deposits for all positions the client enters, automatic liquidation of under-margined position, and automatic measures which preclude clients from losing more than their stated risk capital.

Additional types of accounts that should be considered as an alternative to a qualified party definition are those which have a preset caps on the client cumulative risk capital limit, which limit client loss to their stated cumulative risk capital limit while ensuring a reduced risk assumption by the derivatives dealer.

Q3: Should registration as a derivatives dealer be subject to a de minimus exemption similar to the exemption adopted by U.S. regulators? Please indicate why such an exemption is appropriate.

We agree with the Committee that participants in the derivatives market should be subject to the same registration requirements regardless of the size or the total derivatives exposure of the dealer with no de minimus exemption.

Q4: Are derivatives dealer, derivatives adviser and LDP the correct registration categories? Should the Committee consider recommending other or additional categories?

An additional category for consideration – IIROC currently accepts the registration of derivative dealers who provide self-directed online trading to retail and institutional clients on a suitability exempt basis for OTC contracts including foreign exchange, CFD's and spot contracts. We recommend the committee consider including a comparable category.

Q5: Are the factors listed the correct factors that should be considered in determining whether a person is in business of trading derivatives? Please explain your answer.

These seem sufficient

Q6: The Committee is not proposing to include frequent derivatives trading activity as a factor that we will consider when determining whether a person triggers as a derivatives dealer. Should frequent derivatives trading activity trigger an obligation to register where an entity is not otherwise subject to a requirement to register as a derivatives dealer or a LDP? Should entities that are carrying on frequent derivatives trading activity for speculative purposes be subject to different registration trigger than entities trading primarily for the purpose of managing their business risks?

Frequency of derivatives trading activity should have no bearing on the definition of a derivatives dealer. Entities that carry on derivatives trading activity for speculative purposes should be subject to the same registration triggers that entities trading primarily for the purposes of managing risk to ensure market integrity.

Q7: Is the proposal to impose derivative dealer registration requirements on parties providing clearing services appropriate? Should an entity providing these clearing services only to qualified parties be exempt from regulation as a derivatives dealer?

No input.

Q8: Are the factors listed above the appropriate factors to consider in determining whether a person is in the business of advising on derivatives?

No input.

Q9: Are the factors listed for determining whether an entity is a LDP appropriate? If not what factors should be considered? What factors should the Committee consider in determining whether an entity, as a result of its derivatives market exposure, could represent a serious adverse risk to the financial stability of Canada or a province or territory of Canada?

No input

Q10: Is the Committee's propose to only register derivative dealer representatives where they are dealing with clients or when dealing with counterparties that are non-qualified parties appropriate?

We agree that derivative dealer representatives should be registered, but we also agree that there should be a suitability exempt category similar to what IIROC currently grants.

Q11: Is it appropriate to impose category or class-specific proficiency requirements?

We believe a base knowledge of derivatives is appropriate and should be a minimum proficiency requirement. Thereafter, we agree that class-specific proficiency requirements

could be beneficial for derivative dealer representative, such as an OTC contract (FX, CFD's, and Spot contracts) specific proficiency.

Q12: Is the proposed approach to establish proficiency requirements appropriate?

Please see response 11.

Q13: Is the Committee's proposal to impose a requirement on registrants to 'act honestly and in good faith' appropriate?

It is always reasonable that a dealer member should 'act honestly and in good faith'. We support the notion that derivatives dealers should avoid making incomplete, inaccurate or unwarranted claims, opinions or forecasts in their communications with clients and counterparties, or potential clients or counterparties.

Q14: Are the requirements described appropriate registration requirements for derivative dealers, derivative advisers and LDPs? Are there any additional regulatory requirements that should apply to all categories of registrants? Please explain your answers.

There is no current centralized facility or clearing agent to clear OTC trades in Forex, CFD's and spot contracts, and there is no central repositories to hold these types of contracts. Since dealers who trade in such OTC products are direct counterparties to their client's trades there would be no advantage to requiring IIROC dealers to hold customer assets at a central repository.

As an IIROC dealer we are already subject to IIROC oversight regarding segregation and holding of client assets (cash).

Q15: Should derivatives dealers dealing with qualified parties be subject to business conduct standards such as the ones described in part 7.2(b)(iii) above? If so, please explain what standards should apply.

We agree that standards such as 7.2(b)(iii) are reasonable standards with regards to Know Your Customer requirements and Conflicts of Interest requirements.

As a suitability exempt dealer, we would recommend a comparable suitability exemption as currently provided by IIROC.

Q16: Do you have a preference between the two proposals relating to the regulation of derivatives dealer trading with counterparties that are non-qualified parties? Is there another option to address the conflict of interest that the Committee should consider? Please explain your answer.

We prefer alternative two which pertains to enhanced notifications to clients and do not support alternative one. We believe the burden of seeking outside advisors would preclude market participation.

There are numerous measures that can be implemented to properly communicate risk, conflict of interest, and product suitability such as enhanced or clarification of current conflicts of interest policies on account opening and the establishment of auto-liquidation procedures that take effect at preset margin requirements.

Q17: Are the recommended requirements appropriate for registrants that are derivatives dealers? If not please explain. Are there any additional requirements that should apply to registered derivatives dealers?

With regards to additional regulatory requirements per section 7.3 of the consultation paper, we agree to the appropriateness of the recommendations.

We would recommend that recognition of suitability exempt dealers remain in effect similar to IIROC's current suitability exempt status.

Q18: Are the recommended requirements appropriate for registrants that are derivatives advisors? If not please explain. Are there any additional regulatory requirements that should apply to registered derivatives advisers?

No input.

Q19: The Committee is recommending that foreign resident derivative dealers dealing with Canadian entities that are qualified parties be required to register but be exempt from a number of registration requirements. Is this recommendation appropriate? Please explain.

No input.

Q20: Is the Committee's recommendation to exempt foreign resident derivatives dealers from Canadian registration requirements where equivalent requirements apply in their home jurisdictions appropriate? Please explain.

We agree with the Committee that participants in the derivatives market should be subject to the same registration requirements as Canadian registrants.

Q21: Should foreign derivatives dealers or advisors not registered in Canada be exempt from registration requirements where such requirements solely result from such entities trading with the Canadian government, provincial governments or with the Bank of Canada?

No input.

Q22: Is the proposal to exempt crown corporations whose obligations are fully guaranteed by the applicable government from registration as a LDP and, in the circumstances described, as a derivatives dealer appropriate? Should entities such as crown corporations whose obligations are not fully guaranteed or corporations owned or controlled by foreign governments benefit from comparable exemptions? Please provide an explanation for your answer.

No input.

Q23: Are the proposed registration exemptions appropriate? Are there additional exemptions from the obligation to register or from registration requirements that should be considered but that have not been listed?

We agree as appropriate the proposed registration exemptions for affiliate entities when both are controlled, either directly or indirectly, by a common entity where they are facilitating the trades of a Canadian registered affiliate.

IGM Financial

IGM Financial Inc. One Canada Centre, 447 Portage Ave., Winnipeg, Manitoba R3C 3B6

June 21, 2013

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Dear Sirs/Mesdames:

RE: CSA Staff Consultation Paper 91-407 – *Derivatives: Registration*

We are writing in respect of CSA Consultation Paper 91-407 published by the Derivatives Committee of the Canadian Securities Administrators ("CSA") regarding the regulation of key derivatives market participants through the implementation of a registration regime (the "Consultation Paper").

INVESTMENT INDUSTRY ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÈRES

June 17, 2013

DELIVERED VIA EMAIL

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Re: CSA Consultation Paper 91-407 – Derivatives: Registration (the "Paper")

The Investment Industry Association of Canada ("IIAC") appreciates the opportunity to provide comment on CSA Consultation Paper 91-407 – Derivatives: Registration. Our comments reflect the views of the IIAC Derivatives Committee which is comprised of senior professionals with responsibilities for derivatives markets activities and compliance.

The IIAC is the professional association for the securities industry, representing close to 170 investment dealers regulated by the Investment Industry Regulatory Organization of Canada ("IIROC"). Our mandate is to promote efficient, fair and competitive capital markets for Canada and to assist our member firms across the country.

IIROC regulated investment dealers play a recognized role in the exchange-traded derivatives market, participating as registered dealers and market-makers. Some IIROC dealers engage exclusively in derivatives.

IIAC members also participate in the over-the-counter (OTC) derivatives market, primarily in foreign exchange (FX) and contracts for differences (CFDs). CFDs and FX contracts are distributed to the retail market in Canada through registered investment dealers that are subject to strict terms and conditions of their registration, including capital, segregation, supervisory, reporting and proficiency requirements. These transactions are well regulated, do not involve institutional counterparties and do not contribute to systemic risk.

Our comments should be received in the context of our recent representations to the Canadian Securities Administrators ("CSA") and IIROC that the pace and breadth of regulatory initiatives in Canada is overwhelming our members at of time of declining revenue in several sectors of activity. We estimate that 65 dealers have lost money on a consistent basis over the past 2 years and the increased cost of regulation is often one of the main factors affecting their profitability.

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 Paper, based on their role in the market and their regulatory situation. Our comments are meant to supplement those submissions.

General Comments

Our members recognize the importance of implementing a regulatory framework for OTC derivatives that, as stated by the CSA in Consultation Paper 91-401 on Over-the-Counter Derivatives Regulation in Canada ("CP 91-401"), is …" intended to strengthen Canada's financial markets and manage specific risks related to OTC derivatives, implement G20 commitments in a manner appropriate for our markets, harmonize regulatory oversight to the extent possible with international jurisdictions, all while avoiding causing undue harm to our markets".

Notwithstanding our support for the CSA's efforts in this sphere, we strongly believe that a new registration regime is unnecessary and should therefore not be implemented in Canadian derivatives markets. We are of the view that the implementation of G20 commitments and the effective management of risks related to OTC derivatives can be achieved within the framework of registration regimes already in place; G20 commitments do not contemplate a specific registration regime for OTC derivatives. Other jurisdictions – notably the European Union – are currently implementing G20 commitments within their existing registration regime. We also submit that the implementation of a new registration regime for OTC derivatives in the US – the sole jurisdiction to do so – is mandated by the Dodd-Frank Act and motivated by issues that are specific to the US market.

We also believe the need for changes or additions to the existing registration regime can be best assessed once other initiatives contemplated in CP 91-401 have been implemented, including Trade Repositories ("TR") and Central Counterparty Clearing ("CCP Clearing"). Together with the use of unique identifiers, TR and CCP Clearing will provide Canadian regulators and the Bank of Canada with the necessary data and tools to monitor systemic risk exposures of market participants, detect possible market abuse and assist in the performance of systemic risk analysis on these markets. TR and CCP Clearing will require substantial investment in technology and operations on the part of industry participants and we believe that is where efforts should be concentrated.

We strongly believe that a new registration regime is unnecessary and should therefore not be implemented in Canadian derivatives markets. We therefore recommend that Canadian regulators implement G20 commitments within the existing registration framework. The need for changes or additions to the existing registration regime can be best assessed once other initiatives contemplated in CP 91-401 have been implemented, including Trade Repositories and Central Counterparty Clearing. Furthermore, if and when regulators choose to proceed with the implementation of a new regulatory regime, IIROC regulated firms should be exempt.

Our second general comment pertains to the definition of “derivatives”. Although the Paper is part of a series that build on the regulatory proposals contained in CP 91-401, it is unclear that the scope of the Paper is limited to OTC derivatives. We strongly believe that listed derivatives should be excluded from the scope of CP 91-407, because the regime contemplated in the Paper would impose significant and unnecessary regulatory obligations and costs on firms dealing in listed derivatives. These firms are already subject to a registration regime and regulatory obligations that have proven very effective at ensuring market integrity and investor protection and we fail to understand what would justify a reform of that regime at this point. In fact, given that many of our member firms are already struggling to cope with the drastic increase in the cost of regulation in a context of a prolonged decline in trading activity, the adoption of an additional registration regime may push some of these firms to exit the listed derivatives market. That would limit investors’ choice and potentially reduce liquidity in the market.

We therefore ask the CSA Derivatives Committee (the “Committee”) to confirm that listed derivatives are excluded from the scope of the Paper.

Unless otherwise noted, our comments on specific questions assume that listed derivatives are excluded from the scope of the Paper.

Specific comments

As stated in our general comments, we strongly believe that a new registration regime is unnecessary and should therefore not be implemented in Canadian derivatives markets. Nonetheless, we believe it is still useful to comment on the specific issues raised in the Paper in order to bring to the Committee’s attention some of our concerns with the contemplated regime. Unless otherwise noted, our comments assume that listed derivatives are excluded from the regime.

<u>The CRO</u>

We submit that the requirement to appoint a Chief Risk Officer is not appropriate, particularly in the case of some of the smaller IIROC members that are not large OTC derivatives participants and do not maintain significant proprietary positions. The need for this new role for IIROC members has not been demonstrated from the point of view of market integrity or systemic risk.

IIROC members already have strict OTC derivatives risk management obligations under Rule 2600, Policy Statement 8 – Derivative Risk Management ("Policy Statement 8"), which states:

> *"This policy statement includes all types of derivatives i.e. exchange traded and over-the-counter derivatives.*
>
> *The control objective is to ensure that:*
>
> > *a) There is a risk management process of identifying, measuring, managing and monitoring risks associated with the use of derivatives.*
> >
> > *b) Management demonstrates their understanding of the nature and risks of all derivative products being used in treasury, trading and sales.*
> >
> > *c) Written policies and procedures exist that clearly outline risk management guidance for derivatives activities."*

Furthermore, Policy Statement 8 imposes what we believe is the equivalent of a CRO position:

> *"Dealer Members must have a risk management function, with clear independence and authority to ensure the development of risk limit policies and monitoring of transactions and positions for adherence to these policies."*

The appointment of a CRO would add unnecessary and significant costs, without measurable benefits, in a context of declining trading volumes and margins and should therefore not be imposed upon IIROC members.

<u>Dealing with non-qualified parties and conflicts of interest</u>

When dealing with non-qualified parties, we recommend that written disclosure be provided during the account opening/documentation process and that the non-qualified party be allowed to provide a blanket acknowledgement indicating that they were electing not obtain independent advice. A similar disclosure could also be included on post trade reports. More detail is provided in our answer to question 16 below.

Answers to Committee questions

We have reviewed the specific questions raised in the Paper and will comment only where the issues are directly relevant to our members.

Q2: What is the appropriate standard for determining whether a person is a qualified party? Should the standard be based on the financial resources or the proficiency of the client or counterparty? If the standard is based on financial resources should it be based on the net assets of the client or counterparty, gross annual revenues of the client or counterparty, or some other factor or factors?

Our members favour objective standards and clearly defined thresholds rather than subjective criteria like proficiency that may be difficult to measure. Furthermore, we question the need to introduce a new concept of “qualified party” when existing regulation already defines similar concepts of “accredited investor” in NI 45-106 and “permitted client” in NI 31-103.

Q3: Should registration as a derivatives dealer be subject to a *de minimis* exemption similar to the exemption adopted by U.S. regulators? Please indicate why such an exemption is appropriate.

Assuming that a new registration requirement is adopted for OTC derivatives, we believe it should be subject to a *de minimis* exemption in order to avoid putting an undue regulatory burden on participants that do not present a systemic risk. It is our view that the de minimis threshold cannot be determined (in addition to the the need for a registration regime for derivatives) until the TR and CCP Clearing data has been collected and assessed.

Q4: Are derivatives dealer, derivatives adviser and LDP the correct registration categories? Should the Committee consider recommending other or additional categories?

As stated above, we do not believe there is any need or requirement for additional categories of registration to be implemented in Canada. To the extent a new regime is adopted, where an IIROC member engages in OTC derivatives activities, OTC derivatives regulation should provide an “equivalent regime” exemption from registration requirement.

Q9: Are the factors listed for determining whether an entity is a LDP appropriate? If not what factors should be considered? What factors should the Committee consider in determining whether an entity, as a result of its derivatives market exposures, could represent a serious adverse risk to the financial stability of Canada or a province or territory of Canada?

As stated in our general comments, we recommend that the need to improve upon the existing registration regime should be assessed based on data gathered form TRs and CCP Clearing. We therefore support the view that the CSA Derivatives Committee should conduct extensive analysis of trade repository data before determining the factors that should trigger a registration requirement for LDPs. That information will shed light on the microstructure of the market for OTC derivatives and potential sources of systemic risk.

Q10: Is the Committee's proposal to only register derivative dealer representatives where they are dealing with clients or when dealing with counterparties that are non-qualified parties appropriate?

We agree that dealer representatives should only be registered where they are dealing with non-qualified parties.

Q11: Is it appropriate to impose category or class-specific proficiency requirements?

We agree that proficiency requirements should be limited to classes or categories of derivatives that a representative is trading. We believe that it would be difficult to define those requirements by category or class of product in regulations. To the extent a registration regime is adopted, any determination concerning the required proficiencies would have to be subject to significant study and industry consultation.

Q12: Is the proposed approach to establishing proficiency requirements appropriate?

Care must be taken to ensure that proficiency and examination requirements are adapted to the role of the registered individual. For example, directors should not be expected to have the same product specific knowledge as traders. To the extent a registration regime is adopted, any determination concerning the required proficiencies would have to be subject to significant study and industry consultation.

Q13: Is the Committee's proposal to impose a requirement on registrants to "act honestly and in good faith" appropriate?

We do not believe that this requirement is necessary because, in the context of a transaction between counterparties, it already is a contractual obligation.

Q14: Are the requirements described appropriate registration requirements for derivatives dealers, derivatives advisers and LDPs? Are there any additional regulatory requirements that should apply to all categories of registrants? Please explain your answers.

As stated in our general comments, IIROC Dealer Members should benefit from equivalent regime recognition and not be subject to specific requirements outlined in the Paper.

Q15: Should derivatives dealers dealing with qualified parties be subject to business conduct standards such as the ones described in part 7.2(b)(iii) above? If so, please explain what standards should apply.

IIROC members are already subject to business conduct standards similar to those described in 7.2(b)(iii) and, as such, should be exempted from the specific business conduct requirements set out in the Paper.

Q16: Do you have a preference between the two proposals relating to the regulation of a derivatives dealer trading with counterparties that are non-qualified parties? Is there another option to address the conflict of interest that the Committee should consider? Please explain your answer.

We recognize the need to protect the interests of non-qualified parties trading with derivatives dealers. However, we believe that neither of the alternatives proposed in the Paper is appropriate.

In the first alternative, we fail to understand who would advise clients in transactions without providing trading facilities. We are not aware of any entity offering such services to retail clients in Canada. Furthermore, how could a dealer ascertain that a client is receiving independent advice? Finally, if such a service existed, it would certainly add significant costs that would be borne by clients.

The second alternative, to have pre-trade disclosure and written acknowledgment that the non-qualified party is electing not to obtain independent advice is simply not practical in many, if not most market conditions. It would add unnecessary delays in the trading process and would inevitably cause many trading opportunities to be missed, resulting in increased risks. Disclosure on a trade-by-trade basis is also completely redundant as most participants would make the same election on all of their trades.

We therefore recommend that written disclosure be provided during the account opening/documentation process and that the non-qualified party be allowed to provide a blanket acknowledgement indicating that they were electing not to obtain independent advice. The same disclosure could also be included on post trade reports.

Q17: Are the recommended requirements appropriate for registrants that are derivatives dealers? If not please explain. Are there any additional regulatory requirements that should apply to registered derivatives dealers?

With regards to KYC requirements, we acknowledge the need to update client information on a periodic basis. We would like clarification however on how ``on a periodic basis`` would be interpreted. Would the frequency be left to the firm? We also submit that the obligation to update KYC information should not apply to clients that have not maintained a position or been active in the past year.

We do not agree that the requirement to update client information "…where the person takes steps to enter into a transaction that is inconsistent with the person's general objectives or is materially inconsistent with their past trading activity" should apply to all cases. We submit that exemption should exist for order-execution only firms.

Conclusion

We reiterate our two main recommendations:

1. We strongly believe that a new registration regime is unnecessary and should therefore not be implemented in Canadian derivatives markets. We therefore recommend that Canadian regulators implement G20 commitments within the existing registration framework. The need for changes or additions to the existing registration regime can be best assessed once other initiatives contemplated in CP 91-401 have been implemented, including Trade Repositories and Central Counterparty Clearing . Furthermore, if and when regulators choose to proceed with the implementation of a new regulatory regime, IIROC regulated firms should be exempt.
2. We ask the Committee to confirm that listed derivatives are excluded from the scope of the Paper.

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,

Richard Morin
Director, Government Relations and Quebec Region
Investment Industry Association of Canada
rmorin@iiac.ca

IGM Financial Inc. ("IGM") is a diversified financial services provider which operates through its business units Investors Group Inc., Mackenzie Inc. and Investment Planning Counsel Inc. and their respective subsidiaries. Principal subsidiaries include registered portfolio managers I.G. Investment Management, Ltd. and Mackenzie Financial Corporation, and mutual fund dealer Investors Group Financial Services Inc. IGM is interested in the registration regime as a number of its subsidiaries use OTC derivatives for the hedging of commercial risks for their own account, or on behalf of investment funds and other client accounts that they manage.

Responses to Specific Questions

Dealing with the specific questions raised in the Consultation Paper, our responses are as follows (for ease of reference, we have repeated the question before setting out our comments).

Question 1 – Should investment funds be subject to the same registration triggers as other derivatives market participants? If not, what registration triggers should be applied to investment funds?

Investment funds that are regulated under National Instrument 81-102 should not be subject to the same registration triggers as other derivatives market participants. National Instrument 81-102 already restricts when a mutual fund may purchase, sell or use derivatives, requires the holding of cash cover and dealing with counterparties who have designated ratings at certain levels, imposes limitations on the exposure to any one counterparty and limits leveraging such that such investment funds' derivatives dealings should not result in the systemic risk that the G20 commitments were meant to address. Further, the investment managers for these investment funds are registered under Canadian securities legislation as advisers. Similar to foreign entities being exempted from specific registration requirements where the foreign entity is subject to equivalent regulatory requirements in its home jurisdiction, we believe that investment funds subject to National Instrument 81-102 should be exempt from specific derivative registration requirements.

As we advised in our June 18, 2012 comment letter on CSA Consultation Paper 91-405 – *Derivatives: End-User Exemption*, Canadian prospectus-qualified investment funds are already subject to a comprehensive regulatory regime regarding their use of derivatives and should be exempt from the registration requirements proposed in the Consultation Paper.

We further do not believe that an investment adviser should be subject to registration as a Derivatives Adviser by virtue of advising investment funds governed by NI 81-102 if such a market participant would not otherwise be subject to registration by virtue of being a Derivatives Dealer or a Large Derivatives Participant.

This rationale stems from the same discussion above concerning the restrictions and legislation concerning such funds.

Question 9 – Are the factors listed for determining whether an entity is a LDP appropriate? If not, what factors should be considered? What factors should the Committee consider in determining whether an entity, as a result of its derivatives market exposures, could represent a serious adverse risk to the financial stability of Canada or a province or territory of Canada?

The key factor that should be considered in determining whether an entity is a LDP is the net potential future exposures resulting from their derivatives positions. In other words, the potential fair value of amounts due to counterparties over a specified period of time and calculated at some level of confidence, after giving effect to master netting agreements.

In terms of determining an entity's exposure in Canadian derivatives markets, the netted amounts with each counterparty, where there are netting agreements, should be considered (not the notional dollar value of all derivatives transactions with that counterparty) in order to understand the true risk involved. As well, the derivatives positions should be marked to market using industry standard practices and posted collateral should be deducted to determine the net exposure.

We believe that derivatives trading for hedging purposes should be excluded when determining whether an entity is a LDP, similar to such trading being excluded when determining whether an entity is a major swap participant in the U.S. Hedging of commercial risk through use of derivatives transactions should not make an entity a LDP (or a derivatives dealer).

As we advised in our June 18, 2012 comment letter on CSA Consultation Paper 91-405 – *Derivatives: End-User Exemption*, there should be exemptions for entities where the nature of their derivatives activities do not pose meaningful systemic risk concerns. Exemptions should be developed having regard to:

- the nature and extent of systemic risk posed by an entity's use of derivatives;
- the nature of capital adequacy and other regulatory capital requirements to which the entity is already subject; and
- the cost and burden to an entity that proposed regulation may introduce to hedging or otherwise mitigating business risks.

Question 18 – Are the recommended requirements appropriate for registrants that are derivatives advisers? If not, please explain. Are there any additional regulatory requirements that should apply to registered derivatives advisers?

The requirement to have a Chief Risk Officer is too prescriptive. Effective oversight processes are important but we believe they can be more effectively accomplished within existing, broad risk management frameworks related to Enterprise Risk Management and Financial Risk Management processes that are already well understood. Risk should be considered on an overall enterprise basis and National Instrument 31-103 already requires that entities have a policy dealing with risk management on an enterprise basis, not just with regard to derivatives.

There should be grandfathering and transitional rules with regard to proficiency requirements for those individuals who have many years of derivatives experience but may not meet the recommended regulatory requirements.

It should be clear that the proficiency requirements apply to those making the decision to enter derivatives transactions (including when acting as an adviser), not those who execute derivatives transactions further to instructions from the adviser or individual who makes the decision to enter the derivatives transactions.

Further, to the extent a firm is already registered under Canadian securities legislation as an adviser, any additional obligations imposed in connection with derivatives activities carried out by these firms in their role as portfolio managers should be integrated into the existing requirements they must currently meet to make the process as efficient as possible and to avoid needless duplication.

We appreciate having this opportunity to share our views regarding the Consultation Paper and would be pleased to discuss any of these concerns with you at your convenience. If you would like to do so, please either contact myself or David Cheop at (204)956-8444 or david.cheop@investorsgroup.com.

Yours truly,

IGM FINANCIAL INC.

Murray J. Taylor
Co-President and Chief Executive Officer

cc: Jeffrey R. Carney, Co-President and Chief Executive Officer

ISDA® Safe, Efficient Markets

June 17, 2013

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Re: Canadian Securities Administrators (CSA) Consultation Paper 91-407 on Derivatives: Registration (the Registration Consultation Paper)

The International Swaps and Derivatives Association, Inc. (**ISDA**)[1] welcomes the opportunity to respond to the Consultation Paper published by the CSA on April 18, 2013 setting

[1] Since 1985, ISDA has worked to make the global over-the-counter ("OTC") derivatives markets safer and more efficient. Today, ISDA is one of the world's largest global financial trade associations, with over 800 member institutions from 56 countries on six continents. These members include a broad range of OTC derivatives market participants: global, international and regional banks, asset managers, energy and commodities firms, government and supranational entities, insurers and diversified financial institutions, corporations, law firms, exchanges, clearinghouses and other service providers.

forth the CSA Derivatives Committee's (**Committee**) proposal for the regulation of key derivatives market participants through the implementation of a registration regime in the Canadian over-the-counter (**OTC**) derivatives markets. We are pleased to share these comments with the CSA, in addition to our comment letters submitted to the CSA in connection with Consultation Paper 91-401 setting forth the CSA Derivatives Committee proposals regarding the regulation of OTC derivatives (the **OTC Derivatives Consultation Paper**)[2], Consultation Paper 91-402 setting forth proposals for the reporting of OTC derivatives transactions and the operation of trade repositories[3], and Consultation Paper 91-406 on Derivatives: OTC Central Counterparty Clearing[4].

ISDA is actively engaged with providing input on regulatory proposals in Asia, Europe, the United Kingdom and the United States. ISDA commends the Committee for its careful consideration of the issues raised by its registration proposal and welcomes further dialogue with the Committee on this Registration Consultation Paper.

I. Registration Requirement

ISDA and its members are strong supporters of regulatory reform in a manner that promotes safety and market integrity. Regulators should, nevertheless, be cautious not to introduce conflicting, unduly incremental or uncertain requirements and to avoid creating opportunities for regulatory arbitrage. Thus, it is highly important that comprehensive analysis and consultation occurs on the soundness of a registration regime in the Canadian OTC market and the implications for financial stability and competitiveness. ISDA urges the Committee to consider that derivative specific registration requirements exist in only a handful of jurisdictions globally, and the related volume and thresholds in such jurisdictions as compared to the size of the Canadian-booked share of the global market, to ensure that imposing a registration regime would not negatively impact the trading of OTC derivatives in Canada.

Information about ISDA and its activities is available on the Association's web site: www.isda.org.

[2] Letter from ISDA to the CSA dated January 14, 2011 may be found at http://www2.isda.org/regions/canada/ (**January 2011 Comment Letter**).

[3] Letter from ISDA to the CSA dated September 12, 2011 may be found at http://www2.isda.org/regions/canada/ (**September 2011 Comment Letter**).

[4] Letter from ISDA to the CSA dated September 21, 2012 may be found at http://www2.isda.org/regions/canada/ (**September 2012 Comment Letter**).

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A. Scope of Registration Requirement

The Committee's proposal imposes standard registration requirements based on the activity conducted by market participants, the so-called "business trigger". Among other categories of market participants, such as Large Derivative Participants ("LDPs"), the registration requirement would apply to persons (i) carrying on, or holding themselves out to be carrying on, the business of trading in derivatives ("Derivatives Dealer") and (ii) that carry on the business of advising others in relation to derivatives, or who hold themselves out to be in that business ("Derivatives Adviser"). The Committee, nonetheless, acknowledges that the definition of derivative is not consistent across Canada, and the only guidance as to what types of instruments the Committee may recommend to be considered derivatives relates to the recently published CSA Staff Consultation Paper 91-301, which only relates to trade reporting.

As indicated in our previous comment letters, the Committee needs to clearly define the scope of the transactions, entities, trades and markets that are intended to be covered by the regulations in order for the industry to give meaningful comments on proposed rules. The Committee will also have to outline which of its member agencies have jurisdiction and rule-making authority over the various issues outlined in the Registration Consultation Paper. It remains unclear what would be an "OTC derivative" and a "Canadian" derivative or market, which leaves unanswered the question of which products and parties will be covered by the regulations. For example, we need to understand whether a derivative trade by non-Canadian entities that references a Canadian asset will be subject to the registration requirement, as well as the implications for non-Canadian entities (including non-Canadian affiliates or branches of a Canadian bank.

The Committee indicates that additional protection is intended for certain market participants that are not large, sophisticated participants with adequate resources to absorb losses from derivatives trades ("qualified parties"). It is not clear from the Registration Consultation Paper which entities would not qualify and would, therefore, need additional protection, which may or may not be registration based. As the Committee concedes, there are several options available to determine whether a person will be a qualified party. ISDA members are concerned about potential overlap and, to some extent, inconsistencies among the various standards available to determine whether a person will be a qualified party. For example, the application of the definition of "Accredited Investor" for prospectus disclosures under National Instrument 45-106 and the definition of "Permitted Client" under National Instrument 31-103 may result in a client trading prospectus exempt securities and derivatives having to meet three separate definitions. Therefore, ISDA urges the Committee to carefully consider how it defines "qualified party" to ensure it is harmonized where possible.

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B. Cross-Border Considerations

The Committee acknowledges that in developing the proposal it considered rules and proposals specific to the regulation of key derivatives market participants in a number of foreign jurisdictions, particularly Europe and the United States, as well as the existing CSA registration regime for securities and existing regulatory requirements applicable to derivatives market participants in each CSA jurisdiction.

As noted in our January 2011 Comment Letter, we urge the Committee to consider the global nature of the markets when creating regulations for OTC derivatives to ensure that such regulations do not restrict the ability of Canada market participants to continue participating in, and remaining competitive in, the global OTC derivatives market. To this end, ISDA cautions regulators against adopting duplicative, overlapping or incremental requirements and/or infrastructure where sufficient alternatives exist. For example, regulators should consider whether it is appropriate to establish a Canadian registration requirement when there is no requirement to register under the European Market Infrastructure Regulation ("EMIR") and registration is not a G20 obligation. Moreover, regulators should bear in mind the more limited number and types of counterparties participating in the Canadian market, as well as products traded, when compared to other foreign markets. The only other country with an OTC registration requirement comparable to Committee's proposal is the United States, which is a market of a size, diversity and liquidity that does not compare to that of the Canadian market. Furthermore, the United States' OTC derivatives registration regime includes a number of exemptions and thresholds that have not been incorporated, in whole or in part, in the Committee's proposal. We further note that other jurisdictions of comparable size and participating counterparty types, such as Australia, have not imposed local registration requirements for the OTC derivatives market. In addition, none of the Asian jurisdictions have adopted derivatives registration regimes similar to, or as fulsome as, the Committee's proposal.

Many Canadian counterparties have, therefore, expressed concerns that a registration regime may make participation in the Canadian market too burdensome or expensive in particular for foreign derivatives dealers, with the result that Canadian market participants may face a dwindling number of counterparties willing to transact in Canada. We, therefore, recommend that regulators allow for a consultation and data collection period to consider these market concerns and conduct jurisdictional comparisons that evaluate the competitive impact to the domestic market, as well as accept further public comment as to whether a derivatives registration requirement is appropriate for the Canadian market.

C. Thresholds

The Committee notes that its proposal, although in many ways comparable to the registration requirements applicable to derivatives dealers in the U.S. under both the CFTC and SEC regimes, does not include a *de minimis* exemption comparable to that adopted by U.S. regulators. ISDA agrees with the Committee's assessment that all participants in the derivatives market should be subject to sound protections. Nonetheless, ISDA believes that, in establishing a registration requirement, a form of threshold is important to recognize that not all derivative market participants represent systemic risk.

Moreover, we believe that if foreign firms deemed to be in the business of dealing or advising in the trading of derivatives are required to register in Canada, a threshold should be established. Since the United States, which is currently the only jurisdiction to require statutorily defined entity-level registration, has set a threshold for registration, requiring foreign firms to register without establishing a comparable threshold will impose a burden on these firms that is excessive when compared to the scale of the Canadian market. As a result, market participants may avoid transacting in Canada, triggering contraction and decreased liquidity in the Canadian market. There are also concerns about disparate results from a lack of a *de minimis* threshold in Canada that can be a further disincentive for participation in the Canadian OTC derivatives market. For example, a firm doing business in both the United States and Canada with higher trading volume in the United States may not be required to register in United States due to a *de minimis* requirement, but be subject to registration requirements in Canada where its trading volume is lower.

Given the Canadian market's particular traits, in terms of volume and nature of market participants, it would be difficult to propose an appropriate threshold for a *de minimis* requirement without further evaluation of trading patterns and competitive risks. We, thus, recommend a test period once reporting requirements are in effect in Canada allowing to better assess and monitor OTC trading volume and compare with other jurisdictions prior to the adoption of a registration requirement devoid of a *de minimis* threshold.

II. Exemptions from Registration

The Committee's proposal includes exemption from certain registration requirements for Canadian counterparties where there are equivalent regulation requirements applicable to that party in Canada, and for foreign market participants when they are subject to equivalent regulation requirements in their home jurisdictions. Foreign market participants would, nonetheless, be required to register in each Canadian jurisdiction where they carry on business.

ISDA believes that the burden resulting from required registration in multiple provinces with possible divergent or inconsistent requirements, even where the differences between provinces are minor, may result in further disincentive to transact in OTC derivatives in the Canadian market.

ISDA welcomes the Committee's proposal to exempt from specific regulatory requirements foreign-based derivatives advisers and derivatives dealers, where they are subject to equivalent regulatory requirements, as part of Canada's commitments to developing cooperative regulation regimes with regulators outside of Canada. Given the global nature of the

OTC derivatives market, such coordination is essential to effectively establish international minimum risk management standards, avoid regulatory arbitrage, and mitigate systemic risk and adverse spill-over across countries. Diverse and inconsistent requirements between different supervisors will increase costs and make it less likely that robust international standards can be developed. As stated above, however, these market participants would still be subject to the requirement to register, and comply with potentially conflicting, duplicative or incremental requirements, in each Canadian jurisdiction where they carry business under the Committee's proposal.

ISDA submits that in making a global assessment of regulatory reform, the Committee should consider whether to impose any requirement to register in Canada for a foreign market participant if and where the regulations in the participant's home jurisdiction are deemed to achieve equivalent outcomes as the Canadian regulations[5]. Our members are concerned about the potential negative impact of imposing duplicate regulations for foreign institutions conducting derivatives business in Canada, where compliance with multiple regulatory frameworks would make such cross-border business unduly burdensome and costly. ISDA, therefore, urges the Committee to consider further harmonization with foreign regimes, including the establishment of "substitute compliance" exemptions where appropriate[6], to avoid a potentially counterproductive impact on the Canadian derivatives market. To that end, we believe that the Committee should establish a consultation working group with market participants subject to the Dodd-Frank Act to evaluate and develop "substitute compliance" provisions that eliminate burdensome overlap with registration requirements in Canada.

[5] In Japan, for example, under the Financial Instruments and Exchange Act (FIEA), if a firm will be conducting "financial instruments trading business", it will need to apply for registration for the type of business it will conduct. If a firm enters into OTC derivatives as "business", they are required to register as a Type 1 Financial Instruments Business Operator (FIBO). The FIEA sets out exemptions for foreign financial institutions to allow, with no registration in Japan, to offer or trade OTC derivatives with certain professional investors such as Qualified Institutional Investors if the foreign financial institution is licensed or registered in the foreign country and is supervised by that country's authority (Item (ii) of paragraph 1 of Article 1-8-6, and Article 17-3 of the Order for Enforcement of the Financial Instruments and Exchange Act).

[6] For example, swap dealers and major swap participants registered under the Dodd-Frank Act should be exempted from registration in Canada.

ISDA

*   *   *

ISDA appreciates the opportunity to provide its comments on the Registration Consultation Paper and looks forward to working with the Committee as it continues to consider the issues outlined in the Registration Consultation Paper. Please feel free to contact me or ISDA's staff at your convenience.

Sincerely,

Katherine Darras

Katherine Darras
General Counsel, Americas

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June 17, 2013

VIA electronic submission

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission

Re: Consultation Paper 91-407 on Derivatives: Registration

Dear Members of the Canadian Securities Administrators Derivatives Committee:

Just Energy Group Inc. ("Just Energy"), on behalf of itself and its subsidiaries, welcomes this opportunity to submit comments to the Canadian Securities Administrators Derivatives Committee (the "Committee") on Consultation Paper 91-407 on Derivatives: Registration published on April 18, 2013 (the "Consultation Paper").

Just Energy

Just Energy, through its subsidiaries, is a leading independent supplier of electricity and natural gas to residential and small to mid-size commercial consumers in Canada, the United States and the United Kingdom. In Canada, the Just Energy family of companies provides electricity in Alberta and Ontario and offers natural gas in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and Quebec. Just Energy also is one of the largest competitive green energy retailers in North America.

To meet its delivery obligations to its Canadian customers, Just Energy purchases power and natural gas on a wholesale basis. Just Energy also periodically sells power and natural gas back into the wholesale markets when it has more supply than is needed to meet its customers' demands.

Just Energy provides power and natural gas to residential and commercial consumers under long-term fixed-price or price-protected contracts. The provision of such services is subject to Provincial utility regulations in each of the provinces in which Just Energy conducts its business. In Ontario, these include the Market Rules for the Ontario Electricity Market and the Gas Distribution Access Rules. Just Energy is subject to supervision by the Ontario Energy Board, the Ontario Power Authority and the Independent Electricity System Operator. In the case of retail customers, it is also subject to applicable consumer protection laws.

The derivatives activities that Just Energy undertakes serve only to hedge its obligations to its customers. In particular, in an environment of variable market prices, it needs to balance the cost of its delivery obligations on its supply contracts with its cost of its customer delivery obligations.

The markets in which Just Energy operates are highly competitive. There are at least ten other companies in Ontario in each of the electricity and natural gas sectors with whom we compete for customers.

We believe that the imposition of registration requirements on Just Energy, whether as a dealer, adviser or Large Derivative Participant (LDP), would reflect a misunderstanding of the nature of its business activities and its relationship with its customers and is not warranted by either public interest concerns or Canada's G-20 commitments. Just Energy is already subject to regulatory regimes and laws designed to ensure both an orderly market in the commodities it sells and appropriate protection for consumers. The imposition of a further layer of regulatory requirements based on a perceived analogy between Just Energy's activities and those of a securities dealer or securities adviser or concerns that such activities might pose serious systemic risk to the Canadian financial markets are, in our view, not justified and would impose onerous and unnecessary regulatory burdens on Just Energy's business.

The imposition of registration requirements on Just Energy would also mark a significant departure from the position taken by US regulators, who designate as "end- users", rather than as potential registrants, entities who, among other things, engage in derivatives trading to hedge or mitigate commercial risk.[1] In this regard, we believe that the proposed regulation should be revised to make it clear that entities such as Just Energy are to be properly regarded as "end users" rather than as potential registrants.

Our responses to a number of the questions posed by the Committee are as follows:

Q5. Are the factors listed in the Consultation Paper the correct factors that should be considered in determining whether a person is in the business of trading derivatives?

As a preliminary comment, we believe it would be helpful to clarify what in the Committee's view constitutes a "derivative" for these purposes. Proposed OSC Rule 91-506: *Product Determination* and the Companion Policy exclude a variety of transactions (including physically-settled commodity transactions and related book-outs, as well as consumer supply transactions), from the ambit of derivatives reporting requirements under OSC Rule 91-507: *Trade Repositories and Derivatives Data Reporting.* These exclusions cover the bulk of Just Energy's

[1] See Section 2(h)(1)(A)(ii) of the *Commodity Exchange Act* as amended by Title VII.

transactions and it should be clear that such transactions do not fall back into the "derivatives" category for purposes of determining the applicability of registration requirements.

We also believe that greater clarity is required with respect to which activities constitute being in the business of trading of derivatives. Just Energy is not in the business of trading derivatives; it is in the business of selling electricity and natural gas to consumers. It should not be required to register as a derivatives dealer merely because certain hedging activities ancillary to its main business might be characterized as engaging in dealing in derivatives.

The Consultation Paper sets out several business triggers that are problematic in this regard. Specifically:

Intermediating trades and acting as a market maker: Just Energy is not and does not hold itself out as a broker or a market maker nor does it engage in activities that would cause it to be commonly regarded as a broker of or market maker in derivatives. It does not seek to intermediate transactions between market participants who are taking different views on the future values of a derivative. While it does sit between its customers and the generator, this is due to the design of the energy supply system in Canada, which prevents small individual customers from approaching wholesale commodity providers for their individual needs. This is a function of how the deregulated retail energy market operates. Just Energy offsets its risk to a large number of individually small consumers by aggregated risk contracted with wholesale suppliers. Just Energy does not perform a market-maker function. It does not stand ready to enter into transactions at the request of its customers and counterparties but rather decides in each case with whom and on what terms it will contract.

- *Trading with the intention of being remunerated or compensated*: The existing definition is broad and does not appear to contemplate that commercial entities will always enter into a transaction to receive an expected benefit. What comprises compensation in this context requires more clarity as a current interpretation could capture the core retailer function of buying aggregated volumes of a commodity at market and retailing to consumers with a margin and therefore a benefit. We believe that the regulation is instead meant to capture situations where the specific derivatives transaction or group of transactions attracts a broker fee or where the intermediary is seeking to profit by capturing the spread between intermediated offsetting derivatives transactions or to realize gains as a result of movements in the value of the derivatives themselves.

- *Directly or indirectly soliciting*: Again the definition in the Consultation Paper is broad, referring to "contacting someone by any means". Just Energy's concern is related to the interpretation of whether its customer contracts will all be considered end-use as, if they do not meet the end-use exception, all our marketing materials could potentially be captured under this definition.

As a further example of the need for more clarity, currently the novation of a derivative, other than a novation with a clearing agency, as well as the assignment of any or all rights under a derivatives contract, will be considered trading under the proposed regulation. We do not believe that it is the intent of the regulation, where the novation is required as a result of other requirements (e.g. novation of the transport of a commodity between a utility and a retailer, or where assignment is required as part of credit and collateral arrangements) to have these activities trigger registration requirements.

Guidance on what should properly be characterized as being in the business of trading derivatives can be found in the approaches taken by other regulators.

For example, in the EU, MiFID provides for the regulation of investment firms trading either as an agent or as a principal in relation to derivatives. For these purposes, an "investment firm" is defined as "…any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis". [2] Just Energy does not provide nor is it in the business of providing investment services to its customers, it provides price certainty around energy for consumption.

In addition, IOSCO's proposal for regulating derivative market intermediaries (DMIs) indicates that designation as a DMI should not include persons who, while they may enter into derivatives transactions, are not engaged in the business of dealing, making a market or intermediating trades in derivatives.[3]

In the US, the CFTC includes as one of the key criteria of being a "swap dealer" that an entity "regularly enters into swaps in the ordinary course of business for its own account" but then excludes from the calculation of whether such activities exceed a *de minimus* threshold any exposure from a non-dealing activity such as transactions entered into by the entity to hedge its own business risks.[4]

The Committee should also take into account the definition of "end-user" set out in CSA Consultation Paper 91-405: essentially, a non-financial institution hedging for its own account to mitigate commercial risk in its business and not of a size that poses systemic risk. We believe that this is an accurate characterization of Just Energy's activities and should not be displaced simply because some of its hedging activities could, in a technical sense, constitute "trading in derivatives".

In light of these considerations, we would recommend that either the criteria for being in the business of trading derivatives be clarified to exclude entities such as Just Energy or that the activities of entities such as Just Energy be expressly exempted from derivatives dealer registration requirements.

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[2] Consultation Paper, Part 3.2 – *European Union Approach,* (2013) OSCB 4120

[3] Consultation Paper, Part 4.1 – *Registration Standards,* (2013) OSCB 4121

[4] Consultation Paper, Part 3.1 – *United States Approach,* (2013) OSCB 4117

Q8: Are the factors listed in the Consultation Paper the appropriate factors to consider in determining whether a person is in the business of advising on derivatives?

We also have concerns with respect to the triggers for registration as an adviser.

The Consultation Paper states that the concept of advising in relation to derivatives is very similar to the concept of advising about securities and states that a person would be considered to be "advising" in relation to derivatives where they provide another person with any advice or direction relating, directly or indirectly, to trading in derivatives, including the provision of advice in relation to:

- The management of a portfolio of derivatives
- The use of derivatives as an investment strategy or part of an investment strategy; and
- The provision of advice in relation to hedging strategies

We believe that these types of advisory activities are quite different in kind than those engaged in by Just Energy with its customers, which relate to the consumption of energy rather than derivatives investment or hedging strategies.

While we understand that many of the supply contracts that our customers have with Just Energy will not be regarded as derivatives, since they will be "[a] consumer contract or instrument to purchase non-financial products or services at a fixed, capped or collared price"[5], we do have some customer contracts where payment is based on an indexed or variable rate[6]. There are often discussions regarding the payment options available to customers at the time of entering into such contracts. We do not believe such discussions should be characterized as "advising others in relation to derivatives", requiring the registration of both Just Energy and various individuals in the derivatives adviser category. These discussions focus on explaining payment terms under supply contracts, are ancillary to the supply of energy to consumers and should not be characterized as being the business of providing advice for compensation.

We would therefore recommend that the regulation either clarify the criteria for being in the business of advising on derivatives or expressly exempt entities such as Just Energy from any adviser registration requirement.

Q9: Are the factors listed in the Consultation Paper for determining whether an entity is an LDP appropriate?

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[5] OSC's Companion Policy to 91-506 – *Derivatives: Product Determination* , Part 2, Excluded Derivatives

[6] In response to the request for comments on CSA Staff Consultation Paper 91-301, we have sought clarification as to whether these contracts are captured derivatives.

We note that the threshold for designation as an LDP is left for further study based on data to be obtained through trade reporting. In this regard, we understand that much of the business activity that Just Energy engages will not be subject to trade reporting, either because it constitutes a physically-settled commodity contract[7] or is a consumer contract referred to in the OSC's proposed Companion Policy.[8] This suggests that much of Just Energy's business activity has already been determined to be of a kind that does not need to be subject to regulation under the new derivatives regulatory regime.

To the extent that Just Energy's other derivatives activities are to be taken into account in assessing its status as an LDP, we urge that there be comparability with other jurisdictions in whatever exposure threshold is specified, both in what is included in the calculation of holding a substantial and systemically important position in the derivatives market and the actual dollar threshold. In particular, in clarifying what constitutes a "substantial position", consistency with other jurisdictions' exclusions of hedging to offset commercial risk and monetary thresholds, is needed.

On this point, we note that the Committee is considering taking derivatives activity into account, regardless of whether it is for hedging purposes or for speculative purposes and, in Question 6, specifically asks whether entities that are carrying on frequent derivatives trading activity for speculative purposes should be subject to a different registration trigger than entities trading primarily for the purpose of managing their business risks. Just Energy supports differentiation and submits that entities who engage in derivatives activity to hedge business risk should be exempt from registration since these activities serve to offset their commercial risk, and thus do not pose a serious risk to the stability of the financial markets. This would make such regulation consistent with that of other jurisdictions. As noted previously, the registration requirements of *Dodd- Frank* allow consideration of hedging or mitigating commercial risk and the IOSCO Standards recommend an exemption for end-users "that are not engaged in the business of dealing, making a market or intermediating trades". This would allow companies such as Just Energy, that enter into derivatives to hedge and mitigate commercial risk, and do not represent a threat to the soundness of the financial markets, to avail themselves of the exception. There does not appear to be an equivalent exemption available within the Consultation Paper and we would urge the Committee to consider its inclusion in the interest of equivalency of regulation.

Q14: Are the requirements described in the Consultation Paper appropriate registration requirements for derivatives dealers, derivatives advisers and LDPs?

As indicated previously, we do not believe that business activities of the kind engaged in by Just Energy require registration, in which case the registration requirements set out in the Consultation paper are moot. However, examination of such requirements in the context of Just Energy's business serves to highlight the inappropriateness of registration in our case.

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[7] Section 2(c) of the OSC's Rule 91-506 *Derivatives: Product Determination* (OSC Rule 91-506)

[8] See Part 2(h) of the Companion Policy to OSC Rule 91-506

We note that a broad range of requirements are proposed for registrants. Generally speaking, the object of such requirements (at least in the context of the securities industry) is to protect the investing public and to ensure open, fair and efficient capital markets. The imposition of such requirements on LDPs in the derivatives context is intended to mitigate systemic risk.

As discussed previously, we do not believe that Just Energy's activities pose systemic risk to the Canadian financial markets and thus its designation as an LDP would be inappropriate. We also question the need for the various other requirements that might be imposed in connection with registration, either because they are inappropriate or unnecessary in the context of the sale of electricity or natural gas to consumers (which is already a regulated activity) or because Just Energy's supplier at the wholesale level are large, sophisticated entities who do not need such protections in their dealings with Just Energy.

For example, to address financial and solvency concerns, the new regulations would impose minimum capital, margin and insurance requirements on registrants. Firstly, Just Energy does not perform any kind of custodial or fiduciary function, the only assets it may receive from some of its customers are security deposits. This activity does not relate to Canadian customers, the deposits are not in material amounts and are held in segregated accounts**.** Secondly, credit concerns between Just Energy and its suppliers are addressed through bi-laterally negotiated security and collateral arrangements which are tailored to the parties' particular circumstances. The imposition of standardized capital, margin and insurance requirements serve no useful purpose in these circumstances and we urge the Committee to recognize the efficacy of existing arrangements. Finally, if Just Energy were to fail financially, the only practical consequence to its customers (apart from inconvenience) would be that they would have to switch to one of the many other energy retailers for supply on prevailing market terms. This is as likely to be beneficial to them as detrimental. There is no analogy between an energy supply of this kind and the functions performed by financial institutions and securities dealers for Canadian savers and investors.

Periodic financial reporting is contemplated for each registrant. Existing arrangements for many companies include the audit of one set of consolidated financial statements for the group rather than the audit of individual entity financial statements. The imposition of this additional requirement will result in increased costs to consumers without a tangible net benefit of decreasing overall financial market risk. Derivatives are by their nature forward-looking while financial statements reflect the past and therefore provide limited insight as to the open market risk a company is facing at the balance sheet date.

We believe that most of our customers would be characterized as "non-qualified persons". The regulation therefore contemplates that, if registered as a dealer or adviser, Just Energy would be required to perform a form of "Gatekeeper" role in respect of each of its 587,000 customers and implement KYC, business conduct and suitability procedures in its dealings with them. While this may be reasonable in the context of a relationship in which a client is relying upon the registrant to assist it in making investments, we question its appropriateness or utility when the relationship centers around the purchase and sale of a commodity for personal consumption.

We do not believe that it is the intention of the regulation to impose requirements on individuals and companies that do not materially impact overall market risk. This would cause concern both from Just Energy's retail customer base as well as simply adding to existing regulation from the OEB on the provision of customer information.

Particularly for customers that have indexed supply contracts which might be characterized as "derivatives", it is unclear whether they would be required to obtain independent advice before entering into such contracts (and, if so, from whom and at what cost?) or whether Just Energy will have the obligation to implement the proposed Business Conduct and Gatekeeper procedures and, if required to register as a dealer, pre-trade reporting, trade confirmations and account statement procedures.

Additionally, if the customers are considered non-qualified parties, it could mean that all of Just Energy's business activities might be considered a business trigger under 6.1(b)(vi) of the Consultation Paper. In this regard, we request clarity with respect to the definition of a "qualified party". Specifically,

- will existing collateral arrangements be considered when establishing whether the party has sufficient financial resources?

- What is meant by the 3rd inclusive bullet point: "they have not entered into a contract with the registered entity that requires the registered entity to provide the persons with the same types of protections that are adopted as registration requirements when trading with a non-qualified party.

Q23: Are the proposed registration exemptions appropriate? Are there additional exemptions from the obligation to register or from registration requirements that should be considered but that have not been listed?

Just Energy acknowledges that the Committee has considered potential exemptions from registration but requests further clarity. Specifically:

- the exemption for regulated persons is available for "equivalent regulatory requirements". More specifics are required as to what forms of regulation will be considered "equivalent" for these purposes.

- In the context of the adviser registration requirement, what threshold is considered "incidental" to the provision of trading services? Is it a percentage of revenue? How or would this be calculated or considered if the cost of this service is embedded in the cost of the related derivatives?

Finally, we note that an entity whose activities triggered a Dealer or Advisor registration requirement would be required to register even if they are not resident in Canada, potentially subjecting the same entity to multiple (domestic and foreign) registration regimes. It is therefore important to keep regulatory requirements in Canada as consistent as possible with existing foreign rules as well as broaden the scope for substituted compliance.

***

Just Energy asks the Committee to reflect on these comments. Please contact us if you have any questions or concerns regarding these comments.

Respectfully submitted,

/s/ Stephanie Bird
Stephanie Bird
SVP, Corporate Risk Officer

KFW

KfW Bankengruppe, Postfach 111141, 60046 Frankfurt am Main

submitted via Email

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
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››› CSA Consultation Paper 91-407 – Derivatives: Registration, dated April 18, 2013

Date: 13-06-2013

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Ladies and Gentlemen:

We are submitting this comment letter in response to the Consultation Paper 91-407 – Derivatives: Registration, dated April 18, 2013 (the "Consultation Paper"), issued by the Canadian Securities Administrators (the "CSA"). We appreciate the opportunity to comment on the proposed requirements on registration of certain derivatives market participants set forth in the Consultation Paper.

This comment letter is submitted on behalf of KfW, and the views expressed herein are those of KfW only. For the reasons described herein and with regard to Question 22 of the Consultation Paper, we believe that entities owned or controlled by foreign governments, such as KfW, which, as explained below, is a foreign government-linked entity owned by the Federal Republic of Germany (the "Federal Republic") and the German states and the obligations of which are backed by the full faith and credit of the Federal Republic due to a statutory guarantee, should benefit from an exemption comparable to the exemption from the obligation to register recommended under Section 8.2 (b) of the Consultation Paper for Canadian federal, provincial, territorial and municipal governments on the one hand and for federal and provincial crown corporations whose obligations are fully guaranteed by the applicable government on the other (together, the "Canadian Governments"). Accordingly, we respectfully request the CSA to exempt KfW from the potential obligation to register as a derivatives dealer, derivatives adviser or as a large derivatives participant.

I. Background on KfW

Legal Status, Ownership and Statutory Guarantee

KfW is a German public law institution (*Anstalt des öffentlichen Rechts*) organised under the Law Concerning KfW (*Gesetz über die Kreditanstalt für Wiederaufbau*, or "KfW Law"). The Federal Republic holds 80% of KfW's equity capital and the German federal states hold the remaining 20%.

The KfW Law expressly provides that the Federal Republic guarantees all existing and future obligations of KfW in respect of money borrowed, bonds and notes issued and derivative transactions entered into by KfW (KfW Law, Article 1a). Under this statutory guarantee (the "Guarantee of the Federal Republic"), if KfW fails to make any payment of principal or interest or any other amount required to be paid with respect to any of KfW's obligations mentioned in the preceding sentence, the Federal Republic will be liable at all times for that payment as and when it becomes due and payable. The Federal Republic's obligation under the Guarantee of the Federal Republic ranks equally, without any preference, with all of its other present and future unsecured and unsubordinated indebtedness. Creditors who have a claim against KfW resulting from one of the obligations mentioned in the first sentence of this paragraph may enforce this obligation directly against the Federal Republic without first having to take legal action against KfW. Against this background, these obligations of KfW, both financially and in terms of legal recourse, are viewed as sovereign credits and KfW, like the Federal Republic, enjoys a triple A credit rating.

Furthermore, as a public law institution, KfW benefits from the German administrative law principle of *Anstaltslast*, according to which the Federal Republic, as the constituting body of KfW, has an obligation to safeguard KfW's economic basis. Under *Anstaltslast*, the Federal Republic must keep KfW in a position to pursue its operations and enable it, in the event of financial difficulties, through the allocation of funds or in some other appropriate manner, to meet its obligations when due. Although *Anstaltslast* is not a formal guarantee of KfW's obligations by the Federal Republic, the effect of this legal principle is that KfW's obligations are fully backed by the credit of the Federal Republic on this basis as well, in addition to the Guarantee of the Federal Republic referred to above.

Purpose

KfW was established in 1948 by the Administration of the Combined Economic Area, the immediate predecessor of the Federal Republic. Originally, KfW's purpose was to distribute and lend funds of the European Recovery Programme (the "ERP"), which is also known as the Marshall Plan. Even today, several of KfW's programmes to promote the German and European economies are supported using funds for subsidising interest rates from the so-called "ERP Special Fund". Over the past decades, KfW has expanded and internationalised its operations. Today, KfW serves domestic and international public policy objectives of the German Federal government, primarily by engaging in various promotional lending activities.[1]

As a foreign government-owned entity, KfW does not seek to maximise profits. KfW does, however, seek to maintain an overall level of profitability that allows it to strengthen its equity base in order to support its promotional activities and to grow the volume of its business. KfW is prohibited under the KfW Law from distributing profits, which are instead allocated to statutory and special reserves. KfW is also prohibited from taking deposits, conducting current account business or dealing in securities for the account of others.

Governance and Supervision

KfW is governed by an Executive Board (*Vorstand*) and a Board of Supervisory Directors (*Verwaltungsrat*). The Executive Board is responsible for the day-to-day conduct of KfW's business and the administration of its assets. The Board of Supervisory Directors, which, among others, consists of seven Federal ministers[2], supervises the overall conduct of KfW's business and the administration of its assets.

Under the KfW Law, the Federal Ministry of Finance, in consultation with the Federal Ministry of Economics and Technology, supervises KfW and has the power to adopt all measures necessary to safeguard the compliance of KfW's business operations with applicable laws, KfW's by-laws and other regulations[3].

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1 KfW's lending activities include: domestic financing, primarily made through commercial banks, including loans to small and medium-sized enterprises, housing-related loans, grants and financings to individuals for educational purposes, financing for infrastructure projects and global funding instruments for promotional institutes of the German federal states (*Landesförderinstitute*); export and project finance through its wholly-owned subsidiary KfW IPEX-Bank GmbH ("KfW IPEX-Bank"); and development finance for developing and transition countries, including private-sector investments in developing countries through its wholly-owned subsidiary DEG—Deutsche Investitions- und Entwicklungsgesellschaft mbH ("DEG").

2 Generally, the Supervisory Board has 37 members and consists of the Federal Minister of Finance; the Federal Minister of Economics and Technology; the Federal Minister of Foreign Affairs; the Federal Minister of Food, Agriculture and Consumer Protection; the Federal Minister of Transport, Building and Urban Affairs; the Federal Minister for Economic Cooperation and Development; the Federal Minister for the Environment, Nature Conservation and Nuclear Safety; seven members appointed by the *Bundesrat*; seven members appointed by the *Bundestag*; five representatives of commercial banks; two representatives of industry; one representative each of the local municipalities, agriculture, crafts, trade and the housing industry; and four representatives of the trade unions. The representatives of the commercial banks, industry, the local municipalities, agriculture, crafts, trade, the housing industry and the trade unions are appointed by the German Federal government after consultation with their constituencies.

3 As of mid-June 2013, an amendment to the KfW Law has been approved by the two Houses of Parliament (the *Bundestag* and the *Bundesrat*). The amendment provides broad rulemaking authority (*Verordnungsermächtigung*) to the Federal Ministry of Finance in consultation with the Federal Ministry of Economics and Technology to subject KfW, by analogy, to certain provisions of European and German bank regulatory law and, in particular, to declare certain

In addition to the annual audit of its financial statements, KfW, as a government-owned entity, is subject to an audit that meets the requirements of the German Budgeting and Accounting Act (*Haushaltsgrundsätzegesetz*). One of the specific aspects to be covered by this audit and the related reporting is the proper conduct of KfW's business by its management.

Funding Activities and Derivatives Transactions

KfW finances the majority of its lending activities from funds raised by it in the international financial markets. KfW issues debt instruments in various currencies, primarily the Euro and the U.S. dollar (which accounted for 49% and 32% of KfW's new capital-market funding in 2012, respectively). As of December 31, 2012 KfW's total outstanding funded debt amounted to EUR 388.0 billion. At year-end 2012, the total outstanding of notes issued in CAD amounted to CAD 4.9 billion.

KfW enters into derivatives transactions in order to manage the risks incurred by it and its wholly-owned subsidiaries KfW IPEX-Bank and DEG in connection with its financing and funding activities. Such risks are almost entirely associated with changes in interest rates and foreign exchange rates.

Some of KfW's major counterparties are dealers based in Canada. As of April 30, 2013, the total notional amount of derivatives outstanding amounted to EUR 713 billion equivalent (on a consolidated basis), of which close to 8% (by notional amount) were executed with Canadian counterparties.

KfW enters into all of the foregoing types of transactions solely for purposes of hedging risks incurred by it and its wholly-owned subsidiaries KfW IPEX-Bank and DEG, and KfW does not and, in accordance with Article 2 paragraph 3 of the KfW Law, may not, engage in proprietary or speculative trading. Further, KfW does not accommodate demand for swaps from other parties nor enter into swaps in response to interest expressed by other parties in the manner a dealer would customarily do, except that, in the context of centralising and aggregating market-facing hedging activities within the group at the parent level, KfW accommodates demand for swaps by its wholly-owned subsidiaries KfW IPEX-Bank and DEG for their hedging activities. KfW therefore considers itself as an end-user customer of derivatives.

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provisions of the German Banking Act (*Kreditwesengesetz*) applicable to KfW. The amendment stipulates that KfW's statutory promotional mandate shall be considered in the rulemaking process and that the legal supervision of KfW remains with the Federal Ministry of Finance in consultation with the Federal Ministry of Economics and Technology. To the extent that bank regulatory provisions are applied by analogy by KfW, banking supervision may be assigned to the German Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*) and the *Deutsche Bundesbank*. It is expected that the amendment to the KfW Law will be enacted at the beginning of the second half of 2013, after formal completion of the legislative procedure.

KFW

II. Treatment of KfW under over-the-counter derivatives regulation in the United States and Europe

Against the background of CSA's contributions to and monitoring of international regulatory proposals and legislative initiatives to develop international standards, we would like to respectfully point out the manner in which entities like KfW are treated in other jurisdictions with respect to over-the-counter derivatives regulation.

Treatment of KfW under certain rules issued by the U.S. Commodity Futures Trading Commission ("CFTC") under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")

CFTC has responded to entities such as KfW and foreign entities in general. In the CFTC's release accompanying its final rules regarding the further definition of "Swap Dealer," "Major Swap Participant," and other matters, the CFTC stated that foreign governments, foreign central banks and international financial institutions should not be required to register as a Swap Dealer ("SD") or Major Swap Participant ("MSP") and it clarified that it considers KfW a foreign government for this purpose.[4] Furthermore, in its release accompanying its final rules regarding the end-user exception to clearing requirements for swaps, the CFTC similarly stated that foreign governments, foreign central banks and international financial institutions will not be subject to the requirement under Dodd-Frank that swap transactions be cleared through a derivatives clearing organisation and it also clarified that it considers KfW a foreign government for this purpose.[5]

The CFTC has therefore recognised that foreign sovereign entities in particular should be distinguished from other non-U.S. persons and excluded from certain of the most significant regulatory requirements, including the registration requirements as SD or MSP, and that KfW should be treated as a sovereign for these purposes.

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[4] *See* CFTC and the Securities and Exchange Commission, Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 77 Fed. Reg., 30,596, 30,692-93 (May 23, 2012). The CFTC stated that it "does not believe that foreign governments, foreign central banks and international financial institutions should be required to register as swap dealers or major swap participants." *See id.* at 36,093. In addition, in a footnote just prior to that statement, the release stated that "[f]or this purpose, we consider that the term "foreign government" includes KfW, which is a non-profit, public sector entity responsible to and owned by the federal and state authorities in Germany, mandated to serve a public purpose, and backed by an explicit, full, statutory guarantee provided by the German federal government." *See id.* at fn. 1178.

[5] *See* CFTC, End-User Exception to the Clearing Requirement for Swaps, 77 Fed. Reg. 42,560 (July 19, 2012). The CFTC stated that "foreign governments, foreign central banks, and international financial institutions should not be subject to the [clearing] requirements of Section 2(h)(1) of the CEA." *See id.* at 42,562. It further stated, as it did in its release with respect to the swap dealer and MSP definition rules, that "for this purpose, the Commission considers that the term "foreign government" includes KfW, which is a non-profit, public sector entity responsible to and owned by the federal and state authorities in Germany, mandated to serve a public purpose, and backed by an explicit, full statutory guarantee provided by the German federal government." *See id.* fn 12 at 42,561.

KfW

Treatment of KfW under European legislation

With respect to the so-called European Market Infrastructure Regulation ("EMIR")[6], Article 1 Paragraph 5 of EMIR provides that, with the exception of the reporting obligation, EMIR shall not apply to a) multilateral development banks, b) public sector entities owned and explicitly guaranteed by a central government, and c) the European Financial Stability Facility and the European Stability Mechanism. KfW is a public sector entity within the meaning of Article 1 Paragraph 5b) of EMIR, and is thus, except for the reporting obligation, not subject to the obligations imposed by EMIR, including the clearing obligation and margin requirements. EMIR, however, does not include registration requirements for market participants other than central counterparties and trade repositories.

Authorisation requirements, in particular for dealing on own account or executing orders on behalf of clients in securities or derivatives, are part of the provisions of the European Markets in Financial Instruments Directive ("MiFID")[7] and its proposed revisions by proposals for a regulation ("MiFIR")[8] and a further directive ("MiFID II")[9]. However, under MiFID/ MiFID II, derivative participants holding large derivatives positions are not required to register, as proposed in the Consultation Paper and as implemented under U.S. regulation, only because they hold a large position in a financial instrument. Regulatory requirements imposed by MiFID, MiFIR and MiFID II have to be fulfilled by investment firms which are exclusively defined as legal persons performing certain investment services and activities. Hence, the requirements resulting from MiFID, MiFIR and MiFID II are service- and activity-based and not related to substantial positions in counterparty exposures.

KfW is not an investment firm authorised under the provisions of MiFID.

III. Discussion of Question 22 of the Consultation Paper related to foreign governments and similar bodies: "... Should entities such as ..., foreign governments or corporation owned or controlled by foreign governments benefit from comparable exemptions?"

KfW does not act as a derivatives dealer or derivatives adviser, does not engage in any of the activities that have been identified by the CSA as those of a dealer or adviser and is, to the contrary, a customer of the dealers that serve as its counterparties. Hence, it is our understanding

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[6] *See* 2012 O.J. (L 201), Regulation (EU) No 648/2012 of the European Parliament and the Council of July 4, 2012 on OTC Derivatives, Central Counterparties and Trade Repositories, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ. do?uri=OJ:L:2012:201:0001:0059:EN:PDF.

[7] Directive 2004/39/EC of the European Parliament and of the Council, of 21 April 2004 on markets in financial instruments.

[8] Proposal for a regulation of the European Parliament and the Coucil on markets in financial instruments, dated 21 May 2013 (current Presidency compromise).

[9] Proposal for a directive of the European Parliament and of the Council on markets in financial instruments, dated 21 May 2013 (current Presidency compromise).

that KfW would not be required to register as derivatives dealer or adviser in Canada.

However, given the extent of KfW's use of derivatives for hedging purposes, it is possible that it will be required to register as a large derivative participant ("LDP"). As outlined in Section 6.3 of the Consultation Paper, an LDP is an entity that is a Canadian resident entity that maintains a substantial position in a derivative or a category of derivatives; or is a foreign resident entity that holds a substantial position in a derivative or category of derivatives with Canadian resident counterparties; and the entity's exposure in Canadian derivatives markets results in counterparty exposure that could pose a serious risk to Canadian financial markets or to the financial stability of Canada or a province or territory of Canada.

We assume that transactions entered into by KfW from outside Canada with non-Canadian counterparties will be outside the jurisdiction and scope of the intended regulation and will not need to be taken into account in determining KfW's status as an LDP. However, because KfW enters into certain transactions with Canadian counterparties, and such transactions will need to be taken into account in determining KfW's registration status, it is possible that KfW would be required to register as an LDP[10]. As described above, there is no registration requirement for large positions holders as recommended for LDP pursuant to Section 6.3 of the Consultation Paper under European legislation. Thus, European governments and government-linked entities (including KfW) triggering the requirements for an LDP would not be able to benefit from the exemption recommended for foreign LDPs under Section 8.1 (c) of the Consultation Paper, simply because equivalent regulatory requirements do not exist in their home jurisdiction.

This result, we respectfully submit, would be unnecessary for the realisation of the purposes of the intended regulation of the Canadian over-the-counter derivatives market and detrimental to the mission and objectives of KfW and the Federal Republic.

KfW is wholly government owned and backed by a statutory guarantee of the Federal Republic and, from a credit risk perspective, its obligations rank equally with those of the Federal Republic. The Federal Republic also has an obligation to safeguard KfW in the event of financial difficulties under the administrative law principal of *Anstaltslast* discussed above. Accordingly, it is unlikely that derivatives exposures of KfW in the Canadian derivatives markets could pose a risk to them.

Hence, KfW's position is comparable to the one of Canadian Governments as described under Section 8.2 (b) of the Consultation Paper for which an exemption from the registration requirement is provided.

Furthermore, given its purpose, ownership and structure, KfW is not a profit making enterprise, but rather has a mandate of furthering the public policy objectives of the Federal Republic by primarily engaging in promotional lending activities. We therefore submit that KfW is closely aligned with sovereign entities, and is distinct from private banking or

[10] As the thresholds for registration as an LDP have not yet been established, it is still uncertain whether KfW's position in derivatives with Canadian counterparties may be considered substantial.

trading businesses. KfW, as noted, is a wholly government-owned entity rendering regulation by extraterritorial government dispensable.

The application of the registration requirements as recommended in the Consultation Paper on KfW interferes with KfW's purpose to serve the public policy objectives of the German Federal government, primarily by engaging in various government-sponsored lending activities. In addition, the imposition of the requirements recommended in the Consultation Paper on KfW would most likely result in increasing costs for its funding and lending activities, which will restrict its ability to fulfill its government mandate, and increase the costs its borrowers will have to bear. These effects will have adverse consequences for the markets served by KfW and, we submit, none of these consequences are necessary or warranted, given the nature of KfW, its ownership and its mandate.

For the above mentioned reasons, we think that foreign governments and government-owned entities, in particular those entities which are explicitly guaranteed by a foreign government[11], should be treated like Canadian Governments because they equally represent sovereign risk. In this context, we would like to bring to your attention the report of the European Commission[12] in which it concludes that the list of exempted entities under EMIR be extended to foreign central banks and foreign public bodies managing debt in certain jurisdictions outside the European Union in order to contribute to greater international coherence and consistency. The European Commission concludes that a delegated act is required to exempt the central banks and public bodies charged with or intervening in the management of public debt from Japan and the United States in a first step, which at the time of publication of the report the European Commission considered to be the two jurisdictions with final rules on OTC derivatives in place. With respect to Canada and some other jurisdictions, the European Commission intends to monitor the latest developments with a view to also exempting the respective central banks and debt management offices of these jurisdictions.

If a general exemption of foreign governments and government-owned entities like KfW from the registration requirements is not deemed to be appropriate, an individual approach to exempt certain foreign governments and government-owned entities from registration requirements on a case-by-case-basis should be considered as a viable alternative. This approach, while generally recognising the particularities of subjecting foreign sovereign entities to domestic jurisdiction, would leave the CSA the discretion to provide relief on an individual basis taking into consideration all aspects that are deemed relevant therefor at the time of the decision.

[11] As outlined above and under footnote 5 of this paper, the CFTC, for example, considers that the term „foreign government" includes KfW as a non-profit, public sector entity owned and guaranteed by the Federal Republic.

[12] Report from the Commission to the European Parliament and the Council, dated 22 March 2013 – The International Treatment of Central Banks und Public Entities Managing Public Debt with regard to OTC Derivatives Transactions.

KfW

IV. Conclusion

In sum, based on the foregoing, we believe that transactions entered into by KfW and other foreign government-owned entities should be excluded from the various requirements otherwise applicable to registered entities. While it is not clear if KfW would be required to register as an LDP, there is, as noted, a risk that such registration will be required. However, subjecting KfW to the registration requirement, and the related regulatory obligations, would not ultimately serve the purpose intended by the CSA. Due to KfW's purpose, use of derivatives, ownership structure and Guarantee of the Federal Republic, its activities will not pose a risk to Canadian financial markets. In this aspect, KfW is comparable to Canadian Governments who benefit from an exemption from the obligation to register. Under such circumstances, the relief sought hereunder is appropriate and necessary.

We are therefore of the opinion that it is appropriate to exempt foreign government-owned entities such as KfW from the recommended registration requirement. Accordingly, we respectfully request that the CSA determine that foreign governments and entities owned or controlled by foreign governments (including KfW) be excluded from the requirement to register. Alternatively, we request to consider granting such an exemption to foreign governments and government-linked entities on an individual basis.

For your further work on regulating the Canadian derivatives market, we kindly ask you to also consider to exempt foreign governments and government-linked entities like KfW from clearing and margin requirements, because the arguments outlined in this paper regarding an exemption from the registration requirements are valid and substantial for these requirements, too.

Thank you 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 supervisory authority.

Sincerely,
KfW

Name: Dr. Lutz-Christian Funke
Title: Senior Vice President

i.A.

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

BY EMAIL June 17, 2013

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Dear Sirs / Madames,

Re: Canadian Securities Administrators CSA Consultation Paper 91-407 Derivatives: Registration (the "Consultation Paper")

About Nexen

Nexen Inc. is a wholly owned subsidiary of CNOOC Limited, which ultimately is 64.43% owned by the Chinese 'state' and 35.57% owned by investors through shares traded on the Hong Kong and New York stock exchanges. CNOOC Limited has also applied for listing on the Toronto Stock Exchange.

Under CNOOC Limited, Nexen Inc. and its subsidiaries ("Nexen") is part of one of the largest independent oil and gas exploration and production companies in the world with production in excess of 900,000 BOE/day and a market capitalization in excess of $80 Billion. Nexen, in its own right, also operates in various countries including Canada, the US, Columbia, the United Kingdom, Yemen and Africa. As such, Nexen brings a unique perspective as a Canadian company with global operating and marketing experience, expertise and exposure.

Introduction

Nexen welcomes the opportunity to comment on the Consultation Paper. Nexen also wishes to thank ASC legal counsel, Debrah McInyre and her team for taking the time to meet with Nexen and several other companies on April 22, 2013 to discuss the efforts of the Canadian Securities Administrators Derivatives Committee (the "Committee") to date as well as the current Consultation Paper. Such an open dialogue with the industry is appreciated and we submit will also lead to more informed and therefore better and more relevant and appropriate regulation.

We understand that the Committee had expected to receive a wider participation and higher number of comments than were actually received on the previous consultation papers in this matter. Nexen believes that many companies had internal resources focused on understanding the US Dodd-Frank Act (as defined below) rules and implementing systems and processes for compliance with the Dodd-Frank Act deadlines and therefore, until the Committee's most recent efforts to create industry awareness of the Canadian derivatives reform, had not been aware of the consultation papers requesting industry comments. In light of this, we believe that the industry would benefit from an extended comment period after all the consultation papers have been released in order to have an opportunity to assess the implications of the entire proposed regulatory framework.

Nexen supports the general objective to protect participants in the derivatives market, reduce counterparty risk and protect the soundness of Canadian financial markets as set out on p.9 of the Consultation Paper. However, we are concerned that some of the proposed mechanisms in the Consultation Paper are over reaching, and unnecessarily burdensome in that they seek to go well beyond what would be necessary to achieve the stated objectives. In addition, certain of the proposed mechanisms create unnecessary conflict and inconsistency with the regulatory regimes adopted by the U.S. and European regulators. We believe that (as well as creating duplicative and conflicting regulatory requirements) the likely consequence of implementing such proposals in their current form would be that Canadian companies and, in particular, Canadian energy companies, would be put at a competitive disadvantage to U.S. and European companies.

The comments made in this letter comparing and contrasting areas of the US *Dodd-Frank Wall Street Reform and Consumer Protection Act* (the "*Dodd-Frank Act*") and the *European Market Infrastructure Regulation* ("*EMIR*") regimes are simply made as a point of reference. They are not intended to detract from the efforts of the Canadian Regulators to develop a regulatory regime appropriate to Canadian market participants and customers and, where appropriate, to improve on the foreign regimes.

However, in the context of the registration proposals set out in the Consultation Paper (as highlighted below), we believe that a minimum degree of consistency with the foreign regimes is essential for Canadian market participants and Canadian markets generally to remain competitive and not be placed at a disadvantage.

Relevance to Nexen's Business

Nexen, through its marketing division, engages in financial derivatives contracts primarily for the purposes of hedging risks associated with our commercial or treasury activities (as described in more detail below).

Several hedge scenarios exist for our business, such as the following:

a. Potential change in value of commodities (including crude oil, natural gas and other related commodities) or other assets (including transportation and storage) that Nexen owns, produces, processes, purchases, leases, markets or sells or anticipates owning, producing, processing, purchasing, leasing, marketing or selling in the ordinary course of business; or
b. Potential change in value of liabilities incurred or anticipated to be incurred by Nexen in the ordinary course of business; or
c. Potential change in value of services that Nexen provides, purchases, or anticipates providing or purchasing in the ordinary course of business; or
d. Potential change in value of the overall portfolio (assets, services or commodities) that Nexen owns, produces, processes, purchases, leases, markets or sells or anticipates owning, producing, processing, purchasing, leasing, marketing or selling in the ordinary course of business; or
e. Potential change in value from interest rate, foreign exchange ('FX") or currency associated with any of such current or anticipated assets or liabilities; or
f. Potential change in value due to fluctuation in interest, currency or FX rate exposures arising from any of such current or anticipated assets or liabilities (such as financial risks arising from daily operations).

In addition, we also might enter into a financial derivatives as a substitute for transactions made or to be made or positions taken or to be taken by Nexen at a later time in the physical market. Proxy hedges may also be entered into where an exactly matching hedge (to the relevant underlying physical position) is not available.

The vast majority of our financial derivatives trading activity falls into one or more of the above scenarios of hedging.

Nexen also engages in a handful of financial derivatives trading for a few small Canadian energy producers annually as a means for them to hedge their physical production. This is a service we provide to customers at their request as we are familiar with their business and understand their needs. These producer hedge contracts are typically non-standardized swaps or options which are not available to be transacted on exchanges and as such they are required to be traded OTC.

The majority of our financial derivatives trading activity (approximately 95%) is transacted on global exchanges (mainly in the US) and/or cleared through centralized clearing brokers. These derivatives contracts therefore are already fully transparent to U.S. regulators (given they are traded on exchanges based in the US) and are centrally cleared and margined. The remaining 5% of our derivatives transactions are traded OTC and will be reported to either U.S., European or Canadian regulators (depending on applicable jurisdiction) and, in almost all cases, by our counterparties. A key objective of the Pittsburgh G20 summit was to improve transparency in the OTC derivatives markets, which clearly is achieved by such reporting of OTC derivatives trades.

Response to Specific Questions in the Consultation Paper

Nexen's response to questions 3, 4, and 5 posed in the Consultation Paper is set out below.

Q3: Should registration as a derivatives dealer be subject to a *de minimis* exemption similar to the exemption adopted by U.S. regulators? Please indicate why such an exemption is appropriate.

Yes. Nexen strongly believes registration as a derivatives dealer should be subject to a *de minimis* exemption similar to the exemption adopted by U.S. regulators and also similar to the rules adopted by European regulators.

Pursuant to the *Dodd-Frank Act* implemented in the US to comply with its G20 commitments, persons that are not currently registered as swap dealers will not be deemed swap dealers if their positions resulting from (potential) dealing activity over a trailing 12 month period in the aggregate do not exceed a gross notional amount of USD$8 billion, (or USD$25 million with "special entities" which are governmental entities, employee benefit plans etc.). The USD$8 billion threshold will be reduced to USD$3 billion following a phase-in period. Hedges are not included in calculating the *de minimis* value.

Pursuant to *EMIR* implemented by the European Union to comply with its G20 commitments, non-financial counterparties whose positions in OTC derivatives contracts do not exceed a clearing threshold (which is a separate €3 billion gross notional value for each of interest rate, foreign exchange and commodity derivatives) on a rolling average basis for 30 working days are subject to lower regulatory requirements (and are exempt from the clearing and margining obligations) relating to OTC derivatives, than the requirements to which a financial counterparty, or a non-financial counterparty that exceeds the threshold, is subject. The calculation must include all OTC derivatives contracts entered into by the non-financial counterparty itself or by other non-financial entities within its group. As with the *Dodd-Frank Act*, hedges are not included in calculating whether the relevant threshold is exceeded.

While Nexen appreciates the Committee's position that the derivatives market should be subject to the same protections regardless of the size or the total derivatives exposure of the dealer, we respectfully submit that the interests of all persons impacted by the derivatives market and the proposed legislation needs to be balanced in the context of the key objectives of the G20 commitments to reform the OTC derivatives market, namely to improve transparency, mitigate systemic risk and protect against market abuse.

We believe that there are numerous reasons as to why a *de minimis* exemption is appropriate for inclusion in the proposed Canadian legislation, for reasons similar in nature to those that were persuasive in aiding the CFTC to conclude it was a necessary exemption, including but not limited to:

1. As the swap dealer market is dominated by large entities which exceed the *de minimis* threshold, the vast majority of swap dealing activity will be regulated even with the *de minimis* exemption in place.

   The *de minimis* factors should take into account the size and unique attributes of the market for swaps. The CFTC believes that factors that exclude entities whose OTC derivative dealing activity is sufficiently modest in light of the total size, concentration and other attributes of the applicable markets can be useful in avoiding the imposition of unnecessary regulatory burdens on those entities for which dealer regulation would not materially contribute to advancing the customer protection, market efficiency and transparency objectives of dealer regulation[1].

2. Regulatory efficiency.

   The *de minimis* exemption under *Dodd-Frank Act* was mandated by Congress in the belief it would further the interests of regulatory efficiency when the amount of a person's dealing activity is limited to an amount that does not warrant registration to address the concerns implicated by government regulation of swap dealers. To advance this interest it was necessary for the CFTC to consider the benefits of the marketplace associated with the regulation of dealers against the total burdens and potential impacts on competition, capital formation and efficiency associated with that regulation.[2]

3. End users other than those genuinely making markets in swaps should not be required to register as swap dealers.

   Inclusion of a *de minimis* exemption under *Dodd-Frank Act* was influenced from many end users who used swaps to hedge their risk.[3] Hedging one's own production does not constitute dealing activity, so swaps for the purpose of

[1] Further Definition of "Swap Dealer", "Security-Based Swap Dealer, "Major Swap Participant" and "Eligible Contract Participant", Securities Exchange Act Release No. 66868, 77 FR 30596 (May 23, 2012) at p. 30629.
[2] Ibid at p. 30629.
[3] Supra at p. 30758.

hedging are not even included in the *de minimis* calculation.[4] However, hedges put in place on behalf of other producers are included in the *de minimis* calculation.

The main justification for the hedging exemption is that when a person enters into a swap for the purpose of hedging one's own risks in specified circumstances, the element of the swap dealer definition requiring the accommodation of the counterparty's needs or demands is absent. Further justification was that the exclusion of such swaps would reduce ongoing costs that persons using such swaps would incur in determining if their activity levels would categorize them as swap dealers.[5] In addition, where OTC derivative contracts are used for hedging by a person, that person is in fact reducing the overall commercial risks in its business activities.

4. We believe that a single *de minimis* value is the most cost effective, manageable and reasonable way to apply such a standard, as opposed to creating several different categories or different amounts for different market categories.

   There is value in setting a single standard so there is a level playing field and a standard that can be easily implemented without the need to categorize swaps or complicate compliance processes that would further increase costs of participants to determine which category might apply to their business.[6] The additional costs that participants incur in simply determining which compliance category applies, in addition to the internal costs of compliance, education and new systems and processes is significant and is not to be underestimated. Such systems are already in place for *Dodd-Frank Act* and *EMIR* compliance, but the current proposal in the Consultation Paper will require entirely new systems and significant additional costs to comply with the different registration and compliance obligations in Alberta and potentially registration and compliance in other Provinces as well.

   While Nexen recognizes that there is always a cost to companies brought about by new regulatory compliance obligations and Nexen accepts that as a cost of doing business, Nexen submits that the extra (and unnecessary) costs that would be incurred in this instance (were the current proposals to be implemented) would be unreasonable and unwarranted and they will put energy companies like Nexen in an uncompetitive situation as compared to U.S., European and other international energy companies. Nexen requests clarification from the Committee as to whether the extent of the cost and competition impact has been fully analyzed (and a detailed cost/benefit study conducted) by the Committee and would invite the Committee to contact companies individually and on a confidential basis in order to gain a better understanding of the potential costs implications (for example by

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[4] Supra at p. 30631 and 17 C.F.R. Part 1.3(ggg)(6)(iii).
[5] Further Definition of "Swap Dealer", "Security-Based Swap Dealer, "Major Swap Participant" and "Eligible Contract Participant", Securities Exchange Act Release No. 66868, 77 FR 30596 (May 23, 2012) at p. 30710.
[6] Ibid at p. 30632.

ascertaining the costs companies have incurred in respect of *Dodd-Frank Act* and *EMIR* compliance to date).

The CFTC determined that a fixed notional amount would best protect the markets and the public, foster efficiency and competitiveness and serve the public interest. Adding any more variables would only serve to increase the costs of market participants to evaluate the application of the *de minimis* exemption.[7] Nexen agrees with such an approach.

5. We believe a *de minimis* exemption could increase competition in the marketplace.

   The exception may maintain competition in dealing activity within the swap markets by helping to allow non-registered persons to continue providing dealing services while clients may avoid the costs associated with full-fledged dealers. Competition within the market for swaps may not only decrease the costs for participants in the market, but also may help to decrease systemic risk by discouraging a lessening of the concentration of dealing activity among a few major market participants which could be exacerbated by the proposed regulation.[8]

6. The exception would permit those persons that are already in a relationship of trust with energy companies to accommodate those existing clients that have a need for swaps (such as the small producers for which Nexen conducts hedges), to avoid the need to establish separate relationships with registered dealers with attendant costs.

7. A *de minimis* threshold should be high enough to allow the existing pool of swap dealing entities to participate.

   The threshold should not be set inappropriately low otherwise persons engaged in a smaller quantity of swaps would be forced to choose between reducing their swap activities to a level below the thresholds or register as a swap dealer and incur the additional costs of compliance and regulation, which could reduce the availability of swaps in smaller or niche markets.[9] The CFTC considered this could impact the competitiveness of those markets and undermine the ability of market participants to practice sound, cost effective risk management. A higher threshold would promote a larger pool of swap dealing entities, as entities with activities below the threshold would not incur costs to deal with swap dealer regulations, resulting in more potential counterparties available to swap users. The CFTC recognized that on the other hand, a greater quantity of swap dealing would be undertaken without customer protection, market orderliness and market transparency benefits of dealer regulation. The CFTC balanced all of these

[7] Supra at p. 30708.
[8] Supra at p. 30629.
[9] Supra at p. 30707.

factors in determining the notional amount and balanced the need to better promote the efficiency, competitiveness and financial integrity of the markets.[10]

8. The *de minimis* level should be determined with economic analysis.

   While recognizing its difficulty and limitations, the CFTC evaluated data regarding indexed credit default swaps ("CDS") provided by the Securities Exchange Commission (the "SEC") to establish the *de minimis* notional value.[11] The *de minimis* threshold was considered in light of a $300 trillion notional amount U.S. swaps market.[12] The CFTC believed there was merit in the 0.001 percent ratio suggested by several commenters, and that an appropriate balance of the goal of promoting the benefits of regulation (while recognizing the unquantifiable nature of those benefits) against the competing goal of avoiding the imposition of burdens on those entities for which regulation as a dealer would not be associated with achieving those benefits in a significant way, would be reached by setting the notional standard for swaps at a level that is near 0.001 percent of a reasonable estimate of the overall domestic market for all swaps between all counterparties. The CFTC believed a $3 billion notional value standard was appropriate taking all these considerations into account.[13] The phase in period allows additional time for the CFTC to study swap markets as they evolve with the new regulatory regime while preserving focus on the regulation of the largest and most significant swap dealers.[14]

We acknowledge that a *de minimis* exception by its nature will eliminate key counterparty protections and that the broader the exception, the greater the loss of protection. However, we believe such an exemption is an appropriate balance of the need to balance the protection of counterparties and the promotion of the effective operation and transparency by regulation against the regulatory goals. The Committee could include a mechanism to consider application of any *de minimis* amount in the future based on how the markets evolve as enhancements to pricing and transparency may facilitate new entrants to the swap market.[15] This would be consistent with the approach taken by the CFTC for the much larger U.S. derivatives market and the European regulators.

It should be noted that under the *Dodd-Frank Act*, Nexen's swap dealing activity in connection with swaps falls significantly below the USD$8 billion threshold (and also the subsequent USD$3 billion threshold) and, as such, Nexen is not required to register with the CFTC as a swap dealer. However, under the legislation contemplated by the Consultation Paper, Nexen would likely fall within the derivatives dealer and derivatives advisor categories and therefore would be subject to registration requirements. Such entirely conflicting and contradictory regulatory results could not have been intended by

[10] Supra at p. 30707.
[11] Supra at p. 30707.
[12] Supra at p. 30758.
[13] Supra at p. 30633.
[14] Supra at p. 30633.
[15] Supra at p. 30628.

U.S. and Canadian regulators in respect of the same dealing activities and legislative goals designed to address the similar market risks. In addition, such difference will put Nexen at a competitive disadvantage in cross-border transactions from a cost of business perspective and willingness of foreign counterparties to transact with parties in a Canadian jurisdiction that has an entirely different regulatory regime from other larger and more significant markets.

Q4: Are derivatives dealer, derivatives adviser and LDP the correct registration categories? Should the Committee consider recommending other or additional categories?

Nexen respectfully submits that the Committee should consider including an end user category that is similar to the *Dodd-Frank Act* regime. Under the *Dodd-Frank Act*, any market participant that does not fall within the swap dealer category or major swap participant category by virtue of exemptions or otherwise is classified as a non-swap dealer or non-major swap participant, otherwise known as an end user. Participants that would otherwise be swap dealers but for the *de minimis* exemption and hedging exemption are classified as end users. As is the case with most of the energy sector companies, Nexen is an end user under the *Dodd-Frank Act*. This means that while Nexen has record keeping and reporting obligations, it is not subject to the registration requirements. Nexen submits that this is an appropriate level of compliance given the nature of its activities.

To give additional perspective, Nexen wishes to clarify that the difference in registration treatment in the U.S. as an end user and under *EMIR* as a non-financial counterparty below the clearing threshold, which subjects Nexen to record keeping and reporting requirements, as compared to Alberta as a derivatives dealer and adviser, which would subject Nexen to additional registration and other compliance requirements, is not unique to Nexen and will be endemic to the whole energy industry. According to a recent IFLR Webcast entitled *Dodd-Frank Act* Title VII Update presented by Morrison Foerster dated May 21, 2013, no major energy company has registered as a swap dealer or a major swap participant under the *Dodd-Frank Act* as at the end of April, 2013. This suggests the majority of energy companies are end users under *Dodd-Frank Act*. Accordingly, the majority of the energy sector in the U.S. is subject to registration exemptions under *Dodd-Frank Act* in stark contrast to the Canadian proposal. Nexen requests clarification as to whether such consequences were intended for the Canadian energy sector and, if so, would like to understand the Committee's reasons for the more onerous treatment in Canada when both regulatory regimes arose from compliance with the G20 commitments in respect of regulation of the OTC derivatives market. This further highlights the extent to which the Committee's proposal could put companies such as Nexen at a competitive disadvantage to those in the U.S. and Europe. Businesses in the energy sector (including Nexen) tend to enter into derivatives or swaps on a cross border perspective and if interpretation of definitions differ from those in other parts of the world this may reduce the number of transactions that occur between foreign and domestic markets.

The end user exemption is further discussed below in the context of hedging activities.

Q5: Are the factors listed the correct factors that should be considered in determining whether a person is in the business of trading derivatives? Please explain your answer.

Nexen submits that hedging for the purpose of mitigating the risk of an underlying asset is a trading activity that should have no place in the registration requirements and should be exempt from registration. The registration requirements should only apply to derivatives dealers. Under the current proposal in the Consultation Paper, Nexen would be subject to the registration requirements for its own hedging activities. This appears to be contrary to the Committee's intent with respect to the end user exemption discussed in CSA Consultation Paper 91-405 in which the Committee states at pp. 5 and 6:

> "The objectives of the proposed framework for the regulation of the OTC derivative market are to strengthen financial market infrastructure and meet the G20 commitments as discussed in Consultation Paper 91-401.
>
> …
>
> It is widely agreed that the proposed regulatory requirements should not be applied to a limited category of end-users of OTC derivatives contracts. This category of end-user enters into OTC derivatives contracts in order to protect itself against a risk arising from its own business activities. The terms of these contracts are negotiated between the parties and are tailored to the needs of the end-user. The limited activity of the end-user in relation to the overall market and the total exposure resulting from the contracts entered into by a single end-user does not represent a substantial risk to our markets or the wider economy. In addition, the end-user is not in the business of trading OTC derivatives contracts for speculative purposes.
>
> ...
>
> The Committee recommends the implementation of an end-user exemption which is intended to provide a qualifying end-user with an exemption from most of the proposed regulatory requirements, such as registration, trading, clearing, margin, capital and collateral."

The requirement for registration of persons in the business of trading derivatives, as set out in the Consultation Paper, will result in disparity with the *Dodd-Frank Act* and *EMIR* regimes and will impact the entire energy sector if there is no exemption for hedging activities.

In considering the exemption applicable to hedging under the *Dodd-Frank Act*, the CFTC clarified the trader-dealer distinction and used it as the basis for a framework that appropriately distinguishes between persons who should be regulated as swap dealers and those who should not.[16] Traders such as hedgers or investors are considered non-dealers by the CFTC. Conversely, dealers hold themselves out and are commonly known in the trade to (i) accommodate demand from other parties and contact counterparties to solicit interest; (ii) develop new types of swaps and inform counterparties of their availability; (iii) tend not to request that other parties propose the terms of the swap but instead enter into the instruments on their own terms; and (iv) usually have membership in a swap association and provide marketing materials.

[16] Supra at p. 30607.

Under the *Dodd-Frank Act*, swaps generally are held for the purpose of "hedging or mitigating commercial risk" if any such position is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise where such risks arise from (i) the potential change in the value of assets actually, or anticipated to be, owned, produced, manufactured, processed or merchandised, (ii) the potential change in value of liabilities that a person has incurred in the ordinary course of business of the enterprise or (iii) the potential change in value of services that a person provides, purchases, or reasonably anticipates providing or purchasing in the ordinary course of business of the enterprise.[17] Similarly, under *EMIR* the genuine hedging test is satisfied where the derivative, (i) covers risk arising from the normal course of business (ii) covers indirect risks relating to the business resulting from fluctuation of interest rates, inflation rates, foreign exchange rates or credit risk or (iii) is consistent with the IFRS hedging definition.

The main justification for the hedging exemption by the CFTC is that when a person enters into a swap for the purpose of hedging one's own risks in specified circumstances, the element of the swap dealer definition requiring the accommodation of the counterparty's needs or demands is absent. Further justification was that the exclusion of such swaps reduces costs that persons using such swaps would incur in determining if they were swap dealers.[18]

Under the *Dodd-Frank Act* and *EMIR*, for those companies where swaps activities occur in connection with the hedging of actual physical inventory and exposure, such swaps need not be included in determining whether the entity must register as a swap dealer or exceeds the clearing threshold for a non-financial counterparty. Conversely, swap activities in connection with any third party producer hedges may be viewed as dealing activity and would be included in the calculation of whether a company is required to register as swap dealer, subject to the *de minimis* calculation.

Nexen respectfully submits that the hedging exemption recognized by the regulators in the U.S. and Europe and incorporated in the *Dodd-Frank Act* and *EMIR* is fundamental and a similar concept should be considered by the Canadian regulators for inclusion in the derivatives dealer classification in the proposed Canadian legislation. Further, Nexen submits such an exemption is warranted in that this type of activity does not put the market at risk (and on the contrary actually reduces risk) and the absence of such an exemption in the Canadian legislation does not further the ultimate goals sought to be achieved by the Canadian Regulators, but rather unnecessarily penalizes companies that enter into swaps solely for the purpose of hedging or mitigating commercial risk.

In addition, the Consultation Paper's lack of any exemption for hedging seems contradictory to Consultation Paper 91-405 (p.9) which states hedging to mitigate risk which may lead to compensation is acceptable. Nexen respectfully submits that further

[17] 17 C.F.R. Part 1.3(kkk)
[18] Further Definition of "Swap Dealer", "Security-Based Swap Dealer, "Major Swap Participant" and "Eligible Contract Participant", Securities Exchange Act Release No. 66868, 77 FR 30596 (May 23, 2012) at p. 30710.

guidance from the Committee and alignment of the treatment and categorization of hedging is necessary.

Alignment with International Standards

In addition to the specific questions posed by the Committee, Nexen wishes to comment on the importance of alignment with international standards.

As noted above, the *de minimis* exemption and the hedging exemption in both the *Dodd-Frank Act* and *EMIR* result in vastly different regulatory treatment and obligations for Nexen as compared to the proposed registration requirements and other compliance obligations proposed by the Committee in the Consultation Paper. Nexen recognizes that the different definitions and terminology used in the Canadian and U.S. derivatives regulation legislation (and also of that in Europe) is somewhat driven by the need to align with the different securities legislation applicable in each separate jurisdiction and also, as relevant, within the different Canadian Provincial jurisdictions. However, the concepts and overall effect should be consistent and any differences in definitions and terminology that may be necessary should not be at the expense of the market participants (in terms of increased regulatory burden and cost, reduced liquidity and opportunity to hedge risks and conflicting rules), which we believe will act as a deterrent to competition in the marketplace.

The Committee appears to acknowledge the need for a market participant to only comply with one jurisdiction where the derivatives regulation functions are similar. At p. 2 of CSA Consultation Paper 91-405, the Committee states:

> "The Committee is committed to working with foreign regulators to develop rules that adhere to internationally accepted standards. The Canadian OTC derivative market is a small segment of the global market and the majority of transactions involving Canadian market participants include foreign counterparties. It is therefore crucial that rules developed for the Canadian market accord with international practice to ensure that Canadian market participants and financial market infrastructures have full access to the international market and are regulated in accordance with international principles." [Footnotes omitted]

In addition, at pp. 9 and 42 of the Consultation Paper the Committee states:

> "…the Committee recommends that, where appropriate, the Committee consider relying on third-party regulators to carry out some or all of the regulatory functions. These regulators <u>could include foreign regulators</u>, regulating the registrant in its home jurisdiction, prudential regulators, including those responsible for regulating financial institutions in Canada, and self-regulatory organizations.
>
> …
>
> Where such a regime provides for equivalent supervision and regulatory requirements that are monitored and enforced to the satisfaction of Canadian Securities Regulators, those persons should not be subject to redundant requirements."

Nexen agrees with and fully supports this concept (which we respectfully submit is the only sensible course to take to reduce inconsistency in regulatory requirements imposed on market participants and duplication of the burden and costs of compliance). However, Nexen is concerned that the Committee's ultimate recommendation on p. 42 of the Consultation Paper does not in fact follow this principle and instead only seeks to apply to regulatory regimes imposed by other Canadian regulatory authorities and not U.S. (or other) authorities, despite its previous statement (as highlighted above) that the rules developed by the Committee should adhere to international standards. In contrast to the Committee's stated commitment "to develop rules that adhere to internationally accepted standards", it appears to us that the Committee's proposals are a significant departure from the international standards of the US *Dodd-Frank Act* regime or the European *EMIR* regime.

Once the Committee has reconsidered the proposed registration requirements with a more detailed comparison with the international standards already in place and in the context of keeping Canadian companies on an equal footing with their international counterparts, Nexen would respectfully urge the Committee to apply its recommendation (to rely "on third-party regulators to carry out some or all of the regulatory functions") to the *Dodd-Frank Act* and *EMIR* regulatory regimes or, failing that, to at least include similar exemptions as contained in the *Dodd-Frank Act* and/or the *EMIR* to ensure a more uniform regulatory application and compliance.

It is critical that the Canadian regulators work to minimize any inconsistencies between Canadian and U.S. and European jurisdictions because, among other things:

a. it will enable non-Canadian dealers (as well as Canadian dealers operating in international markets) to process transaction and reporting obligations using the systems and processes they have already implemented. These processes were implemented at a great expense and effort for the purposes of compliance with international requirements (i.e. *Dodd-Frank Act* and *EMIR*) which have already been established;
b. even minor differences in rules may cause dealers to be less incentivized to transact with parties in Canadian jurisdictions;
c. the market in Canada, as acknowledged by the Committee, is relatively small in comparison to the global market. Further compliance restrictions and limitations may have negative implications to the growth of the market in Canada;
d. any reduction in significant derivatives activity may decrease liquidity in the market and potentially negatively impact the Canadian market and the ability of physical market participants to continue to hedge their risks efficiently;
e. inconsistencies in categorization of market participants are likely to render it more difficult from a trade perspective to aggregate the necessary data which would undermine the very purpose of the trade repository reporting rules (due to the difference regarding interpretation and definitions); and
f. businesses in the energy sector tend to enter into derivatives or swaps on a cross border perspective and if interpretation of inconsistent and multiple definitions mean different things in other parts of the world this will likely reduce the number of transactions that occur between foreign and domestic markets. This will in turn lead to reduced liquidity available to domestic participants to hedge

their physical exposures and risks and will also lead to over regulation of a market that is deemed to be considered small by the Committee.

Nexen thanks the Committee for considering the comments set out in this letter and would be pleased to discuss any aspect of our comments in further detail should the Committee so wish. Nexen has full confidence that further clarifications from the Committee will be provided based on the comments received from the public.

All of which is respectfully submitted,

Susan L. Schulli,
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Dear Sirs/Mesdames:

CSA Consultation Paper 91-407 – *Derivatives: Registration*

This letter is in response to the request for comments regarding the above-noted CSA Consultation Paper (the **Consultation Paper**). Each capitalized term used but not defined herein has the meaning ascribed to it in the Consultation Paper.

As counsel to counterparties ranging from global financial institutions and pension plans to commodity producers and investment funds, Osler, Hoskin & Harcourt LLP has had extensive involvement with derivatives transactions, albeit from a legal perspective. In this letter, we comment from a regulatory, as opposed to business, standpoint, on certain of the proposals in the Consultation Paper. This letter reflects the general comments of certain members of Osler's financial services and derivatives practice group and does not necessarily reflect the overall views of our firm or our clients.

This letter is divided into two main parts: Part I sets forth some general comments on the Consultation Paper and Part II reflects our responses to the specific questions that appear in the Consultation Paper.

PART I – GENERAL COMMENTS

Scope

We request that the CSA Derivatives Committee (the **Committee**) clarify whether the Consultation Paper applies only to over-the-counter (**OTC**) derivatives, or also to exchange-traded derivatives. At times, one might think that the Consultation Paper applies only to OTC derivatives, but there are also several references to "derivatives traded on a trading facility" in the paper. It is not clear how provinces other than Manitoba, Ontario and Quebec would regulate registration requirements for trading commodity futures and commodity futures options if the rules that are ultimately developed for registration of derivatives dealers and advisers apply only in the OTC context. Would a dealer trading both exchange-traded commodity derivatives and OTC commodity derivatives with Alberta counterparties have to register as both a derivatives dealer and investment dealer? Also, would a dealer that carries on business in Ontario and Manitoba and that wishes to trade securities, exchange-traded derivatives and OTC derivatives be required to register as an investment dealer, a futures commission merchant and a derivatives dealer? We would respectfully request that all efforts be made to avoid such unnecessary regulatory overlap. The Committee should focus on developing a flexible registration regime that facilitates trading all types of derivatives: both OTC and exchange-traded.

Harmonization

The introduction to the Consultation Paper includes a sentence stating that registration requirements will be harmonized "to the degree practical" across all CSA jurisdictions (page 4116). We are concerned that the Committee has concluded that it would not be practical to harmonize registration requirements in certain circumstances. We strongly request that the CSA to make every effort to ensure that the registration regime in each CSA jurisdiction is identical such that there is a completely harmonized regime across Canada.

Explanation of New Concepts

Several concepts in the Consultation Paper appear to be relatively novel given the securities regimes in certain Canadian jurisdictions, in particular the concept of a "counterparty" to a derivatives transaction. To our knowledge, the proposal that a dealer owe regulatory obligations to a "counterparty" has not been made or adopted in other jurisdictions. We would request that the Committee provide additional guidance on the distinction between a "counterparty" and a "client". To take only one example, we think it would be helpful to clarify the discussion of a counterparty having an "account" with a dealer, receiving "account statements" from a dealer and benefitting from a dealer's suitability determination, which to us would suggest a dealer-client relationship.

PART II – RESPONSES TO CONSULTATION PAPER QUESTIONS

Q1: Should investment funds be subject to the same registration triggers as other derivatives market participants? If not, what registration triggers should be applied to investment funds?

Investment funds should be subject to the same registration triggers as other derivatives market participants. However, we do not think that such triggers could ever require a fund to register as an adviser or a dealer. With respect to the adviser registration requirement, the fund will be receiving advice from an adviser, and will not be providing advice to others. With respect to the dealer registration requirement, it is respectfully submitted that a fund should not, in the ordinary course, be viewed as carrying on the business of trading in derivatives. A fund does not intermediate trades between counterparties, act as a market maker, trade with the intention of being remunerated or compensated, solicit derivatives trades, provide clearing services, engage in activities similar to a derivatives dealer, and is unlikely to trade with a counterparty that is a non-qualified party that is not represented by a derivatives dealer or adviser on a repetitive basis. There is no policy rationale for imposing derivatives dealer registration requirements on a fund, which has no clients.

We appreciate that in the securities context, exemptive relief has been issued that would suggest that frequent trading activities alone trigger the dealer registration requirement. See *e.g.*, *Macquarie Emerging Markets Infrastructure Income Fund* (2012), 35 OSCB 4685; *Connor, Clark & Lunn Financial Opportunities Fund* (2012), 35 OSCB 2331; and *Dividend 15 Split Corp.* (2012), 35 OSCB 2785. It is submitted that the applicants for these decisions were seeking greater certainty with respect to the dealer registration requirements. We respectfully request that the CSA take this opportunity to clarify that frequent trading activity alone does not trigger dealer registration requirements.

At the same time, we agree that it is possible for a fund's derivative trading activities to be of such magnitude that they pose a systemic risk to the market, such that it would be appropriate to require the fund to register as an LDP. In such cases, the regulatory authorities will receive financial information, including information with respect to derivative exposures, pursuant to trade reports and reports furnished under registration requirements, necessary to appropriately regulate the fund and its trading activities.

Q2: What is the appropriate standard for determining whether a person is a qualified party? Should the standard be based on the financial resources or the proficiency of the client or counterparty? If the standard is based on financial resources should it be based on the net assets of the client or counterparty, gross annual revenues of the client or counterparty, or some other factor or factors?

Currently, Canadian securities law includes the concepts of "accredited investors" (set forth in National Instrument 45-106 – *Prospectus and Registration Exemptions*), as well as "permitted clients", "Canadian permitted clients" and "permitted clients that are not individuals" (all of which are set forth in NI 31-103). There are significant administrative costs associated with establishing and maintaining compliance regimes based on each of these terms. Meanwhile, the distinctions among these terms are highly nuanced. Thus, we believe that, to the extent feasible, the definition of "qualified party" should be consistent with the definition of "permitted client".

We would also appreciate clarity on the third bullet of the proposed qualified party definition (*i.e.*, "they have not entered into a contract with the registered entity that requires the registered entity to provide the persons with the same types of protections that are adopted as registration requirements when trading with a non-qualified party"). We do not see how this is relevant to the determination of whether a person is sophisticated or has adequate resources to absorb losses.

Q3: Should registration as a derivatives dealer be subject to a *de minimis* exemption similar to the exemption adopted by U.S. regulators? Please indicate why such an exemption is appropriate.

Yes, there should be a *de minimis* exemption in Canada. In our view, it would be a strange result if a firm engaged in very limited derivatives dealing activity in both the United States and Canada was exempt from registration in the United States but required to register in Canada. The reasons for the *de minimis* exemption in the United States are equally applicable in Canada.

Q4: Are derivatives dealer, derivatives adviser and LDP the correct registration categories? Should the Committee consider recommending other or additional categories?

The Concept Paper recognizes that derivatives markets and securities markets operate in different ways and therefore should be regulated differently (see *e.g.*, part 6).

According to the Concept Paper, the Committee considered, but ultimately rejected, regulating derivatives with securities underliers the same as securities. We respectfully disagree with the conclusion reached by the Committee: a person who purchases a security-based derivative is subject to the same risks as a person who makes a cash purchase or a short sale of securities. The value of a security can go to zero or can increase in value exponentially; the economic result of securities trading or trading derivatives with securities underliers is the same. Exposure from both derivative transactions and cash purchases can be magnified by leverage or margin. We question whether it makes sense that a stock option be regulated as a security, but a total return equity swap be regulated as a derivative. More fundamentally, it would be both expensive and unnecessarily complex to require a dealer that offers both securities and security-based derivatives to a client to register under two separate registration regimes.[1]

Q5: Are the factors listed the correct factors that should be considered in determining whether a person is in the business of trading derivatives? Please explain your answer.

We are concerned with the factors to be considered when determining whether a person is carrying on business in a jurisdiction. The Consultation Paper states that the presence of any one of the factors would indicate that a person is carrying on business in the jurisdiction. In our view, there are problems with this approach. For example, an entity could have an office in multiple jurisdictions, but not conduct any derivatives business out of an office in the local jurisdiction and not have any derivatives clients in the local jurisdiction. We question the policy rationale for requiring that person to register as a derivatives dealer in the local jurisdiction, given that all of that person's derivatives business is conducted in other jurisdictions.

Also, we suggest that item (ii) (intermediating trades) and item (v) (market maker) be qualified by the phrase "on a regular or repetitive basis" to be consistent with item (iii).

Please see additional comments on the factors in the response to Q7 below.

Q6: The Committee is not proposing to include frequent derivatives trading activity as a factor that we will consider when determining whether a person triggers registration as a derivative dealer. Should frequent derivatives trading activity trigger an obligation to register where an entity is not otherwise subject to a requirement to register as a derivatives dealer or a LDP? Should entities that are carrying on frequent derivatives trading activity for speculative purposes be subject to a different registration trigger than entities trading primarily for the purpose of managing their business risks?

While we agree that an active trader should be required to register if it trades with a non-qualified party on a repetitive basis, frequent derivatives trading activity alone should not

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[1] In our experience, a dealer would never trade security-based derivatives for a customer unless the dealer is registered as a dealer to trade the underlying security.

trigger an obligation to register where an entity is not otherwise subject to a requirement to register as a derivatives dealer or an LDP. Being an active investor or trader does not trigger registration in the securities context, and should not do so in the derivatives context. It would not make sense to impose on an active investor or trader that does not have any clients the compliance requirements to which a derivatives dealer is subject. Active investors and traders should be permitted to manage their own business risks without the need for regulatory oversight, provided they do not pose a systemic risk to the market (in which case LDP registration should be required).

Q7: Is the proposal to impose derivatives dealer registration requirements on parties providing clearing services appropriate? Should an entity providing these clearing services only to qualified parties be exempt from regulation as a derivatives dealer?

Imposing derivatives dealer registration requirements on clearing service providers is not appropriate. This business trigger could make central clearing less accessible to Canadians, by requiring foreign-based clearing service providers to register in Canada simply because they facilitate clearing through foreign-based clearing houses for Canadians.

Q8: Are the factors listed above the appropriate factors to consider in determining whether a person is in the business of advising on derivatives?

Subject to our other comments herein, we think that the factors are generally appropriate.

Q9: Are the factors listed for determining whether an entity is a LDP appropriate? If not what factors should be considered? What factors should the Committee consider in determining whether an entity, as a result of its derivatives market exposures, could represent a serious adverse risk to the financial stability of Canada or a province or territory of Canada?

While we appreciate that additional analysis is required to set registration thresholds for LDPs, it would be helpful to have more guidance regarding the types of entities that the Committee contemplates will have large derivatives exposure in responding to these questions.

At present, we would submit that systemic risk concerns are minimized if the counterparties' positions are hedged, such that ideally, only positional exposures are taken into account.

With respect to foreign LDPs, we query why a foreign entity should be required to register as an LDP in each Canadian jurisdiction where trading obligations exceed prescribed thresholds, if those obligations are offset by trading conducted in other

Canadian or non-Canadian jurisdictions. Is there systemic risk in such a circumstance? We respectfully submit that, when designing registration requirements, there is a need to recognize the cross-border nature of OTC derivatives markets and the interconnectedness of derivatives market participants. In our view, it is not necessary or productive to require foreign LDPs with a limited connection to Canada register in Canadian jurisdictions when there is no actual systemic risk to the local Canadian jurisdiction.

Finally, we would suggest that registration thresholds for an LDP be consistent with U.S. thresholds so that a U.S. entity that is not required to register as a "major swap participant" in its home jurisdiction would not be required to register as an LDP in a Canadian jurisdiction.

Q10: Is the Committee's proposal to only register derivative dealer representatives where they are dealing with clients or when dealing with counterparties that are non-qualified parties appropriate?

As a general matter, we query why individuals should be required to register at all. To our knowledge, this is not consistent with the approach taken in the United States. However, if registration is required, representatives of both dealers and advisers should only have to register when dealing with or advising non-qualified parties.

Q11: Is it appropriate to impose category or class-specific proficiency requirements?

Yes, this would generally be appropriate. Different types of derivatives can have substantially different features and risks. Individuals should not be expected to understand the features and risks of derivative products for which they are not responsible.

Q12: Is the proposed approach to establishing proficiency requirements appropriate?

In our view, the principles-based approach is acceptable, but we recommend caution in casting the proficiency net too broadly. The phrase "all individuals who are directors, partners, officers, employees or agents of a derivatives registrant who are involved in trading in or advising on derivatives" could be read to include individuals who carry out administrative functions but do not have any meaningful involvement in the registerable activity. In our view, the better approach is to apply the proficiency requirements only to individuals who are required to register.

We would also request clarity on the proficiency requirements that the Committee recommends for individuals acting as CCO and CRO. It is not clear whether specific requirements will be prescribed, or if those requirements will also be principles-based.

Q13: Is the Committee's proposal to impose a requirement on registrants to "act honestly and in good faith" appropriate?

While we are not opposed to the proposed requirement, provided that it is clear that it is not intended to affect a registrant's ability to negotiate commercial terms of a derivatives contract to which it is a counterparty, we think a careful and thorough comparison of the proposed requirement and the current, common law requirements and the effect of imposing the former must be undertaken before determining whether or not to enact it.

Q14: Are the requirements described appropriate registration requirements for derivatives dealers, derivatives advisers and LDPs? Are there any additional regulatory requirements that should apply to all categories of registrants? Please explain your answers.

In our view, the proposed record-keeping requirements are overly broad and will impose significant burdens on registrants. For example, there is a suggestion that a derivatives dealer or adviser keep records of advice provided to a counterparty. We are not certain why a dealer or adviser would provide advice to a counterparty that is not its client. Similarly, the Committee recommends that a registrant be required to document and, in a manner that is fair and reasonable, respond to each complaint made by any client or counterparty in relation to any of the registrant's activities relating to derivatives trading. Again, it is not clear to us why a registrant should be required to do so with respect to counterparties that are not its clients. We would suggest that the Committee consult with firms that are currently dealing in derivatives with regard to record-keeping practices in considering rules in this regard.

Q15: Should derivatives dealers dealing with qualified parties be subject to business conduct standards such as the ones described in part 7.2(b)(iii) above? If so, please explain what standards should apply.

For the reasons stated in part 7.1(d) of the Consultation Paper, derivatives dealers dealing with qualified parties should not be subject to business conduct standards such as the ones described in part 7.2(b)(iii). When derivatives trades are executed between two large and sophisticated counterparties, there should never be "know-your-client", suitability, conflict of interest or fair dealing provisions imposed on either party to the transaction.

We also question whether these requirements are appropriate where a derivatives dealer is dealing with a non-qualified party. The Committee notes that the requirements are similar to the obligations that swaps dealers owe to clients that are "special entities" under U.S. regulations. However, the U.S. rules are based on the premise that dealers owe duties to clients, not to counterparties (where there is no client relationship). The Committee's proposal, in effect, turns counterparties into clients. We have difficulty understanding the rationale, for instance, for requiring a registrant to deliver “account statements” to a counterparty that is a non-qualified party.

Q16: Do you have a preference between the two proposals relating to the regulation of a derivatives dealer trading with counterparties that are non-qualified parties? Is there another option to address the conflict of interest that the Committee should consider? Please explain your answer.

The Committee states that a conflict of interest will exist where a derivatives dealer enters into a transaction with a counterparty that is a non-qualified party that relies on that derivative dealer for direction or advice in relation to the trade. However, a non-qualified party may not so rely on a derivatives dealer trading as principal. In that situation, the interests of the derivatives dealer and the counterparty are opposed and there is no “fundamental conflict of interest” facing the registrant. Where there is such a conflict of interest, the second alternative is preferable.

Q17: Are the recommended requirements appropriate for registrants that are derivatives dealers? If not please explain.

In addition to the responses to the questions above, the business conduct requirements in part 7.2(b)(iii) should not apply to a dealer or adviser dealing with qualified parties. There are exemptions in NI 31-103 from certain know-your-client and suitability requirements when a registrant’s client is a permitted client. Similar exemptions should be put in place for derivatives registrants. Institutional investors will not be willing to disclose their investment objectives or risk tolerances to a derivatives dealer, and would not want a derivatives dealer to tell them whether a trade is suitable.

It is also problematic to require a registrant to periodically consider whether the outstanding positions of a client or counterparty continue to effectively achieve the objectives of the client or counterparty on an ongoing basis. It will not be feasible for registrants to comply with this proposed requirement. Suitability at the time of entering the trade, consistent with the approach taken in securities regulation, is the only requirement that should apply.

It is not clear how a derivatives dealer will comply with fair dealing requirements when dealing with a counterparty that is a non-qualified party. How does the dealer fairly balance the interests of the dealer and its counterparty in these circumstances? In our view, honesty and good faith should be the only requirements imposed on a dealer when dealing with non-qualified parties.

Finally, it will be difficult and expensive to comply with the proposed account statement requirements. It is not clear what would happen if a large institutional client disagreed with the highly subjective information that a derivatives dealer would be required to include in account statements, such as current market value and the client's exposure. We respectfully suggest that the Committee consult with derivatives market participants (both end users and dealers) to determine the appropriate types of information to be included in account statements.

Are there any additional regulatory requirements that should apply to registered derivatives dealers?

No.

Q18: Are the recommended requirements appropriate for registrants that are derivatives advisers? If not please explain. Are there any additional regulatory requirements that should apply to registered derivatives advisers?

Please see our responses to the questions concerning recommended requirements for derivatives dealers.

Q19: The Committee is recommending that foreign resident derivative dealers dealing with Canadian entities that are qualified parties be required to register but be exempt from a number of registration requirements. Is this recommendation appropriate? Please explain.

Q20: Is the Committee's recommendation to exempt foreign resident derivatives dealers from Canadian registration requirements where equivalent requirements apply in their home jurisdictions appropriate? Please explain.

By way of introduction, we think that only foreign resident derivative dealers engaging in an unrestricted practice (*e.g.*, dealing with qualified parties and non-qualified parties) should be required to register. Foreign resident derivative dealers engaging in a restricted practice (*e.g.*, dealing with only qualified parties) should be permitted to benefit from an exemption from registration, similar to the international dealer exemption from registration in the existing securities regime. See also our response to Q23, below.

The Committee suggests that foreign derivatives advisers and foreign derivatives dealers be exempted from specific regulatory requirements in Canada where they are subject to an equivalent regulatory regime in their home jurisdiction. We think that an exemption from certain derivatives adviser registration requirements available to a foreign entity regulated as a derivatives adviser in its home jurisdiction would be of limited applicability, because the Canadian approach to requiring entities to register as derivatives advisers is unique.

Moreover, we are concerned about the complexities associated with an analysis of whether the regulatory regime of another jurisdiction is substantially equivalent to the

Canadian one. In our view, it is unworkable for an exemption from certain registration requirements to be granted on a case-by-case basis based on information provided to the relevant Canadian regulatory authority. We suggest that there be transparent and consistently-applied standards as to applicable registration requirements. The Committee should consult with foreign derivatives advisers and foreign derivatives dealers to develop a set of standard equivalency measures that would result in exemptions from Canadian registration requirements where appropriate.

We also think that the following statement in part 8.1(b) of the Consultation Paper should be clarified:

> "This recommendation will require foreign dealers trading with Canadian counterparties, including qualified parties, or for derivatives dealers or derivatives advisers that act for Canadian clients, to register in the Canadian jurisdiction where the client or counterparty resides before entering into the derivatives trade or providing advice. This registration requirement will apply in all circumstances, including where the Canadian counterparty or client has operations in the foreign derivative dealer's home jurisdiction and the trade is booked there."

In our respectful view, a trade booked in a foreign jurisdiction between a foreign dealer and a Canadian entity with operations in the foreign jurisdiction does not have sufficient nexus to Canada to be subject to Canadian securities or derivatives law.

Q21: Should foreign derivatives dealers or advisers not registered in Canada be exempt from registration requirements where such requirements solely result from such entities trading with the Canadian federal government, provincial governments or with the Bank of Canada?

Yes. There should also be exemptions for trading only with Canadian banks, registered Canadian investment dealers and registered Canadian derivatives dealers. This would be similar to the exemption in NI 31-103 for trades through or to a dealer and would enable cross-border derivatives transactions between regulated derivatives dealers to continue without unnecessary disruption.

Q22: Is the proposal to exempt crown corporations whose obligations are fully guaranteed by the applicable government from registration as a LDP and, in the circumstances described, as a derivatives dealer appropriate? Should entities such as crown corporations whose obligations are not fully guaranteed, foreign governments or corporation owned or controlled by foreign governments benefit from comparable exemptions? Please provide an explanation for your answer.

We do not think that an entity, the obligations of which are fully and unconditionally guaranteed by a creditworthy government, should be required to register as an LDP.

From a credit risk perspective, such an entity's obligations rank equally with that of the applicable government, by virtue of the guarantee. Accordingly, there is no policy rationale from a systemic risk perspective for requiring it to register as an LDP. We have no comments on the balance of Q22.

Q23: Are the proposed registration exemptions appropriate? Are there additional exemptions from the obligation to register or from registration requirements that should be considered but that have not been listed?

We would suggest the following refinements to the proposed exemptions:

- ***Adviser Exemption for a Derivatives Dealer*** - We disagree with the suggestion that a derivatives dealer only be exempt from the requirement to register as an adviser if providing advice is "solely incidental" to a derivatives trade. There is an exemption from the adviser registration requirements for an investment dealer that advises on securities in certain circumstances, even if the investment dealer has discretionary trading authority over a client account. The same firm should not have to register as both a derivatives dealer and derivatives adviser. We note that the Committee recommends that a derivatives dealer not have to register as an LDP. We think the rationale underlying this recommendation also supports not requiring registration as both a dealer and adviser.

- ***Exemption for Affiliate Transactions*** - We would like to clarify that both trades with an affiliate and trades <u>on behalf of</u> an affiliate are covered by the exemption.

We would propose the following additional exemptions:

- ***Foreign Firms (Dealing and Advising)*** - The international dealer and international adviser exemptions in NI 31-103 are available in certain circumstances to a dealer or an adviser based in a foreign jurisdiction in relation to particular securities related activities. We would encourage the Committee to consider similar exemptions for foreign derivatives dealers and foreign derivatives advisers. See also our responses to Q19 and Q20.

- ***Institutional Clients (Dealing***) - It is noted in the Consultation Paper that the provinces of British Columbia, Alberta, Saskatchewan, Quebec and Manitoba have adopted registration exemptions for institutional trading. However, the Committee has concluded that exemptions for this market are no longer appropriate. The issues in the institutional market requiring the imposition of a registration regime are not clear to us. We would ask the Committee to consider why a dealer exemption for trading only with institutional entities is inappropriate.

- ***Generic Advice*** - We would ask the Committee to consider a generic advice exemption for advising in derivatives generally, similar to generic advice exemption for advising in securities generally under NI 31-103.

- ***Institutional Clients (Advising***) - We would strongly encourage the Committee to consider an exemption in respect of advice provided to institutional clients on the basis that (i) OTC derivative advisers not required to register in other countries, (ii) advising on derivatives (but not dealing) should not give rise to systemic risk concerns, and (iii) institutional clients do not require the same level of investor protection as other clients.

- ***Sub-Adviser*** - We would ask the Committee to consider a sub-adviser exemption for sub-advising in derivatives, which exemption could be modelled after the sub-adviser exemption that currently exists in Ontario under OSC Rule 35-502 - *Non-Resident Advisers*.

We thank you for the opportunity to comment on the Consultation Paper and would be pleased to discuss our thoughts with you further. If you have any questions or comments, please contact Mark DesLauriers (416.862.6709 or mdeslauriers@osler.com), Anna Huculak (416.862.4929 or ahuculak@osler.com) or Blair Wiley (416.862.5989 or bwiley@osler.com).

Yours very truly,

Osler, Hoskin & Harcourt LLP

Pension Investment Association of Canada

Association canadienne des gestionnaires de caisses de retraite

June 16, 2013

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission

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Ontario Securities Commission
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Dear Mr. Stevenson and Me Beaudoin,

Re: CSA Consultation Paper 91-407, Derivatives: Registration

This submission is made by the Pension Investment Association of Canada (PIAC) in reply to the request for comments by the Canadian Securities Administrators Derivatives Committee (the “Committee”) regarding CSA Consultation Paper 91-407, Derivatives: Registration (the “Consultation Paper”).

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 trillion in assets on behalf of Canadians. PIAC's mission is to promote sound investment practices and good governance for the benefit of pension plan sponsors and beneficiaries.

PIAC welcomes the opportunity to comment on the Consultation Paper. As most of the questions raised in the Consultation Paper are related to derivative dealers and advisers, it is not our intention to provide comments on every point raised. Rather, our comments will be more general and centered on the notion of establishing registration requirements for larger players in the derivatives markets – i.e. the proposed Large Derivative Participants (LDP) threshold. Finally, it is PIAC's understanding that some of its individual pension plan members intend to separately provide comments targeting their specific needs.

Over the last few years, PIAC and other global pension fund organizations have provided comments to regulators as part of multiple consultation processes on the topic of the regulation of over-the-counter (OTC) derivatives markets and centralized counterparties. As a reference, it is our pleasure to provide you with the most recent filings provided by the Global Pension Coalition to the Basel Committee on Banking Supervision and International Organization of Securities Commissions in regards to non-centrally cleared derivatives (attached). In these submissions, you will note the perspective of the pension industry on the role that its members play and the value that pension plans bring to OTC derivatives markets.

PIAC's main recommendation is that the CSA exclude pension plans from the registration requirements proposed under the Consultation Paper, including from the definition of Large Derivative Participant ("LDP"). There are three main reasons for our recommendation – (i) pension plans (even the largest ones) do not present systemic risks to the Canadian financial system, (ii) pension plans are already subject to comprehensive regulation by the federal and provincial governments, and (iii) the United States appears to be moving to a regime for OTC derivatives whereby pension plans are exempt from registration requirements. We address each of these points below.

In terms of systemic risk, it is important to understand that pension plans, whether large or small, mainly 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. It is PIAC's opinion that the use of derivatives by pension plans is more likely to reduce systematic risk and increase liquidity for the overall market as pension plan counterparties allow derivatives dealers to offset some of their risk with high quality, low credit risk entities. Capturing pension plans under the registration requirements may discourage participation in OTC derivatives markets, which could undermine investment and risk management objectives as well as be detrimental to overall market robustness.

On the second point, PIAC notes that Canadian pension plans are subject to comprehensive regulation by federal and provincial governments, in terms of solvency, governance and risk management. This regulatory regime is long-standing and has been the subject of considerable review in recent years by both levels of government in Canada. Capturing pension plans under the derivatives registration requirements would undoubtedly subject them to duplicative regulatory requirements, something which the Committee states within the Consultation Paper that it expressly wishes to avoid.

In terms of the international context, the Committee notes in the Consultation Paper that the U.S. Commodity Futures Trading Commission has exempted employee benefit plans from the definition of "major swap participant", which appears to be an analogous concept to the LDP. PIAC also notes there is no registration requirement created by comparable rules within Europe. We would note further that the U.S. test surrounding the definition of major swap participant relies somewhat upon an entities uncollateralized exposure. We would encourage the CSA to harmonize with the international approach on this issue so as not to impose additional regulatory obligations for Canadian pension plans.

As a final point regarding the LDP threshold, PIAC supports the Committee's view to not make any decisions regarding the threshold until it is able to sufficiently analyze trade repository data to better understand overall flows, exposures and the extent of collateralization in the OTC derivatives market. Moreover, PIAC recommends that such data and analysis be made public for analysis by all market participants. An incremental approach to derivatives regulation which starts with the obvious core set of systemically important financial institutions in terms of size, leverage and interconnectedness and then proceeds from there to other market participants based on the analysis of actual market data and activity will best serve the Canadian financial market in this important area.

We appreciate the opportunity to comment on the Consultation Paper. Please do not hesitate to contact Kevin Fahey, Chair of the Investment Practices Committee (416-673-9006; kfahey@caatpension.on.ca) if you wish to discuss any aspect of this letter in further detail.

Yours sincerely,

B McInnes

Brenda McInnes
Chair

PMAC
PORTFOLIO MANAGEMENT ASSOCIATION OF CANADA
Advancing Standards™

June 17, 2013

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission

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Re: CSA Consultation Paper 91-407 Derivatives: Registration

The Portfolio Management Association of Canada ("PMAC"), through its Industry, Regulation & Tax Committee, is pleased to have the opportunity to submit the following comments regarding CSA Consultation Paper 91-407 Derivatives: Registration (the "Consultation Paper").

As background, PMAC represents investment management firms registered to do business in Canada as portfolio managers. In addition to this primary registration, some firms are dually registered as investment fund mangers and/or exempt market dealers or other registration categories but generally 70% of their income is derived from portfolio manager registration to be members of PMAC. PMAC was established in 1952 and currently represents over 170 investment management firms that manage total assets in excess of $800 billion (excluding mutual funds assets). Our mission is to advocate the highest standards of unbiased portfolio management in the interest of the investors served by Members. For more information about PMAC and our mandate, please visit our website at www.portfoliomanagement.org.

General Comments

PMAC supports the regulation of key derivatives market participants. However, we have concerns with a new registration regime being created that will overlap with an already sufficient and robust securities registration regime. Specifically, we do not believe that a new registration category for advisers that is based solely on an asset class is necessary. In our view, just as investment fund managers will continue to be regulated under securities legislation regardless of the assets held by the fund, we believe portfolio managers should be treated equivalently. Derivatives are one of the many types of securities that portfolio managers may include in a client managed portfolio on a discretionary basis to meet a client's investment objectives. We do not believe that a new registration category for advisers should be predicated on the type of assets being advised on as opposed to the established business triggers set out in National Instrument 31-103. For entities that may not otherwise be registered under securities laws, we believe that if such entities advise with respect to derivatives, a registration under securities laws is adequate. If an individual is already registered as an adviser under NI 31-103, there should be no additional registration requirements under a derivatives regime to register. The act of advising on derivatives, in and of itself, in our view is not required to trigger a registration requirement in a separate category and under a separate regime. Particularly, since many of the proposed registration requirements for a derivatives adviser would simply duplicate many of the existing requirements under securities laws.

Set out below are some additional comments on the Consultation Paper. Our comments do not provide responses to each question included in the Consultation Paper but rather we highlight some of the issues we see with the proposals.

Portfolio Managers and the Use of Derivatives

PMAC Members are uniquely positioned in the derivatives space in that many of our Members have no derivatives exposure at all, with some Members having a small exposure and a limited group being somewhat more active. Derivatives are one of several possible types of investments such as equities and fixed income securities that portfolio managers employ to manage their client's assets on a discretionary basis to meet their investment objectives. They are typically used as a compliment to the portfolio management process or for hedging purposes. Portfolio managers, thus advise clients to trade derivatives on a limited basis for portfolios that they manage in accordance with a client's written investment mandate or investment policy statement that forms a part of a contractual agreement with a client and, which is guided by a fiduciary duty owed to such client. In addition, portfolio managers are compensated based on the value of assets under management and not based on derivatives transaction volumes. While the concepts/proposals set out in the Consultation Paper appear to be aimed at derivatives transactions, portfolio managers have ongoing client relationships that are guided by concepts such as know-your-client, know-your-product and suitability. In our view, given the existing regulatory requirements and the nature of the portfolio manager/client relationship, we do not believe it is necessary or appropriate to introduce a registration category that is based on asset type for advisers.

Notwithstanding this view, we do strongly believe that any derivatives registration requirements, to the degree practical, should be harmonized across all CSA jurisdictions and impose requirements that will not result in duplication with securities laws and unnecessary regulatory burden.

Harmonization

Despite our objection to a new derivatives adviser category of registration, a derivatives registration regime in Canada should be founded on set of rules that are harmonized across provinces and territories. The Consultation Paper does not confirm that a derivatives regime would fall under a national instrument and given the various current differences provincially in this area, we believe greater certainty and clarity is needed. Regulatory coordination and cooperation, both within Canada and between Canadian and global authorities, is needed to clarify the appropriate scope of regulation. Canada also needs to be aligned with other G20 countries in order to maintain our ability to advise on the trading of derivatives internationally and avoid the undesirable scenario of advising under a fragmented regime.

Definition of "Derivatives"

We note that the Consultation Paper does not provide a definition of "derivatives" and it remains unclear as to what is contemplated to be included and subject to the registration regime. The Consultation Paper does not define derivatives products and currently, there is no single, harmonized definition of derivatives available across the CSA. Without such a definition, the registration regime outlined in the Consultation Paper has the potential to create an uneven and potentially confusing playing field for firms.

We note that CSA Consultation Paper 91-301 - *Model Provincial Rules – Derivatives: Product Determination and Trade Repositories and Derivatives Data Reporting* provides the Committee's recommendations on the type of instruments that will be considered derivatives as it relates to trade reporting as a source of insight into what types of instruments that the Committee may recommend to be considered derivatives for the purposes of triggering registration as a derivatives dealer or adviser. More recently, we note the publication of proposed OSC Rule 91-506 Derivatives: Product Determination which was published on June 6, 2013. As a preliminary observation, we are pleased that currency exchange contracts will be excluded from the definition of "derivatives". However, foreign exchange forwards, swaps and options should also excluded from definition used in Rule 91-506.

The importance of certainty as to what will be considered to be a derivative is of crucial importance and will inform many of the comments/concerns provided by stakeholders through the CSA consultation process. Therefore, we urge the CSA to consider carefully the scope of the definition of "derivatives".

Concept of "Qualified Parties"

We recommend there be a "qualified party" exemption for advisers. We believe the concept of "qualified parties" should be aligned with similar existing concepts. For instance, the CSA should consider incorporating existing definitions of "accredited investor" under NI 45-106, "permitted client" under NI 31-103 and "accredited counterparty" under *Quebec Derivatives Act* into any new derivatives registration regime. Portfolio managers that manage derivatives portfolios for "qualified parties" should be exempt from registration.

***De Minimus* Threshold**

The Consultation Paper does not make reference to any sort of *de minimus* threshold that would trigger the registration requirement. We think there is merit in exploring the approach adopted by U.S. regulators to registration as a derivatives dealer, which provides a *de minimus* exemption. While participants in the derivatives market should be subject to the same protections regardless of the size or the total derivatives exposure of the dealer or adviser, a *de minimus* exemption may be appropriate in certain cases.

Registration Requirements

We agree that persons carrying on the business of "trading" in derivatives or holding themselves out to be carrying on that business, should be regulated. Similarly, advising in derivatives should and is, in our view, already regulated under the current securities regulatory regime. While acknowledging that the derivatives markets are different from securities markets, as an overall observation, we believe that the registration requirements contemplated in the Consultation Paper should tied to the existing registration concepts in NI 31-103. This will allow for a more consistent approach and application to all types of market participants and reduce inefficiencies in duplicative roles and other requirements related to compliance. We recommend that the proposed registration requirements for a derivatives adviser that are not currently included in NI 31-103, such as the requirement to have a Chief Risk Officer, be considered for inclusion in future amendments to NI 31-103.

Regarding proficiency, we agree that minimum levels of proficiency should be stipulated for persons carrying on the business of trading and/or advising others in relation to derivatives. However, we see some issues with the duplication in a derivatives registration regime to what is already required under NI 31-103. For instance, if a firm is required to register under the derivatives framework, then the Consultation Paper contemplates firms having to have two UDPs, two capital calculations etc. This becomes increasingly onerous for smaller firms who may be caught if there is no *de minimus* threshold or otherwise available exemption. Similarly, the concept of a Chief Risk Officer who would report to the "risk committee" of the board of directors assumes that a firm has a risk committee in place. We identify below some additional concerns with certain concepts included in the Consultation Paper:

Fund registration -- We have concerns with the concept that a “fund” itself would need to be registered as a derivatives dealer. What objective would this achieve? In our view, this is an odd outcome and inconsistent with the current securities regime.

Proficiency requirements -- We note that there is very little detail in the Consultation Paper on the proficiency requirements. We would expect that proficiency requirements mirror current principles based concepts of proficiency under NI 31-103 (in addition to specified exams) with the specifications that the proficiency relate specifically to derivatives. We agree that proficiency requirements are intended to ensure that individuals representing registrants understand the fundamentals of the markets in which they trade or advise in and the regulatory requirements relevant to their activities. However, it is not clear to us that minimum proficiency requirements should be based on the specific classes or categories of derivatives that a representative is trading in or providing advice on. As this is not currently required in the securities regime, it is not entirely clear how this would be accomplished in the derivatives world. Meeting proficiency requirements through work experience is likely the most common way to meet proficiency requirements. Derivatives registrants that are also securities registrants will be required to ensure that their representatives meet proficiency requirements applicable to both securities registrants and derivatives registrants. Under the know-your-product (KYP) and suitability rules this is already contemplated under NI 31-103.

Minimal Capital Requirements -- We agree that registrants be required to maintain minimum specified levels of capital. These requirements are intended to ensure the solvency of registrants, with the intention of reducing the likelihood that they cannot meet their ongoing obligations under derivatives contracts. As many potential derivatives registrants are already subject to capital regulation by various regulatory bodies, we agree that where such requirements are substantially equivalent, those requirements will continue to apply and those entities will be exempt from the CSA's capital requirements. We support this approach and do not agree with having separate capital requirements under a derivatives registration regime. We understand that further recommendations relating to minimum capital requirements will be provided in a future paper.

Concept of UDP and Chief Risk Officer (CRO) -- We note that these roles as contemplated in the Consultation Paper are not consistent with NI 31-103. For example, the CRO would need to report to a risk committee of the Board (smaller firms won't have this) annually and file this report with the CSA (not a current requirement for CCO report to the board). It is not clear what the purpose of filing an annual compliance and risk management report with regulators would serve. Such reports would be available to regulators upon request. In our view, requiring such reports to be reviewed annually by the firm's board of director's is sufficient.

Exemptions from Registration

The Consultation Paper specifically mentions an exemption for foreign registered derivatives dealers and advisers. These entities would be exempt from having to comply with Canadian requirements but would still be required to register. In our view, they should be exempt from registration as well. In this regard, we believe that exemptions should be made consistent with NI 31-103 and that a derivatives regime should not depart from the existing securities framework in place as there is already a double regime between the CSA and OSC (OSC Rule 35-502 Non-resident Advisers) for such exemptions.

Clarification Issues

There are a number of issues that the Consultation Paper either does not address or where further clarity is required. For instance, how this regime will impact foreign affiliates servicing Canadian funds. With regard to the treatment of pooled funds, it remains unclear as to whether pooled funds would need to be registered. There also remains many questions surrounding the definition of derivatives. Having a separate registration for futures or listed options would, in our view, create even more problems. Finally, we note that discussion on a timeline for a derivatives registration regime was not included in the Consultation Paper nor a discussion regarding registration fees.

<u>Conclusion</u>

As indicated above, we do not believe that a new derivatives adviser registration category is necessary given the current securities registration requirements and safeguards that such rules provide. We acknowledge that there remains much work to be done in the area of derivatives regulation and given the number of moving parts under consideration, we believe it is imperative that the CSA continue to consider all of the issues raised by market participants/stakeholders and maintain meaningful consultations with those it is seeking to regulate.

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If you have any questions regarding the comments set out above and/or any of our recommendations, please do not hesitate to contact Katie Walmsley at (416) 504-7018 or Julie Cordeiro at (416) 504-1118.

Yours truly,
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PORTFOLIO MANAGEMENT ASSOCIATION OF CANADA

Katie Walmsley
President, PMAC

Scott Mahaffy
Chair, Industry, Regulation & Tax Committee
Vice President Legal, MFS McLean Budden Limited

PMAC
PORTFOLIO MANAGEMENT ASSOCIATION OF CANADA
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MEMBERSHIP LIST 2013

Addenda Capital
Adroit Investment Management Ltd.
Aegon Capital Management Inc.
AGF Investments Inc.
Aldersley Securities Inc.
Alitis Investment Counsel Inc.
AMG Canada
ATB Investment Management Inc.
Aurion Capital Management Inc.
Avenue Investment Management Inc.
Barometer Capital Management Inc.
Barrantagh Investment Management Inc.
Baskin Financial Services Inc.
Beaujolais Private Investment Management
Bellwether Investment Management Inc.
Beutel, Goodman & Company Ltd.
BlackRock Asset Management Canada Limited
Bloom Investment Counsel, Inc.
BMO Asset Management Inc.
BMO Harris Investment Management Inc.
BNP Paribas Investment Partners Canada Ltd.
BNY Mellon Wealth Management, Advisory Services, Inc.
Brandes Investment Partners & Co.
Bull Capital Management Inc.
Burgundy Asset Management Ltd.
Bush Associates Ltd.
C.A. Delaney Capital Management Ltd.
Campbell & Lee Investment Management Inc.
Canoe Financial L.P.
Canso Investment Counsel Ltd.
Cardinal Capital Management, Inc.
Celernus Investment Partners Inc.
CGOV Asset Management
CIBC Global Asset Management Inc.
CIBC Private Investment Counsel
Cockfield Porretti Cunningham Investment Counsel Inc.
Coerente Capital Management Inc.
Coleford Investment Management Ltd.
Connor, Clark & Lunn Investment Management Ltd.
Cordiant Capital Inc.
Cougar Global Investments LP
Covenant Capital Management Inc.
Crestridge Asset Management Inc.
Crystal Wealth Management System Ltd.
Cypress Capital Management Ltd.
Davis-Rea Ltd.
De Luca Veale Investment Counsel Inc.
Dixon Mitchell Investment Counsel Inc.
Doherty & Associates Investment Counsel
Dorchester Investment Management
Duncan Ross Associates Ltd.
Echlin Investment Management Ltd.
18 Asset Management Inc.
Empire Life Investments Inc.
ETF Capital Management
Evans Investment Counsel
Excel Investment Counsel Inc.
Exponent Investment Management Inc.
Falcon Asset Management Inc.
Fiera Capital Corporation
Focus Asset Management
Foster Asset Management Inc.
Foyston, Gordon & Payne Inc.
Galibier Capital Management Ltd.
Galileo Global Equity Advisors Inc.
Genova Private Management Inc.
Genus Capital Management Inc.
GFI Investment Counsel Ltd.
GLC Asset Management Group Ltd.
Global Wealth Builders Ltd.
Globeinvest Capital Management Inc.
Gluskin Sheff + Associates
Greystone Managed Investments Inc.
Groundlayer Capital Inc.
Gryphon Investment Counsel Inc.
Guardian Capital LP
Heathbridge Capital Management
Hélène Dion Investment Management Inc.

Hesperian Capital Management Ltd.
Heward Investment Management Inc.
Highstreet Asset Management Inc.
Highview Asset Management Inc.
Hillsdale Investment Management Inc.
Horizons Investment Management Inc.
Howard, Barclay & Associates Ltd.
HSBC Global Asset Management (Canada) Limited
IA Clarington Investments Inc.
Independent Accountant's Investment Counsel Inc.
Integra Capital Ltd.
J.C. Hood Investment Counsel Inc.
J. Zechner Associates Inc.
Jarislowsky, Fraser Limited
Jones Collombin Investment Counsel Inc.
Kerr Financial Advisors Inc.
LDIC Inc.
Legg Mason Canada Inc.
Leith Wheeler Investment Counsel Ltd.
Leon Frazer & Associates Inc.
Lester Asset Management
Letko Brosseau & Associates Inc.
Longview Asset Management Ltd.
Lorne Steinberg Wealth Management Inc.
Louisbourg Investments Inc.
Macdonald, Shymko & Company Ltd.
Mackenzie Global Advisors
Manitou Investment Management Ltd.
Manulife Asset Management
Marquest Asset Management Inc.
Martin, Lucas & Seagram Ltd.
Mawer Investment Management Ltd.
McElvaine Investment Management Ltd.
MD Physician Services Inc.
MFS McLean Budden
Milestone Investment Counsel Inc.
Mirador Corporation
Montrusco Bolton Investments Inc.
Morgan Meighen & Associates Limited
Morguard Financial Corporation
Newport Private Wealth Inc.
Nexus Investment Management Inc.
Northwood Family Office LP
NT Global Advisors, Inc.
Pacific Spirit Investment Management Inc.
Patient Capital Management Inc.
Patrimonica Asset Management Inc.
Perennial Asset Management Corp.
Picton Mahoney Asset Management
Pier 21 Asset Management Inc.
PIMCO Canada Corp.
Portfolio Management Corporation
Portland Investment Counsel Inc.
Rae & Lipskie Investment Counsel Inc.
RBC Phillips, Hager & North Investment Counsel Inc.
Rempart Asset Management Inc.
Richmond Equity Management Ltd.
Ridgewood Capital Asset Management Inc.
Rogan Investment Management Ltd.
Rondeau Capital Inc.
RP Investment Advisors
Russell Investments Canada Ltd.
Scotia Asset Management L.P.
Sharp Asset Management Inc.
Silver Heights Capital Management Inc.
Sionna Investment Managers
Sprung Investment Management Inc.
Standard Life Investments Inc.
Stanton Asset Management Inc.
State Street Global Advisors, Ltd.
Steadyhand Investment Management Ltd.
Stonegate Private Counsel
Strathbridge Asset Management Inc.
Stylus Asset Management Inc.
Successful Investor Wealth Management Inc.
Summerhill Capital Management Inc.
T.E. Investment Counsel Inc.
Taylor Asset Management Inc.
TD Asset Management Inc.
TD Harbour Capital (Division of TD Waterhouse Private Investment Counsel Inc.)
TD Waterhouse Private Investment Counsel Inc.
Tetrem Capital Management Ltd.
TFP Investment Counsel Corp.
Thornmark Asset Management Inc.
Toron Investment Management
TriDelta Investment Counsel
Tulett, Matthews & Associates
UBS Global Asset Management (Canada) Co.
University of Toronto Asset Management
Vancity Investment Management Ltd.
Venable Park Investment Counsel Inc.
Vestcap Investment Management Inc.
Vision Wealth Management Ltd.
W.A. Robinson & Associates Ltd.
Waterstreet Family Capital Counsel Inc.
Watson Di Primio Steel Investment Management Ltd.

Watt Carmichael Private Counsel Inc.
West Face Capital Inc.
Wickham Investment Counsel Inc.

June 17, 2013

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
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Re: Canadian Securities Administrators Consultation Paper 91-407
Derivatives: Registration

The undersigned public sector Canadian pension funds and/or institutional investors, Alberta Investment Management Corporation, British Columbia Investment Management Corporation, Caisse de dépôt et placement du Québec, CPP Investment Board, Public Sector Pension Investment Board, Ontario Municipal Employees Retirement System and Ontario Teachers' Pension Plan Board[1] (referred to below collectively as "**Canadian Pension Fund Managers**", "us" or "we"), are grateful to have the opportunity to provide collectively their comments on the Consultation Paper 91-407 Derivatives: Registration (the "Registration Paper").

While some of the Canadian Pension Fund Managers are members of other groups such as the Canadian Market Infrastructure Committee or the International Swaps and Derivatives Association that will provide separate comment letters, we found it important

[1] Please refer to Annex 1 for a detailed description of each of these Canadian Pension Fund Managers.

to communicate to you our concerns, as sophisticated and high-credit buy-side entities. This letter will focus on two elements identified as our main concerns:

i) the creation of the Large Derivative Participant ("LDP") category and its broad definition that may trigger a registration requirement for us; and

ii) the notion of "qualified party" that should expressly include sophisticated market participants, such as pension fund managers and minimally pension fund managers with strong resources like us.

About The Canadian Pension Fund Managers

Our group represents many of the largest Canadian pension fund managers. While we operate under different governance regimes[2], we do have common features and objectives including that of maximizing the returns for beneficiaries while satisfying our fiduciary duties. On an aggregate basis, the assets managed by the Canadian Pension Fund Managers represent over $770 billion in assets.

The use of derivatives products, both futures and over-the-counter, is a critical element of our risk management strategies. These products are used to manage interest rate risk as well as market risk and currency exposure. Historically they have achieved their objective of reducing risk.

Supportive of constructive derivatives regulation

We are very supportive of any measures that would cause derivatives markets to become safer for their users, including sophisticated buy-side players like us and we thank the Canadian Securities Administrators ("CSA") for their involvement and contribution to this global regulatory process. We are generally supportive of regulatory initiatives in line with the G-20 commitments that have the effect of decreasing systemic risk.

SUMMARY OF COMMENTS

1. Registration

a) Deferral of registration

Unlike the central clearing and trade repository reporting requirements, the Registration Paper creates material requirements that go beyond the scope of the G-20 commitments. We do not believe that registration is necessary to reduce the likelihood that a party's OTC derivatives exposure could pose a serious risk to the financial stability of Canada or its provinces. This risk can be sufficiently mitigated through the implementation of appropriate: (i) reporting requirements and (ii) clearing requirements; For these reasons, we strongly believe the CSA should defer the implementation of a registration regime until it has had time to analyze the relevant data it receives from the

[2] Some Canadian Pension Fund Managers are governmental provincial entities, or agents, crown-corporations and others are provincially-regulated

trade repositories and to discuss with global regulators the risks that have been identified domestically or globally.

b) Large Derivative Participant

Because of the particularities of the Canadian markets (small market, biggest participants are sophisticated participants), we submit that the LDP Category is neither necessary nor appropriate for the Canadian market.

c) Registration Requirements

In addition, meeting some of the registration requirements, including filing of quarterly financial statements and capital requirements would not be feasible for us. We are not structured like financial institutions which provide services to clients or otherwise acts as a broker/dealer on the market.

2. Notion of qualified party

We strongly believe that the definition of qualified party should expressly include sophisticated institutional investors, such as pension fund managers like us. The requirement to register should only be applicable to derivatives dealers or advisers facing non-qualified parties. The execution of a trade between qualified parties should not trigger the registration requirement. In addition, certain foreign dealers should be exempt from registration requirements. If sophisticated foreign dealers are required to register, they may decide not to register and cease providing services to Canadian clients, as the costs of such services could outweigh the benefits. As a result, the liquidity of the Canadian financial market could be impaired.

COMMENTS OF THE CANADIAN PENSION FUNDS MANAGERS

I. REGISTRATION REGIME

a) Deferral of registration

We strongly believe the CSA should defer any implementation of a registration regime until it reaches a conclusion after interpreting data received from the trade repositories and discusses same with global regulators. The receipt of trade data by the regulatory authorities from all market participants is innovative and will provide such regulatory authorities with unprecedented views on the domestic and global markets. We find that a period of at least two years is required for the regulatory authorities to interpret such data.

b) Importance of harmonization

As mentioned in several previous comment letters, the Canadian OTC derivatives market is small and materially less liquid than the US market, with a large portion of the market being occupied by non-Canadian participants. Imposing registration requirements that are not imposed by other non-U.S. jurisdictions may have the effect of discouraging the foreign participants from providing their services to

Canadian clients as they may estimate that the costs of compliance will exceed the benefits of serving Canadian clients. If such a situation occurs, the Canadian market would lose substantial liquidity and be concentrated with the six largest Canadian banks. A less liquid Canadian market would impact pricing and impair our capacity to diversify our derivatives exposure by counterparty.

c) LDP Category

Secondly, if the CSA imposes a registration requirement, we strongly believe that the LDP category should not be retained as a category of participants required to register.

We understand that the purpose of the LDP category is to reduce the likelihood that a party's OTC derivatives exposure could pose a serious risk to the financial stability of markets in Canada. We understand also that, by creating this category, the CSA is trying to achieve the same goal as the US regulatory authorities with the Major Swap Participant Category created under the *Dodd-Frank Wall Street Reform and Consumer Protection Act* ("Dodd-Frank") ("MSP"). We think there are differences between the objectives and scope of the MSP definition and the proposed LDP category. Firstly, we understand that the MSP category was created to address large market participants that did not meet the definition of broker/dealer but had substantial derivatives positions that could pose systemic risks to the financial market. There has not been a similar situation in the Canadian market that would need to be addressed in the same manner through regulation. The Canadian market is a small market and its large participants are mostly highly-regulated investment funds, pension funds, governmental entities or crown corporations.

Secondly, in reading the definition of MSP, we understand that the US regulatory authorities have identified the following key elements as being elements of systemic risk: 1) substantial position; 2) uncollaterized exposure; 3) meeting of certain triggers per products and 4) using derivatives for other purposes than hedging positions.

The LDP category does not consider the same elements as the US regulatory authorities to determine what would be systemic but considers only the positions taken by a participant. Such a broad definition could, presumably, include large buy-side participants like us.

While we support measures to reduce systemic risk, highly-liquid institutional investors with superior credit, like us, present minimal counterparty credit risk and provide a crucial source of stability and liquidity to the market.[3] Firstly, we do have strong resources to support our operations and transactions and do not believe that such category should be created or designed to include us.

[3] See the Global Pension Coalition's 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. This paper outlines the reasons why pension plans should be exempt from margin requirements of non-cleared derivatives.

Secondly, we are either i) already subject to extensive pension legislation and are registered with various regulatory bodies, including the Financial Services Commission of Ontario ("FSCO") and the Office of the Superintendent of Financial Institutions Canada (OSFI) or ii) are agents of a province or crown corporations with comprehensive statutory frameworks. As a result of these regulations and other governance practices, we have developed sophisticated investment processes and have extensive risk management systems in place (as outlined in Schedule B in respect of those of us that are subject to the Pension Benefits Act), and are of the view that we should benefit from any exemption from registration as a LDP if such LDP is created.

d) Registration requirements

In addition to our previous comments, we address specific concerns with some of the proposed registration requirements. We think that such requirements are not necessary or appropriate. We cannot comply with some requirements as they are not aligned with the structure of pension funds or governmental entities. They are likely to increase costs and expenses without commensurate benefits towards achieving a reduction in systemic risk in financial markets in Canada.

e) Proficiency requirements and the financial and solvency requirements

We are already required by law to prepare audited annual financial statements. In addition, it is market practice for OTC derivatives counterparties to request financial information from the opposing party in order to assess the other party's creditworthiness and financial stability. These financial documents, including financial statements, are contractually provided for in the ISDA Master Agreement between counterparties. Thus, requiring us to produce quarterly financial statements would impose material additional costs and operational burden upon certain of us without commensurate benefits towards achieving a reduction in systemic risk to the financial markets in Canada.

Secondly, we do not believe that minimum proficiency requirements are necessary for Canadian Pension Fund Managers given that we are sophisticated, experienced investors with an in-depth knowledge of the OTC derivatives market. We do not enter into OTC derivatives transactions with non-qualified counterparties and have exhaustive risk policies to manage our counterparty risk. It is our view that proficiency requirements might be more appropriate for dealers or advisors facing non-qualified parties, similar to the requirements employed in the securities market with respect to individuals within securities firms dealing with unsophisticated and retail investors. Proficiency requirements would impose additional costs on qualified counterparties like us without commensurate benefits towards achieving a reduction in systemic risk.

Finally, we do not have a capital structure similar to regulated financial institutions which provide services to clients or otherwise act as a broker/dealer on the market.

II. <u>QUALIFIED PARTY</u>

We believe that the CSA should adopt a “qualified party” definition that expressly includes pension plan managers like us. We believe that we clearly meet the qualified party criteria as we have sufficient financial resources to ensure that: (i) losses resulting from a derivatives trade would not cause undue hardship; and (ii) all of our obligations pursuant to a derivatives trade are met. In addition, as sophisticated institutional investors, we have experience and knowledge in trading derivatives to properly manage the risks and obligations related to trading in derivatives.

We strongly believe that a distinction should be made between derivatives dealers or advisers facing qualified vs. non-qualified parties and that the registration requirements should be limited to transactions made with non-qualified parties. Transactions between qualified parties should not be subject to any registration requirements. Having additional requirements imposed on a party who provides services to a non-qualified party is a common practice both in securities and derivatives markets as it allows a higher level of protection for less sophisticated parties. We see no reason why the CSA should not follow such market practice.

Moreover, we suggest that the definition of a qualified party be similar to the “accredited counterparties”[4] definition in the Quebec Derivatives Act. Alternatively, we support a definition that is at least as broad as the “Eligible Contract Participant”[5] in the U.S. Commodity Exchange Act. In all cases, the definition that is adopted should account for the diversity of business models in the Canadian OTC derivatives and recognize any entity that is sophisticated and has a strong financial capacity like us.

CONCLUSION

We hope that the comments formulated in this letter are useful in the development of Canadian regulatory framework and we welcome any opportunity to discuss our views with representatives from the CSA.

Alberta Investment Management Corporation (AIMCo)
British Columbia Investment Management Corporation (bcIMC)
Caisse de dépôt et placement du Québec
CPP Investment Board
Public Sector Pension Investment Board
Ontario Municipal Employees Retirement System (OMERS)
Ontario Teachers’ Pension Plan Board

[4] Such definition is detailed in Schedule C.
[5] Such definition is detailed in Schedule C.

SCHEDULE A

DESCRIPTION OF CANADIAN PENSION FUND MANAGERS

AIMCo – ALBERTA INVESTMENT MANAGEMENT CORPORATION

Alberta Investment Management Corporation (AIMCo) is one of Canada's largest and most diversified institutional investment fund managers, with an investment portfolio of approximately $70 billion. It invests globally on behalf of its clients, 26 pension, endowment and government funds in the Province of Alberta.

It became a Crown corporation on January 1, 2008, and its sole shareholder is the Province of Alberta. Its goal is to inspire the confidence of Albertans by achieving superior risk-adjusted investment returns. To help reach this goal, it has extraordinary teams of top professionals and is governed by an experienced and highly talented board of directors.

AIMCo manages funds for a diverse group of Alberta public sector clients. The majority of AIMCo's assets under management come from Alberta public sector pension plans and provincial endowment funds. The pension funds meet the retirement income needs of nearly 310,000 active and retired public sector employees.

bcIMC – BRITISH COLUMBIA INVESTMENT MANAGEMENT CORPORATION

The British Columbia Investment Management Corporation (bcIMC) is one of Canada's largest institutional investors within the global capital markets. It invests on behalf of public sector clients in British Columbia including the pension plans of more than 500,000 people.

bcIMC manages a globally diversified investment portfolio of C$92.1 billion as at March 31, 2012. Based in Victoria, British Columbia, and supported by industry-leading expertise, bcIMC invests in all major asset classes: fixed income, mortgages, public equities, private equity, real estate and infrastructure. »

CAISSE DE DÉPÔT ET PLACEMENT DU QUÉBEC

The Caisse de dépôt et placement du Québec is a mandatory of the State of Province of Quebec. It manages institutional funds, primarily from public and private pension and insurance funds in Québec. With a growth perspective in mind, it invests the money of these depositors in financial markets in Québec, elsewhere in Canada, and around the world. 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 31st, 2012, it had over C$175 billion in net assets of depositors.

CPP 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 Fund is $183.3 billion. Canada's Chief Actuary estimates that CPP contributions will exceed annual benefits paid through until 2021. Thereafter a portion of the CPP Fund's investment income would be needed to help pay CPP benefits.

OMERS ADMINISTRATION CORPORATION

The Ontario Municipal Employees Retirement System (OMERS) was established pursuant to The Ontario Municipal Employees Retirement System Act, 1961-62, and continued under the Ontario Municipal Employees Retirement System Act, 2006 (the "OMERS Act"). The OMERS pension plan is one of Canada's largest multi-employer defined benefit pension plan and, as of December 31, 2012, served 968 participating employers and over 428,000 employees and former employees of municipalities, school boards, libraries, police, and fire departments, children's aid societies, and other local agencies across Ontario.

Pursuant to the OMERS Act, OMERS Administration Corporation (OAC) is the administrator and trustee of the pension plan. OMERS has more than C$60 billion in net assets and OAC manages a diversified global portfolio of stocks, bonds, real estate, infrastructure and private equity investments.

ONTARIO TEACHERS' PENSION PLAN BOARD

Ontario Teachers' Pension Plan Board (OTPP) is the largest single-profession pension plan in Canada, with $129.5 billion in net assets. 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 179,000 current elementary and secondary school teachers in addition to 124,000 pensioners. OTPP operates in a highly regulated environment and is governed by the Teachers' Pension Act and complies with the Pension Benefits Act (PBA) and the Income Tax Act.

PUBLIC SECTOR PENSION INVESTMENT BOARD

The Public Sector Pension Investment Board is one of Canada's largest pension investment managers, with $64.5 billion of net assets under management at March 31, 2012. It invests funds for the pension plans (Plans) of the Public Service of Canada, the Canadian Forces, the Royal Canadian Mounted Police and the Reserve Force. Its skilled and dedicated team of more than 400 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 was incorporated as a Crown Corporation under the Public Sector Pension Investment Board Act in 1999. Its investments will fund retirement benefits under the Plans for service after April 1, 2000 for the Public Service, Canadian Forces, Royal Canadian Mounted Police, and after March 1, 2007 for the Reserve Force.

SCHEDULE B

The following is the complete text of Exhibit B to the Global Pension Coalition Margin Paper[6] and applies to Canadian Pension Fund Managers that are subject to 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."[7] 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.[8]

- 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.[9] 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. [10]

- Pension plans are generally prohibited from borrowing. [11]

- 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.

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[6] Supra, note 1.

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

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

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

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

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

- Pension plans must regularly file an actuarial valuation with the appropriate regulators.
- 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.[12]
- 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."

[12] 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.

SCHEDULE C

Definition of "accredited counterparty", section 3 of Derivatives Act (R.S.Q., c. I-14.01)

"Accredited counterparty" means

(1) a government, government department or public body or a wholly owned enterprise or entity of a government;

(2) a municipality, public board or commission or other similar municipal administration, a metropolitan community, a school board, the Comité de gestion de la taxe scolaire de l'Île de Montréal or an intermunicipal management board in Québec;

(3) a financial institution, including the Business Development Bank of Canada established under the Business Development Bank of Canada Act (S.C. 1995, c. 28), or a subsidiary of such a financial institution to the extent that the financial institution holds all the subsidiary's voting shares, other than the voting shares held by directors of the subsidiary or its employees;

(4) a dealer or adviser registered under this Act, a dealer or adviser registered under the Securities Act (chapter V-1.1) or a person authorized to act as such or to exercise similar functions under equivalent legislation applicable outside Québec;

(5) a registered representative of a person described in paragraph 4 or a representative who has ceased to be so registered within the last three years;

(6) a pension fund regulated by the Office of the Superintendent of Financial Institutions established by the Office of the Superintendent of Financial Institutions Act (R.S.C. 1985, c. 18 (3rd Suppl.)), the Régie des rentes du Québec or a pension commission or similar regulatory authority in Canada whose investment policy provides for or authorizes the use of derivatives, or an entity that is analogous in form and function established under legislation applicable outside Québec;

(7) a person who establishes in a conclusive and verifiable manner

> *(a)* that the person has the requisite knowledge and experience to evaluate the information provided to the person about derivatives, the appropriateness to the person's needs of proposed derivatives strategies, and the characteristics of the derivatives to be traded on the person's behalf;
>
> *(b)* that the person has assets equal to or in excess of the minimum assets specified by regulation; and
>
> *(c)* that the person has at the person's disposal net assets in the amount specified by regulation and sufficient to fulfill the person's delivery or payment obligations under the terms of derivatives to which the person is party, in light of the positions held in the person's account and the orders the person is seeking to have executed;

(8) an investment fund whose investment policy includes or authorizes the use of derivatives, that distributes or has distributed its securities under a prospectus for which the Autorité des marchés financiers ("the Authority") or another authority empowered to issue receipts under the securities legislation of another province or a territory of Canada has issued a receipt, or that distributes or has distributed its securities exclusively to

(a) a person who is or was an accredited investor within the meaning of the Securities Act at the time of the distribution;

(b) a person who acquires or has acquired securities of the fund in order to make a minimum amount investment or an additional investment under the conditions prescribed by the Securities Act; or

(c) a person described in subparagraph *a* or *b* who acquires or has acquired securities of the fund in order to reinvest in the fund, in the circumstances set out in the Securities Act;

(9) an investment fund that is advised by an adviser described in paragraph 4;

(10) a charity registered under the Income Tax Act (R.S.C. 1985, c. 1, (5th Suppl.)) or the Taxation Act (chapter I-3) that, in regard to the trade in question, has used the services of an adviser registered under this Act or of a person authorized to act as such or to exercise similar functions under the equivalent legislation of another province or a territory of Canada;

(11) a person all of whose interest holders, except the holders of voting securities required by law to be held by directors, are accredited counterparties within the meaning of this Act;

(12) a hedger, that is, a person who, because of the person's activities,

(a) is exposed to one or more risks attendant upon those activities, including supply, credit, exchange and environmental risks and the risk related to fluctuations in the price of an underlying interest; and

(b) seeks to hedge that risk by engaging in a derivatives transaction, or a series of derivatives transactions, where the underlying interest is the underlying interest directly associated with that risk or a related underlying interest; or

(13) a person specified by regulation or designated by the Authority as an accredited counterparty under section 87;

2. Definition of Eligible contract participant – Commodity Exchange act, USC, Title 7 › Chapter 1, section 1a:

Eligible contract participant

The term "eligible contract participant" means—

(A) acting for its own account—

(i) a financial institution;

(ii) an insurance company that is regulated by a State, or that is regulated by a foreign government and is subject to comparable regulation as determined by the Commission, including a regulated subsidiary or affiliate of such an insurance company;

(iii) an investment company subject to regulation under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.) or a foreign person performing a similar role or function subject as such to foreign regulation (regardless of whether each investor in the investment company or the foreign person is itself an eligible contract participant);

(iv) a commodity pool that—

(I) has total assets exceeding $5,000,000; and

(II) is formed and operated by a person subject to regulation under this chapter or a foreign person performing a similar role or function subject as such to foreign regulation (regardless of whether each investor in the commodity pool or the foreign person is itself an eligible contract participant) provided, however, that for purposes of section 2 (c)(2)(B)(vi) of this title and section 2 (c)(2)(C)(vii) of this title, the term "eligible contract participant" shall not include a commodity pool in which any participant is not otherwise an eligible contract participant;

(v) a corporation, partnership, proprietorship, organization, trust, or other entity—

(I) that has total assets exceeding $10,000,000;

(II) the obligations of which under an agreement, contract, or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by an entity described in subclause (I), in clause (i), (ii), (iii), (iv), or (vii), or in subparagraph (C); or

(III) that—

(aa) has a net worth exceeding $1,000,000; and

(bb) enters into an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity's business;

(vi) an employee benefit plan subject to the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), a governmental employee benefit plan, or a foreign person performing a similar role or function subject as such to foreign regulation—

(I) that has total assets exceeding $5,000,000; or

(II) the investment decisions of which are made by—

(aa) an investment adviser or commodity trading advisor subject to regulation under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) or this chapter;

(bb) a foreign person performing a similar role or function subject as such to foreign regulation;

(cc) a financial institution; or

(dd) an insurance company described in clause (ii), or a regulated subsidiary or affiliate of such an insurance company;

(vii)

(I) a governmental entity (including the United States, a State, or a foreign government) or political subdivision of a governmental entity;

(II) a multinational or supranational government entity; or

(III) an instrumentality, agency, or department of an entity described in subclause (I) or (II);

except that such term does not include an entity, instrumentality, agency, or department referred to in subclause (I) or (III) of this clause unless (aa) the entity, instrumentality, agency, or department is a person described in clause (i), (ii), or (iii) of paragraph (17)(A); (bb) the entity, instrumentality, agency, or department owns and invests on a discretionary basis $50,000,000 or more in investments; or (cc) the agreement, contract, or transaction is offered by, and entered into with, an entity that is listed in any of subclauses (I) through (VI) of section 2 (c)(2)(B)(ii) of this title;

(viii)

(I) a broker or dealer subject to regulation under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or a foreign person performing a similar role or function subject as such to foreign regulation, except that, if the broker or dealer or foreign person is a natural person or proprietorship, the broker or dealer or foreign person shall not be considered to be an eligible contract participant unless the broker or dealer or foreign person also meets the requirements of clause (v) or (xi);

(II) an associated person of a registered broker or dealer concerning the financial or securities activities of which the registered person makes and keeps records under section 15C(b) or 17(h) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–5 (b), 78q (h));

(III) an investment bank holding company (as defined in section 17(i) [2] of the Securities Exchange Act of 1934 (15 U.S.C. 78q (i)); [3]

(ix) a futures commission merchant subject to regulation under this chapter or a foreign person performing a similar role or function subject as such to foreign regulation, except that, if the futures commission merchant or foreign person is a natural person or proprietorship, the futures commission merchant or foreign person shall not be considered to be an eligible contract participant unless the futures commission merchant or foreign person also meets the requirements of clause (v) or (xi);

(x) a floor broker or floor trader subject to regulation under this chapter in connection with any transaction that takes place on or through the facilities of a registered entity (other than an electronic trading facility with respect to a significant price discovery contract) or an exempt board of trade, or any affiliate thereof, on which such person regularly trades; or

(xi) an individual who has amounts invested on a discretionary basis, the aggregate of which is in excess of—

(I) $10,000,000; or

(II) $5,000,000 and who enters into the agreement, contract, or transaction in order to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by the individual;

(B)

(i) a person described in clause (i), (ii), (iv), (v), (viii), (ix), or (x) of subparagraph (A) or in subparagraph (C), acting as broker or performing an equivalent agency function on behalf of another person described in subparagraph (A) or (C); or

(ii) an investment adviser subject to regulation under the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 et seq.], a commodity trading advisor subject to regulation under this chapter, a foreign person performing a similar role or function subject as such to foreign regulation, or a person described in clause (i), (ii), (iv), (v), (viii), (ix), or (x) of subparagraph (A) or in subparagraph (C), in any such case acting as investment manager or fiduciary (but excluding a person acting as broker or performing an equivalent agency function) for another person described in subparagraph (A) or (C) and who is authorized by such person to commit such person to the transaction; or

(C) any other person that the Commission determines to be eligible in light of the financial or other qualifications of the person.

Le 17 juin 2013

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Commission des valeurs mobilières de l'Ontario
Commission des valeurs mobilières du Manitoba
Commission des valeurs mobilières du Nouveau-Brunswick

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Objet: **Document de consultation 91-407 des Autorités canadiennes en valeurs mobilières – Dérivés : inscription (le « Document de consultation »)**

Nous les soussignés, des fonds de pension canadiens du secteur public et/ou des investisseurs institutionnels, l'Alberta Investment Management Corp., la British Columbia Investment Management Corporation, la Caisse de dépôt et placement du Québec, l'Office d'investissement du Régime de pensions du Canada, l'Office d'investissement des régimes de pensions du secteur public, l'Ontario Municipal Employees Retirement System et le Régime de retraite des enseignantes et des enseignants de l'Ontario (collectivement ci-après les « **Gestionnaires de fonds de pension canadiens** », « nous » ou « on »)[1], vous remercions de nous donner l'opportunité de commenter le Document de consultation 91-407 – Dérivés : inscription (le « Document de consultation »).

[1] Veuillez vous référer à l'Annexe 1 pour une description détaillée de chaque Gestionnaire de fonds de pension canadiens.

Bien que certains d'entre nous soient membres de groupes comme le Comité de l'infrastructure du marché canadien ou de l'International Swaps and Derivatives Association (ISDA), qui soumettront leurs propres commentaires sur le Document de consultation, nous avons jugé opportun de vous faire part de nos préoccupations en notre qualité d'investisseurs avertis, placés du côté achat et jouissant d'un crédit élevé.

Nos commentaires se limiteront aux deux éléments suivants qui constituent nos principales préoccupations :

i) La création d'une catégorie d'inscription de « Grand participant au marché des dérivés » (« GPMD ») pourrait nous assujettir à une obligation d'inscription en raison de sa large portée;

ii) La définition de « Partie qualifiée » devrait expressément inclure les participants avertis du marché comme les gestionnaires de fonds de pension et à tout le moins inclure les gestionnaires de fonds de pension qui, comme nous, bénéficient de solides ressources financières.

À propos des Gestionnaires de fonds de pension canadiens

Notre groupe représente les plus importants gestionnaires de fonds de pension du Canada. Bien que nous opérions en vertu de régimes de gouvernance qui nous sont propres[2], nous partageons des caractéristiques et des objectifs communs, incluant l'objectif de maximiser les rendements pour nos bénéficiaires tout en nous acquittant de nos devoirs fiduciaires. La somme de nos actifs s'élève à plus de 770 milliards.

Le recours à des produits dérivés, qu'il s'agisse de contrats à terme standardisés ou d'autres dérivés de gré à gré, constitue un élément essentiel de nos stratégies de gestion des risques. Ces produits sont utilisés pour gérer tant le risque de taux d'intérêt ou de marché que l'exposition aux devises. Ils ont par le passé démontré leur utilité dans la réduction des risques.

Favorables à une réglementation efficiente des dérivés

Nous sommes favorables à toutes mesures qui permettent d'assurer que nos marchés des dérivés soient sécuritaires pour leurs participants, incluant les investisseurs avertis comme nous et nous remercions les Autorités canadiennes en valeurs mobilières (« les ACVM ») pour leur implication et leur contribution au processus réglementaire international des dérivés. Nous soutenons généralement toute réforme réglementaire qui est conforme aux engagements du G-20 et qui a pour effet de diminuer le risque systémique.

RÉSUMÉ DES COMMENTAIRES

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[2] Certains Gestionnaires de fonds de pension canadiens sont des entités provinciales gouvernementales, ou des mandataires ou sociétés de la Couronne ou des entités réglementées par les provinces.

1. Inscription

a) Report de l'inscription

Contrairement aux exigences de compensation et de déclaration des opérations sur dérivés à un référentiel central, le Document de consultation crée des obligations qui vont au-delà de la portée des engagements du G-20.

Nous ne croyons pas que l'inscription soit nécessaire pour atténuer le risque que représenterait sur la stabilité financière du Canada ou d'une province l'exposition d'une contrepartie au marché des dérivés. Ce risque peut être suffisamment atténué par la mise en œuvre d'exigences appropriées (i) de déclarations et (ii) de compensation.

Pour ces motifs, nous sommes d'avis que les ACVM doivent reporter la mise en œuvre d'un régime d'inscription jusqu'à ce qu'elles aient complété l'analyse des données transmises par les référentiels centraux et qu'elles aient discuté avec les régulateurs de d'autres pays des risques identifiés tant au niveau national qu'international.

b) Grand participant au marché des dérivés

En raison des particularités du marché canadien (petit marché, prédominance des participants avertis), nous estimons que la catégorie d'inscription GPMD n'est ni requise ni appropriée pour ce marché.

c) Obligations d'inscription

En outre, nous ne serions pas en mesure de nous acquitter de certaines des obligations d'inscription de la catégorie GPMD, notamment l'exigence de dépôt d'états financiers trimestriels et les exigences de capital. En effet, nous ne sommes pas structurés comme des institutions financières réglementées qui fournissent des services à des clients ou qui agissent autrement sur le marché à titre de courtiers.

2. Notion de Partie qualifiée

Nous sommes d'avis que la définition de Partie qualifiée devrait expressément inclure les investisseurs institutionnels avertis, incluant des gestionnaires des fonds de pension comme nous. En outre, il est impératif que l'obligation d'inscription ne soit applicable que si la contrepartie du conseiller ou du courtier en dérivés est une contrepartie qui est une partie non qualifiée. L'exécution d'une transaction entre des contreparties qualifiées ne devrait pas déclencher l'obligation d'inscription.

Par ailleurs, certains courtiers étrangers devraient être exemptés de l'obligation d'inscription. Si des courtiers étrangers étaient soumis à l'exigence d'inscription, ils pourraient, s'ils jugeaient que les coûts associés à l'inscription étaient trop élevés, décider de ne pas s'inscrire et cesser de fournir des services aux clients canadiens. Une telle situation viendrait affecter la liquidité du marché canadien.

Commentaires des Gestionnaires de fonds de pension canadiens

I. RÉGIME D'INSCRIPTION

a) Report de l'inscription

Nous sommes d'avis que les ACVM devraient reporter toute mise en œuvre d'un régime d'inscription jusqu'à ce que ces autorités complètent l'interprétation des données qu'elles recevront des référentiels centraux. De plus, les ACVM devraient, avant toute mise en œuvre d'un tel régime, consulter d'autres régulateurs internationaux. Le fait que les autorités règlementaires recevront désormais des données de l'ensemble des participants au marché est une première qui permettra de donner à ces autorités une vue plus globale des marchés nationaux et internationaux. Nous croyons qu'une période d'au moins deux ans est nécessaire pour permettre aux autorités réglementaires d'interpréter ces données.

b) Importance de l'harmonisation

Comme mentionné précédemment dans plusieurs lettres de commentaires, le marché canadien des dérivés de gré à gré est un petit marché, significativement moins liquide que le marché américain et dont les participants sont en grande partie des non canadiens.

L'imposition d'exigence d'inscription, que l'on ne retrouve pas dans des juridictions autres que les États-Unis, pourrait avoir pour effet de dissuader les participants étrangers d'offrir des services au Canada dans la mesure où ces participants concluent que les coûts associés à l'inscription excèdent les bénéfices de leurs activités au Canada. Si une telle situation devait survenir, cela se traduirait par moins de liquidité sur le marché et par la concentration de ce marché entre les six grandes banques canadiennes. Un marché canadien moins liquide aurait un impact sur les prix et sur notre habilité à diversifier notre exposition aux dérivés par contreparties.

c) La catégorie GPMD

De plus, si les ACVM vont de l'avant et imposent une obligation d'inscription, nous sommes d'avis que la catégorie d'inscription de GPMD ne devrait pas être une catégorie retenue.

Nous comprenons que la catégorie GPMD a pour but de réduire la probabilité que l'exposition d'une contrepartie aux produits dérivés ne constitue un risque sérieux pour la stabilité financière des marchés canadiens.

Nous comprenons également qu'en créant la catégorie de GPMD, les ACVM tentent d'atteindre le même objectif que les autorités réglementaires américaines avec la création de la catégorie de « participants majeurs au marché des swaps » (Major Swap Participant) (« MSP ») créé en vertu de la loi *Dodd-Frank Wall Street Reform and Consumer Protection* (« Dodd-Frank »).

Nous croyons toutefois qu'il existe plusieurs différences entre l'objectif et la portée de la définition de MSP et la catégorie GPMD envisagée par les ACVM.

Tout d'abord, la catégorie des MSP a été créée aux États-Unis pour pallier la situation d'un participant au marché qui, sans se qualifier de courtier, détient une exposition en dérivés telle qu'il peut constituer un risque systémique pour le marché.

Or, il n'y a pas sur le marché canadien ce type de participant qui justifierait une intervention réglementaire. Le marché canadien est un petit marché et ses grands participants sont pour la plupart des fonds d'investissement, des fonds de pension, des entités gouvernementales ou des sociétés d'état déjà encadrés.

Par ailleurs, en analysant la définition de MSP, nous constatons que les autorités réglementaires américaines ont identifié les éléments clés suivants comme étant des éléments de risque systémique : 1) les positions importantes; 2) l'exposition sans collatéral; 3) l'atteinte de certains seuils déclencheurs par produit et 4) l'utilisation d'instruments dérivés à des fins autres que la gestion des risques.

La catégorie GPMD ne considère pas les mêmes éléments que ceux retenus par les autorités réglementaires américaines pour déterminer ce qui constitue un risque systémique. En effet, la définition de cette catégorie ne considère que les positions prises par un participant. Une définition aussi large va nécessairement inclure de grands investisseurs comme nous.

Nous soutenons les mesures visant à réduire le risque systémique, nous croyons toutefois que des investisseurs institutionnels comme nous qui bénéficient de crédit favorable représentent un risque minime de contrepartie. Nous sommes une source importante de stabilité et de liquidité[3] pour le marché. Nous bénéficions de ressources adéquates pour soutenir nos opérations et nos transactions. Nous ne croyons pas qu'il soit opportun que la catégorie de GPMD soit instituée ou qu'elle nous englobe.

Par ailleurs, nous sommes soit i) déjà soumis à une réglementation étendue qui s'applique aux fonds de pension et nous sommes inscrits auprès de divers organismes de réglementation, y compris la Commission des services financiers de l'Ontario (la « CSFO »), et le Bureau du surintendant des institutions financières (BSIF) soit ii) nous sommes des mandataires du gouvernement d'une province ou des sociétés d'état bien encadrés par leur loi constitutive.

En raison de cet encadrement réglementaire ou des conditions qui nous régissent, nous avons développé des processus d'investissement sophistiqués et mis en place d'importants systèmes de gestion des risques (comme indiqué à l'annexe B pour ceux d'entre nous qui sommes régis par la Loi sur les régimes de retraite). Nous sommes donc d'avis que nous devrions bénéficier de toute disposition nous permettant d'être dispensés de l'exigence d'inscription dans la catégorie GPMD si une telle catégorie était créée.

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[3] Voir le document de commentaires du Global Pension Coalition's intitulé: « Comments on Second Consultative Document: Margin Requirements for non-centrally cleared derivatives », émis par le Comité de Bâle (Basel Committee on Banking Supervision) et l'Organisation internationale des commissions de valeurs, daté du 15 mars 2013. Ce document expose les motifs pour lesquels les fonds de pension devraient être exempts des exigences de marges pour les dérivés non compensés.

d) Obligations d’inscription

Nous vous réitérons certaines préoccupations spécifiques liées aux obligations d'inscription proposées. Nous sommes d’avis que ces obligations ne sont ni nécessaires ni appropriées. Nous ne pouvons nous conformer à certaines d’entre elles, car elles sont difficilement conciliables avec la structure spécifique des fonds de pension ou des entités gouvernementales. Ces obligations sont susceptibles d'augmenter les coûts de transaction sans toutefois procurer d’avantages proportionnels en termes de réduction du risque systémique pour les marchés financiers canadiens.

e) Obligation de compétence, situation financière et solvabilité

Nous sommes déjà tenus de par la loi de préparer des états financiers annuels vérifiés. En outre, il est pratique courante, sur le marché des dérivés de gré à gré, pour les contreparties de s’échanger des informations financières afin de jauger de leur crédit et stabilité financière respective. Cette obligation de fournir des documents financiers, y compris des états financiers, est contractuellement prévue dans la convention-cadre ISDA. Pour ces motifs, l’obligation de fournir des états financiers trimestriels nous imposerait, pour certains d’entre nous, un fardeau et des coûts supplémentaires sans toutefois procurer d’avantages en termes d’atténuation du risque systémique pour les marchés financiers canadiens.

Par ailleurs, nous ne croyons pas que l’imposition de normes de compétence minimales soit nécessaire pour les Gestionnaires de fonds de pension canadiens étant donné que nous sommes des investisseurs sophistiqués et expérimentés et que nous avons une connaissance approfondie du marché des dérivés de gré à gré. Nous ne réalisons pas d’opérations sur des dérivés de gré à gré avec des contreparties qui sont des parties non qualifiées et nous nous sommes dotés de politiques de gestion des risques. Il est de notre avis que les normes de compétence minimales soient plus appropriées pour les courtiers ou les conseillers qui font affaire avec des contreparties qui sont des parties non qualifiées. On pourrait donc les assujettir à des normes de compétence similaires à celles imposées aux courtiers traitant avec des investisseurs au détail non sophistiqués.

L’imposition de normes de compétence se traduirait là encore par des coûts supplémentaires que devront assumer des contreparties averties comme nous sans pour autant que cela entraîne une diminution proportionnelle du risque systémique.

Enfin, nous n'avons pas une structure de capital similaire à celle d’institutions financières réglementées qui fournissent des services à des clients ou qui agissant à titre de courtier ou de conseiller sur le marché.

II. Partie qualifiée

Nous sommes d’avis que les ACVM devraient adopter une définition de « Partie qualifiée », qui inclut expressément les gestionnaires des fonds de pension. Nous croyons que nous remplissons clairement les critères de la définition de « Partie qualifiée » et que nous avons les ressources adéquates pour i) assumer sans difficulté excessive les pertes pouvant découler d'une opération sur dérivé et ii) nous acquitter de l'ensemble des obligations qui nous incombent relativement à une opération sur dérivés. De plus, en tant qu'investisseurs institutionnels avertis, nous avons l'expérience et les connaissances dans la négociation de dérivés pour bien comprendre les risques et obligations associés aux opérations sur dérivés.

Par ailleurs, nous sommes d'avis qu'une distinction doit être faite entre les courtiers ou conseillers en dérivés, selon qu'ils concluent des opérations avec des contreparties qui sont des parties qualifiées ou non. En effet, nous croyons que les exigences d'inscriptions devraient être limitées aux opérations réalisées avec des contreparties qui sont des parties non qualifiées.

Les opérations entre contreparties qui sont des parties qualifiées ne devraient pas déclencher d'obligation d'inscription. Des exigences supplémentaires imposées à une contrepartie qui fournit des services à une contrepartie qui est une partie non qualifiée sont une pratique courante en valeurs mobilières et sur les marchés des dérivés. Une telle pratique permet d'assurer une plus grande protection d'une contrepartie moins sophistiquée. Nous ne voyons pas pourquoi les ACVM ne suivraient pas cette pratique.

Enfin, nous suggérons que la définition de Partie qualifiée soit semblable à celle de « contrepartie qualifiée »[4] au sens de la Loi québécoise sur les instruments dérivés.
De façon alternative, nous serions en faveur d'une définition qui serait aussi large que celle de « contractant admissible » (Eligible Contract Participant) prévue à la loi des États-Unis intitulée « Commodity Exchange Act ».[5] Dans tous les cas, la définition retenue doit tenir compte de la diversité des modèles d'affaires sur le marché canadien des dérivés de gré à gré et reconnaître l'existence d'entités sophistiquées aux grandes capacités financières comme nous.

CONCLUSION

Nous espérons que les commentaires formulés dans cette lettre vous seront utiles pour l'élaboration d'un cadre réglementaire canadien et nous restons à la disposition des ACVM et de ses représentants pour discuter de ces commentaires.

Alberta Investment Management Corporation
British Columbia Investment Management Corporation
Caisse de dépôt et placement du Québec
L'Office d'investissement du Régime de pensions du Canada
L'Office d'investissement des régimes de pensions du secteur public
Ontario Municipal Employees Retirement System
Régime de retraite des enseignantes et des enseignants de l'Ontario

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[4] La définition de « contrepartie qualifie » est reproduite en Annexe C.
[5] La définition de *« Eligible Contract Participant* » est reproduite en Annexe C.

ANNEXE A

DESCRIPTION DES GESTIONNAIRES DES FONDS DE PENSION CANADIENS[6]

AIMCo – ALBERTA INVESTMENT MANAGEMENT CORPORATION

Alberta Investment Management Corporation (AIMCo) est l'un des gestionnaires de fonds d'investissement institutionnels les plus importants et les plus diversifiés au Canada, avec un portefeuille d'investissement d'environ 70 milliards de dollars. Il investit mondialement pour le compte de ses clients, soit 26 fonds de pension, des fonds de dotation et des fonds gouvernementaux de la province de l'Alberta.

Il est devenu une société d'État le 1er janvier 2008 et son unique actionnaire est le gouvernement de l'Alberta. Son objectif est d'inspirer confiance aux Albertains grâce à des rendements d'investissement supérieurs et ajustés aux risques. Pour l'aider à atteindre cet objectif, Il peut compter sur une équipe extraordinaire de professionnels de haut niveau et sur un conseil d'administration expérimenté et très talentueux.

AIMCo gère des fonds pour un groupe diversifié de clients provenant du secteur public de l'Alberta. La majorité des actifs sous gestion d'AIMCo provient des régimes de retraite du secteur public de l'Alberta et des fonds de dotation provinciaux. Les fonds de pension gérés par AIMCo répondent aux besoins de retraite de près de 310.000 employés actifs et retraités du secteur.

bcIMC – BRITISH COLUMBIA INVESTMENT MANAGEMENT CORPORATION

Le British Columbia Investment Management Corporation (bcIMC) est l'un des plus importants investisseurs institutionnels au Canada dans les marchés mondiaux de capitaux. Il investit pour le compte de clients du secteur public de la Colombie-Britannique, y compris certains régimes de retraite de plus de 500.000 personnes.

bcIMC gère un portefeuille d'investissement diversifié internationalement de 92,1 milliards de dollars au 31 mars 2012. Basé à Victoria en Colombie-Britannique et comptant sur une expertise de pointe, bcIMC investit dans toutes les principales classes d'actifs : les titres à revenu fixe, les prêts hypothécaires, les actions publiques, les placements en capital privé, l'immobilier et les infrastructures. »

CAISSE DE DÉPÔT ET PLACEMENT DU QUÉBEC

La Caisse de dépôt et placement du Québec, un mandataire de la province du Québec gère des fonds institutionnels provenant principalement de régimes de retraite et d'assurance publics et privés québécois. Elle investit l'argent de ses déposants sur les marchés financiers au Québec, au Canada et ailleurs dans le monde pour les faire fructifier.

Par sa taille et l'importance de ses activités, la Caisse est un investisseur d'envergure mondiale et l'un des plus importants gestionnaires de fonds institutionnels au Canada et

[6] Nous avons traduit leur dénomination en français lorsque celle-ci était disponible

en Amérique du Nord. Au 31 décembre 2012, la Caisse gérait plus de 175 milliards de dollars d'actifs.

L'OFFICE D'INVESTISSEMENT DU RÉGIME DE PENSIONS DU CANADA

L'Office d'investissement du RPC (OIRPC) est un organisme de gestion de placements professionnel basé à Toronto qui a été créé par une loi du Parlement en décembre 1997. Son but est d'investir les actifs du Régime de pensions du Canada de manière à maximiser le rendement sans prendre de risque excessif. Les actifs sous gestion de l'Office s'élèvent à 183.3 milliards $. L'actuaire en chef du Canada estime que les cotisations faites au RPC seront supérieures aux prestations versées par ce dernier et cela jusqu'en 2021. Par la suite, une partie des revenus de placement du fonds du RPC seraient nécessaires pour financer les prestations.

LA SOCIÉTÉ D'ADMINISTRATION OMERS

L'Ontario Municipal Employees Retirement System (OMERS) a été créé en vertu de l'« Ontario Municipal Employees Retirement System Act, 1961-62 » et depuis 2006, il est régi par l'« Ontario Municipal Employees Retirement Systems Act, 2006 » (« Loi sur OMERS»).

Avec plus de 60 milliards de dollars d'actif net au 31 décembre 2012, le régime de retraite OMERS est l'un des plus importants régimes de retraite à prestations déterminées du Canada.

En date du 31 décembre 2012, il représente 968 employeurs et près de 428 000 employés et anciens employés municipaux, travailleurs de sociétés d'aide à l'enfance, pompiers, membres du personnel des services d'urgence, policiers, employés de commission scolaire, travailleurs œuvrant dans les secteurs du transport et de l'hydroélectricité.

En vertu de la Loi sur OMERS, la société d'administration OMERS (« SAO ») est l'administrateur et le fiduciaire des régimes de retraite. OMERS dispose de plus de 60 milliards $ d'actif net et la SAO gère un portefeuille diversifié mondialement et composé d'actions, d'obligations, et cela sans oublier l'immobilier, les infrastructures et les placements en capital privé.

RÉGIME DE RETRAITE DES ENSEIGNANTES ET DES ENSEIGNANTS DE L'ONTARIO

Le Régime de retraite des enseignantes et des enseignants de l'Ontario (RREO) est le plus important régime de retraite s'adressant à une seule profession au Canada avec un actif sous gestion de 129,5 G$. Créé par le gouvernement de l'Ontario et la Fédération des enseignants de l'Ontario, il est une organisation indépendante.

Dans la poursuite de son mandat, le RREO administre les prestations de retraite de 179 000 enseignants actifs du primaire et du secondaire en de plus de 124000 enseignants à la retraite. Le RREO évolue dans un environnement hautement réglementé et régi par

La Loi sur les régimes de retraite des enseignants et se conforme à la loi sur les régimes de retraite et la Loi sur l'impôt.

L'OFFICE D'INVESTISSEMENT DES RÉGIMES DE PENSIONS DU SECTEUR PUBLIC

L'Office d'investissement des régimes de pensions du secteur public est l'un des plus grands gestionnaires de fonds pour des caisses de retraite au Canada, avec 64,5 milliards de dollars en actif net sous gestion au 31 mars 2012. Il investit des fonds pour les régimes de pensions (les « régimes ») de la fonction publique, des Forces canadiennes, de la Gendarmerie royale du Canada et de la Force de réserve. L'équipe d'Investissements PSP composée de plus de 400 professionnels gère un portefeuille mondial diversifié qui inclut des actions, des obligations et d'autres titres à revenu fixe ainsi que des placements privés et des placements en immobilier, en infrastructures et en ressources renouvelables.

Investissements PSP a été constituée en société de la Couronne en 1999 par la Loi sur l'Office d'investissement des régimes de pensions du secteur public. Les investissements de PSP serviront à capitaliser les prestations de retraite en vertu des régimes pour services rendus après le 1er avril 2000 pour la fonction publique, les Forces canadiennes et la Gendarmerie royale du Canada, et après le 1er mars 2007 pour la Force de réserve.

SCHEDULE B (traduction non disponible)

The following is the complete text of Exhibit B to the Global Pension Coalition Margin Paper[7] and applies to Canadian Pension Fund Managers that are subject to 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."[8] 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.[9]

- 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.[10] 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. [11]

- Pension plans are generally prohibited from borrowing. [12]

- 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.

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[7] Supra, note 1.

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

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

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

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

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

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

- 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.[13]

- 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."

[13] 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.

ANNEXE C

La définition de « contrepartie qualifiée », article 3 de la Loi sur les Instruments dérivés (L.R.Q., c. I-14.01)

«contrepartie qualifiée»:

1° tout gouvernement, de même que tout ministère, tout organisme public, toute société d'État ou toute entité qui est la propriété exclusive de ce gouvernement;

2° tout office public, toute municipalité, toute commission publique ou toute autre administration municipale de même nature, de même qu'une communauté métropolitaine, une commission scolaire, le Comité de gestion de la taxe scolaire de l'Île de Montréal et une régie intermunicipale au Québec;

3° toute institution financière, y compris la Banque de développement du Canada constituée en vertu de la Loi sur la Banque de développement du Canada (L.C. 1995, c. 28), de même que sa filiale dans la mesure où l'institution financière détient la totalité des actions comportant droit de vote de sa filiale, à l'exclusion de celles que détiennent les administrateurs de la filiale ou ses employés;

4° un courtier ou un conseiller inscrit en vertu de la présente loi, un courtier ou un conseiller en valeurs inscrit en vertu de la Loi sur les valeurs mobilières (chapitre V-1.1), ou toute personne autorisée à agir à ce titre ou à exercer des fonctions semblables en vertu de dispositions équivalentes d'une législation applicable à l'extérieur du Québec;

5° un représentant d'une personne visée au paragraphe 4° inscrit ou qui a cessé d'être inscrit depuis moins de trois ans;

6° une caisse de retraite réglementée par le Bureau du surintendant des institutions financières constitué par la Loi sur le Bureau du surintendant des institutions financières (L.R.C. 1985, c. 18 (3e suppl.)), la Régie des rentes du Québec, une commission des régimes de retraite ou une autorité de réglementation similaire au Canada, et dont la politique de placement prévoit ou autorise l'utilisation de dérivés, de même qu'une entité constituée en vertu d'une législation applicable à l'extérieur du Québec dont la forme et la fonction sont analogues;

7° une personne qui établit de façon prépondérante et vérifiable qu'elle remplit les conditions suivantes:

a) elle a les connaissances et l'expérience requises pour évaluer l'information qui lui est fournie sur les dérivés, la convenance des stratégies d'utilisation de dérivés qui lui sont proposées compte tenu de ses besoins, et les caractéristiques des dérivés qu'on lui offre de négocier;

b) elle dispose d'un actif minimal déterminé par règlement;

c) elle peut disposer d'un actif net déterminé par règlement, suffisant pour pouvoir honorer ses obligations de livraison ou de paiement aux termes des dérivés auxquels elle est partie, compte tenu des positions maintenues à son compte et des ordres dont elle demande l'exécution;

8° un fonds d'investissement, dont la politique de placement prévoit ou autorise l'utilisation de dérivés, qui place ou a placé ses titres au moyen d'un prospectus visé par l'Autorité des marchés financiers ou par une autre autorité habilitée à le faire en vertu de la législation en valeurs mobilières d'une autre province ou d'un territoire du Canada, ou qui place ou a placé ses titres exclusivement auprès d'une des personnes suivantes:

a) une personne qui est ou était un investisseur qualifié, au sens de la Loi sur les valeurs mobilières, au moment du placement;

b) une personne qui souscrit ou a souscrit des titres de ce fonds afin d'y réaliser un investissement minimal ou un investissement additionnel dans les conditions prévues par la Loi sur les valeurs mobilières;

c) une personne visée au sous-paragraphe a ou b qui souscrit ou a souscrit des titres de ce fonds afin d'y réinvestir, dans les circonstances prévues par la Loi sur les valeurs mobilières;

9° un fonds d'investissement qui est conseillé par un conseiller visé au paragraphe 4°;

10° un organisme de bienfaisance enregistré en vertu de la Loi de l'impôt sur le revenu (L.R.C. 1985, c. 1 (5e suppl.)) ou de la Loi sur les impôts (chapitre I-3) qui, à l'égard de l'opération visée, a utilisé les services d'un conseiller inscrit en vertu de la présente loi ou ceux d'une personne autorisée à agir à ce titre ou à exercer des fonctions semblables en vertu de dispositions équivalentes de la législation d'une autre province ou d'un territoire du Canada;

11° une personne à l'égard de laquelle tous ceux qui ont la propriété de droits, à l'exception des titres comportant droit de vote que les administrateurs sont tenus de détenir en vertu de la loi, sont des contreparties qualifiées au sens de la présente loi;

12° un opérateur en couverture, c'est-à-dire une personne qui, compte tenu de son activité:

a) est exposée à un ou plusieurs risques se rapportant à cette activité, dont des risques d'approvisionnement, de crédit, de change, environnementaux ou de fluctuation de prix d'un sous-jacent;

b) recherche la couverture d'un tel risque en réalisant une opération ou une série d'opérations sur dérivés dont le sous-jacent est celui qui est directement associé à ce risque, ou un autre sous-jacent qui lui est apparenté;

13° une personne visée par règlement ou désignée par l'Autorité comme contrepartie qualifiée conformément à l'article 87;

2. Definition of Eligible contract participant – Commodity Exchange act, USC, Title 7 › Chapter 1, section 1a: (traduction non disponible)

Eligible contract participant

The term "eligible contract participant" means—

(A) acting for its own account—

(i) a financial institution;

(ii) an insurance company that is regulated by a State, or that is regulated by a foreign government and is subject to comparable regulation as determined by the Commission, including a regulated subsidiary or affiliate of such an insurance company;

(iii) an investment company subject to regulation under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.) or a foreign person performing a similar role or function subject as such to foreign regulation (regardless of whether each investor in the investment company or the foreign person is itself an eligible contract participant);

(iv) a commodity pool that—

(I) has total assets exceeding $5,000,000; and

(II) is formed and operated by a person subject to regulation under this chapter or a foreign person performing a similar role or function subject as such to foreign regulation (regardless of whether each investor in the commodity pool or the foreign person is itself an eligible contract participant) provided, however, that for purposes of section 2 (c)(2)(B)(vi) of this title and section 2 (c)(2)(C)(vii) of this title, the term "eligible contract participant" shall not include a commodity pool in which any participant is not otherwise an eligible contract participant;

(v) a corporation, partnership, proprietorship, organization, trust, or other entity—

(I) that has total assets exceeding $10,000,000;

(II) the obligations of which under an agreement, contract, or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by an entity described in subclause (I), in clause (i), (ii), (iii), (iv), or (vii), or in subparagraph (C); or

(III) that—

(aa) has a net worth exceeding $1,000,000; and

(bb) enters into an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity's business;

(vi) an employee benefit plan subject to the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), a governmental employee benefit plan, or a foreign person performing a similar role or function subject as such to foreign regulation—

(I) that has total assets exceeding $5,000,000; or

(II) the investment decisions of which are made by—

(aa) an investment adviser or commodity trading advisor subject to regulation under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) or this chapter;
(bb) a foreign person performing a similar role or function subject as such to foreign regulation;
(cc) a financial institution; or
(dd) an insurance company described in clause (ii), or a regulated subsidiary or affiliate of such an insurance company;

(vii)

(I) a governmental entity (including the United States, a State, or a foreign government) or political subdivision of a governmental entity;
(II) a multinational or supranational government entity; or
(III) an instrumentality, agency, or department of an entity described in subclause (I) or (II);
except that such term does not include an entity, instrumentality, agency, or department referred to in subclause (I) or (III) of this clause unless (aa) the entity, instrumentality, agency, or department is a person described in clause (i), (ii), or (iii) of paragraph (17)(A); (bb) the entity, instrumentality, agency, or department owns and invests on a discretionary basis $50,000,000 or more in investments; or (cc) the agreement, contract, or transaction is offered by, and entered into with, an entity that is listed in any of subclauses (I) through (VI) of section 2 (c)(2)(B)(ii) of this title;

(viii)

(I) a broker or dealer subject to regulation under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or a foreign person performing a similar role or function subject as such to foreign regulation, except that, if the broker or dealer or foreign person is a natural person or proprietorship, the broker or dealer or foreign person shall not be considered to be an eligible contract participant unless the broker or dealer or foreign person also meets the requirements of clause (v) or (xi);
(II) an associated person of a registered broker or dealer concerning the financial or securities activities of which the registered person makes and keeps records under section 15C(b) or 17(h) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–5 (b), 78q (h));
(III) an investment bank holding company (as defined in section 17(i) [2] of the Securities Exchange Act of 1934 (15 U.S.C. 78q (i)); [3]

(ix) a futures commission merchant subject to regulation under this chapter or a foreign person performing a similar role or function subject as such to foreign regulation, except that, if the futures commission merchant or foreign person is a natural person or proprietorship, the futures commission merchant or foreign person shall not be considered to be an eligible contract participant unless the futures commission merchant or foreign person also meets the requirements of clause (v) or (xi);
(x) a floor broker or floor trader subject to regulation under this chapter in connection with any transaction that takes place on or through the facilities of a registered entity (other than an electronic trading facility with respect to a significant price discovery contract) or an exempt board of trade, or any affiliate thereof, on which such person regularly trades; or

(xi) an individual who has amounts invested on a discretionary basis, the aggregate of which is in excess of—

(I) $10,000,000; or

(II) $5,000,000 and who enters into the agreement, contract, or transaction in order to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by the individual;

(B)

(i) a person described in clause (i), (ii), (iv), (v), (viii), (ix), or (x) of subparagraph (A) or in subparagraph (C), acting as broker or performing an equivalent agency function on behalf of another person described in subparagraph (A) or (C); or

(ii) an investment adviser subject to regulation under the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 et seq.], a commodity trading advisor subject to regulation under this chapter, a foreign person performing a similar role or function subject as such to foreign regulation, or a person described in clause (i), (ii), (iv), (v), (viii), (ix), or (x) of subparagraph (A) or in subparagraph (C), in any such case acting as investment manager or fiduciary (but excluding a person acting as broker or performing an equivalent agency function) for another person described in subparagraph (A) or (C) and who is authorized by such person to commit such person to the transaction; or

(C) any other person that the Commission determines to be eligible in light of the financial or other qualifications of the person.

Pour votre information.

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De : Dairen Beblow [mailto:dbeblow@saskpower.com]
Envoyé : 14 juin 2013 16:43
À : Consultation-en-cours
Objet : Comments on Consultation Paper 91-407 – Derivatives: Registration

To: Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission

Re: Comments on Consultation Paper 91-407 – Derivatives: Registration

To whom it may concern,

My name is Dairen Beblow and I am the Treasurer at Saskatchewan Power Corporation. I am writing on behalf of Saskatchewan Power Corporation and our subsidiary NorthPoint Energy Solutions Inc. to provide comments on Consultation Paper 91-407 – Derivatives: Registration. The comments on specific questions are as follows:

Q2: What is the appropriate standard for determining whether a person is a qualified party? Should the standard be based on the financial resources or the proficiency of the client or counterparty? If the standard is based on financial resources should it be based on the net assets of the client or counterparty, gross annual revenues of the client or counterparty, or some other factor or factors?

Comment: (1) A qualified party should be based on both proficiency and financial resources. (2) A qualified party should be defined in a similar manner to that under Saskatchewan Financial Services Commission General Order 91-907 (or other similar documents in other provinces) that would include provincial crown corporations by default and require corporations to have total assets in excess of $25 million (or some other lower threshold). However it is recognized that having a specific limit in place in terms of assets, revenues, etc. doesn't necessarily answer the question of an entity's ability to meet the obligations on its contracts as this depends on the size of the positions taken on relative to the size of the company.

Q6: The Committee is not proposing to include frequent derivatives trading activity as a factor that we will consider when determining whether a person triggers registration as a derivative dealer. Should frequent derivatives trading activity trigger an obligation to register where an entity is not otherwise subject to a requirement to register as a derivatives dealer or a LDP? Should entities that are carrying on frequent derivatives trading activity for speculative purposes be subject to a different registration trigger than entities trading primarily for the purpose of managing their business risks?

Comment: (1) No, we don't feel that frequent derivatives trading activity should trigger an obligation to register in and of itself since the activity may not be significant relative to the size of the market and only when the entity is considered an LDP should it be required to register. (2) We also don't feel that there should be a different registration trigger between entities trading for speculative purposes vs business risk purposes, particularly if the parties are qualified parties who are able to meet their obligations.

Q15: Should derivatives dealers dealing with qualified parties be subject to business conduct standards such as the ones described in part 7.2(b)(iii) above? If so, please explain what standards should apply.

Comment: No

Q22: Is the proposal to exempt crown corporations whose obligations are fully guaranteed by the applicable government from registration as a LDP and, in the circumstances described, as a derivatives dealer appropriate? Should entities such as crown corporations whose obligations are not fully guaranteed, foreign governments or corporation owned or controlled by foreign governments benefit from comparable exemptions? Please provide an explanation for your answer.

Comment: All domestic crown corporations should be exempt.

Q23: Are the proposed registration exemptions appropriate? Are there additional exemptions from the obligation to register or from registration requirements that should be considered but that have not been listed?

Comment: SaskPower agrees with the exemption related to affiliates.

Dairen Beblow
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On behalf of:

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SaskEnergy

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June 17, 2013

Our File: S9279

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And to:

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission

Dear Sirs/Mesdames:

RE: CSA Consultation Paper 91-407, "Derivatives: Registration"

SaskEnergy Incorporated ("SaskEnergy") and TransGas Limited ("TransGas") welcome the opportunity to comment on CSA Consultation Paper 91-407, "Derivatives: Registration", published on April 18, 2013.

As we understand the proposed registration regime, certain persons would be required to register, and there will be a number of additional regulatory requirements associated with that registration requirement. The registration requirements are designed to:

- "protect participants in the derivatives markets from unfair, improper and fraudulent practices";
- "protect the soundness of our financial markets by ensuring that key market participants manage risks relating to their participation in derivatives markets, including counterparty risk";
- "impose specific requirements on registrants when trading with counterparties and trading on behalf of clients"; and

- "reduce risks, including systemic risks, resulting from the derivatives activities of key market Participants".

We are again pleased that some thought will be given to targeting the scope of said regulation, so as to obtain the greatest benefit, with the least harm and collateral impact. As noted previously, these changes are being considered at a time when Saskatchewan provincial agencies are being asked to streamline or eliminate regulatory burden and costs. A "one size fits all approach" may simplify the rules, but does not limit unnecessary regulatory burden if it is overbroad in application.

Selected Summary of Proposed Changes

Three categories of registrant would exist. The first category would be derivatives dealers, persons carrying on the business of trading in derivatives or holding themselves out to be carrying on that business. The second would be the derivatives advisors, persons carrying on the business of advising others in relation to derivatives, or holding themselves out to be doing so. The third would be large derivatives participants, persons other than derivatives dealers that have a substantial aggregate derivatives exposure above a threshold to be defined.

A "person" includes legal entities. An individual would be required to register, where the individual is the ultimate designated person, chief compliance officer, or chief risk officer of the registrant. Individuals involved in providing clients with advice relating to derivatives, or involved in providing trading services to clients as an intermediary to a trade, would be required to register. Finally an individual involved in a trade with a counterparty that is a non-qualified party, and that is not represented by an independent derivatives adviser would be required to register.

Registration would have a minimum proficiency requirement for all directors, partners, officers, employees or agents of a derivatives registrant involved in trading or advising on derivatives. All registrants would be subject to financial and solvency requirements, including capital, margin, insurance and financial record and reporting requirements. There would be requirements related to compliance systems and internal business conduct, honest dealing, and care of collateral. Finally derivatives dealers and derivatives advisors would be required to carry out an information gathering and "gatekeeper" requirement with respect to their clients, and know your client/counterparty, product suitability, conflict of interest, and fair dealing requirements.

Provincial Crown corporations whose obligations are guaranteed by the provincial government would not generally be required to register, except when dealing with other than qualified parties and when intermediating trades for clients.

Persons that would be subject to registration as either a derivatives dealer or a derivatives adviser solely because of activities with their affiliates would be exempt from the requirement to register as a derivatives dealer or adviser.

About SaskEnergy

SaskEnergy is a Saskatchewan Crown corporation governed by *The SaskEnergy Act*. SaskEnergy owns and operates a distribution utility, and has the exclusive legislative mandate to distribute natural gas within the province of Saskatchewan. With the exception of the City of Lloydminster, SaskEnergy is effectively the sole provider of natural gas distribution service in the Province. SaskEnergy delivers natural gas to more than 365,000 residential, commercial and industrial customers throughout Saskatchewan. SaskEnergy purchases substantially all of its natural gas from independent suppliers and transports it through its 68,100 kilometer distribution system to 93% of Saskatchewan communities.

Approximately 355,000 of SaskEnergy's 365,000 delivery customers currently purchase their natural gas commodity supply directly from SaskEnergy, and SaskEnergy is one of the largest purchasers of natural gas supply in the Province.

SaskEnergy is primarily a natural gas delivery or distribution business, and its core natural gas purchases are for resale to its customers on a tariff basis. SaskEnergy also sells natural gas to industrial users on a contract basis and natural gas transactions are also executed to generate incremental corporate income from physical assets, including storage facilities.

In setting its commodity tariff rate, SaskEnergy follows the standard Canadian natural gas utility regulatory practice, which is to pass through the cost of gas sold to customers without applying any margin or additional costs. No profit or loss should be incurred by the utility on the sale of natural gas.

SaskEnergy utilises both physically and financially settled natural gas derivatives. Financially settle derivatives are used for price hedging, and risk management. Physically settled derivatives take the form of natural gas commodity purchase and sale agreements.

About SaskEnergy's Subsidiaries

TransGas is a wholly owned subsidiary of SaskEnergy. It has the exclusive legislated franchise to transport natural gas within the Province of Saskatchewan. Natural gas transport involves the use of transmission pipelines to move gas long distances to a point where it can be delivered to large customers, another transporter or to the distribution utility.

TransGas also owns and operates a natural gas storage business as well as gathering and processing facilities, which are integrated with the transmission pipeline system.

SaskEnergy has a number of other subsidiaries, carrying on business primarily in the energy services or natural gas production, storage, transportation or processing areas.

SaskEnergy's subsidiaries may purchase or sell gas as part of their operations, but all commodity derivatives are physically settled, including derivative transactions with SaskEnergy.

It is the expectation of TransGas that its gas transport and storage contracts will not be classified as derivatives, but that issue has arisen in the United States, and has resulted in a fairly complex interpretation. For the purpose of these submissions, the exclusion of transport and storage contracts is assumed.

SaskEnergy's Derivative Trading Experience

Natural gas is sold on a forward basis for practical reasons inherent in the natural gas sector. Almost all purchases and sales are going to be "derivatives", as commonly defined, and the financially versus physically settled distinction is really an artificial one from a price risk perspective. Our price "risk" and price "speculation" is occurring largely in circumstances where physical delivery must occur. The financially settled transaction is actually the mechanism by which SaskEnergy reduces its price risk.

SaskEnergy utilizes financially settled natural gas commodity derivatives to hedge the price of natural gas, in circumstances where fixed priced commodity purchase contracts are not available or competitive, to enable fixed price commodity sale contracts with certain customers, and to enable yearly or bi-annual rate changes to our tariff rates, through a rate review panel process.

Historically, SaskEnergy has freely transacted with counterparties in Europe and the United States.

At this time, SaskEnergy has effectively withdrawn from new American counterparty transactions. Given that SaskEnergy makes no profit from the sale of gas, if something similar or more onerous to the United States model is planned for Canada, and it is not done well, the feasibility of providing stable gas prices to consumers might come into question.

SaskEnergy is currently trading financially settled transactions exclusively with Canadian banks.

Comments

SaskEnergy and TransGas are pleased to comment on the following queries. We have eliminated queries which are not of particular interest to SaskEnergy, to which we have limited insight, or which would elicit the same answer as a previous inquiry.

Q2: What is the appropriate standard for determining whether a person is a qualified party? Should the standard be based on the financial resources or the proficiency of the client or counterparty? If the standard is based on financial resources should it be based on the net assets of the client or counterparty, gross annual revenues of the client or counterparty, or some other factor or factors?

A standard based on financial resources, likely net worth, seems the most practical test as it can be readily ascertained. In this sense, a qualified party is simply one that can afford to absorb a loss, and to protect its interest through knowledge acquisition or otherwise. However, if there are alternative means of substantially addressing the mischief perceived, such as experience, knowledge or proficiency requirements, then there should be some consideration of alternative tests (rather than a single test or cumulative tests).

SaskEnergy suggests that the rules error, initially, in favour of a broad definition of qualified party. Derivative transactions do add a benefit and do add value. SaskEnergy itself needs to meet the test to carry on business in a manner close to the manner in which it has historically, and we have some concern that these requirements will discourage market participation.

One of the consequences of not meeting a qualified party standard may be the necessity of engaging a dealer or advisor in some way. We do acknowledge something of a self-fulfilling mechanism here, wherein the creation of rules creates the need for proficient people to interpret the rules. However, SaskEnergy itself does not feel an immediate need or desire to be represented by a third party "derivatives dealer" or "derivatives adviser", in addition to existing staff.

Q3: Should registration as a derivatives dealer be subject to a de minimis exemption similar to the exemption adopted by U.S. regulators? Please indicate why such an exemption is appropriate.

The Committee believes that participants should be subject to the same protections regardless of the size or the total derivatives exposure of the dealer. SaskEnergy respectfully disagrees.

From our own experience, the first thing an advisor will look to is the *de minimis* test. It is a relatively quick and (hopefully) straightforward way of ascertaining whether or not the registration rules apply to an entity. It is likely more certain than a "holistic" analysis of whether you are "in the business of dealing derivatives", particularly if no other exemption clearly applies. There is some value in certainty.

Secondly, a *de minimis* test places the greater burden on the parties who (arguably) are best able to meet it.

Third, the *de minimis* test likely addresses the "too big to fail" effect on the market. If participant protection is desired, the choice always exists to deal only with a derivatives dealer, and derivatives dealers can advertise that. Participant protection should be secondary, and you can impose participant protection to the point there is no market.

From the perspective of SaskEnergy's best interest, registration and registration requirements are not beneficial. Registration requirements promise to be administratively expensive, for both the registrant and the counterparty, and even if SaskEnergy itself is exempt, it threatens to limit liquidity and available counterparties.

If the mischief perceived can be substantially addressed with a *de minimis* exemption, with high notional exposure thresholds as in the United States, then a *de minimis* exemption seems to be one way of balancing cost and benefit.

Alternatively, some consideration might be given to starting with a *de minimis* test. If it is not working, steps can be taken to change it. Changing too much all at once (i.e. making registration applicable to all "derivatives dealers") may do more harm than good.

Q5: Are the factors listed the correct factors that should be considered in determining whether a person is in the business of trading derivatives? Please explain your answer.

SaskEnergy does not take issue with the test proposed, assuming physically settled derivatives are out of scope. SaskEnergy does enter into physically settled transactions with small producers, small retailers and small consumers of gas who may or may not meet a qualified party test, and which may or may not otherwise trigger this test.

The factors as we understand them are acting as a market maker, trading with the intention of being remunerated or compensated, soliciting trades (directly or indirectly), providing clearing services to a third party, trading with a non-qualified party that is not represented by a derivatives dealer or advisor on a repetitive basis, or engaging in activities similar to a derivatives dealer.

Q6: The Committee is not proposing to include frequent derivatives trading activity as a factor that we will consider when determining whether a person triggers registration as a derivative dealer. Should frequent derivatives trading activity trigger an obligation to register where an entity is not otherwise subject to a requirement to register as a derivatives dealer or a LDP? Should entities that are carrying on frequent derivatives trading activity for speculative purposes be subject to a different registration trigger than entities trading primarily for the purpose of managing their business risks?

SaskEnergy likely agrees with the current approach. Frequent derivatives trading should only be a factor, if there are clear reasons for believing that frequent trading in itself aggravates systemic risk, the potential for market abuse, etc.

If such risk is perceived, and can be substantially managed by regulating the speculative trader only, then we would advocate limiting the scope to speculative trades. Assuming physically delivered commodity is not captured, SaskEnergy will not be directly impacted as, by policy, SaskEnergy's financially settled trades are limited to hedging activities.

Q8: Are the factors listed the correct factors that should be considered in determining whether a person is in the business of advising on derivatives?

Yes. It is not SaskEnergy's intent to enter into business as a derivatives advisor, and the risk of SaskEnergy inadvertently meeting this test is small assuming physically settled transactions are out of scope.

We understand the factors to be considered to be directly or indirectly providing advice about derivatives trading activity with repetition, regularity or continuity, being, or expecting to be, remunerated or compensated, soliciting business relating to advising in derivatives trades (directly or indirectly), or engaging in activities similar to a derivatives adviser.

Q9: Are the factors listed for determining whether an entity is a LDP appropriate? If not what factors should be considered? What factors should the Committee consider in determining whether an entity, as a result of its derivatives market exposures, could represent a serious adverse risk to the financial stability of Canada or a province or territory of Canada?

Yes. A prescribed threshold approach, without differentiation between hedging and speculation, or by business activity, is fine.

Q10: Is the Committee's proposal to only register derivative dealer representatives where they are dealing with clients or when dealing with counterparties that are non-qualified parties appropriate?

Yes. We think this is an appropriate balance between the need to protect the interests of derivative market participants and the costs of having registrants register.

Q15: Should derivatives dealers dealing with qualified parties be subject to business conduct standards such as the ones described in part 7.2(b)(iii) above? If so, please explain what standards should apply.

Not necessarily. Qualified parties should be more sophisticated than non-qualified parties. Imposing these requirements on derivatives dealers has some "trickle-down" effect on customers of derivatives dealers, and financial institutions and others will likely respond with a multitude of protocols, "boilerplate" representations, forms, and agreements. These "know your customer" and other requirements are financially burdensome to everyone involved, at least initially, and in determining the needed scope, timing and number of these requirements, some though should again be given to the benefit to be achieved in proportion to those costs.

Q16: Do you have a preference between the two proposals relating to the regulation of a derivatives dealer trading with counterparties that are non-qualified parties? Is there another option to address the conflict of interest that the Committee should consider? Please explain your answer.

Yes, the second option.

The first alternative precludes a derivatives dealer from entering into trades with counterparties that are non-qualified parties unless those counterparties receive advice from an independent registered derivatives adviser in relation to that transaction.

The second alternative requires that a derivatives dealer inform counterparties that are non-qualified parties that there is a conflict of interest, in writing. In addition, the dealer would be required to advise the counterparty that they have the right to obtain independent advice before entering into the transaction, and to obtain a signed acknowledgment.

SaskEnergy is convinced that the first alternative would in fact drive some people out of the market. The second option will do one of two things. First, it could do very little. A party signs what it needs to sign, and accepts the conflict "boilerplate" as standard, and as a cost of doing business. A less sophisticated counterparty may still depend very heavily on the dealer for guidance. Alternatively, it will increase administration and advice costs for both the derivatives dealer and the counterparty, as each party attempts to independently achieve due diligence. For those counterparties who can justify neither approach, it will drive them from the market.

In any event, the market should not be significantly jeopardized in the interests of protecting parties from the market, and the first approach seems to carry more risk. The second alternative almost seems to be enhancing what dealers will already being doing for fear of civil or other liability. Documentation certainly protects the counterparty, but there is a bit of a sense of dealer protection to it as well. It should have less of a chilling effect.

Q19: The Committee is recommending that foreign resident derivative dealers dealing with Canadian entities that are qualified parties be required to register but be exempt from a number of registration requirements. Is this recommendation appropriate? Please explain.

The requirement for parties to register in each Canadian province in which it conducts business is troubling, because it assumes that counterparties are adequately motivated to conduct business in a province.

SaskEnergy is aware that existing electronic trading platforms, for example, have been slow, or disinclined, to meet Saskatchewan application requirements, presumably because of the relatively small customer base. Whether or not the same will be true in this instance, whether for Saskatchewan alone or Canada altogether, is unknown.

This may have adverse consequences for parties operating in smaller provinces.

Q22: Is the proposal to exempt crown corporations whose obligations are fully guaranteed by the applicable government from registration as a LDP and, in the circumstances described, as a derivatives dealer appropriate? Should entities such as crown corporations whose obligations are not fully guaranteed, foreign governments or corporation owned or controlled by foreign governments benefit from comparable exemptions? Please provide an explanation for your answer.

SaskEnergy would suggest that further analysis is necessary. Whether a guarantee exists, in the literal sense, seems to be a rather blunt test as to whether the exception should apply. Many Crown corporations do not exist separately from the Crown in the same way as a typical corporation would, and may be agents of the Crown by legislation, with assets that are deemed assets of the Crown by legislation. Further, they are confined in their powers and mandates, may already have derivative related oversight built in by statute, and presumably exist for some meritorious reason that may in itself warrant consideration in this context. (All "capital market activities" performed by SaskEnergy, including commodity swaps and futures, require the prior approval of the Finance Minister under Section 46 of *The Financial Administration Act.)*

Q23: Are the proposed registration exemptions appropriate? Are there additional exemptions from the obligation to register or from registration requirements that should be considered but that have not been listed?

SaskEnergy supports the affiliate exemption. SaskEnergy is a provincial Crown corporation, and exercises its powers through several subsidiaries. SaskEnergy supports exemptions for inter-affiliate trades as, in the case of SaskEnergy, each subsidiary has the same owner, essentially the same executive, and effectively the same Board. Other Crown corporations in Saskatchewan are less closely connected to SaskEnergy, but do share a common owner, and in many instances report to the same holding company.

Most or all "derivative" transactions, wherein SaskEnergy is involved with an affiliate, are physically settled sales of commodity. There is arguably no need to protect one affiliate from the other, and any effect on the market should be limited.

Exempting a clearing house from registration is helpful, considering the concern described in Q19 above.

SaskEnergy takes no further position on the Crown corporation exemption, except to state the observations in Q22 above.

Conclusion

SaskEnergy and TransGas are thankful for the opportunity to provide these comments.

Increased regulatory burden ultimately increases costs for our customers. Even the prospect of new regulation in Canada is drawing on staff resources, and affecting the way we do business, as are the new regulations elsewhere. The Committee should ensure the benefit of any mischief to be avoided justifies the cost to the ultimate consumer.

If the mischief perceived can be substantially addressed with a *de minimis* exemption, in particular, then a *de minimis* exemption seems to be one way of balancing cost and benefit. The reasoning behind this exemption in the United States might again be examined.

Where any doubt exists that the benefits of the new regulatory regime will not warrant its cost, direct and indirect, SaskEnergy would argue for some caution, some care, and potentially a narrower scope. A public interest exemption or exemptions specific to the utility or Crown corporations should also be considered.

Respectfully submitted,

SASKENERGY INCORPORATED

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June 17, 2013

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Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission
Saskatchewan Financial Services Commission

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Re: Canadian Securities Administrators ("CSA")
Consultation Paper 91-407 Derivatives: Registration ("the Paper")

Shell Energy North America (Canada) Inc. ("Shell Energy") and Shell Trading Canada, a division of Penzoil-Quaker State Canada Incorporated ("STC") (collectively, "Shell Trading") make this submission to comment on the Paper issued by the CSA considering the proposed registration regime and compliance requirements for participants in the Canadian over the counter ("OTC") derivatives markets.

Description of Shell Trading

The Shell Trading companies are indirect subsidiaries of Royal Dutch Shell, plc ("Shell") which is impacted by, and participating in, the global efforts to reform financial markets regulation. Shell Energy markets and trades natural gas, electricity, and environmental products, including the natural gas produced by its affiliates in Canada. STC trades various grades of crude oil, refinery feed stocks, bio-components, and finished oil-related products, including such commodities that are produced, manufactured, or imported by affiliates. Both entities also participate in the Canadian energy derivatives markets and together they manage risk and optimize value across physical and financial, exchange-traded and OTC markets.

Energy companies such as Shell often use an integrated approach to physical trading, supply management, and financial hedging in which different entities in the corporate group participate as a producer, trader, and marketer in the relevant commodity markets. Separate legal entities within the group are designated to enter into physical and financial transactions to help manage risk and optimize the physical portfolio of commodity assets owned and controlled by the corporate group. Such an approach achieves economies of scale, reduces and consolidates risk, and lowers administrative and transactional costs. By consolidating such physical and financial trading activity through hedging affiliates like Shell Trading, this model reduces overall risk to the company and the markets. Inter-affiliate swaps are an important, practical, and efficient component of this process.

Registration Requirement and Categories of Registration

Exchange-based Transactions - The Paper does not distinguish OTC transactions from exchange traded contracts and the consequences with respect to the business triggers for registration. The CSA has proposed to exclude commodity-based derivative contracts traded on exchanges from the definition of derivatives under the requirements for trade repository reporting. However, the CSA has also previously stated that the definition of derivative may be different for other aspects of new regulatory requirements. This has created uncertainty regarding the intentions of the CSA and the types of activity that trigger registration requirements. Shell Trading recommends that the CSA specifically exclude exchange traded contracts from the definition of derivative for registration purposes. If not excluded from the definition of derivative, the CSA should ensure that such activity is addressed and excluded from the triggers for registration, as referenced below.

Qualified Parties - Shell Trading strongly supports the delineation of participant types for the purpose of establishing compliance requirements designed to provide further protections for less sophisticated parties. While the Paper is silent as to the process involved for determining qualified party status, it is important that any proposed definition specify that status may be established at the time parties enter into a contract, and that each party may rely on the representations made by the other. Additionally, where a transaction is completed on an exchange, there should be an exemption from the need to determine qualified party status and the onus placed on the exchange to ensure that each party is a qualified party. Shell Trading does not take a position in recommending the adoption of any of the existing definition examples listed in the Paper, but notes that the breadth of scope of participant types and criteria contained in each of the examples are important factors in establishing the definition of a qualified party for derivatives regulation.

Derivatives Dealer - The Paper incorrectly makes the activities of “trading” and “dealing” synonymous, and the enumerated business triggers present the outcome that any entity that is determined to be trading in derivatives should be registered as a dealer. This results in an unacceptable risk that many more participants will be required to be registered, and regulated, than is necessary which is inconsistent with the CSA approach to date. The CSA has repeatedly acknowledged the need to avoid placing undue burden on participants or negatively impacting markets, but in this instance concludes that, *"The proposed trigger may result in a variety of persons that do not carry out derivatives dealing activities as their primary business becoming subject to an obligation to register as a derivatives dealer."*[1] There are many types of participants, including ones that would otherwise be considered "end-users" that are active in trading and may be captured by the proposed triggers and forced to register as dealers.

For example, a company that is in the business of speculative trading should not be required to register as a dealer if all of the trading activity is done on an exchange, even where the identity of the counterparty is known. Similarly, a participant who transacts predominantly for hedging purposes but also for speculative purposes on an exchange should not be required to register as a dealer, which would result in the participant losing end-user status and the accompanying exemptions. Producers and consumers of energy commodities will generally be considered as end-users under the evolving OTC derivatives regulatory regime, however, some may take a more active and dynamic approach to trading for the purpose of hedging. It is important to avoid imposing a dealer registration requirement on these participants on the basis of subjective triggers such as "*acting as a market maker*" or "*directly or indirectly soliciting*".

In line with the comments above, the frequency of trading activity, whether for speculative or other purposes, should not be used as a trigger that requires any form of registration.

Registration for Categories of Derivatives - The Paper is silent on whether registration is specific to the derivatives, or category of derivatives, in which the participant is dealing. For example, a participant dealing in certain OTC energy commodity derivatives might be considered a dealer for those derivatives and thus be subject to registration under that category. The participant might, however, also be actively engaged in trading foreign exchange derivatives for the purpose of hedging this risk arising from trading energy commodity derivatives. It is important that registration as a dealer does not encompass these other transactions and impose dealer-type requirements or prevent the participant from being treated as an end-user for this separate and distinguishable activity.

***De Minimis* Exemption -** Shell Trading disagrees with the proposal to not implement a *de minimis* threshold for exemption from the requirement to register as a dealer. Compared to international markets, the Canadian derivatives markets are small in size. The lack of a *de minimis* exemption will likely drive many current participants out of the Canadian OTC markets resulting in reduced competition and liquidity, with increased costs to those remaining who rely on such instruments to hedge their commercial exposures. Fewer parties willing to enter derivatives transactions could also result in greater concentration of risks among those remaining.

The CSA has placed a great deal of importance on the transparency objective of OTC derivatives regulation, resulting in the trade reporting rules being the first category of changes to be put in place. Implementing a *de minimis* exemption at the start will not diminish the transparency available to regulators. It will allow for further analysis of the markets to determine whether to reduce the threshold in the future if warranted. Any value in starting without a threshold and then assessing whether one could be enacted in the future would be outweighed by the burden and costs unnecessarily imposed on participants and the damage caused to the markets. In

[1] The Paper at page (2013) 36 OSCB 4127

implementing a *de minimis* level the CSA might consider establishing different thresholds based on whether the transactions are conducted with qualified parties or non-qualified parties. This would allow the threshold for participants whose transactions include non-qualified parties to be set lower than the threshold for those transacting with qualified parties only.

Large Derivatives Participant - The Paper notes that additional work will be undertaken, "*in consultation with other Canadian authorities to establish the thresholds for registration as a LDP*."[2] Shell Trading recommends that consultation related to registration thresholds as well as any resulting compliance obligations should include public consultation seeking participant comments on proposals.

Registration of Individual Representatives - Shell Trading supports the proposal to require the registration of individuals where they are the ultimate designated person, chief compliance officer, and chief risk officer of the registrant but has some concerns as discussed below. Shell Trading also supports the proposal that individual representatives of a derivatives dealer need not register where they do not trade on behalf of non-qualified parties.

Registration Requirements

Proficiency Requirements - Shell Trading supports the recommendation that individual proficiency requirements be principle based and only for the class or category of OTC derivative being traded. Initially allowing work experience as a means to develop proficiency should be established as an enduring method to achieve this goal.

Financial Records and Reporting - The CSA proposes that registrants be required to file quarterly financial statements and audited financial statements annually. Many potential registrants are subsidiaries within a larger corporate group and may not have their own audited financial statements. If such a requirement is implemented as worded, it could cost each of these participants tens of thousands of dollars in audit fees. Shell Trading recommends that registrants be permitted to file the consolidated statements of their parent.

Compliance and Risk Management Systems - Shell Trading supports the need for such systems, policies, and procedures, but again notes that a registrant entity might be part of a larger corporate group. The CSA should make it clear that where the registrant functions within or under the systems, policies, and procedures of a corporate parent or group, the registrant is permitted to rely on these as control mechanisms in their operations as well as to demonstrate compliance, rather than be required to implement duplicative controls for the registrant entity solely.

Appointment of an Ultimate Designated Person, Chief Compliance Officer, and Chief Risk Officer - The CSA recommends that, "*no individual may simultaneously act as UDP, CCO and CRO however in certain situations, such as where the entity is very small in size, one individual may be allowed to fill more than one role*."[3] Shell Trading appreciates the intent to be flexible in this regard, but is concerned about the uncertainty that remains. For some participants this

[2] Id. at 4129
[3] Id. at 4135

concern may be lessened if the CSA confirms in future rules that the individuals acting in these roles are not required to be employees of the registered entity. Irrespective of entity size, a registrant should be able to have these roles performed by an employee of their parent company or other affiliate. This arrangement may be necessary due to size, but also may be the most practical approach where the trading, compliance, or risk management functions and policies of the registrant are governed by or part of those of another entity. Difficulties for smaller participants brought on by such new requirements are another reason why the CSA should implement a *de minimis* threshold for registration.

Complaint Handling - It is not reasonable to require that all responses to complaints be approved by the registrant's UDP or CCO. In particular, complaints related to account or billing issues do not warrant the involvement of these individuals. Such a requirement should be limited to situations involving potential breaches of specific conduct requirements or involve an accusation of impropriety.

Honest Dealing - Shell Trading strongly supports the CSA's recognition that imposing the full gamut of fair dealing and other conduct requirements in circumstances where sophisticated parties enter into an OTC derivative trade is unnecessary to protect the interests of the registrant's counterparty and would disadvantage the registered entity. The recommendation to impose only the obligations to act honestly and in good faith when dealing with qualified parties, and then supplementing this with additional requirements when transacting with non-qualified parties, is reasonable. Similarly, it is also appropriate to limit the requirements for pre-trade reports, post-trade reports, and account statements to relationships with non-qualified parties, as recommended in the Paper.

Exemptions from Registration or Registration Requirements

Domestic Governments - Regulators must avoid providing an advantage to any type of participant in competitive markets when establishing rules and requirements related to participating in the markets. In the energy sector, government enterprises actively compete directly with non-public participants. As such, Shell Trading opposes the recommendation to exempt domestic governments and their corporations from registration and registration requirements where they are transacting only with qualified parties. The CSA justification based on financial resources and presenting little risk to the markets is not valid, as there are privately owned participants that are more financially sound than some of these governments.

Avoiding requirements related to capital and margining will provide an unacceptable direct financial advantage to government entities and negatively influence the competitiveness of the markets. Additionally, in considering the other requirements that come with registration as a dealer, it could be argued that with public funds at risk it is even more important that government entities have in place appropriate record keeping along with robust compliance and risk management policies, practices, and systems.

Affiliated Entities - Shell Trading supports the exemption from registration related to affiliate transactions and suggests there are other considerations that stem from this conclusion. For example, if the CSA adopts a *de minimis* exemption, inter-affiliate transactions should be excluded from the calculation of notional value within the threshold. Similarly, the value of these transactions should be excluded from any calculation related to registrant capital and collateral requirements that may be proposed in the future.

Foreign Parties - The recommendation to exempt foreign derivatives dealers and advisors from certain regulatory requirements is reasonable, however, further clarification and caution is necessary regarding comparing the rules of other jurisdictions. Having an "equivalent" regulatory regime or even "equivalent" requirements may be too narrow a test for the purposes of this exemption. The CSA should review these foreign requirements for similarity rather than equivalency, which is in line with the approach taken in the United States. More broadly, when crafting rules and requirements applicable to Canadian participants, the CSA should continue to be mindful of the different structure and needs of Canadian markets and avoid attempting to make the domestic rules "equivalent" to those of other jurisdictions.

Conclusion

In establishing regulations related to OTC derivatives dealer registration the CSA must also consider the views of participants previously filed related the end-user exemption. The comments of Shell Trading can be found at: http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20120615_91-405_kerrp.pdf

Shell Trading appreciates the opportunity to provide these comments, and welcomes the opportunity to work with the CSA on the future regulation of commodity derivatives, including the critically important treatment of commercial energy firms within the reforms. Please contact me at (416) 227-7312 if you have any questions regarding these comments or would like to explore any of the issues further.

Respectfully submitted,

Submitted electronically

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June 17, 2013

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Ontario Securities Commission
Saskatchewan Financial Services Commission

VIA ELECTRONIC MAIL

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RE: ***CSA Consultation Paper 91-407 - Derivatives-Registration; Comments on the Proposed Definition of Derivatives Dealers and Proposed Implementing Regulations***

Dear Sirs/Mesdames:

I. INTRODUCTION.

Suncor Energy Inc. and its subsidiaries and affiliates (collectively "**Suncor**") hereby respectfully submit comments on the Canadian Securities Administrators ("**CSA**") Staff Consultation Paper 91-4071 – *Derivatives: Registration* ("**Consultation Paper**") published by the CSA over-the-counter (OTC) Derivatives Committee on April 18, 2013. Suncor appreciates the opportunity to submit these comments on the Consultation Paper and looks forward to working with the Committee as it moves forward to implementing Canada's G-20 commitments that relate to the regulation of the trading of derivatives in Canada through its participation in the Alberta Securities Commission Derivatives Advisory Committee.

Suncor is the fifth largest North American energy company and is headquartered in Calgary, Alberta. Suncor's operations include oil sands development and upgrading, conventional and offshore oil and gas production, petroleum refining, and product marketing (under the Petro-Canada brand). Suncor's common shares are listed on the Toronto Stock Exchange and the New York Stock Exchange under the symbol "SU." Suncor's Energy Trading business is organized around four main commodity groups – crude oil, natural gas, sulphur, and petroleum coke. Suncor's customers include mid- to large-sized commercial and industrial consumers, utility companies, and energy producers. The Energy Trading business is used as a mechanism to support the marketing of Suncor's oil sands production by optimizing price realizations, managing inventory levels during unplanned outages at Suncor's facilities, and managing the impacts of external market factors, including pipeline disruptions or outages at refining customers. The Energy Trading business has entered into arrangements for other midstream infrastructure, such as pipeline and storage capacity in order to optimize delivery of existing and future growth production, while generating trading earnings on select strategies and opportunities.

In addition to this submission, Suncor generally supports the positions set out in the comment letter submitted by Dentons Canada LLP, on behalf of the Canadian Energy Derivatives Working Group.

II. COMMENTS OF SUNCOR.

A. General Comments.

1. Consistency with G-20 Commitment

The CSA, in the Consultation Paper, indicates that, at some level, the proposals in the Consultation Paper are in response to Canada's G-20 commitments. The Consultation Paper states, "in September 2009, Canada and other members of the G20 called for the improvement of the global financial market and committed themselves to reforming OTC derivatives markets and improving oversight of those markets. These reforms included specific commitments to improve transparency, mitigate systemic risk, and protect against market abuse." In short, as part of the G-20, Canada committed to achieve the following:

- All standardized OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest.
- OTC derivative contracts should be reported to trade repositories.
- Non-centrally cleared contracts should be subject to higher capital requirements.

Suncor submits the CSA should focus on finalizing and implementing the above noted key reforms before tackling issues outside of the scope of its G-20 commitment. The regulation and registration of Derivatives Dealers should be undertaken only once Canada's G-20 commitments have been satisfied and markets have had time to adjust. To impose the registration requirements in the Consultation Paper on a market in flux may lead to a regulatory design that is not fully functional in derivatives markets that have completed their G-20 reforms.

2. Energy Derivatives Markets Operate Differently Than Other Domestic Derivatives Markets

The CSA's regulatory reform initiative will result in significant changes to Canadian derivatives markets. Any changes to market regulation of this magnitude have the potential to cause significant unintended consequences that could adversely impact Canadian energy markets. These unintended consequences may include, but are not limited to: (a) a loss of liquidity and corresponding increase in volatility; and (b) uncertainty regarding the regulatory status of certain market participants.

Energy derivatives markets are unique. In energy markets, derivatives transactions are routinely executed *without* the involvement of dealers. This is because producers and users of a commodity generally have opposite risk profiles and often make natural hedging counterparties. In these transactions, neither counterparty is engaged in dealing activity. Unlike certain large financial institutions, energy firms primarily trade derivatives as principles to, among other things, hedge the risk associated with their core business of providing electricity, crude oil, natural gas, propane, gasoline, and other energy commodities to customers. The CSA should recognize that certain energy firms, while primarily engaged in hedging activities, may also engage in speculative trading or limited dealing activity. However, that activity is ancillary and incidental to their core physical business. An overly broad definition of "Derivatives Dealer" could require such energy companies to register as Derivatives Dealers. Those companies would face the unfortunate choice between: (i) registering as a Derivatives Dealer; or (ii) reducing their activity in financial derivatives markets to avoid registration. As discussed below, either choice will increase costs for energy market participants, and consequently, Canadian energy consumers.

3. The Scope of the Consultation Paper Should Be Limited to Identifying the Factors that Would Require Registration

The Consultation Paper should limit its scope to identifying the factors that would trigger an obligation for a market participant to register as a Derivatives Dealer or Derivatives Advisor. The identification of activities that would cause an entity to register and determination of which entities should register are important, complex threshold issues and should be answered before considering the regulatory structure that would apply to registrants. Undertaking to address those issues simultaneously may well result in a regulatory infrastructure that is properly designed for the markets and entities to which it is applied.

The CSA's definition of "Derivatives Dealer" should only capture entities that the market traditionally has viewed as "dealers". The CSA should focus its initial efforts on providing clear guidance to market participants through enumerated factors that market participants can use to determine whether they must register as a Derivatives Dealer.

In addition, the Consultation Paper's business triggers and regulatory requirements are significantly similar to those set forth in the securities context by National Instrument 31-103[1] ("NI 31-103"). While certain parts of the securities markets' registration framework may be appropriate for the regulation of derivatives markets, that framework should not be adopted whole-cloth. The majority of those rules were designed to operate in a retail market. The over-the counter derivatives markets in Canada are not retail markets.

B. Definition of "Derivatives Dealer."

1. The Proposed Definition of "Derivatives Dealer" Should be Narrowly Construed

The CSA's use of the word "trading" in the phrase "persons carrying on the business of **trading** in derivatives"[2] when describing the business trigger for registration as a Derivatives Dealers could be interpreted to capture all active participants in derivatives markets. The definition of "Derivatives Dealer" should focus only on activities that are routinely understood in derivatives markets to be "dealing activity." While similar language is used in NI 31-103 to determine if an entity is a securities dealer,[3] Derivatives Dealers operate in different markets. The use of the word "trading" could be read

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1 Canadian Securities Administrators, National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (July 17, 2009).

to create an unintentionally broad definition by including non-dealing trading activities in the Derivatives Dealer determination.

Market participants trading for their own account and profit are commonly understood to be engaged in "trading activity," while entities entering into derivatives transactions for the express purpose of making markets, providing liquidity, or functioning as an intermediary on behalf of a customer are engaged in "dealing activity." As such, the proposed definition of "Derivatives Dealer" should be amended to refer to "persons carrying on the business of **dealing** in derivatives."

The determination of whether an entity must register as a Derivatives Dealer should focus on dealing activity. As discussed further in Sections II.2. and II.4., below, Suncor requests that the CSA: (a) exclude any non-dealing activity from the definition of "Derivatives Dealer"; and (b) promulgate a *de minimis* threshold up to which an entity may engage in limited dealing activity without having to register as a Derivatives Dealer.

2. The Definition of "Derivatives Dealer" Should Expressly Exempt "Non-Dealing Activity"

The definition of "Derivatives Dealer" should be drafted to recognize that a large portion of activity engaged in by commodity derivative market participants is trading activity that is not derivatives dealing. While the CSA may in fact believe that the activity discussed below is not derivatives dealing activity, to provide regulatory certainty that such activity is not derivatives dealing, the CSA should explicitly recognize the following:

- Hedging is not dealing activity;
- Speculation is not dealing activity; and
- Anonymous on-facility transactions are generally not dealing activity.

a. Hedging.

Many market participants, including energy firms, use derivatives to hedge the commercial risk that arises from their primary physical business. Hedging is risk reducing. When hedging, an entity acts for its own account and does not act as an intermediary for a customer. As such, it should be explicitly excluded from the types of activities that would require an entity to register as a Derivatives Dealer.

b. Speculative Trading.

Speculation is also a legitimate non-dealing activity. Market participants engaged in speculative trading are not neutral to price movements in derivatives markets and underlying commodity markets, where entities engaged in dealing activity typically are neutral to price movements. Speculative trading activity is entered into for purposes of benefiting from changes in the price of the instrument.

Speculative trading is a key strategy many energy commodity market participants use in order to ensure optimal value of their underlying commodity assets. Developing a speculative trading capability enables an energy commodity market participant to achieve active market intelligence and logistical

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[2] *Consultation Paper* at 4,125.

[3] *Companion Policy to NI 31-103* (July 17, 2009) at Section 1.3.

flexibility which are key to maximizing asset values over the long term. In that regard, speculative trading: (a) provides price information that can allow an entity to hedge more effectively; and (b) prevents counterparties from anticipating the trading needs of entities that also use commodity derivatives to hedge. In short, entities engaged in speculative trading act for their own account and not as an intermediary for third-parties, and such activity should not be deemed dealing. If the CSA is concerned that speculative trading may introduce systemic risk into the derivatives markets, then the Large Derivatives Participant ("LDP") regime is the proper framework to address this, not within the definition of "Derivatives Dealer. "

c. Exchange Trading "On-Facility."

Finally, when crafting the definition of "Derivatives Dealer," the CSA should acknowledge the differences among the various types of derivatives. Uncleared OTC derivatives have a risk profile vastly different from on-facility cleared derivatives. Registration criteria should take these differences into account in order to properly align regulation to proportional risks. In addition, derivatives trading on an exchange generally is not considered dealing activity and the CSA should explicitly state this. Derivatives transactions in which counterparties are anonymously matched should be explicitly classified as "non-dealing" activity, unless such market participants are explicitly engaged in market-making activity.

3. <u>The CSA Should Provide Comprehensive Guidance on the Factors to Be Considered When Determining if a Person Must Register as a Derivatives Dealer</u>

While the Consultation Paper appears to correctly identify general types of behavior that are routinely characterized as "dealing activity," further clarification is necessary. Certain of the general factors set forth for identifying dealing activity in derivatives markets broadly align with Suncor's view of what constitutes such activity.[4] The relevant factors are whether an entity is: (a) acting as an intermediary; (b) acting as market maker; and (c) providing clearing services. When engaging in each of those activities, derivatives dealers typically remain neutral to price movements in the relevant instrument as they are compensated through fees and the difference in the bid/ask spread.

The definition of "Derivatives Dealer" should generally be qualitative in nature. Said another way, it should be based on the functional role an entity plays in the market. As such, it should only cover a limited set of market participants. Suncor is concerned that the proposed definition of "Derivatives Dealer," will capture a set of derivatives market participants much larger than those entities engaged in dealing derivatives as their primary business purpose.

a. Market-Making.

The use of the term "market-making" without further definition could lead to overly broad and potentially conflicting interpretations of the concept. As such, the CSA should develop interpretive guidance, including enumerated criteria, that clarifies the types of activities that constitute market making.

Although an energy company may, on occasion, take either side (*i.e.,* short or long) of a particular type of derivatives transaction, this is not market-making activity. It is driven by the

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[4] *Consultation Paper* at 4,126.

commercial energy firm's primary physical business.[5] Such activity is generally undertaken to address changes in the risk associated with underlying physical positions or to engage in price discovery.

b. Remuneration and Compensation.

The CSA should clarify that "trading with the intention of being remunerated or compensated" refers explicitly to fees for acting, or providing services, on behalf of customers and money made from or compensation for market making. The language as written, even when read in conjunction with the Companion Policy to NI 31-103, opens up the possibility that trading profits generated by beneficial market movements could be indicia of dealing activity.

c. Solicitation of Interest.

The CSA should make clear that "directly or indirectly soliciting" includes scenarios in which an entity seeks out a counterparty to facilitate the goals of that counterparty and not to trade for its own account. It should not cover scenarios in which a party knows that a potential counterparty likely has a business reason to take the other side of a trade it would like to enter into. For example, a refinery is natural counterparty for a producer of crude oil.

d. Frequent Dealing Activity.

Finally, Suncor strongly encourages the CSA to include "frequent derivatives ***dealing*** activity" and not "frequent derivatives ***trading*** activity" as a factor to consider in determining whether an entity triggers the registration requirement. Suncor requests that the CSA provide guidance as to the frequency of dealing activity that would require an entity to register as a Derivatives Dealer. Without such guidance, market participants will grapple with the concept of being "in the business" of dealing derivatives. At a minimum, the CSA should clarify that nominal or irregular dealing activity, or dealing activity that is ancillary to an entity's primary physical business, has a business purpose of supporting such primary business and will not lead to the entity's categorization as a Derivatives Dealer.

4. The CSA Should Provide a *De Minimis* Exemption

The CSA should provide an exception from the definition for market participants that engage in a *de minimis* amount of derivatives dealing activity. A *de minimis* exception is necessary for two major reasons:

First, requiring market participants that enter into a small amount of derivatives dealing activity that is incidental and ancillary to their core business to register as a Derivatives Dealer will likely result in such entities discontinuing that activity. Causing these entities to stop that behavior will likely concentrate risk and market-share within large financial institutions and will reduce market liquidity. This will limit options for non-dealer market participants, and the potential drop in liquidity could lead to increased volatility. Both of which likely will increase the cost of hedging, potentially increasing energy costs for Canadian consumers.

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[5] In certain derivatives markets, particularly those tied to physical locations, only a few firms trade. This applies in Canada with respect to certain energy-related derivatives (notably swaps). Any interpretive guidance developed or proposed by the CSA should recognize that providing or eliciting two-way pricing in non-liquid or episodically liquid markets does not, by itself, constitute dealing activity as such activity is necessary to efficiently hedge the risks unique to that specific location.

Second, without a *de minimis* exception, a single dealing transaction could trigger a registration obligation. A *de minimis* exception would limit that possibility and provide market participants with certainty as to their non-dealer status. To the extent that the CSA adopts the precedent-based, facts and circumstances approach set forth in NI 31-103,[6] then a *de minimis* exception may only be necessary temporarily as the adequate precedent as to what kind of activity constitutes "carrying on the business of dealing in derivatives" is developed as entities that are clearly derivatives dealers register as such.

Any *de minimis* threshold level proposed should be set carefully and should be based on actual market data. To do so, Canadian regulators should finalize and implement their proposed reporting rules in order to collect at least six months of data prior to setting a *de minimis* level. For energy markets, special consideration should be taken, as the notional value of commodity derivatives are sensitive to changes in commodity prices. For example, natural gas prices are depressed from historic norms. If a proposed *de minimis* threshold is set at an unduly restrictive level, market participants transacting in natural gas derivatives that currently meet such a threshold could easily violate it in the future simply due to rising energy prices, not an increase in actual dealing activity.

If the CSA decides to provide a *de minimis* exception prior to the advent of transaction reporting, Suncor would prefer a *de minimis* determination method similar to what has been crafted under the Dodd-Frank Wall Street Reform and Consumer Protection Act, whereby the notional value of all dealing activity would be aggregated and evaluated against a minimum threshold level to determine whether there is a requirement for registration. Initially, $3B is an appropriate level for this threshold. This approach to the determination of which entities must register as Derivatives Dealers satisfies the G20 mandate of systemic risk mitigation in a practical way, and can allow companies some certainty in evaluating their business models appropriately.

C. The Consultation Paper Should Address How the Proposed End-User Exemption Would Operate in Conjunction with the Derivatives Dealer Registration Regime.

In order to ensure market certainty, Suncor also urges the CSA to provide more guidance on how this Consultation Paper operates in conjunction with *Consultation Paper 91-405 – Derivatives: End-User Exemption*,[7] and how entities falling outside the registration regime and End-User Exemption will be regulated under this framework. Suncor generally believes that the Consultation Paper should work in tandem with the End-User Exemption such that all Canadian derivatives market participants know their regulatory classification with respect to their derivatives activities.

The intersection between the Consultation Paper and the End-User Exemption creates a regulatory purgatory. Entities that are "in the business of trading derivatives" will be required to register as Derivatives Dealers, while entities that only use derivatives to hedge will be eligible for the End-User Exemption. However, market participants that engage in some dealing or speculative activity will be neither Derivatives Dealers nor be permitted to use the End-User Exemption.

Market participants that are not required to register with a Canadian regulator in any derivatives-related capacity should be eligible for the End-User Exemption. Said another way, the CSA

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[6] One of the primary factors relied upon in determining if an entity has engaged in "securities trading for a business purpose" is whether that entity is engaged in activities similar to those of a registered securities dealer. *Companion Policy to NI 31-103* at Section 1.3(a). The Consultation Paper includes a similar factor in the Derivatives Dealer context. *Consultation Paper* at 4,127.

[7] *See* Canadian Securities Administrators, CSA Consultation Paper 91-405 – Derivatives: End-User Exemption (April 13, 2012).

should allow for non-registered entities to qualify for the End-User Exemption even if they engage in speculative activity or *de minimis* dealing activity.

D. The CSA Should Minimize Duplicative Registration and Regulatory Requirements.

As discussed above, the CSA must take care not to adopt a regulatory framework for derivatives regulation that inadvertently impacts market liquidity. The Canadian derivatives market is 1% of the global market. Suncor is concerned that market participants could choose to leave or scale back their participation in Canadian markets if the Derivatives Dealer registration rules and related regulatory obligations are seen as too invasive and onerous. In short, it would be an easy decision for multi-national entities to leave Canada if the regulatory costs of trading in Canadian markets are too high. Any reduction in Canadian market liquidity would be damaging to domestic market participants.

To avoid that outcome, Suncor requests that CSA structure its framework for the regulation of Derivatives Dealers as follows. *First,* if an entity is registered as a Derivatives Dealer in its principal Canadian jurisdiction, then it should be subject to the transaction and entity-level regulatory obligations imposed upon it by that jurisdiction and should only have to provide a notice filing to the other Canadian jurisdictions in which it operates. *Second*, if an entity is a non-Canadian entity and is registered in its home jurisdiction as the equivalent of a Derivatives Dealer, then the CSA should allow for substituted compliance with regard to entity-level regulatory obligations.

E. The LDP Regulatory Paradigm Should be Addressed Once the CSA has Adequate Data.

The concept of "Large Derivatives Participant" ("LDP") as addressed in the Consultation Paper is vague and incomplete. It is difficult for Suncor to foresee, on a practical basis, that any Canadian entity, other than those likely to register as Derivatives Dealers, would pose enough risk to make it an LDP. Hence, Suncor recommends that the CSA re-visit the LDP issue and related thresholds once it has enough data under the new reporting requirements to address the issue properly.

III. CONCLUSION.

Suncor thanks the Committee and the CSA for the opportunity to comment on the Consultation Paper and hopes that the Committee takes these comments into consideration as it finalizes these rules. Suncor respects the efforts of the CSA to regulate the Canadian OTC derivatives market and will continue to provide support and feedback to the CSA as it publishes further consultation papers to regulate the Canadian OTC derivatives market.

Should the Committee have any questions, or if Suncor may be of further assistance, please contact the undersigned.

Yours truly,
Suncor Energy Inc.

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June 17, 2013

SUBMITTED ELECTRONICALLY

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Re: Canadian Securities Administrators ("CSA") Consultation Paper 91-407 on Derivatives: Registration, CSA Derivatives Committee April 18, 2013 (the "Committee")

Dear Mr. Stevenson and Me Beaudoin:

TMX Group Ltd. ("TMX Group") appreciates the opportunity to comment on the CSA Consultation Paper 91-407 on Derivatives: Registration (the "**Consultation Paper**"). The Consultation Paper invited market participants to provide input on Committee proposals regarding requirements for the registration of key derivatives market participants.

The form and implementation of registration requirements will have a significant impact on the effectiveness of these measures in mitigating both firm and systemic risk, particularly when measured against the regulatory burden that they will impose. We commend the Committee and the CSA for addressing the regulatory objectives, key issues and challenges associated with this reform in a thoughtful and consultative manner.

The implementation of new registration requirements for derivatives will also have a significant impact on Canadian derivatives market participants and intermediaries, as well as on TMX Group subsidiaries, and our domestic and foreign market participants. Although many of our comments on registration requirements are addressed in broad terms, we would be pleased to expand on our comments, either in writing or in person.

TMX Group

TMX Group's key subsidiaries operate cash and derivative markets for multiple asset classes including equities, fixed income and energy. Toronto Stock Exchange, TSX Venture Exchange, TMX Select, Alpha Exchange, The Canadian Depository for Securities, Montréal Exchange, Canadian Derivatives Clearing Corporation, Natural Gas Exchange, Boston Options Exchange, Shorcan, Shorcan Energy Brokers, Equicom and other TMX Group companies provide listing markets, trading markets, clearing facilities, data products and other services to the global financial community. TMX Group is headquartered in Toronto and operates offices across Canada (Montreal, Calgary and Vancouver), in key U.S. markets (New York, Houston, Boston and Chicago) as well as in London, Beijing and Sydney.

Definition of Derivatives in the Consultation Paper

Our concern with respect to the Consultation Paper lies mainly with the scope of the definition of derivatives for the purposes of registration, and the potential impact on exchange-traded and centrally-cleared markets and participants on those markets.

The Introduction to the Consultation Paper refers specifically to the need to impose obligations on certain participants in the OTC derivatives market.

> "In Consultation Paper 91-401 the Committee outlined its proposals relating to the regulation of over-the-counter ("OTC") derivatives in Canada, including proposals to impose obligations on *certain participants in the OTC derivatives market."* (emphasis added)

In the next sentence Paper extends these requirements to all derivatives markets:

> "To implement those regulatory proposals the Committee believes that it is necessary to impose registration requirements on key derivatives market participants (including participants that represent significant risks to the market because of their derivatives exposure and persons *in the business of trading in derivatives or providing advice in relation to derivatives.*" (emphasis added)

On page 22 of the Paper the Committee suggests that the definition of derivatives provided in CSA Staff Consultation Paper 91-301 can provide insight into what types of instruments may be considered derivatives for the purposes of triggering registration as a derivatives dealer. This definition (the "Scope Rule") is a negative definition, specifying those contracts that are not to be considered derivatives, and catches all exchange-traded futures and options in its very wide net. We observe that the focus of the Committee shifts very abruptly from OTC derivatives and OTC market participants to the much broader category of <u>all</u> derivatives, including those that are listed on an exchange and cleared by a central counterparty.

We are concerned with the scope this definition. The CSA's OTC derivatives market reform project is exactly that – a set of proposals aimed at the regulation of OTC markets, which have been identified as under-regulated, insufficiently transparent and potential sources of systemic risk. In contrast, exchange-traded derivatives are centrally cleared and subject to a comprehensive regulatory regime, including laws and regulations relating to the authorization and supervision of exchanges, clearing houses and market participants. Exchange-traded derivatives offer a fair and transparent market model, efficient price discovery, market liquidity, anonymity and rigorous market surveillance. These derivatives already benefit from all of the risk management and mitigation advantages of central counterparty clearing. Furthermore, the rules governing market access and trading of exchange-traded derivatives in Canada extend to rigorous proficiency requirements specific to registrants who deal in or advise on exchange-traded derivatives.

In fact, most OTC regulatory reform efforts seek to apply the advantages of exchange-traded derivatives - transparency, central counterparty clearing, market regulation and surveillance, and participant registration - to the OTC markets. We therefore submit that there are no benefits to be gained by including exchange-traded derivatives within the scope of this registration regime, and we strongly recommend that the Committee make clear that the proposals in this Paper do not extend to exchange-traded derivatives. This would avoid significant duplication and confusion, align the proposals with rules adopted in the US and Europe, and would also be consistent with other OTC reform proposals that do not apply to exchange-traded derivatives, such as segregation and portability and trade reporting.

Registration requirements

Not excluding exchange-traded derivatives from this definition will impose significant and unnecessary costs and burdens on participants on derivatives exchanges, without providing any additional risk management or investor protection benefits.

Under the heading Derivatives Dealers the Paper specifies that:

> "The Committee believes that persons carrying on the business of trading in derivatives or holding themselves out to be carrying on that business should be regulated. The Committee recommends that these persons be required to be registered as derivatives dealers in each Canadian province and territory where they conduct derivatives trading business, unless an exemption is available."

First, we recommend that market participants who are currently subject to registration requirements under existing Canadian laws and regulations with respect to their activities on derivatives exchanges not be subject to duplicative and redundant registration requirements under new derivatives legislation. Persons carrying on the business of trading in exchange-traded derivatives are already regulated under existing derivatives and securities laws and regulations, as well as by IIROC rules and proficiency requirements. Canadian broker-dealers are subject to a comprehensive regulation regime with respect to exchange-traded derivatives, and layering an additional regime on top of this one will not advance in any way the transparency, integrity or stability of markets, OTC or otherwise. It should be noted that CFTC registration requirements clearly limit the requirements to those participants who are dealers in swaps, and not all derivatives.

Second, we recommend that the Committee clarifies the differences between dealing and trading. There is clearly a difference between the concepts of dealing in OTC derivatives and trading exchange-traded derivatives. For example, IIROC Dealer Rule 1.1 defines a Securities Dealer as:

> "**Securities Dealer**" means an <u>individual</u>, firm or corporation acting as dealer (principal) or broker (agent) in carrying out transactions in securities and commodity futures contracts or options on behalf of clients and includes, without limitation, acting as an underwriter or adviser;

This is clearly distinct from the concept of trading, whereby a market participant enters orders to buy and sell through the agency of a securities or derivatives broker, or directly if they are eligible for exchange membership. There is an entire class of market participant that trades exchange-traded derivatives to an extent that would meet the Committee's proposed trading trigger, but should not be deemed to be dealers. These traders, known as principal or proprietary traders, trade their own accounts and do not offer services to or trade against clients. Principal traders trade on exchanges as clients of Canadian broker/dealers, who are registered and regulated in accordance with the relevant provincial securities or derivatives regulation, as well as being subject to IIROC member regulation. In addition to the fact that IIROC broker-dealers are gatekeepers for these principal traders, these traders in turn do not advise, act on behalf of, or face clients. There is therefore no apparent rationale for considering them to be dealers despite their trading activity, and imposing investor protection or business conduct obligations on them would add significant costs without adding any benefits. These traders are not subject to registration under current legislation and regulation, and we question how the registration of principal traders on exchange-traded and centrally-cleared derivatives markets would advance the objectives of the OTC market reform project.

We strongly recommend that the Committee clarifies that a market participant that trades exchange-traded derivatives, trading through the agency of a registered dealer, would be exempt from registration requirements, similar to the exemption in NI 31-103 Section 8.5.

Exemptions

There are very limited exemptions available under the proposals. The first is for regulated persons, but the exemption refers only to regulatory regimes imposed by "other Canadian regulatory authorities," which implies that these are authorities other than the members of the CSA. This would seem to exclude existing registration requirements under existing securities and derivatives regulation, and apply principally to other financial institutions, principally banks. As noted above, we strongly recommend that market participants who are already subject to registration requirements not be subject to a duplicative and redundant registration regime.

The other exemption is for Foreign Derivatives Dealers and Advisors. This is not a registration exemption, but rather an exemption from certain regulatory requirements where the Foreign Derivatives Dealers and Advisors are subject to an equivalent regulatory regime in their home jurisdiction. It appears that the foreign dealers and advisers will be expected to make the case that their home regime is substantially equivalent to the Canadian regime.

We recommend that exemptions should be provided where equivalent regulatory regimes are in place. With respect to CSA members, this would apply to market participants that are already subject to registration requirements. With respect to the assessment of equivalent regimes in foreign jurisdictions, we recommend that this assessment of substituted compliance should be done by and among regulators. Obliging foreign entities to make the case of equivalence in each and every application for an exemption would seem to be duplicative and wasteful. The CSA should be able to assess the principal jurisdictions – i.e. US, EU – for equivalence once and then grant recognition consistently.

Shorcan Brokers Ltd., ("Shorcan") part of the TMX Group, is a concrete example of a firm that is already registered and regulated, and therefore should be exempted from any proposed derivatives registration regime.

Section 6.1 (b) (i) regarding Business Trigger for Trading states:

> "Intermediating Trades – In general, the provision of services relating to the intermediation of trades between counterparties to derivative contracts will be considered to be a trading business activity. This typically takes the form of the business commonly referred to as a broker."

Shorcan is an inter-dealer bond broker active in brokering Canadian fixed income products, including interest rate derivatives, since 1977. Shorcan is registered as an Exempt Market Dealer (EMD) with the OSC and is subject to minimum capital requirement. All of Shorcan's brokers are subject to proficiency requirements.

Shorcan is also regulated as an inter-dealer bond broker with IIROC and is regulated by IIROC rules 2100 and 36. Shorcan does not provide its clients advice nor does Shorcan take principal positions (no risk).

Shorcan's client base includes US Broker Dealers and as such is currently in the process of registering with the National Futures Association as an Introducing Broker (IB) for the purposes of preserving access to the US customers as it pertains to its CAD$ derivatives business.

The TMX Group submits that inter-dealer bond brokers, registered as EMD's, governed by IIROC be exempt from the derivatives registration contemplated in the Consultation Paper as the registration requirements would be redundant and superfluous.

De Minimis Exemption

Finally, we recommend a de minimis exemption for registration. This will make our rules consistent with those in the US and Europe, avoiding regulatory arbitrage. Set at an appropriate threshold, a de minimis exemption will avoid the registration of firms that are not primarily in the business of dealing, for example commercial hedgers and principal traders. For many firms, particularly those that participate in the commodity sector, no allowances for even relatively small amounts of un-hedged positions is practically very difficult to achieve and administratively burdensome.

Consistent with U.S. regulations, derivative volumes counted towards the de minimis threshold should exclude exchange-traded derivatives as well as bona fide hedge transactions. While entities falling below the de minimis threshold would not be subject to registration, such entities would remain subject to all registrant requirements for those transactions that do not qualify as hedge transactions. This framework ensures that market participants that engage in diminutive levels of speculative activity are subject only to registrant requirements for the portion of their business that is un-hedged. Such methodology aligns with the regulatory aim of not imposing unnecessary commercial burden while ensuring material risks are managed in a consistent and prudent manner.

CONCLUSION

TMX Group is supportive of the general direction in which the CSA proposals have been framed. We applaud the commitment by the CSA to implement reforms intended to enhance the transparency of OTC markets and the overall mitigation of risks. We believe that OTC markets will benefit from appropriate and sensible regulatory reform, and that the CSA must focus on areas that have been identified as under-regulated and that will actually benefit from reform. We also strongly recommend a thorough evaluation of the costs and benefits of any change to the regulatory environment, ensuring that additional regulatory burdens will produce better risk mitigation and transparency outcomes. We are ready and willing to participate in the development and implementation of these reforms in order to improve market integrity and systemic stability.

Please feel free to contact me at (514) 871-3525 with any questions regarding our comments.

Respectfully submitted,

Alain Miquelon

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June 17, 2013

VIA electronic submission

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission

Dear Sirs/Mesdames:

Re: Comment Letter to CSA Staff Consultation Paper 91-407 – Derivatives: Registration

TransAlta Corporation **("TransAlta"**) and its affiliates hereby respectfully submit comments on the Canadian Securities Administrators (**"CSA"**) Staff Consultation Paper 91-407 – Derivatives: Registration **("CSA Paper 91-407"**) published by the CSA OTC Derivatives Committee (the **"Committee")** on April 18, 2013, providing an overview of the Committee's proposals (the **"Proposals"**) to impose a registration regime on key derivatives market participants. TransAlta appreciates this opportunity to comment on CSA Paper 91-407 and looks forward to further dialog following the submission and consideration of these comments.

Introduction:

TransAlta is Canada's largest publicly traded generator and marketer of electricity and renewable power. TransAlta owns, operates and manages a highly contracted and geographically diversified portfolio of assets that utilize a broad range of generation fuels including coal, natural gas, hydro, wind and geothermal. TransAlta's major markets are Western Canada, the Western U.S., and Eastern Canada. TransAlta owns a total of 6,536 MW of electricity generation capacity in Western Canada and 1,479 MW in Eastern Canada. TransAlta uses OTC derivatives transactions to manage its exposure to price volatility in organized electricity markets and reduce price risks associated with fuel inputs which TransAlta faces. TransAlta's primary objective as a generation company is to manage the revenue risk TransAlta faces due to fluctuations in short-term, spot market power prices.

Wholesale marketing is conducted by TransAlta Energy Marketing (U.S.) Inc. ("**TEMUS**") and TransAlta Energy Marketing Corp. ("**TEMC**"). Market activity is composed of asset hedging and optimization of our power generation portfolio and securing our fuel requirements, electricity retailing to mid to large sized commercial and industrial customers, and proprietary trading of electricity and natural gas. TransAlta utilizes a variety of instruments to manage price exposure, including physical forward contracts for electricity, natural gas and environmental commodities, and financial derivative transactions based on those same commodities. Much of TransAlta's trading activity takes place on regulated electronic exchanges and clearing platforms, such as Intercontinental Exchange (ICE), Chicago Mercantile Exchange (CME) and Natural Gas Exchange (NGX), and via brokered transactions or directly with counterparties. Historically, at least 95% of TEMC/TEMUS's financial derivative trading is through a cleared platform. Interest rate and foreign exchange derivatives are transacted by our centralized treasury function organized within TransAlta Corporation ("**TAC**"), which is our ultimate parent company. Treasury transactions are entered into for the purpose of risk mitigation and are not used for speculative trading or investment.

For the interest of the Committee, TransAlta's companies with derivative activity are classified under the Dodd-Frank regime implemented by the CFTC as "Non-Swap Dealers / Non-Major Swap Participants / Non-Financial Entities". Under the Dodd-Frank regime, TEMUS is a "US Person" through its incorporation in Delaware but operates from our office in Calgary, Alberta. TEMC and TAC are "Non-US Persons", being incorporated under the Canada Business Corporations Act with a registered office in Calgary, Alberta. In general, TEMUS, TEMC and TAC represent themselves as a "Qualified Party" and/or an "Eligible Contract Participant" ("ECP"), as applicable, in our ISDA standardized enabling agreements.

General Comments:

First, we would like to state that we are a member of the *Canadian Energy Derivatives Working Group.* We endorse the comment letter submitted by the group on 91-407[1].

TransAlta supports the efforts of the CSA to design and implement a regulatory regime that will "strengthen Canada's financial markets and manage specific risks related to OTC derivatives, implement G-20 commitments in a manner appropriate for our markets, harmonize regulatory oversight to the extent possible with international jurisdictions, all while avoiding causing undue harm to our markets."[2]. While TransAlta supports the efforts of thoughtful and effective reform, TransAlta remains concerned that the proposals put forward in CSA Paper-91-407 are representative of effective securities markets regulation and are ill-suited to the regulation of derivatives markets.

TransAlta notes that the Committee considered regulatory regimes in a number of foreign jurisdictions, particularly the US and Europe, as well as the "existing CSA registration regime for securities as well as existing regulatory requirements applicable to derivatives market participants in each CSA jurisdiction."

TransAlta is concerned that the regime proposed in Consultation Paper 91-407 relies too heavily on the pre-existing registration regime for securities in Canada and does not adequately

[1] Priscilla Bunke (Dentons Canada LLP on behalf of the *Canadian Energy Derivatives Working Group*), "Comment Letter to CSA Staff Consultation Paper 91-407 - Derivatives Registration", June 17, 2013

[2] CSA Consultation Paper 91-401 on Over-the-Counter Derivatives Regulation in Canada, November 2, 2010

consider the fact that OTC derivatives, as risk-management tools, differ in material ways from securities. We are further concerned that the registration regime set out in the Proposals does not clearly align itself to those elements of reform that have been identified as necessary in order for Canada to meet G-20 commitments.[3] TransAlta respectfully comments that it is unclear whether a registration regime is required at all in order for Canada to meet its G-20 commitments.

Nevertheless, if such a regime is justifiable, TransAlta would in general, recommend close alignment with regimes being implemented by Canada's G-20 peers, and in particular, the US. In support of this recommendation, TransAlta notes that the importance of alignment has been acknowledged by the CSA.[4]

<u>Detailed Issue Discussion:</u>

DEFINITION OF DERIVATIVE

TransAlta respectfully comments that a necessary first step in the identification of registration categories is the definition of "OTC Derivative". TransAlta is concerned that despite the Committee's express recognition that "derivatives markets operate in ways that are different from securities markets" and that "the regulation of derivatives market participants involve derivatives-appropriate registration requirements", the Committee has nonetheless stated that it believes that is "desirable to subject all types of derivatives to a consistent regime regardless of the nature of the underlying asset".

TransAlta respectfully submits that different derivative products in fact carry different risks. This difference was acknowledged by US regulators in the exclusion of energy forward contracts from the definition of "swap" under the Dodd-Frank Act.

TransAlta notes that the Committee has defined OTC derivative for the purposes of trade reporting in *CSA Staff Consultation Paper 91-301 – Model Provincial Rules – Derivatives: Product Determination.* We recommend the adoption of the same definition for the purposes of registration, noting that the Committee has already stated that this definition would provide them some insight into the types of instruments that the Committee may recommend to be considered

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[3] On October 26, 2010, the Canadian OTC Derivatives Working Group set out preliminary recommendations for implementing Canada's G-20 commitments related to OTC derivatives. The five areas of reform were: i) capital incentives and standards; ii) standardization; iii) central counterparties and risk management; iv) trade repositories and v) trading venues.

[4] "Although a significant market in Canada, the Canadian OTC derivatives market comprises a relatively small share of the global market, with a substantial portion of transactions involving Canadian market participants transacting with foreign counterparties. It is therefore crucial that rules be developed for the Canadian market that ensure Canadian market participants have access to international markets and are regulated in accordance with international principles."

derivatives for the purposes of triggering registration as a derivatives dealer.[5] At a minimum, TransAlta recommends an explicit definition of OTC derivative for the purposes of registration.

An explicit definition is required because without a meaningful definition of OTC derivative which has its roots in the mitigation of systemic risk, market participants face a high level of uncertainty regarding the registration requirements applicable to their activity and the Committee risks imposing registration on market activity that does not contribute to systemic risk. Absent such clarification, entities possibly affected face uncertainty as to which aspects of their derivative market activities (which could cover exchange-traded futures, physical, ISO trades and/or retail activity) would qualify that entity for registration. The Committee's proposals concerning registration should be confined to the appropriate derivative instruments that are the subject of the overall regulatory agenda.

Furthermore, derivatives used to hedge an entities' commercial risk (end user transactions) should be excluded from the activity that is considered as part of registration.

TransAlta also emphasizes that the magnitude of the impact of registration requirements on market participants goes beyond the individual requirements of registrants laid out in the Proposal, specifically:

- Registration as a derivatives dealer would impose immense technology upgrades and process changes in order to meet trade reporting deadlines (i.e. the 'as soon as technologically practicable' standard vs. the existing 'next day' reporting to trade repositories that TransAlta has been required to comply with in the US).
- Registration as a derivatives dealer would disqualify an entity from taking advantage of any end-user exemption from clearing. TransAlta appreciates that the CSA has also published a discussion paper on the end user exemption and that this paper explicitly acknowledges that some participants may use derivatives exclusively for the purpose of managing commercial risk.[6] TransAlta also understands that the end user exemption applies to clearing and collateral requirements, *not to registration*. However, *CSA Consultation Paper 91-405 - End-User Exemption* puts forward a regime that would disqualify any market participant required to register as a derivatives dealer from electing to use the end user exemption. Therefore, as we will describe more fully below, TransAlta, is concerned that trading in derivatives for the purpose of asset hedging or proprietary trading may trigger registration as a derivatives dealer, and a consequent inability to elect an end user exemption from clearing for transactions that are legitimate, risk reducing hedges and that qualify as risk management activity.

APPROPRIATE DEFINITION OF QUALIFIED PARTY

As previously noted, TransAlta is in the business of operating electric generation facilities and supplying low-cost electricity to mid and large-sized consumers in Canada. While much of

[5] CSA Consultation Paper 91-301 Model Provincial Rules - Derivatives - Product Determination and Trade Repositories, December 6, 2012

[6] CSA Consultation Paper 91-405 Derivatives - End-User Exemption, April 13, 2012

TransAlta's electricity is hedged and delivered into the wholesale market, TransAlta also has a portfolio of transactions for the sale and retail supply of electricity to commercial and industrial customers[7]. In addition to aforementioned concerns regarding an appropriate definition of OTC derivative for the purposes of registration, TransAlta is concerned that without an appropriate definition of qualified party, our business of providing low-cost electricity to retail consumers (potential non-qualified parties) might trigger an onerous registration requirement, accompanied by clearing and collateral requirements. While TransAlta believes that non-qualified parties should benefit from certain protections in applicable derivatives markets, we submit that retailing arrangements for the consumption of electricity are effectively overseen by other regulatory regimes.[8]

In addition to our comments regarding the appropriate definition of OTC derivatives and derivatives dealing, TransAlta recommends that the definition of qualified party be informed by and aligned with the definition of an eligible contract participant under the Commodity Exchange Act.

MINIMISATION OF INDIVIDUAL REQUIREMENTS WHEN DEALING WITH QUALIFIED PARTIES

TransAlta believes that it is appropriate to minimize the individual requirements to qualified parties who deal primarily with other qualified parties. TransAlta appreciates that the CSA has noted material differences between the trading of securities as investment tools, and derivatives as risk management instruments. In line with this distinction, TransAlta submits that sophisticated commercial entities transacting with like entities should not be required to comply with the requirements in parts 7.2 and 7.3. TransAlta believes that sophisticated parties should be held to a standard that requires honest dealing in all of their activities, but submits that the requirements listed in 7.2 and 7.3 are suitably aimed towards the protection of unsophisticated parties. When large commercial producers of energy are engaging in risk management transactions, the protections offered by these requirements is minimal when consideration is given to safeguards present in commercial contracts, Canadian common law and when assessed against the high compliance costs associated with parts 7.2 and 7.3.

DERIVATIVES TRADING VS. DEALING

TransAlta recommends that the CSA give further consideration to their definition of what constitutes "trading" versus "dealing" in derivatives markets. It is unclear to TransAlta what the standard of "in the business of trading derivatives" amounts to. This definition appears to borrow

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[7] Although Alberta's electricity market is structured as a financial market where wholesale supply and demand receive net settlement payments based on a pool price and power does not need to be scheduled from generator to load, retailing arrangements with end-use customers can be thought of as akin to physical forward transactions settling on a contracted fixed price or index price.

[8] For example, in Alberta the Alberta Utilities Commission (AUC), the Alberta Electric System Operator (AESO) and the Market Surveillance Administrator (MSA) administer and have oversight over the organized electricity market.

from Canadian securities regulation, but TransAlta submits that it does not adequately lend itself to derivatives market activity. Trading in securities lends itself easily to the concept of a dealer-client relationship, while derivatives market activity in the energy asset class does not. TransAlta recommends that the Committee differentiate dealing from trading, and define these activities in a way that aligns itself with the definitions adopted by the CFTC. Some firms will engage in derivatives dealing for the purposes of their business, but a plain reading of being "in the business of trading derivatives" does not adequately capture the hallmarks of derivatives dealing activity, such as intermediating transactions, market-marking and providing clearing services.

TransAlta agrees with the Committee that "derivatives dealers" should be subject to registration requirements as the nature and level of their activity in the derivatives market is inextricably linked to the systemic risk which OTC reform seeks to mitigate. Market participants that enter into derivatives transactions for the purpose of hedging commercial and operational risk or trading for their own account (proprietary activity) should not be required to register as a "derivatives dealer" unless there is some other aspect of their business activity indicative of dealing activity (e.g. market-making activity). Such a distinction will also provide market participants with the requisite legal certainty to assess the future of their current business models in light of forthcoming reform.

CLARIFICATION OF DERIVATIVES DEALING – BUSINESS TRIGGERS

TransAlta is concerned with the "Business Triggers for Trading" identified by the Committee. In particularly, TransAlta submits that triggers (iii) and (iv) should be redefined.

Trigger (iii) explicitly seeks to capture firms whose derivatives activity is the subject of remuneration or compensation. TransAlta is concerned that this definition fails to distinguish between the separate activities of dealing and trading in OTC derivatives and fails to provide meaningful guidance as to what will amount to a finding that one is "in the business of trading derivatives".

The trigger, as written, appears to comingle the concepts of asset hedging, asset optimization and proprietary trading (all of which are activities where traders may receive compensation based on their performance) with derivatives dealing. In particular, by referencing "compensation for carrying on derivatives trading activity, including whether the compensation is transaction or <u>value based</u>"[9], the Committee is including a scope of activity that extends to end-user transactions. A plain reading of this trigger would require any entity that rewards its employees with incentive-based compensation, where that employee is tasked with hedging the long-range output of the company's assets, to consider whether the entity is a derivatives dealer based on this fact alone. Thus, by including trading with the intention of being remunerated or compensated as a business trigger, the Committee will likely, in its categorization of derivative dealers, require entities that do not engage in dealing activity to register as dealers. By requiring a far larger portion of derivatives market participants to register as dealers than would

[9] Underline added.

be warranted by their activity, the Committee's Proposal is not aligned with the goals of OTC derivatives reform.

TransAlta submits that even if the business triggers are intended to be analyzed by entities on a holistic basis, without further guidance as to the weight that entities should place on each trigger, entities face significant legal and regulatory uncertainty as to how their activity should be categorized.

As it relates to business trigger (iii) TransAlta recommends the following:

- As the CSA has proposed a registration category of Derivatives Dealer, "Business Triggers for Trading" should be renamed "Business Triggers for Dealing" as this will assist in the distinction of those entities engaged in dealing activity from those who trade for their own account.
- The framework for analysis of what constitutes "dealing" should consider the primacy and level of dealing activity that an entity engages in (the requirement to register as a dealer should further be tied to a defined *de minimis* threshold).
- Registration requirements for dealers should align with swap dealer requirements under the Dodd-Frank Act. The Committee should explicitly state, as the CFTC has done in its interpretative guidance, that hedging, investment and proprietary trading are not activities that will be considered as factors defining derivatives dealers.
- Additional exemptions from the requirement to register should be developed as part of ongoing consultation.

TransAlta is also concerned with business trigger (iv) and respectfully comments that as written, the trigger appears to potentially capture activity that is not dealing.[10] When entering into derivatives for the purpose of hedging production, or other risk management purposes, it is commonplace, to contact counterparties directly with the business terms of a derivative trade an entity would like to enter into. Energy firms often have "account managers" and "originators", alongside energy traders, who seek to hedge or optimize the firm's future production or generation through direct contact with counterparties. Contacting potential counterparties directly is necessary to determine interest in completing a trade. These trades are often completed as over-the-counter financial derivatives, and termed "direct business" in reference to not having been facilitated by an intermediating broker.

TransAlta submits that this type of activity is not necessarily characteristic of dealing activity, but is rather commonplace in regular hedging and commercial risk management activity in the energy industry. Again, for entities seeking to analyze how their business will be affected by OTC reform, the consideration of this factor could lead to unintended results, catching activity that is not dealing but rather legitimate hedging.

[10] "*Directly or indirectly soliciting* -- Contacting anyone to solicit derivatives trades will typically indicate a business purpose. Solicitation includes contacting someone by any means, including advertising that offers derivatives trading or participating in a derivatives trade, or that offers services for these purposes..."

TransAlta believes it may be helpful to consider the types of solicitation associated with derivative dealing in an effort to ensure that this trigger does not catch commercial risk management activity. Solicitation characteristic of dealing could include holding oneself out as being regularly available to arrange customized terms for derivatives upon request, creating new types of derivatives at the dealer's own initiative and advertising their availability. TransAlta also submits that the business triggers associated with swap dealers established through Dodd-Frank rulemaking may serve as helpful guides for establishing robust business triggers designed to identify those entities engaged in dealing activity.

LARGE DERIVATIVES PARTICIPANT (LDP)

TransAlta supports the determination of a quantifiable threshold level of derivatives exposure to identify those parties whose businesses may contribute to systemic risk. As stated above, we recommend that the definition of OTC derivatives is a necessary prerequisite to establishing the transactions that will be considered when applying the threshold level.

TransAlta submits that without an established threshold of exposure, it is unclear which participants would be required to register as an LDP. We also recommend that in order to establish a meaningful threshold and one that identifies "substantial derivatives exposure", the Committee should follow the approach of the CFTC and establish a level of activity that is linked to the G-20 commitments insofar that any threshold does not include commercial hedging transactions. Commercial hedges are used by companies to reduce the natural risks in their businesses, and are therefore scaled to the size of their physical production or generation. Setting a threshold based on this activity would penalize large producers.

JURISDICTIONAL HARMONISATION

TransAlta is concerned that the interprovincial and international nature of derivative activity will create burdensome and overlapping registration requirements for those required to register. The Committee uses five all-embracing factors to define whether a person is carrying on business in a jurisdiction and is required to register with a particular provincial regulator. However, derivatives transactions, especially in commodities markets, are often between counterparties operating from offices in different provinces or countries and that cover multiple physical locations.[11]

For Canadian companies (those incorporated under the Canada Business Corporations Act), TransAlta recommends that the Committee use the location of an entity's principal place of business to define its applicable provincial registration jurisdiction. That would allow for instance, a Canadian entity operating primarily from an office in Calgary to register in Alberta with the Alberta Securities Commission (ASC). As for companies incorporated in or having their principal place of business in another country, we recommend that the Committee look to harmonize their registration requirements with US and foreign regulators as much as possible,

[11] For example, a natural gas basis swap between Stn-2 (British Columbia) and AECO (Alberta) could be transacted between a company located in Saskatchewan and one with an office in Ontario.

including ascertaining whether an entity is subject to comparable and substitutable compliance before enforcing domestic registration.

Duplication of registration requirements is costly and should be unnecessary in the more transparent derivatives environment that is being designed by the regulators. TransAlta hopes that provincial regulators will endeavor to share information about derivatives trading activity amongst themselves and with their international counterparts, removing the burden from market participants to engage in costly repeat registration.

Comments to Selected Questions Posed by the Committee:

TransAlta has also submitted the following comments on the questions posed by the Committee:

Q2: What is the appropriate standard for determining whether a person is a qualified party? Should the standard be based on the financial resources or the proficiency of the client or counterparty? If the standard is based on financial resources should it be based on the net assets of the client or counterparty, gross annual revenues of the client or counterparty, or some other factor or factors?

For the purposes of derivatives within the energy markets, the definition of qualified parties should be tied to how entities hold themselves out for the purpose of entering into transactions. For example, TransAlta represents that it is a qualified party when it enters into an ISDA. Such representation should suffice for the purposes of determining whether a person is a qualified party. This will ensure that those entities wishing to transact as sophisticated commercial parties are not subject to burdensome requirements associated with non-qualified party transactions.

Q4: Are derivatives dealer, derivatives adviser and LDP the correct registration categories? Should the Committee consider recommending other or additional categories?

TransAlta recommends that the Committee abandon the category of derivatives advisor as this activity is properly caught by a more precise definition of derivatives dealer.

Q5: Are the factors listed the correct factors that should be considered in determining whether a person is in the business of trading derivatives? Please explain your answer.

TransAlta agrees with the factors listed but recommends that they be renamed as factors indicating that an entity is in the "business of dealing". Derivatives dealing should in turn, trigger registration, while derivatives trading would not.

Q6: The Committee is not proposing to include frequent derivatives trading activity as a factor that we will consider when determining whether a person triggers registration as a

derivative dealer. Should frequent derivatives trading activity trigger an obligation to register where an entity is not otherwise subject to a requirement to register as a derivatives dealer or a LDP? Should entities that are carrying on frequent derivatives trading activity for speculative purposes be subject to a different registration trigger than entities trading primarily for the purpose of managing their business risks?

TransAlta submits that frequent derivatives trading activity should not be a factor assessed when considering whether an entity triggers registration as a dealer. As addressed elsewhere in our comments, it is the nature (market-making) and size of an entities derivative market activity that should trigger registration as a dealer. Both hedging and speculation for one's own account are risk management activities that allow TransAlta and other producers of electricity to hedge commercial risk, optimize physical assets, collect market information, engage in price discovery, and make decisions to enter organized electricity markets as a generator and supplier of physical power.

Q8: Are the factors listed above the appropriate factors to consider in determining whether a person is in the business of advising on derivatives?

TransAlta submits that the category of Derivatives Advisor be abandoned. The triggers are appropriate for the category of Derivatives Dealer.

Q9: Are the factors listed for determining whether an entity is a LDP appropriate? If not what factors should be considered? What factors should the Committee consider in determining whether an entity, as a result of its derivatives market exposures, could represent a serious adverse risk to the financial stability of Canada or a province or territory of Canada?

TransAlta has addressed this question elsewhere in our comments, but in sum, the factors considered for determining whether an entity is an LDP should be tied to a quantifiable *de minimis* level of activity and exposure.

Q13: Is the Committee's proposal to impose a requirement on registrants to "act honestly and in good faith" appropriate?

Yes.

Q14: Are the requirements described appropriate registration requirements for derivatives dealers, derivatives advisers and LDPs? Are there any additional regulatory requirements that should apply to all categories of registrants? Please explain your answers.

Aside from previous comments on the suitability of the derivatives advisor category, the requirements appear appropriate. TransAlta is concerned that if the categories for registration remain as written, entities whose activity does not contribute to systemic risk will be required to meet burdensome and costly registration requirements. In this letter TransAlta has commented on the Proposals as written and urges the Committee to precisely define Derivatives Dealer that aligns with characteristic dealer activity, and establish a de minimis threshold. Market participants that do not trigger the dealer classification, nor meet the de minimis threshold would then be exempted from reporting requirements. This is desirable and in line with the aim of OTC reform, in that it will impose registration requirements on those entities that contribute to systemic risk.

Q15: Should derivatives dealers dealing with qualified parties be subject to business conduct standards such as the ones described in part 7.2(b)(iii) above? If so, please explain what standards should apply.

TransAlta recommends that derivatives dealing with qualified parties not be subject to the business conduct standards described the part 7.2 and 7.3. Derivatives dealers transacting with qualified parties are transacting with sophisticated commercial parties capable of assessing and managing their commercial risk without the protections in 7.2 and 7.3. TransAlta submits that these protections may be appropriate for dealing with non-qualified parties.

Q17: Are the recommended requirements appropriate for registrants that are derivatives dealers? If not please explain. Are there any additional regulatory requirements that should apply to registered derivatives dealers?

The requirements proposed appear to be appropriate, however TransAlta urges the Committee to consider that if the adopted definition of derivatives dealer casts too wide a net, entities not subject to registration under Dodd-Frank may be required to register, thereby incurring significant compliance costs. Please see previous comments on the appropriate definition of dealing activity.

Q20: Is the Committee's recommendation to exempt foreign resident derivatives dealers from Canadian registration requirements where equivalent requirements apply in their home jurisdictions appropriate? Please explain.

TransAlta supports this approach. Canadian regulators should seek harmonization with foreign jurisdictions in the global derivatives market where conflicting and overlapping rules could cause significant cost and confusion.

Conclusion:

TransAlta would like to thank the Committee for the opportunity to provide comments on CSA Consultation Paper 91-407 and we support the great undertaking of OTC derivatives market reform. However, in accordance with the comments in this letter, TransAlta urges the Committee to aim for precision in its distinction between derivatives trading and derivatives dealing. TransAlta also urges the categorization and exemption of derivatives that do not contribute to systemic risk, as well as the exemption of those entities whose activity is consistent with that of an end-user. These exemptions would assist in the avoidance of the imposition of costly compliance requirements on entities whose business does not contribute to systemic risk. Such an approach will also further efforts to remain harmonized with US regulation.

TransAlta looks forward to additional opportunity for comment and consultation on the Committee's efforts to design and implement OTC reform. If you have any questions or concerns regarding our comments, or require further assistance, please contact either of the undersigned.

Sincerely,

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Re. CSA Consultation Paper 91-407 – DERIVATIVES: REGISTRATION – Consultation Paper April 18, 2013 (the "Consultation Paper")

Dear Sirs,

TriOptima AB ("T**riOptima**") is pleased to submit the following comments in connection with the Canadian Securities Administrators Derivatives Committee (the "**CSA Committee**") Consultation Paper on Registration. 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 Consultation Paper, 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.

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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, 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 responses to the Consultation Paper

TriOptima supports the CSA Committee's approach to regulate market participants in accordance with international principles and the CSA Committee's continued monitoring of international standards.

Consultation paper Question 5, 8 and 23

As a provider of post-trade risk reduction services for the OTC-market and for reasons described below, TriOptima is seeking clarity to ensure that providers of post-trade risk reduction services (as further defined below) do not inadvertently fall within the scope of derivatives dealer or derivatives adviser activity as described in the Consultation Paper.

Post-trade risk reduction services, such as multilateral trade compression counterparty credit risk/portfolio rebalancing and basis risk reduction, can be clearly differentiated from trading activities in that they do not involve the interaction of buying and selling interests and are not price-forming. Instead, they are designed to reduce counterparty credit risk, basis risk and/or operational risk. Post-trade risk reduction services operate with some variation but there are common parameters that reflect their risk-reducing function and differentiate them from trading activity:

- They are multilateral and need to be executed in bulk as a single compound transaction to achieve the identified risk-reduction result and cannot be executed in part by any individual participant;
- There is no price negotiation – participants are not able to post bids or offers to enter into specific positions;
- They are designed to provide a result which is overall market risk neutral for each participant;
- They are designed to reduce unwanted secondary risks, such as counterparty credit risk, basis risk and/or operational risk – these risks have arisen as a result of contracts already entered into by the participants (e.g. because of their normal trading activities);
- They are non-continuous and non-real time – they operate on an overnight or intra-day basis using stale valuations

[1] See Annex 1.
[2] See Annex 2

Providers of post-trade risk reduction services are not party to any transactions and do not provide advice in relation to any transactions. Rather, providers of post-trade risk reduction services perform a calculation exercise based on parameters received from participants participating in the service and report the calculated result back to the participant that verifies the result and decide whether or not to implement the calculated result.

Derivatives dealer

Post-trade risk reduction services may be captured by the concept of being in the business of trading derivatives as described in the Consultation Paper due to the fact that reducing counterparty credit risk, basis risk and/or operational risk in a portfolio requires terminating, replacing and/or putting on trades between participants and may potentially fall under the 'intermediating trades' concept in the Consultation Paper. It should be clarified that post-trade risk reduction service providers should not be regarded as being in the business of trading derivatives since such services do not involve any 'trading activity' and should such services be seen to involve trading activity, such trading activity is only incidental to the administrative calculation functions it performs. For example in relation to trade compression, this view would also be in line with US[3] and European (proposed) regulation[4].

Derivatives adviser

Post-trade risk reduction services may be captured by the concept of being in the business of advising in relation to derivatives as described in the Consultation Paper since such services propose terminations, replacements and/or new trades in order to reduce counterparty credit risk, basis risk and/or operational risk in a portfolio of derivatives. Specifically, such services could be captured by the very broad interpretation that a person should be considered to be advising where they "provide another person with any advice or direction relating, either directly or indirectly, to trading derivatives, including the provision of advice in relation to the management of portfolios /../". It should be clarified that providers of post-trade risk reduction services should not be regarded as being in the business of advising in relation to derivatives as such providers only perform a risk-reducing calculation based on parameters provided by participants and report the result back to the participants. E.g., in a trade compression run, TriOptima merely calculates a compression proposal that would enable participants to reduce their gross position to be closer to their net position and participants verify the calculated proposal and decide whether to accept or reject

[3] See CFTC's final rule on Core Principles and Other Requirements for Swap Execution Facilities 78 FR at 33480-33482.
[4] Recital (7) and Article 25(a) of the latest EU Council's proposal for a regulation of the European Parliament and of the council on markets in financial instruments and amending Regulation (EU) No 648/2013 of the European Parliament and the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

the proposal. The provider does not provide participants with advice on the merits of entering into any trades. Should post-trade risk reduction service providers be seen to involve advising activity, such advising activity is only incidental to the administrative calculation functions it performs.

We are happy to provide further information on the above, if and as required.

Yours faithfully,

TriOptima AB

Per Sjöberg	Christoffer Mohammar
Chief Executive Officer	General Counsel

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 $300 trillion of gross notional exposure from the financial system since its launch in 2003 including, more recently, cleared transactions. triReduce has approximately 180 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 effectively rebalanced by lowering portfolio risk/DV01 characteristics of the portfolio and, thus, systemic risks, by appropriate injections of new bilateral non-cleared trades. Injections of off-setting trades which are not cleared can help to rebalance and stabilize the portfolio by eliminating risk sensitivities in the portfolio. 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.

June 17, 2013

John Stevenson, Secretary Ontario Securities Commission 20 Queen Street West Suite 1900, Box 55 Toronto, Ontario M5H 3S8 comments@osc.gov.on.ca	Me Anne-Marie Beaudoin, Corporate Secretary Autorité des marchés financiers 800, square Victoria, 22e étage C.P. 246, tour de la Bourse Montréal, Québec H4Z 1G3 consultation-en-cours@lautorite.qc.ca

Re: CSA Consultation Paper 91-407, Derivatives Registration

Dear Mr. Stevenson and Me Beaudoin:

Please accept this letter as the comments offered by Custom House ULC, doing business as Western Union Business Solutions ("WUBS") to CSA Consultation Paper 91-407, Derivatives Registration ("Consultation Paper"), submitted to you for forwarding to the Alberta Securities Commission, the Autorité des marchés financiers, the British Columbia Securities Commission, the Manitoba Securities Commission, the New Brunswick Securities Commission, the Nova Scotia Securities Commission and the Ontario Securities Commission (collectively, the "Regulators").

WUBS is pleased to provide its comments to the Consultation Paper, and respond to the Regulators' requests for comments on the derivatives dealer registration requirements ("Proposed Registration Requirements") outlined in the Consultation Paper. As noted in the Consultation Paper, the Proposed Registration Requirements are part of a larger effort by the Regulators to adopt uniform, comprehensive regulations of derivatives in Canada (the "Proposed Derivatives Regulations").

By way of background, WUBS is a registered MSB and operates a foreign exchange and cross border payment service in Canada. As part of that business, WUBS currently offers foreign exchange forwards and options, both of which products are or will be classified as derivatives in Canada under the Proposed Derivatives Regulations. The WUBS' customer base is predominantly made up of commercial entities which have foreign exchange hedging needs in relation to foreign exchange payments or for balance sheet hedging purposes. The customer base is largely comprised of smaller to medium enterprise commercial parties which may use WUBS, as opposed to large commercial banks, due to its industry-tailored payment solutions. In addition to its Canadian business, WUBS affiliates in the United States, Europe, Australia, Singapore, New Zealand and Hong Kong also deal in foreign exchange forwards and/or foreign exchange options. Accordingly, WUBS is familiar with the regulatory approaches taken in those jurisdictions to many of the issues addressed by the Regulators under the Proposed Derivatives Regulations.

WUBS recognizes the global trend toward greater regulatory oversight of derivatives dealing and its affiliates in the United States and Europe have implemented or are currently implementing many of the changes brought about by, respectively, the Dodd-Frank Act and the European Market Infrastructure Regulation (EMIR). As noted by the Consultation Paper, the Proposed Derivatives Regulations will align Canada with other major markets and will promote uniformity in regulatory oversight and market processes. We view the changes coming in Canada as a positive development and appreciate the opportunity to respond to the Regulators' requests for input from industry participants on the Proposed Registration Requirements. For ease of reference, we have included our responses under the re-stated questions as put forth in the Consultation Paper for industry comment.

Q2: What is the appropriate standard for determining whether a person is a qualified party? Should the standard be based on the financial resources or the proficiency of the client or counterparty? If the standard is based on financial resources should it be based on the net assets of the client or counterparty, gross annual revenues of the client or counterparty, or some other factor or factors?

WUBS supports the classification of a customer as a "qualified party" based on objective "bright line," "automatically qualifying" financial criteria. WUBS also proposes that the final regulations include additional means of qualifying customers who do not meet the bright line rule based on the use of a derivative for commercial hedging purposes and based on other specified subjective criteria, together with the mutual agreement between the customer and the derivatives dealer.

With respect to the adoption of a bright line rule, we generally agree that the accredited investor standard provides a reasonable financial benchmark for classification of customers as "qualified parties", with one exception. With respect to entities, under 1.1(m) of NI 45-106 an entity would qualify as an accredited investor only if it holds *net assets* of at least $5,000,000. In our experience this creates artificial barriers to participating in this market that do not serve legitimate policy needs. For example, WUBS has found that many companies - even medium to large-sized businesses - may, for various reasons, fail to meet this net asset test, even though such companies may operate a business with tens or even hundreds of millions of dollars of annual revenue. Companies often have unique features in their financial statements or, in many cases, have intentional policies of withdrawing profits from the business to pay shareholders, or to fund related enterprises, resulting in a lower net asset calculation. In many cases the failure to meet the net asset requirement is not indicative of the lack of sophistication of the company or of its size or ability to absorb losses which may occur from foreign exchange trading.

To the extent that a "financial test" is meant to be a surrogate for "suitability" and sophistication, we believe the final rules should allow for additional financial tests to satisfy the "qualified party" standard such as gross revenue. For example, there is no reason to believe that a corporation with $5,000,000 in gross revenue and $500,000 in net assets has less sophistication or is otherwise less suitable to purchase derivatives than an entity with only $2,000,000 in gross revenue but $1,000,000 in net assets.

In addition to implementing a bright-line financial test to classify an entity as a qualified party, WUBS would propose that the final regulations treat a customer as a "qualified party" if they are purchasing a derivative to hedge a commercial obligation. For example, WUBS markets foreign exchange derivatives exclusively to customers who need to hedge against a risk caused by fluctuations in the value of a foreign currency, such as in connection with foreign currency payment needs or balance sheet related foreign exchange exposures. Commercial hedging alone has long been an independent basis for customers to qualify to enter into a derivative transaction under applicable rules adopted in British Columbia, Alberta, and Quebec. In part, this likely arises from the recognition that many small Canadian businesses have a need to hedge currency risk through foreign exchange derivatives, given the (A) broad participation of small Canadian businesses in cross border trade that creates foreign exchange risk and (B) the pricing of commodities bought and sold within Canada such as oil, minerals and agricultural commodities in U.S. dollars.

Providing these small businesses with ready access to derivative markets to hedge their commercial risks serves the interest of both the customers and of the Canadian economy in general. In addition, in our experience, many small businesses for which the management of foreign exchange risk is critical to the success of their enterprise are generally well-versed in derivatives trading, notwithstanding the size of their business. We believe that that the Proposed Registration Requirements should continue to recognize this concept and treat all commercial hedgers as qualified parties. If this is not the case (and especially if the final rules limit the ability of qualified parties to deal directly with derivatives dealers, without incurring additional third party professional costs, as discussed under our response to Question 16, below), a substantial segment of the market may be dissuaded from hedging currency risks, increasing the scope of risk assumed by such entities.

Finally, if the use of foreign exchange derivatives for hedging purposes is not deemed alone to be a sufficient basis for classifying a party as a qualified party, WUBS would propose that there should be other non-financial means of meeting the qualified party test for parties which are hedging foreign exchange liabilities, such as past trading history (including frequency of trading), the professional designations and qualifications of the person acting for the customer dealing in FX products, the existence of audited financial statements, or the proportion of a party's foreign exchange revenues when compared to gross revenues. While any one of these criteria alone would perhaps be insufficient, a derivatives dealer should be given discretion to consider such relevant subjective criteria in aggregate and make a determination (reasonably documented) that customer may properly be treated as a "qualified party" even if the customer does not meet the "financial test". We believe that the final regulations should allow a customer to agree to be treated as a "qualified party" provided that derivatives dealer can reasonably demonstrate that (A) the customer has the requisite knowledge and experience to evaluate the information provided to the person about derivatives, the appropriateness to the person's needs of proposed derivatives strategies, and the characteristics of the derivatives to be traded on the person's behalf, and (B) the customer has sufficient financial means to fulfill the person's delivery or payment obligations under the terms of derivatives to which the person is party, in light of the positions held in the person's account and the orders the person is seeking to have executed.[1] The regulations might reasonably require clear record keeping establishing the basis for the dealer's determination of the foregoing as well as a signed acknowledgement from the customer agreeing to be treated as a "qualified party".

Of course, even if a customer meets the qualified party designation through whatever standards are ultimately adopted, we note that the suitability provisions of the Proposed Registration Requirements, as outlined in the Consultation Paper, apply to all client transactions and, accordingly, even for hedging transactions a derivatives dealer will have detailed obligations to assure that a particular derivative is suitable for the customer.

Q3: Should registration as a derivatives dealer be subject to a *de minimis* exemption similar to the exemption adopted by U.S. regulators? Please indicate why such an exemption is appropriate.

WUBS does not support the implementation of a de minimis exemption in ascertaining whether a party otherwise subject to a registration requirement should be required to register as a derivatives dealer. The national and global policy concerns that prompted broad review and regulatory overhaul of derivatives regulation apply irrespective of the size of the dealer with whom a customer contracts. Under the proposed regulations, customers will have confidence that persons registered as a derivatives dealer will be subject to a rigorous compliance regime designed to protect both against systemic risk, as well as specific risk to customers caused by unqualified, undercapitalized, or self-dealing dealers.

Adoption of a de minimis exception would create an uneven playing field where dealers who are not subject to registration might well have unfair commercial advantages, both with respect to ease of trading with customers and substantially lesser costs, resulting from the lack of a requirement to put in place the type of oversight and controls that will be needed to assure compliance with the new regime. In addition, an entity "dealing" derivatives but not subject to dealer registration and its concomitant obligations under the "course of business" rules, could sell and market derivatives to customers free of the requirements of good faith and fair dealing, and free of any obligation to disclose conflicts of interests. While WUBS largely supports the proposed regime and its effort to impose upon industry participants certain responsibilities to carefully consider and take into account the interests of their customers, if it were forced to compete with "dealing" entities that had no such requirements, it would be unfairly disadvantaged in a way which would be detrimental to the public interest.

Q4: Are derivatives dealer, derivatives adviser and LDP the correct registration categories? Should the Committee consider recommending other or additional categories?

We believe the proposed categories appropriately capture the role of key industry participants and support the delineation of these categories as set forth in the Consultation Paper.

[1] This standard is similar but not identical to the standard applicable under the rules defining an "Accredited Counterparty" under Section 3 of the Quebec Derivatives Act (http://www.canlii.org/en/qc/laws/stat/rsq-c-i-14.01/latest/rsq-c-i-14.01.html)

Q5: Are the factors listed the correct factors that should be considered in determining whether a person is in the business of trading derivatives? Please explain your answer.

We believe the proposed business trigger categories for dealer registration are appropriate.

Q10: Is the Committee's proposal to only register derivative dealer representatives where they are dealing with clients or when dealing with counterparties that are non-qualified parties appropriate?

WUBS agrees that all derivative dealer representatives who provide advice to clients relative to derivatives should be registered, whether or not the client is a qualified party. Although "dealers" and other representatives advising customers on the purchase of a derivative should properly be subject to registration, WUBS believes that that the final rules should make clear that customer service representatives or others in an administrative role who may provide information to a customer about their account, including the status of any derivatives in the account, are not subject to registration, provided they are not advising customers on whether to purchase or sell, or make any material change to a derivative. Similarly, we would suggest that representatives of a dealer who provide non-specific opinions or information about derivatives, such as persons writing articles or speaking at conferences where the general public or prospective derivative customers are the targeted audience and the information or opinions given are not directed to a particular client or the sale or purchase of a particular derivative, does not need to be registered.

Q11: Is it appropriate to impose category or class specific proficiency requirements?

WUBS strongly agrees that proficiency requirements ought to be by category and be class specific. Although certain characteristics are common to all derivatives, different classes of derivatives have widely varying risk profiles, and the differences between classes are more significant than the similarities. The complexities of each of the various categories of derivatives are alone substantial and challenging. For example, WUBS focuses solely on the foreign exchange derivative business, and expects its representatives to understand completely the nature of that business and the various derivatives that are sold and bought by industry participants. Spending time learning about agricultural commodity or credit default derivatives would be unnecessary and only take valuable time away from focusing on the information our customers will need to best use our products and services. The customer, the industry, and the financial system will be best served with representatives focused solely on mastering the intricacies of their category and class of derivatives.

In addition, WUBS recommends that the final rule include provisions for making publicly available (i.e., via a website accessible by the public) the list of representatives registered and authorized to give advice in connection with the sale or purchase of a derivate. This both encourages transparency and compliance, while offering customers a method of validating the qualifications of the dealer representatives with whom they transact.

Q12: Is the proposed approach to establishing proficiency requirements appropriate?

WUBS generally supports the proficiency requirements as conceptually laid out in the Consultation Paper and, in particular, endorses the view that objective criteria demonstrating proficiency such as passing industry-specific, third party offered examinations is one appropriate way to demonstrate proficiency.

WUBS notes that such a training and testing regime is not widely available in Canada today and likely will take industry participant collaboration to develop. We believe such a scheme can be developed and supported, however, and note that other jurisdictions in which foreign affiliates of WUBS operate (including Australia and Singapore) have such third party accreditation/certification requirements in place today. WUBS proposes that once employment commences for an individual representative subject to proficiency requirements, the individual should be allowed a limited time period (for example, 6 to 12 months) to successfully complete examinations. Until such examinations are completed, risk can be mitigated by having individuals restricted from dealing with customers unless supervised by another employee who has successfully completed proficiency tests.

For the interim, until such time as a derivatives course/testing regime can be developed and implemented, we would support requiring derivatives dealers to have their own formalized training and qualification regimes in place that address the regulatory objectives of assuring that persons providing advice to customers on derivatives have both product proficiency and an understanding of the derivatives compliance regime. Derivatives dealers during any interim period could properly be charged with keeping records demonstrating that all persons providing advice to clients regarding derivatives meet such requirements. WUBS proposes that any proficiency requirements -whether interim or permanent - be phased in to provide a reasonable time period for existing employees to be trained in accordance with any new requirements.

Q13: Is the Committee's proposal to impose a requirement on registrants to "act honestly and in good faith" appropriate?

WUBS supports the proposal to apply the "act honestly and in good faith" requirement to Derivative Dealers. However, WUBS also supports the introduction of clear and unambiguous language or requirements issued by the Regulators to ensure that registrants understand and can satisfy the purpose of the requirement. For example, an industry code of conduct as is currently in place for other providers, such as broker/dealers in securities, could be introduced which sets out general principles for satisfying such requirements.

Q14: Are the requirements described appropriate registration requirements for derivatives dealers, derivatives advisers and LDPs? Are there any additional regulatory requirements that should apply to all categories of registrants? Please explain your answers.

WUBS supports the Proposed Registration requirements in concept, as outlined in the Consultation Paper.

Q15: Should derivatives dealers dealing with qualified parties be subject to business conduct standards such as the ones described in part 7.2(b) (iii) above? If so, please explain what standards should apply.

WUBS believes that the business conduct standards as outlined in part 7.2(b) (iii) are generally appropriate and should apply to trades with all clients, including both qualified parties and non-qualified parties. However, WUBS would respectfully suggest that business conduct standards should apply only when a client enters into a trade for which it seeks or receives advice from the derivatives dealer. While WUBS understands and supports the need for business conduct standards where a counterparty is looking to a provider for advice on a product, in many cases counterparties are sophisticated in trading and do not seek advice from the derivates dealer but are procuring foreign exchange hedging products for execution purposes only. In such circumstances, the application of business conduct standards are likely unnecessary and may affect the ability of parties to shop around for best price (given the additional time and steps which would be necessitated by the standards).

WUBS would also like to comment on the proposed “Gatekeeper Requirements” pursuant to which the Consultation Paper indicates that a derivatives dealer should be aware of “potential compliance issues that may relate to the client (for example past regulatory issues that they or their staff may have had…)” and “other information necessary to apply anti-money laundering legislation or other comparable regulatory requirements.” WUBS respectfully suggests that relevant federal and provincial regulation clearly prescribes the obligations of financial service providers (including money services businesses) regarding customer identification and other AML-related requirements. Any additional obligations included in the proposed derivatives legislation should be drafted carefully or should refer to the requirements in such AML legislation so that there is no inadvertent confusion caused with respect to such obligations. In addition, general “know your customer” requirements involve reasonable due diligence into the business and business practices of a customer. However, there is a limited extent to which a provider has access to prior known compliance issues or problems that a prospective client has had, or the extent to which such issues have been satisfactorily addressed and resolved between that party and its relevant regulator. WUBS respectfully suggests that, beyond the due diligence requirements set out in relevant anti-money laundering regulations, the review of customers’ regulatory issues and conduct is better achieved by regulators than by private parties.

Finally, WUBS would ask that the final regulations clarify the responsibilities under the business conduct requirements for situations when two derivatives dealers enter into derivative transactions with each other. For example, WUBS may enter into derivative transactions with a large bank or derivatives dealer to hedge its own liabilities which may arise in connection with customer trades. It would seem incongruous for WUBS to have the obligation to treat our derivatives dealer counterparty as a “customer” and be subject to the suitability and conflict of interest determination requirements set forth in the Consultation Paper with respect to our derivatives dealer counterparty.

Q16: Do you have a preference between the two proposals relating to the regulation of a derivatives dealer trading with counterparties that are non-qualified parties? Is there another option to address the conflict of interest that the Committee should consider? Please explain your answer.

WUBS strongly prefers the Second Alternative, which would permit derivative dealers to trade with non-qualified counterparties provided they advise the counterparty of their right to obtain independent advice prior to entering into the transaction and require written acknowledgment from the customer if the customer elects to proceed without independent advice. This would encourage businesses to continue to hedge their commercial risks, which would serve the interest of both these businesses and Canada's economy in general.

WUBS notes that the First Alternative could greatly increase the transaction cost to a customer as well as potentially lead to delay and inconvenience in completing transactions in a timely manner. In many of the derivative markets, a particular derivative may only be available at a particular price for a short period and delay could result in substantial loss to the client. With respect to customers who use derivatives to hedge risk, which constitutes virtually the entire WUBS' customer base, the small customer may dispense entirely with purchasing a derivative, thereby assuming the full risk of market movements rather than incur the costs of obtaining advice from two separate professionals. WUBS strongly believes that introduction of the First Alternative would not serve the interests of customers and indeed could very well increase the risk of customer losses as a result of the strong potential that many parties which now hedge foreign exchange exposures would cease to do so.

WUBS believes that, subject to modification, the Second Alternative achieves the objectives of the Proposed Derivatives Regulations and does not increase the risk that businesses will cease or decrease their hedging of foreign exchange exposures. As mentioned above in connection with External Business Conduct Rules, WUBS notes that as a practical matter customers frequently deal with more than one derivatives dealer and can often "shop" for the best deal, or confirm for themselves that the terms of the derivative transaction as offered by the derivatives dealer are reasonable. Such customers generally use providers for execution purposes only and are not looking to the dealer to provide advice or assess suitability of a product for its use. This could apply to parties which are or are not Qualified Parties. To this end, a third alternative would be to provide customers who are proficient in derivatives dealing, based on the criteria set out in our response to Question 2, to opt out at the outset of the trading relationship from the requirement to sign such acknowledgements on a transaction by transaction basis. Requiring such acknowledgements on a transaction by transaction basis could negatively affect the ability to trade in a timely fashion and at the most effective price. Any increased risk which may be perceived to occur for the customers who are able to opt out of such obligations, could be addressed by other means such as provision of product specific disclosure documents at the outset of the relationship.

Q17: Are the recommended requirements appropriate for registrants that are derivatives dealers? If not please explain. Are there any additional regulatory requirements that should apply to registered derivatives dealers?

WUBS generally supports the proposed requirements, with the exception of a portion of the requirements outlined for pre-trade reports. Under the third bullet setting forth the required disclosure items is "a detailed description of the risks to and the rights and responsibilities of the client or counterparty under the terms of the trade." While WUBS agrees that it is entirely appropriate to require full disclosure of the risks of a derivative and the rights and responsibilities of the client, WUBS respectfully suggests that such a disclosure is more appropriately given in the parties' legal documents or in a separate product disclosure document provided at the initiation of the customer relationship. We note that product disclosure statements are frequently provided in other jurisdictions in which WUBS operates (for example, in Australia). A requirement that each derivatives dealer provide a written disclosure and description of the risks, rights and responsibilities of the client in connection with a derivative contract is appropriate. However we suggest that a one time (or periodic) product disclosure statement should be an accepted method of providing such disclosure.

WUBS thanks you for the opportunity to provide input to the Consultation Paper and looks forward the publication of proposed rules.

Best regards,

Ian Taylor

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Response to CSA Consultation Paper 91-407 – Derivatives Registration

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Tuesday, 18 June 2013

Introduction

The Wholesale Markets Brokers' Association and the London Energy Brokers' Association (hereafter referred to as WMBA) welcomes the opportunity to respond to the issues raised in the CSA Consultation Paper 91-407 – Derivatives Registration; and looks forward to further active engagement at the agency's pleasure.

WMBA comments are made from the viewpoint of its members who act as Limited Licence/Limited Activity firms in the wholesale markets not only in Europe but also around the world. Several of our members operate Canadian subsidiaries, most notably BGC Partners and Tullett Prebon. We note that WMBA member firms arrange the vast majority of C$ financial instruments and their derivatives that are traded both within Canada and overseas.

Our response here is very brief, being an overseas Trade Association, but we note an interest on behalf of our membership most especially in cross border access to liquidity pools, financial market infrastructures and market participants. Details of members, methods employed in organising platform venues and in arranging transactions are detailed on www.wmba.org.uk and www.leba.org.uk

Summary of Key Points

1. **WMBA notes that according to the definitions in the CSA paper, non position taking intermediaries whom are authorised as investment firms such as WMBA members are designated as "Derivatives Dealers". This is likely to bring about a disproportionate regulatory regime, especially in areas such as capital requirements, resolution and third country equivalence.**

2. **WMBA members very frequently arrange transactions in C$ financial instruments or derivatives based upon Canadian underlying assets or**

indices from outside Canada. The equivalence regime therefore, whilst welcome in principal, highlights the widespread issue that no two regimes are at all equivalent due to differences in both regulatory and legal structures around the world. We would therefore support a more diversity embracing approach based upon regulatory recognition as opposed to legal equivalence.

Response to Questions

Q1: Should investment funds be subject to the same registration triggers as other derivatives market participants? If not, what registration triggers should be applied to investment funds?

Not applicable for overseas intermediaries.

Q2: What is the appropriate standard for determining whether a person is a qualified party? Should the standard be based on the financial resources or the proficiency of the client or counterparty? If the standard is based on financial resources should it be based on the net assets of the client or counterparty, gross annual revenues of the client or counterparty, or some other factor or factors?

Not applicable for overseas intermediaries.

Q3: Should registration as a derivatives dealer be subject to a *de minimis* exemption similar to the exemption adopted by U.S. regulators? Please indicate why such an exemption is appropriate.

WMBA understands that registration as a derivatives dealer should indeed be calibrated relative to the de minimis calibration for balance sheet size or volumes traded as market end user participant. This would enable IDBs to be regulated outside the balance sheet supervision metrics suitable for banks. We note here that all wholesale market sovereign and corporate bond markets are arranged using matched principal broking whereby the IDB offers their name as counterparty, but are only supervised for the operational risks accruing under pillar 2 disclosures. Therefore traded volumes alone would not identify derivatives dealers.

Q4: Are derivatives dealer, derivatives adviser and LDP the correct registration categories? Should the Committee consider recommending other or additional categories?

Following from the answer above, a further category is indeed required for the prudential supervision of market participants that do not have the permissions to hold position risk. Here we would invite Canada to follow the Limited Licence/Limited Activity regimes operated by the FSA in the UK for over a decade now. This allows for proportional and tiered supervision.

Q5: Are the factors listed the correct factors that should be considered in determining whether a person is in the business of trading derivatives? Please explain your answer.

WMBA agrees with the listed factors.

Response to CSA Consultation Paper 91-407 – Derivatives Registration

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Q6: The Committee is not proposing to include frequent derivatives trading activity as a factor that we will consider when determining whether a person triggers registration as a derivative dealer. Should frequent derivatives trading activity trigger an obligation to register where an entity is not otherwise subject to a requirement to register as a derivatives dealer or a LDP? Should entities that are carrying on frequent derivatives trading activity for speculative purposes be subject to a different registration trigger than entities trading primarily for the purpose of managing their business risks?

Not applicable for non position taking intermediaries such as IDBs.

Q7: Is the proposal to impose derivatives dealer registration requirements on parties providing clearing services appropriate? Should an entity providing these clearing services only to qualified parties be exempt from regulation as a derivatives dealer?

Parties providing clearing services as FCMs or Prime Brokers need to be supervised as derivatives dealers. Parties providing clearing services as CCPs need to be supervised as systemic FMIs in their own category.

Q8: Are the factors listed the correct factors that should be considered in determining whether a person is in the business of advising on derivatives?

Not applicable for non position taking intermediaries such as IDBs who also do not give advice.

Q9: Are the factors listed for determining whether an entity is a LDP appropriate? If not what factors should be considered? What factors should the Committee consider in determining whether an entity, as a result of its derivatives market exposures, could represent a serious adverse risk to the financial stability of Canada or a province or territory of Canada?

Not applicable.

Q10: Is the Committee's proposal to only register derivative dealer representatives where they are dealing with clients or when dealing with counterparties that are non-qualified parties appropriate?

Not applicable for IDBs who are wholesale market intermediaries and will only arrange transactions between professional and eligible counterparties, or their overseas equivalents.

Q11: Is it appropriate to impose category or class specific proficiency requirements?

WMBA would support specific exam or experience based proficiency requirements and has indeed hosted qualifying exams for brokers in the UK.

Q12: Is the proposed approach to establishing proficiency requirements appropriate?

WMBA has no comment on third country qualification regimes beyond those standards and principals laid out by IOSCO, whom we believe should set the minima for regulatory recognition.

Q13: Is the Committee's proposal to impose a requirement on registrants to "act honestly and in good faith" appropriate?

Whilst the WMBA has no comment on third country qualification regimes, we note that in Europe we understand that conduct of business requirements are central to supervision and, utilised appropriately make for a far more efficient wholesale regulatory environment than do impossibly complex and restrictive rules based systems.

Regulation focused on supervision of the activities of the participants also caters for wholesale markets that are intrinsically global in the nature of their transactions, but with relatively few participants in relation to the number of products traded.

Q14: Are the requirements described appropriate registration requirements for derivatives dealers, derivatives advisers and LDPs? Are there any additional regulatory requirements that should apply to all categories of registrants? Please explain your answers.

WMBA has no comment.

Q15: Should derivatives dealers dealing with qualified parties be subject to business conduct standards such as the ones described in part 7.2(b)(iii) above? If so, please explain what standards should apply.

WMBA has no comment.

Q16: Do you have a preference between the two proposals relating to the regulation of a derivatives dealer trading with counterparties that are non-qualified parties? Is there another option to address the conflict of interest that the Committee should consider? Please explain your answer.

WMBA has no comment.

Q17: Are the recommended requirements appropriate for registrants that are derivatives dealers? If not please explain. Are there any additional regulatory requirements that should apply to registered derivatives dealers?

WMBA has no comment.

Q18: Are the recommended requirements appropriate for registrants that are derivatives advisers? If not please explain. Are there any additional regulatory requirements that should apply to registered derivatives advisers?

WMBA has no comment.

Q19: The Committee is recommending that foreign resident derivative dealers dealing with Canadian entities that are qualified parties be required to register but be exempt from a number of registration requirements. Is this recommendation appropriate? Please explain.

WMBA are keen advocates of the home/host system of supervision. We would therefore support the registration regime detailed in the proposals.

Q20: Is the Committee's recommendation to exempt foreign resident derivatives dealers from Canadian registration requirements where equivalent requirements apply in their home jurisdictions appropriate? Please explain.

As per the answer to question 19 above, WMBA sees no alternative to a delegated network of regulatory recognition provided that IOSCO standards set the minimum requirements to the global framework.

Q21: Should foreign derivatives dealers or advisers not registered in Canada be exempt from the obligation to register where such requirements solely result from such entities trading with the Canadian federal government or provincial governments or with the Bank of Canada?

WMBA has no comment.

Q21: Is the proposal to exempt crown corporations whose obligations are fully guaranteed by the applicable government from registration as a LDP and, in the circumstances described, as a derivatives dealer appropriate? Should entities such as crown corporations whose obligations are not fully guaranteed, foreign governments or corporation owned or controlled by foreign governments benefit from comparable exemptions? Please provide an explanation for your answer.

WMBA has no comment.

Q23: Are the proposed registration exemptions appropriate? Are there additional exemptions from the obligation to register or from registration requirements that should be considered but that have not been listed?

WMBA has no comment.

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