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CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

CSA Multilateral Notice and Request for Comment Proposed Multilateral Instrument 91-101 *Derivatives Product Determination* and Proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting*

January 21, 2015

Introduction

Staff of the Alberta Securities Commission, the British Columbia Securities Commission, the Financial and Consumer Affairs Authority of Saskatchewan, the New Brunswick Financial and Consumer Services Commission and the Nova Scotia Securities Commission (each an Authority and collectively, "we" or the Authorities) are publishing for a 60 day comment period expiring March 24, 2015:

- proposed Multilateral Instrument 91-101 *Derivatives: Product Determination* (the Scope Rule);
- proposed Companion Policy 91-101 *Derivatives: Product Determination* (the Scope CP);
- proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* (the TR Rule);
- proposed Companion Policy 96-101 *Trade Repositories and Derivatives Data Reporting* (the TR CP).

These documents will be referred to as the Proposed Instruments.

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

Background

On December 6, 2012, the Canadian Securities Administrators Derivatives Committee (the Committee) published CSA Staff Consultation Paper 91-301 Model Provincial Rules *Derivatives: Product Determination* and *Trade Repositories and Derivatives Data Reporting* (the Draft Model Rules). The Committee requested public comment on all aspects of the Draft Model Rules. Thirty-five comment letters were received.

On June 6, 2013, the Authorities published CSA Staff Consultation Paper 91-302 Updated Model Provincial Rules *Derivatives: Product Determination* and *Trade Repositories and Derivatives Data Reporting* (the Updated Model Rules). Also on June 6, 2013, the securities regulatory authorities in Manitoba, Ontario and Québec published corresponding proposed local rules and related companion policies for comment. The Updated Model Rules and the local rules

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and related companion policies published in Manitoba, Ontario and Québec were intended to be substantially similar.[1]

In developing the Proposed Instruments, we have reviewed the comment letters received in relation to both the Updated Model Rules and the local rules published in Manitoba, Ontario and Québec, and have considered the final local rules adopted in each of those provinces, including recent amendments. We intend that the Proposed Instruments will be consistent with the local rules in Manitoba, Ontario and Québec, other than minor variations to accommodate differences in provincial securities legislation and those specific proposals discussed in this notice.

Staff of the Authorities intend to work together to review the comment letters and will make any determinations on changes to the Proposed Instruments as a group. Upon reaching agreement on any changes to the Proposed Instruments with the goal of implementing harmonized instruments.

Substance and Purpose of the Proposed Instruments

With respect to Nova Scotia and Saskatchewan, the Proposed Instruments should be read in the context of the amendments to the local securities legislation that have not yet been proclaimed. The securities regulatory authorities in each of these jurisdictions anticipates that the respective amendments will be proclaimed and in force at or before the time that the Proposed Instruments become final.

(a) The Scope Rule

The purpose of the Scope Rule is to establish the types of derivatives that will be subject to the requirements of the TR Rule. We anticipate that the Scope Rule will, with appropriate adjustment, also apply to future instruments relating to derivatives. The Scope Rule does not apply to other elements of securities legislation.

The Scope Rule provides that the TR Rule does not apply to certain contracts or instruments that fall within the broad definition of "derivative" in local securities legislation. The excluded contracts are contracts that have not traditionally been considered over-the-counter derivatives. The Scope Rule also addresses the fact that the definitions of "derivative" and "security" in securities legislation are expansive and, in some cases, overlapping. Except in Alberta, the Scope Rule resolves conflicts that arise when a contract or instrument meets both the definition of "derivative" and "security". In Alberta, because the definition of security and derivative do not overlap, the Scope Rule designates certain types of contracts or instruments to be derivatives to which the requirements in the TR Rule apply.

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[1] In each of Manitoba, Ontario and Québec, the *Derivatives: Product Determination* rule or regulation currently in effect is numbered 91-506 and its related companion policy is numbered 91-506CP; the *Trade Repositories and Derivatives Data Reporting* rule or regulation currently in effect is numbered 91-507 and its related companion policy is numbered 91-507CP.

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(b) The TR Rule

The purpose of the TR Rule is to improve transparency in the OTC derivatives market and to ensure that recognized trade repositories operate in a manner that promotes the public interest. Derivatives data is essential for effective regulatory oversight of the derivatives market, including the ability to identify and address systemic risk and the risk of market abuse. Derivatives data reported to recognized trade repositories will also support policy-making by providing regulators with information on the nature and characteristics of the Canadian derivatives market.

The TR Rule focuses on two regulatory areas: (i) the regulation and oversight of trade repositories, including the recognition process, data access and dissemination, and operational requirements, and (ii) establishing derivatives data reporting requirements for counterparties to derivatives transactions.

Appendix A to the TR Rule sets out the data fields required to be reported for transactions subject to the reporting requirement in the TR Rule. Guidance for the data fields in Appendix A is included in the Description column in the reporting fields table in Appendix A.

Summary of the Proposed Instruments

(a) The Scope Rule

The definition of "derivative" in the securities legislation of each of Alberta, British Columbia, New Brunswick, Nova Scotia and Saskatchewan (each a jurisdiction) is intended to include the types of instruments traditionally referred to as derivatives (for example, options, swaps and forwards) as well as other novel instruments. The definition of "derivative" is broad enough to capture many contracts and instruments that have not traditionally necessarily been considered to be derivatives. The Scope Rule tailors the application of the TR Rule to certain existing and emerging products.

Contracts or instruments to which the TR Rule would not apply include:

- gaming and insurance contracts where such contracts are regulated by a domestic or an equivalent foreign legislation;

- contracts for the purchase and sale of currency provided that the contract (i) settles by delivery of the contracted currency within prescribed timelines, (ii) is intended by the parties to be settled by delivery of the currency referenced in the contract, and (iii) does not allow for roll-over;

- contracts for the delivery of a commodity provided that the contract (i) is intended by the parties to be settled by delivery of the commodity, and (ii) does not provide for cash settlement in place of the delivery of the commodity;

- evidences of deposit issued by certain Canadian financial institutions;

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- contracts or instruments traded on certain exchanges;
- except in Alberta and British Columbia, contracts that meet the definition of both "derivative" and "security" in the local securities legislation, provided that such contract is not a security solely by virtue of being an "investment contract";
- in Alberta, a contract or instrument that is not a security solely by virtue being an "investment contract" or an "option";
- in British Columbia, a contract or instrument that is a derivative but is also a security solely because it is an "investment contract", a "futures contract" or an "option"; and
- contracts or instruments issued by an issuer, a control person of an issuer or an insider of an issuer where the underlying interest of that contract or instrument is a security of the issuer or an affiliated entity of the issuer and the contract or instrument is used (i) to compensate or incent the performance of a director, employee or service provider of the issuer or an affiliated entity of the issuer or (ii) as a financing instrument in connection with the raising of capital for the issuer or an affiliated entity of the issuer or the acquisition of a business or property by the issuer or an affiliated entity.

(b) The TR Rule

The TR Rule focuses on two regulatory areas: (i) requirements relating to the regulation and oversight of trade repositories, including the recognition process, data access and dissemination, and operational requirements, and (ii) establishing derivatives data reporting requirements by counterparties to derivatives transactions.

(i) Regulation of Trade Repositories

To be recognized as a trade repository in a jurisdiction under the TR Rule, a person or company will be required to apply to the relevant Authority. An applicant for recognition will be required to file with the relevant Authority a completed Form 96-101F1, financial statements and a letter describing how the entity complies, or will comply, with the TR Rule.

A recognized trade repository will be required to comply with the requirements in the TR Rule in addition to the terms and conditions of its recognition order. It will be required to provide the Authority with interim and year-end financial statements and before implementing any significant changes to the information submitted in its application, to provide notice to the Authority. In addition, recognized trade repositories will be subject to a variety of ongoing requirements including ensuring the adequacy of its governance arrangements, meeting board composition requirements, clearly defining management roles and responsibilities, maintaining policies and procedures for material aspects of its business, retaining records, ensuring data security and confidentiality, establishing a comprehensive risk management and compliance framework and meeting other requirements related to systems and operational risks. A

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recognized trade repository will be expected to accept derivatives data for each class of derivatives described in its recognition order.

A recognized trade repository will be required to ensure that its rules, policies and procedures permit fair and open access to its services. Any fees charged by a recognized trade repository will be required to be fairly and equitably allocated amongst its participants and be publicly disclosed. Further, a recognized trade repository will be required to have rules, policies and procedures to confirm the accuracy of reported data with its participants.

Additionally, we propose that a recognized trade repository will be subject to requirements to provide access to trading data to regulators and to the public.

(ii) Reporting Requirements

Under the TR Rule, all derivatives transactions involving a local counterparty will be required to be reported to a recognized trade repository or, in limited circumstances, to the relevant Authority. The TR Rule sets out the following hierarchy for determining which counterparty is the reporting counterparty and has the obligation to report a transaction:

(i) where a transaction is cleared, the clearing agency;

(ii) where a transaction is not cleared and is between a derivatives dealer and a non-dealer, the derivatives dealer;

(iii) where a transaction in not cleared and is between a Canadian financial institution and a counterparty that is neither a Canadian financial institution nor a dealer, the Canadian financial institution;

(iv) where a transaction is not cleared and is between two derivatives dealers, two Canadian financial institutions or two counterparties that are neither derivatives dealers nor Canadian financial institutions, the counterparty that is identified as the reporting counterparty in a written agreement between the counterparties;

(v) where the counterparties cannot agree, both counterparties will have an obligation to report.

The TR Rule requires that reporting be completed on a real-time basis. However, where it is not technologically possible to do so, the reporting counterparty will be required to report as soon as possible but not later than the end of the next business day following the day that the transaction was entered into. Transactions that were entered into prior to the TR Rule coming into force will be required to be reported provided they have not expired or been terminated within a prescribed period after the TR Rule comes into force. The rule contemplates this date will be the 91st day following the implementation of the TR Rule. We encourage comment on the appropriate period.

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Three main types of data must be reported under the TR Rule:

(i) creation data, which includes operational data, product information, principal economic terms, counterparty information, underlier information and relevant identifiers (see Appendix A to TR Rule for more details);

(ii) lifecycle data which includes any change to derivatives data previously reported; and

(iii) valuation data, which includes the current value of the transaction.

Key Differences between the TR Rule and the trade reporting rules in effect Manitoba, Ontario and Québec

Subject to exception noted in this part, we intend that the Scope Rule and the TR Rule be consistent with the corresponding local rules in Manitoba, Ontario and Québec. We do not intend that the Scope Rule to have material differences from the corresponding rules in those provinces.

We are seeking comment on the TR Rule and the corresponding local rules in Manitoba, Ontario and Québec. In particular we are seeking comment on:

(i) whether the proposed differences are appropriate for market participants in our jurisdictions; and

(ii) whether the proposed differences will result in consequences or issues that are detrimental to market participants, industries or the derivatives market in the jurisdictions and/or in Canada.

We encourage each commenter to provide specific analysis in order to assist the Authorities in understanding the specific issues being raised.

(a) The definition of "local counterparty" in the TR Rule

The definition of "local counterparty" in the local trade reporting rules in place in Manitoba, Ontario and Québec includes not just an entity organized or with it head or principal place of business in a jurisdiction (or its guaranteed affiliate), but also a counterparty that is registered under the securities legislation of the local jurisdiction as a derivatives dealer or in another category as a consequence of trading in derivatives (i.e., is a locally-registered entity).

As a result, in each of Manitoba, Ontario and Québec, a counterparty that is a registrant in the jurisdiction, regardless of where its head office or principal place of business is located, would be considered to be a local counterparty in that jurisdiction for all of its derivatives transactions. Consequently, subject to any deemed substitute compliance, all transactions entered into by that registrant are required to be reported even if neither the registrant or its counterparty is situate in the jurisdiction.

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In contrast, the definition of "local counterparty" in the TR Rule does not include a registrant unless that registrant is organized or has its head or principal office in the jurisdiction.

As a result of this difference in the "local counterparty" definition in the TR Rule, a transaction involving a registrant in the local jurisdiction will only be required to be reported under the laws of that local jurisdiction if any one of the following applies:

- the derivatives dealer is organized under the laws of the jurisdiction, or has its head office or principal place of business in the jurisdiction,
- the derivatives dealer is an affiliate of a person referenced in the bullet-point above and that party is responsible for the liabilities of the derivatives dealer, or
- the other counterparty to the trade is a local counterparty.

(b) Reporting counterparty waterfall and record-keeping and additional requirements

The reporting counterparty waterfall in section 25 of the TR Rule establishes which counterparty to a transaction is the reporting counterparty and is responsible for reporting the transaction to a recognized trade repository. The waterfall in the TR Rule is harmonized with the corresponding provisions, as amended, in the local trade reporting rules in effect in Manitoba and Québec. The reporting waterfall is different from the trade reporting rule in Ontario. These differences are:

- "reporting clearing agency" – the TR Rule, similar to the local rules in Manitoba and Québec, contemplates that a clearing agency which has not yet been recognized or exempted from recognition in the local jurisdiction may undertake to the Authorities to fulfill the TR Rule reporting obligations for a transaction cleared through its facilities;
- "Canadian financial institution" – for a transaction that is not cleared through a reporting clearing agency and is between a Canadian financial institution and a counterparty that is neither a derivatives dealers nor a Canadian financial institution, the TR Rule, similar to the corresponding rules in Manitoba and Québec, the Canadian financial institution will be the reporting counterparty; and
- "written agreement" – for a transaction involving two counterparties that are either both derivatives dealers, both Canadian financial institutions or both local counterparties that are not derivatives dealers or Canadian financial institutions, the TR Rule, similar to the corresponding rules in Manitoba and Québec, permits the counterparties to agree in writing which counterparty will be the reporting counterparty. If the counterparties do not agree, in writing, which counterparty will act as a reporting counterparty, each local counterparty to the transaction is a reporting counterparty.[2] If the counterparties cannot agree, each local counterparty will be required to report transaction identifiers to the relevant Authorities under subsection 25(4).

[2] Note that the corresponding provision in the Ontario 91-507 rules requires that the reporting counterparty be determined pursuant to the ISDA methodology, as defined in the Ontario 91-507 rule.

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Section 25 of the TR Rule also sets out record-keeping requirements for the written agreement referred to above.

These differences are intended to reduce the regulatory burden, particularly for counterparties to derivatives transactions that are not derivatives dealers or Canadian financial institutions. In addition, the changes will reduce the incidents of double reporting of derivatives transactions.

(c) Exemptions from reporting trades of commodities derivatives

Section 40 of the TR Rule includes an exemption for a reporting counterparty from the reporting obligations where:

- the transaction is in a derivative based on a commodity, other than cash or currency;
- the counterparty is not a derivatives dealer, a Canadian financial institution or an entity organized in a foreign jurisdiction that is analogous to a Canadian financial institution; and
- at the time of the execution of the transaction, the counterparty's aggregate notional exposure under all contracts based on commodities, other than cash or currency, is less than $250 million (CAD).

The proposed threshold is very different than the exemptions thresholds in the trade reporting rules in Manitoba, Ontario and Québec. This exemption is intended to reduce the regulatory burden on commodity derivatives market end-users, such as commodity producers, commodity processors and commodity consumers, while still ensuring that the majority of derivatives transaction activity will continue to be reported. Transactions in commodity derivatives where a counterparty is a derivatives dealer or financial institution or has a gross notional exposure exceeding the $250 million threshold will still be required to be reported in accordance with the regulatory requirements applicable to that counterparty. The exemption is not available for transactions involving derivatives based on assets other than commodities.

The threshold has been established based on analysis conducted by staff of the Authorities. In developing the proposal staff have considered:

- the potential burden on market participants associated with trade reporting,
- benefits that trade reporting provide to regulators and market participants, and
- whether there would be systemic risks associated with derivatives trades that would not be reported.

We encourage comment on whether the proposed threshold is appropriate and the implementations of the threshold. If commenters suggest alternative thresholds, we request that they explain their suggestions and encourage them to provide data or other information to support their suggestions.

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Contents of Annexes

The following annexes form part of this CSA Notice:

- Annex A – Proposed Multilateral Instrument 91-101 *Derivatives: Product Determination*;
- Annex B – Proposed Companion Policy 91-101;
- Annex C - Proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting*; and
- Annex D – Proposed Companion Policy 96-101.

Questions

While we encourage comments on all aspects of the Proposed Instrument, we are seeking comments on the following specific aspects of the Scope Rule and Scope CP and the TR Rule and TR CP:

(a) The Scope Rule and Scope CP

1. Does the Scope CP provide sufficient clarity as to the contracts and instruments that are subject to trade reporting? Please provide specific examples where there is not sufficient clarity.

2. The Scope Rule and Scope CP indicate that that options to purchase commodities are derivatives but that certain optionality embedded in an agreement to purchase commodities for future delivery will not, in itself, result in the agreement being a derivative. Do you agree with this approach? Please explain.

3. In New Brunswick, Nova Scotia and Saskatchewan the definition of derivative specifically excludes a contract or instrument if the contract or instrument is an interest in or to a security and a trade in the security under the contract or instrument would constitute a distribution. In these provinces these contracts or instruments are defined as securities. Is the inclusion of subsection 3(6) necessary given that these provinces have such a carve-out?

(b) The TR Rule and TR CP

Local counterparty definition

4. Is it appropriate to exclude derivatives dealers from the definition of local counterparty appropriate? Please explain. Do you foresee any issues in the jurisdictions adopting a different definition from Manitoba, Ontario and Québec? Please explain.

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Definition of affiliated entity

5. Subsections 1(4) and (5) of the proposed TR Rule include a harmonized interpretation of the terms “affiliated entity” and “control” that is different from the concept of “affiliate” that applies in the corresponding local rules in Manitoba, Ontario and Québec in that it contemplates that a counterparty may control or be under common control with not just a corporate entity but also a partnership or a trust. Is the TR Rule proposal appropriate? What are the implications of the Authorities adopting an interpretation of “affiliated entity” that is different than the corresponding local rules in Manitoba, Ontario and Québec? Please explain.

Reporting counterparty waterfall

6. Section 25 of the proposed TR Rule allows the counterparties to a transaction where either both are derivatives dealers, Canadian financial institutions or not derivatives dealers or Canadian financial institutions to agree on who will be the reporting counterparty. Is this appropriate? Will this be effective in ensuring that the reporting obligation will be applied to the appropriate counterparty? Please provide specific examples or analysis.

7. Do you foresee any difficulties in counterparties agreeing as to who will be the reporting counterparty? If so, explain.

8. Does the inclusion of a Canadian financial institution in the reporting counterparty waterfall create any issues? Please provide specific examples of complications or analysis of potential scenarios.

End-user Commodity Transactions Exemption

9. Section 40 of the proposed TR Rule contemplates an exemption from trade reporting for commodity-based derivatives transactions that differs from the section 40 exemption in the existing TR rules in Manitoba, Ontario and Québec. The proposed TR Rule would exempt commodity-based transactions between two end-users provided each counterparty is below a threshold of $250,000,000 aggregate notional value, without netting, under all of its outstanding commodity-based derivatives transactions.

(a) Does the proposed threshold reflect those entities in the local jurisdiction that you would consider significant participants in the derivatives market? If not, what threshold would more accurately reflect that threshold for the local jurisdiction? The Authorities welcome specific data on the local provincial, national and product-specific derivatives markets.

(b) Are there certain types of counterparties – e.g., those in certain industries – that you anticipate will be most likely to qualify for and rely on the exemption? Please explain.

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(c) What are the implications of the Authorities adopting a different threshold from the section 40 threshold in the existing Manitoba, Ontario and Québec TR rules?

(d) The proposed TR Rule presently contemplates one threshold applicable across all of the jurisdictions participating in the TR Rule. Please describe in detail, to the extent possible, any implications that would result if different thresholds were applicable in different jurisdictions within the proposed TR rule.

(e) The proposed TR Rule contemplates that the aggregate outstanding notional value be calculated with reference to outstanding commodity derivatives transactions only. The threshold in section 40 of the corresponding local rules in Manitoba, Ontario and Québec is calculated with respect to all outstanding derivatives transaction, regardless of underlying asset or product. Please describe how the proposed modified calculation basis would affect your organization.

(f) One of the policy rationales for requiring derivatives trade reporting is to increase transparency. To what extent is lack of transparency in respect of commodity derivatives a concern? Please explain.

(g) Another policy rationale for requiring derivatives trade reporting is to provide regulators with greater ability to monitor trading for market manipulation, misleading appearance of trading, artificial prices and other practices that might perpetrate a fraud or market abuse. To what extent do concerns exist that these types of practices are occurring in the commodity derivatives market? Please explain.

(h) Would the adoption of a section 40 exemption threshold at $250 million, or at a significantly higher level, result in systemic risk in Canada or in any of the participating jurisdictions? Please specify and explain.

Implementation and Transition Period

10. We have contemplated that there should be some transitional period between the date on which the proposed TR Rule becomes effective and the date that the first reporting obligations will apply. Is a three month period sufficient for trade repositories to seek and obtain recognition? If not, what period would be sufficient?

11. As outlined in the proposed TR CP, we have considered staged implementation of the trade reporting obligations such that the requirement might apply to those lower in the trade reporting waterfall at successively later dates. Given that trade reporting obligations will likely apply to end-users in Manitoba, Ontario and Québec by the time the proposed TR Rule becomes effective, is it necessary for the Authorities to consider staged implementation? Is the staged implementation in the proposed TR CP appropriate?

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Comments

Please submit your comments in writing on or before March 24, 2015. If you are sending your comments by email, please also send an electronic file containing the submissions (in Microsoft Word format).

We do not intend to keep submissions confidential. All comments received will be posted on the websites of each of the Alberta Securities Commission at www.albertasecurities.com and the British Columbia Securities Commission at www.bcsc.bc.ca. You should not include personal information directly in your comments. It is important that you state on whose behalf you are providing comments.

Thank you in advance for your comments.
Please address your comments to each of the following:

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

Deliver your comments **only** to the address below. Your comments will be distributed to the other participating jurisdictions.

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ANNEX A

PROPOSED MULTILATERAL INSTRUMENT 91-101
DERIVATIVES: PRODUCT DETERMINATION

Definitions and interpretation

1. (1) In this instrument, "specified instrument" means Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting*.

(2) In this instrument, a person or company is an affiliated entity of another person or company if one of them controls the other or if each of them is controlled by the same person or company.

(3) In this instrument, a person or company (the first party) is considered to control another person or company (the second party) if any of the following apply:

(a) the first party beneficially owns or directly or indirectly exercises control or direction over securities of the second party carrying votes which, if exercised, would entitle the first party to elect a majority of the directors of the second party unless the first party holds the voting securities only to secure an obligation;

(b) the second party is a partnership, other than a limited partnership, and the first party holds more than 50% of the interests of the partnership;

(c) the second party is a limited partnership and the general partner of the limited partnership is the first party;

(d) if the second party is a trust and a trustee of the trust is the first party.

(4) In British Columbia, "derivative" in this instrument means a contract or instrument that is an option, swap, future, forward, or other financial or commodity contract or instrument whose market price, value, or delivery, payment or settlement obligations are derived from, referenced to or based on an underlying interest including a value, price, index, event, probability or thing.

Excluded derivatives

2. (1) The specified instrument does not apply to a contract or instrument that is a derivative, if the contract or instrument is one or more of the following:

(a) regulated by

(i) gaming control legislation of Canada or a jurisdiction of Canada, or

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(ii) gaming control legislation of a foreign jurisdiction, if the contract or instrument

(A) is entered into outside of Canada,

(B) is not in violation of legislation of Canada or the local jurisdiction, and

(C) would be regulated under gaming control legislation of Canada or the local jurisdiction if it had been entered into in the local jurisdiction;

(b) an insurance contract or an income or annuity contract or instrument entered into

(i) with an insurer holding a licence under insurance legislation of Canada or a jurisdiction of Canada and regulated as insurance under that legislation, or

(ii) outside of Canada with an insurer holding a licence under insurance legislation of a foreign jurisdiction, if it would be regulated as insurance under insurance legislation of Canada or of the local jurisdiction if it had been entered into in the local jurisdiction;

(c) for the purchase and sale of currency that

(i) except where all or part of the delivery of the currency referenced in the contract or instrument is rendered impossible or commercially unreasonable by an intervening event or occurrence not reasonably within the control of the parties, their affiliated entities or their agents, requires settlement by the delivery of the currency referenced in the contract or instrument,

(A) on or before the 2nd business day after the date of execution of the transaction, or

(B) if the contract or instrument was entered into contemporaneously with a related trade in a security, on or before the settlement date for the related trade in a security,

(ii) is intended by the counterparties, at the time of the execution of the transaction, to be settled by the delivery of the currency referenced in the contract within the time periods set out in subparagraph (i), and

(iii) does not allow for the contract or instrument to be rolled over;

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(d) for delivery of a commodity other than cash or currency that

(i) is intended by the counterparties, at the time of execution of the transaction, to be settled by delivery of the commodity, and

(ii) does not allow for cash settlement in place of delivery except where all or part of the delivery is rendered impossible or commercially unreasonable by an intervening event or occurrence not reasonably within the control of the counterparties, their affiliated entities, or their agents;

(e) evidence of a deposit issued by a bank listed in Schedule I, II or III to the *Bank Act* (Canada), by an association to which the *Cooperative Credit Associations Act* (Canada) applies or by a company to which the *Trust and Loan Companies Act* (Canada) applies;

(f) evidence of a deposit issued by a credit union, league, caisse populaire, loan corporation, treasury branch or trust company operated under legislation in any jurisdiction of Canada;

(g) traded on an exchange that is

(i) recognized by a securities regulatory authority,

(ii) exempt from recognition by a securities regulatory authority, or

(iii) regulated in a foreign jurisdiction by a signatory to the International Organization of Securities Commissions' Multilateral Memorandum of Understanding.

(2) For the purposes of paragraph (1)(g), an exchange does not include the following:

(a) a swap execution facility as that term is defined in the *Commodity Exchange Act*, 7 U.S.C. §1a(50) (United States);

(b) a security-based swap execution facility as that term is defined in the 1934 Act;

(c) a multilateral trading facility as that term is defined in Directive 2014/65/EU Article 4(1)(22) of the European Parliament;

(d) an organized trading facility as that term is defined in Directive 2014/65/EU Article 4(1)(23) of the European Parliament;

(e) an entity organized in a foreign jurisdiction that is similar to an entity described in any of paragraphs (a) to (d).

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Investment contracts and options

3. (1) In Alberta, a contract or instrument, other than a contract or instrument to which section 2 applies, that is a contract or instrument referred to under subparagraph (i) of the definition of "derivative" and that is a security solely by reason of being an investment contract or option is designated to be a derivative to which the specified instrument applies.

(2) Subsection (1) does not apply to a contract or instrument to which all of the following apply:

(a) the contract or instrument is issued by any of the following:

(i) an issuer;

(ii) a control person of an issuer;

(iii) an insider of an issuer;

(b) the underlying interest of the contract or instrument is a security of the issuer or an affiliated entity of the issuer;

(c) the contract or instrument is used for either or both of the following:

(i) to compensate or incent the performance of a director, employee or service provider of the issuer or an affiliated entity of the issuer;

(ii) as a financing instrument in connection with the raising of capital for the issuer or an affiliated entity of the issuer or the acquisition of a business or property by the issuer or an affiliated entity of the issuer.

Under the securities legislation of Alberta, a contract or instrument is not both a "derivative" and a "security" for the same purpose at the same time.

(3) In British Columbia, the specified instrument applies to a contract or instrument, other than a contract or instrument to which section 2 applies, that is a derivative, and that is otherwise a security solely by reason of being one or more of the following:

(a) a document evidencing an option, subscription or other interest in a security;

(b) a futures contract;

(c) an investment contract;

(d) an option.

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(4) In British Columbia, despite subsection (3), the specified instrument does not apply to a contract or instrument that is a security and would otherwise be a derivative to which all of the following apply:

(a) the contract or instrument is issued by any of the following:

(i) an issuer;

(ii) a control person of an issuer;

(iii) an insider of an issuer;

(b) the underlying interest of the contract or instrument is a security of the issuer or an affiliated entity of the issuer;

(c) the contract or instrument is used for either or both of the following:

(i) to compensate or incent the performance of a director, employee or service provider of the issuer or an affiliated entity of the issuer;

(ii) as a financing instrument in connection with the raising of capital for the issuer or an affiliated entity of the issuer or the acquisition of a business or property by the issuer or an affiliated entity of the issuer.

(5) In New Brunswick, Nova Scotia and Saskatchewan, the specified instrument does not apply to a contract or instrument, other than a contract or instrument to which section 2 applies, that is a derivative and that, but for the exclusion of derivatives from the definition of security, would be a security unless the contract or instrument would be a security solely by reason of being an investment contract.

(6) In New Brunswick, Nova Scotia and Saskatchewan, the specified instrument does not apply to a contract or instrument to which all of the following apply:

(a) the contract or instrument is issued by any of the following:

(i) an issuer;

(ii) a control person of an issuer;

(iii) an insider of an issuer;

(b) the underlying interest of the contract or instrument is a security of the issuer or an affiliated entity of the issuer;

(c) the contract or instrument is used for either or both of the following:

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(i) to compensate or incent the performance of a director, employee or service provider of the issuer or an affiliated entity of the issuer;

(ii) as a financing instrument in connection with the raising of capital for the issuer or an affiliated entity of the issuer or the acquisition of a business or property by the issuer or an affiliated entity of the issuer.

Under the securities legislation of New Brunswick, Nova Scotia and Saskatchewan, a contract or instrument is not both a "derivative" and a "security" for the same purpose at the same time.

Derivatives that are securities

4. In British Columbia, the specified instrument does not apply to a contract or instrument, other than a contract or instrument to which section 3 applies, that is a security and would otherwise be a derivative.

The definitions of "derivative" and "security" under the securities legislation of Alberta, and the definition of "security" under the securities legislation of New Brunswick, Nova Scotia and Saskatchewan, provide the same effect.

Effective date

5. This instrument comes into force on **[date to be determined]**.

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ANNEX B

PROPOSED COMPANION POLICY 91-101
DERIVATIVES: PRODUCT DETERMINATION

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PART 1
GENERAL COMMENTS

Introduction

This companion policy (the "Policy") provides guidance on how those members ("participating jurisdictions" or "we") of the Canadian Securities Administrators participating in Multilateral Instrument 91-101 *Derivatives: Product Determination* (the "Instrument") interpret various matters in the Instrument.

Except for Part 1, the numbering and headings of sections and subsections in this Policy correspond to the numbering and headings in the Instrument. Any general guidance for a section appears immediately after the section name. Any specific guidance on a section in the Instrument follows any general guidance. If there is no guidance for a Part or section, the numbering in this Policy will skip to the next provision that does have guidance.

The Instrument applies to Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* (the "specified instrument").

The Instrument includes a definition of the term "derivative" that will apply in British Columbia. A comparable definition is not needed in other local jurisdictions as "derivative" is defined in the securities legislation of each of the other local jurisdictions. It is intended that the term "derivative" will capture the same contracts and instruments in each of the local jurisdictions.

Unless defined in the Instrument or this Policy, terms used in the Instrument and in this Policy have the meaning given to them in securities legislation, including in National Instrument 14-101 *Definitions*.

In this Policy, the term "contract" is interpreted to mean "contract or instrument".

PART 2
GUIDANCE

2. Excluded derivatives

Section 2 provides that the specified instrument does not apply to specified categories of contracts that fall under the definition of derivative but, for a variety of reasons, should be excluded from the requirements in the specified instrument.

2. (1)(a) ***Gaming contracts***

Paragraph 2(1)(a) of the Instrument excludes certain domestic and foreign gaming contracts from the requirements in the specified instrument.

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While a gaming contract may come within the definition of "derivative", it is generally not recognized as being a financial derivative and typically does not pose the same potential risk to the financial system as do other derivatives products. In addition, we are of the view that the derivatives regulatory regime is not appropriate for this type of contract. Further, gaming control legislation of Canada (or a jurisdiction of Canada), or equivalent gaming control legislation of a foreign jurisdiction, generally has consumer protection as an objective and is therefore aligned with the objective of securities legislation.

With respect to subparagraph 2(1)(a)(ii), a contract that is regulated by gaming control legislation of a foreign jurisdiction would only qualify for this exclusion if: (A) it is entered into outside of Canada; (B) its execution does not violate legislation of Canada or the local jurisdiction; and (C) it would be considered a gaming contract under domestic legislation. If a contract would be treated as a derivative if entered into in the local jurisdiction, but would be considered a gaming contract in a foreign jurisdiction, the contract does not qualify for this exclusion, irrespective of its characterization in the foreign jurisdiction.

(b) ***Insurance contracts and income or annuity contracts***

Paragraph 2(1)(b) of the Instrument excludes an insurance contract or income or annuity contract from the requirements in the specified instrument if the contract meets the criteria in subparagraphs 2(1)(b)(i) and (ii). A reinsurance contract would be considered to be an insurance contract or income or annuity contract.

While an insurance contract or income or annuity contract may come within the definition of "derivative", it is generally not recognized as a financial derivative and typically does not pose the same potential risk to the financial system as do other derivatives products. The participating jurisdictions are of the view that the derivatives regulatory regime is not appropriate for this type of contract. Further, a comprehensive regime is already in place that regulates the insurance industry in Canada and the insurance legislation of Canada or a jurisdiction of Canada, or equivalent insurance legislation of a foreign jurisdiction, generally has consumer protection as an objective and is therefore aligned with the objective of securities legislation.

Certain derivatives that have characteristics similar to insurance contracts or income or annuity contracts but that are not subject to regulation under insurance legislation, including credit derivatives and climate-based derivatives, will be treated as derivatives and are not excluded from the application of the specified instrument under paragraph 2(1)(b) as insurance contracts or income or annuity contracts.

In order to qualify for this exclusion, subparagraph 2(1)(b)(i) requires an insurance contract or income or annuity contract to be entered into with a domestically licensed insurer and to be regulated as an insurance contract or income or annuity contract under insurance legislation of Canada or a jurisdiction of Canada. Therefore, for example, an interest rate derivative entered into by a licensed insurance company would not be an excluded derivative.

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With respect to subparagraph 2(1)(b)(ii), an insurance contract or income or annuity contract that is made outside of Canada would only qualify for this exclusion if it would be regulated under insurance legislation of Canada or the local jurisdiction if made in the local jurisdiction. Where a contract would otherwise be treated as a derivative if entered into in the local jurisdiction, but is considered an insurance contract in a foreign jurisdiction, the contract does not qualify for this exclusion, irrespective of its characterization in the foreign jurisdiction. Subparagraph 2(1)(b)(ii) is included to address the situation where a local counterparty purchases insurance for an interest that is located outside of Canada and the insurer is not required to be licensed in Canada or any jurisdiction of Canada.

(c) ***Currency exchange contracts***

Paragraph 2(1)(c) of the Instrument excludes a short-term contract for the purchase and sale of a currency from the requirements in the specified instrument if the contract is settled within the time limits set out in subparagraph 2(1)(c)(i). This provision is intended to apply exclusively to contracts that facilitate the conversion of one currency into another currency specified in the contract. These currency exchange services are often provided by financial institutions or other businesses that exchange one currency for another for clients' personal or business use (e.g., for purposes of travel or to make payment of an obligation denominated in a foreign currency).

Timing of delivery (subparagraph 2(1)(c)(i))

To qualify for this exclusion, the contract must require physical delivery of the currency referenced in the contract within the time periods prescribed in subparagraph 2(1)(c)(i). If a contract does not have a fixed settlement date or otherwise allows for settlement beyond the prescribed periods or permits settlement by delivery of a currency other than the currency referenced in the contract, it will not qualify for this exclusion.

Clause 2(1)(c)(i)(A) applies to a transaction that settles by delivery of the referenced currency within two business days – being the industry standard maximum settlement period for a spot foreign exchange transaction.

Clause 2(1)(c)(i)(B) allows for a longer settlement period if the foreign exchange transaction is entered into contemporaneously with a related securities trade. This exclusion reflects the fact that the settlement period for certain securities trades can be three or more days. In order for the provision to apply, the securities trade and foreign exchange transaction must be related, meaning that the currency to which the foreign exchange transaction pertains was used to facilitate the settlement of the related security purchase.

Where a contract for the purchase or sale of a currency provides for multiple exchanges of cash flows, all such exchanges must occur within the timelines prescribed in subparagraph 2(1)(c)(i) in order for the exclusion to apply.

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Settlement by delivery except where impossible or commercially unreasonable (subparagraph 2(1)(c)(i))

Subparagraph 2(1)(c)(i) requires that, to qualify for the exclusion, a contract must not permit settlement in a currency other than what is referenced in the contract unless delivery is rendered impossible or commercially unreasonable as a result of events not reasonably within the control of the counterparties.

Settlement by delivery of the currency referenced in the contract requires the currency contracted for to be delivered and not an equivalent amount in a different currency. For example, where a contract references Japanese Yen, such currency must be delivered in order for this exclusion to apply. We consider delivery to mean actual delivery of the original currency contracted for either in cash or through electronic funds transfer. In situations where settlement takes place through the delivery of an alternate currency or account notation without actual currency transfer, there is no settlement by delivery and therefore this exclusion would not apply.

The participating jurisdictions consider events that are not reasonably within the control of the counterparties to include events that cannot be reasonably anticipated, avoided or remedied. An example of an intervening event that would render delivery to be commercially unreasonable would include a situation where a government in a foreign jurisdiction imposes capital controls that restrict the flow of the currency required to be delivered. A change in the market value of the currency itself will not render delivery commercially unreasonable.

Intention requirement (subparagraph 2(1)(c)(ii))

Subparagraph 2(1)(c)(ii) excludes from the application of the specified instrument a contract for the purchase and sale of a currency that is intended to be settled through the delivery of the currency referenced in such contract. The intention to settle a contract by delivery may be inferred from the terms of the relevant contract as well as from the surrounding facts and circumstances.

When examining the specific terms of a contract for evidence of intention to deliver, we take the position that the contract must create an obligation on the counterparties to make or take delivery of the currency and not merely an option to make or take delivery. Any agreement, arrangement or understanding between the parties, including a side agreement, standard account terms or operational procedures that allow for the settlement in a currency other than the referenced currency or on a date after the time period specified in subparagraph 2(1)(c)(i) is an indication that the parties do not intend to settle the transaction by delivery of the prescribed currency within the specified time periods.

We are generally of the view that certain provisions, including standard industry provisions, the effect of which may result in a transaction not being physically settled, will not necessarily negate the intention to deliver. The contract as a whole needs to be reviewed in order to determine whether the counterparties' intention was to actually deliver the contracted currency.

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Examples of provisions that may be consistent with the intention requirement under subparagraph 2(1)(c)(ii) include:

- a netting provision that allows two counterparties who are party to multiple contracts that require delivery of a currency to net offsetting obligations, provided that the counterparties intended to settle through delivery at the time each contract was created and the netted settlement is physically settled in the currency prescribed by the contract; and
- a provision where cash settlement is triggered by a termination right that arises as a result of a breach of the terms of the contract.

Although these types of provisions permit settlement by means other than the delivery of the relevant currency, they are included in the contract for practical and efficiency reasons.

In addition to the contract itself, intention may also be inferred from the conduct of the counterparties. Where a counterparty's conduct indicates an intention not to settle by delivery, the contract will not qualify for the exclusion in paragraph 2(1)(c). For example, where it could be inferred from the conduct that one or both counterparties intend to rely on breach or frustration provisions in the contract in order to achieve an economic outcome that is, or is akin to, settlement by means other than delivery of the relevant currency, the contract will not qualify for the exclusion. Similarly, a contract would not qualify for this exclusion where it can be inferred from their conduct that the counterparties intend to enter into collateral or amending agreements which, together with the original contract, achieve an economic outcome that is, or is akin to, settlement by means other than delivery of the relevant currency.

Rolling over (subparagraph 2(1)(c)(iii))

Subparagraph 2(1)(c)(iii) provides that, in order to qualify for the exclusion in paragraph 2(1)(c), a currency exchange contract must not permit a rollover of the contract. Therefore, physical delivery of the relevant currencies must occur in the time periods prescribed in subparagraph 2(1)(c)(i). To the extent that a contract does not have a fixed settlement date or otherwise allows for the settlement date to be extended beyond the periods prescribed in subparagraph 2(1)(c)(i), we would consider it to permit a rollover of the contract. Similarly, any terms or practice that permits the settlement date of the contract to be extended by simultaneously closing the contract and entering into a new contract without delivery of the relevant currencies would also not qualify for the exclusion.

We do not intend that the exclusion will apply to contracts entered into through platforms that facilitate investment or speculation based on the relative value of currencies. These platforms typically do not provide for physical delivery of the currency referenced in the contract, but instead close out the positions by crediting client accounts held by the person operating the platform, often applying the credit using a standard currency.

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(d) *Commodities contracts*

Paragraph 2(1)(d) of the Instrument excludes a contract for the delivery of a commodity from the requirements in the specified instrument if the contract meets the criteria in subparagraphs 2(1)(d)(i) and (ii).

Commodity

The exclusion available under paragraph 2(1)(d) is limited to commercial transactions in goods that can be delivered either in a physical form or by delivery of the instrument evidencing ownership of the commodity. The participating jurisdictions are of the view that commodities include goods such as agricultural products, forest products, products of the sea, minerals, metals, hydrocarbon fuel, precious stones or other gems, electricity, oil and natural gas (and by-products, and associated refined products, thereof), and water. We also consider certain intangible commodities, such as carbon credits and emission allowances, to be commodities. In contrast, this exclusion will not apply to financial commodities such as currencies, interest rates, securities and indexes.

Intention requirement (subparagraph 2(1)(d)(i))

Subparagraph 2(1)(d)(i) of the Instrument requires that the counterparties *intend* to settle the contract by delivering the commodity. Intention can be inferred from the terms of the relevant contract as well as from the surrounding facts and circumstances.

When examining the specific terms of a contract for evidence of an intention to deliver, we are of the view that the contract must create an obligation on the counterparties to make or take delivery of the commodity and not merely an option to make or take delivery. Subject to the comments below on subparagraph 2(1)(d)(ii), we are of the view that a contract containing a provision that permits the contract to be settled by means other than delivery of the commodity, or that includes an option or has the effect of creating an option to settle the contract by a method other than through the delivery of the commodity, would not satisfy the intention requirement and therefore does not qualify for this exclusion.

The participating jurisdictions are generally of the view that certain provisions, including standard industry provisions, the effect of which may result in a transaction not being physically settled, may not necessarily negate the intention to deliver. The contract as a whole needs to be reviewed in order to determine whether the counterparties' intention was to actually deliver the commodity. Examples of provisions that may be consistent with the intention requirement under subparagraph 2(1)(d)(i) include:

- an option to change the volume or quantity, or the timing or manner of delivery, of the commodity to be delivered;
- a netting provision that allows two counterparties who are party to multiple contracts that require delivery of a commodity to net offsetting obligations provided that the counterparties intended to settle each contract through delivery at the time the contract was created;

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- an option that allows the counterparty that is to accept delivery of a commodity to assign the obligation to accept delivery of the commodity to a third-party; and

- a provision where cash settlement is triggered by a termination right arising as a result of the breach of the terms of the contract or an event of default thereunder.

Although these types of provisions permit some form of cash settlement, they are included in the contract for practical and efficiency reasons.

Embedded optionality with respect to the volume or quantity, or the timing or manner of delivery, of the commodity to be delivered may be consistent with the intention requirement in subparagraph 1(1)(d)(i) where the terms of the contract make it clear that the parties intend to settle the contract by physical delivery of the commodity and not by cash or any other means. A contract will not qualify for this exclusion where it can be inferred that the counterparties intend to enter into the contract to achieve an economic outcome that is, or is akin to, an option.

In addition to the contract itself, intention may also be inferred from the conduct of the counterparties. For example, where it could be inferred from their conduct that the counterparties intend to rely on breach or frustration provisions in the contract in order to achieve an economic outcome that is, or is akin to, cash settlement, the contract will not qualify for this exclusion. Similarly, a contract will not qualify for this exclusion where it can be inferred from their conduct that the counterparties intend to enter into collateral or amending agreements which, together with the original contract, achieve an economic outcome that is, or is akin to, cash settlement of the original contract.

When determining the intention of the counterparties, we will examine their conduct at execution and throughout the duration of the contract. Factors that we will generally consider include whether a counterparty is in the business of producing, delivering or using the commodity in question and whether the counterparties regularly make or take delivery of the commodity relative to the frequency with which they enter into such contracts in relation to the commodity.

Situations may exist where, after entering into the contract for delivery of the commodity, the counterparties enter into an agreement that terminates their obligation to deliver or accept delivery of the commodity (often referred to as a "book-out" agreement). Book-out agreements are typically separately negotiated, new agreements where the counterparties have no obligation to enter into such agreements and such book-out agreements are not provided for by the terms of the contract as initially entered into. A book-out will generally be considered to qualify for this exclusion provided that, at the time of execution of the original contract, the counterparties intended that the commodity would be delivered.

<u>Settlement by delivery except where impossible or commercially unreasonable (subparagraph 2(1)(d)(ii))</u>

Subparagraph 2(1)(d)(ii) requires that, to benefit from the exclusion from the requirements in the specified instrument, a contract must not permit cash settlement in place of delivery unless physical settlement is rendered impossible or commercially unreasonable as a result of an

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intervening event or occurrence not reasonably within the control of the counterparties, their affiliates or their agents. A change in the market value of the commodity itself will not render delivery commercially unreasonable. In general, the we consider examples of events not reasonably within the control of the counterparties to include:

- events to which typical *force majeure* clauses would apply;
- problems in delivery systems such as the unavailability of transmission lines for electricity or a pipeline for oil or gas where an alternative method of delivery is not reasonably available; and
- problems incurred by a counterparty in producing the commodity that they are obliged to deliver such as a fire at an oil refinery or a drought preventing crops from growing where an alternative source for the commodity is not reasonably available.

In our view, cash settlement in these circumstances would not preclude the requisite intention under subparagraph 2(1)(d)(i) from being satisfied.

(e) and (f) ***Evidences of deposit***

Paragraphs 2(1)(e) and (f) of the Instrument exclude certain evidences of deposit from the requirements in the specified instrument. Paragraph 2(1)(f) references deposits issued by any credit union, league, caisse populaire, loan corporation or trust company that is operating under the legislation of the federal government (in addition to the specific legislation referenced in paragraph 2(1)(e)) or under the legislation of any province or territory of Canada.

(g) ***Exchange-traded derivatives***

Paragraph 2(1)(g) of the Instrument excludes a contract from the requirements in the specified instrument if it is traded on one or more certain prescribed exchanges. Exchange-trading of derivatives provides certain benefits to the derivatives market and the financial system in general, including a measure of transparency to regulators and to the public with respect to trading activity, as well as processing through an accepted clearing and settlement system. For this reason, exchange-traded derivatives are not subject to the requirements of the specified instrument. A transaction that is cleared through a clearing agency, but not traded on an exchange, is not considered to be exchange-traded and is subject to the requirements in the specified instrument, where applicable.

Additional contracts not considered to be derivatives

Apart from the contracts expressly excluded from the requirements in the specified instrument in section 2 of the Instrument, there are other contracts that are not considered to be "derivatives" for the purposes of securities or derivatives legislation. A feature common to these contracts is that they are entered into for consumer, business or non-profit purposes that do not involve investment, speculation or hedging. Typically, they provide for the transfer of ownership of a good or the provision of a service. In most cases, they are not traded on a market.

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These contracts include, but are not limited to:

- a consumer or commercial contract to acquire or lease real or personal property, to provide personal services, to sell or assign rights, equipment, receivables or inventory, or to obtain a loan or mortgage, including a loan or mortgage with a variable rate of interest, interest rate cap, interest rate lock or embedded interest rate option;
- a consumer contract to purchase non-financial products or services at a fixed, capped or collared price;
- an employment contract or retirement benefit arrangement;
- a guarantee;
- a performance bond;
- a commercial sale, servicing, or distribution arrangement;
- a contract for the purpose of effecting a business purchase and sale or combination transaction;
- a contract representing a lending arrangement in connection with building an inventory of assets in anticipation of a securitization of such assets; and
- a commercial contract containing mechanisms indexing the purchase price or payment terms for inflation such as via reference to an interest rate or consumer price index.

3. Investment contracts and options

Contracts to which the requirements in the specified instrument apply

Some types of contracts traded over-the-counter, such as foreign exchange contracts and contracts for difference, meet the definition of "derivative" (because their market price, value, delivery obligations, payment obligations or settlement obligations are derived from, referenced to or based on an underlying interest) in the securities legislation of the local jurisdiction, but also meet the definition of "security" (because they are investment contracts) in the securities legislation of the local jurisdiction. Except in Alberta, this section provides that such contracts will be treated as derivatives. In Alberta, these contracts are designated to be derivatives, but only for the purposes of the specified instrument. Accordingly, where applicable, the requirements in the specified instrument apply to such contracts.

In Alberta, subsection 3(1) of the Instrument provides that the requirements in the specified instrument apply to a contract (to which section 2 of the Instrument does not apply) that meets the first prong of the definition of "derivative" and is a security solely by reason of being either an investment contract or an option under the definition of "security" in the securities legislation of Alberta.

In the securities legislation of Alberta, an option falls within both the definition of "derivative" and the definition of "security". Subsection 3(2) of the Instrument designates an option that is only a security because the definition of "security" includes an option to be a derivative for the

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purposes of the specified instrument. Options, such as stock options, that are also securities under other prongs of the definition of security, for example, because they are commonly known a security, remain securities. Where applicable, the requirements in the specified instrument apply to those options that do not meet other prongs of the definition of security. This treatment applies only to options that are traded over-the-counter; under paragraph 2(1)(g), transactions involving exchange-traded options are not subject to the requirements in the specified instrument.

In British Columbia, subsection 3(3) of the Instrument provides that the requirements in the specified instrument apply to a contract (to which section 2 of the Instrument does not apply) that is a derivative and is a security solely by reason of being an option, subscription or other interest in a security, a futures contract, an investment contract or an option (other than an option in a security) under the definition of "security" in the securities legislation of British Columbia.

The securities legislation in New Brunswick, Nova Scotia and Saskatchewan provides that a contract that is a derivative and, but for the exclusion of derivatives from the definition of "security", would be a security, is a derivative. Subsection 3(5) provides that such a contract will not be subject to requirements in the specified instrument unless the contract would be security solely because it is an investment contract.

Options do not fall within the definition of "security" in the securities legislation of New Brunswick, Nova Scotia and Saskatchewan, but do fall within the definition of "derivative" and are therefore subject to the requirements in the specified instrument. Subsection 3(6) reflects that a "derivative" under the securities legislation in each of these jurisdictions does not include a contract that would otherwise be a derivative if the contract is an interest in or to a security and a trade in the security under the contract would constitute a distribution.

Contracts to which the requirements in the specified instrument do not apply

Some types of contracts that meet the definition of derivative, or in Alberta meet the first prong of the definition, and that also meet the definition of "security" can have a similar or identical economic effect as a security. We are of the view that the requirements generally applicable to securities are more appropriate for these types of contracts. As a result, this section also provides that the requirements in the specified instrument will not apply to such contracts.

Examples of the types of contracts contemplated as being more appropriately subject to the requirements generally applicable to securities include the following: compensation or incentive instruments such as stock options, phantom stock units, restricted share units, deferred share units, restricted share awards, performance share units, stock appreciation rights and compensation instruments provided to service providers, such as broker options; and contracts issued for the purpose of raising capital, including any of the aforementioned instruments as well as rights, warrants and special warrants, or subscription rights/receipts or convertible instruments issued to raise capital for any purpose. A contract that is issued with a profit motive would not generally be considered to be a financing instrument issued in

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connection with the raising of capital. An equity swap, for example, would generally not be considered a financing instrument issued in connection with the raising of capital.

4. Derivatives that are securities

Except in Alberta, section 4 of the Instrument provides that the requirements in the specified instrument do not apply to a contract (to which section 3 of the Instrument does not apply) that meets both the definition of "derivative" and the definition of "security" under the securities legislation of the local jurisdiction. Contracts contemplated as falling within this section include structured notes, asset-backed securities, exchange-traded notes, capital trust units, exchangeable or convertible securities, income trust units, and securities of investment funds.

This section ensures that such instruments will continue to be subject to applicable prospectus disclosure and continuous disclosure requirements in securities legislation as well as to applicable registration requirements for securities dealers and advisers. The participating jurisdictions anticipate that the categorization of instruments as securities and derivatives will be reviewed once the comprehensive derivatives regime has been implemented.

Under the securities legislation of Alberta, absent a designation order, a contract that meets both the first prong of the definition of "derivative" and the definition of "security" is a security. Such a contract is therefore subject to applicable prospectus disclosure and continuous disclosure requirements in securities legislation as well as to applicable registration requirements for securities dealers and advisers and is not subject to the requirements in the specified instrument.

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ANNEX C

PROPOSED MULTILATERAL INSTRUMENT 96-101
TRADE REPOSITORIES AND DERIVATIVES DATA REPORTING

PART 1
DEFINITIONS AND INTERPRETATION

Definitions and interpretation

1. (1) In this Instrument

"asset class" means the asset category underlying a derivative and includes interest rate, foreign exchange, credit, equity and commodity;

"board of directors" means, in the case of a recognized trade repository that does not have a board of directors, a group of individuals that acts in a capacity similar to a board of directors;

"creation data" means the data in the fields listed in Appendix A;

"derivatives data" means all data related to a transaction that is required to be reported pursuant to Part 3;

"derivatives dealer" means a person or company engaging in or holding himself, herself or itself out as engaging in the business of trading in derivatives as principal or agent;

"Global Legal Entity Identifier System" means the system for unique identification of parties to financial transactions developed by the Legal Entity Identifier System Regulatory Oversight Committee;

"Legal Entity Identifier System Regulatory Oversight Committee" means the international working group established by the Finance Ministers and the Central Bank Governors of the Group of Twenty nations and the Financial Stability Board, under the Charter of the Regulatory Oversight Committee for the Global Legal Entity Identifier System dated November 5, 2012;

"life-cycle event" means an event that results in a change to derivatives data previously reported to a recognized trade repository in respect of a transaction;

"life-cycle event data" means changes to creation data resulting from a life-cycle event;

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

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

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

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

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

(b) the counterparty is an affiliated entity of a person or company to which one or more of subparagraphs (a)(i) to (iii) apply and the person or company to which one or more of subparagraphs (a)(i) to (iii) apply is responsible for the liabilities of the counterparty;

"participant" means a person or company that has entered into an agreement with a recognized trade repository to access the services of the recognized trade repository;

"reporting clearing agency" means either of the following:

(a) a person or company recognized or exempted from recognition as a clearing agency under securities legislation in the local jurisdiction;

(b) a clearing agency that has provided a written undertaking to the regulator or securities regulatory authority to act as the reporting counterparty with respect to transactions cleared by it that are subject to the reporting obligations under this Instrument;

"reporting counterparty" means a counterparty identified in accordance with section 25;

"transaction" means any of the following:

(a) entering into, assigning, selling or otherwise acquiring or disposing of a derivative;

(b) the novation of a derivative;

"user" means, in respect of a recognized trade repository, a counterparty (or delegate of a counterparty) to a transaction reported to that recognized trade repository pursuant to this Instrument;

"valuation data" means data that reflects the current value of the transaction and includes the data in the applicable fields listed in Appendix A under the heading "Valuation Data".

(2) In this Instrument, each of the following terms has the same meaning as in National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards*:

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"accounting principles"; "auditing standards"; "publicly accountable enterprise"; "U.S. AICPA GAAS"; "U.S. GAAP"; and "U.S. PCAOB GAAS".

(3) In this Instrument, "interim period" has the same meaning as in section 1.1 of National Instrument 51-102 *Continuous Disclosure Obligations*.

(4) In this Instrument, a person or company is an affiliated entity of another person or company if one of them controls the other or if each of them is controlled by the same person.

(5) In this instrument, a person or company (the first party) is considered to control another person or company (the second party) if any of the following apply:

(a) the first party beneficially owns or directly or indirectly exercises control or direction over securities of the second party carrying votes which, if exercised, would entitle the first party to elect a majority of the directors of the second party unless the first party holds the voting securities only to secure an obligation;

(b) the second party is a partnership, other than a limited partnership, and the first party holds more than 50% of the interests of the partnership;

(c) the second party is a limited partnership and the general partner of the limited partnership is the first party;

(d) if the second party is a trust and a trustee of the trust is the first party.

PART 2
TRADE REPOSITORY RECOGNITION AND ONGOING REQUIREMENTS

Filing of initial information on application for recognition as a trade repository

2. (1) A person or company applying for recognition as a trade repository must file Form 96-101F1 *Application for Recognition – Trade Repository Information Statement* as part of its application.

(2) A person or company applying for recognition as a trade repository whose head office or principal place of business is located outside of the local jurisdiction must

(a) provide an undertaking to provide the regulator or securities regulatory authority with access to its books and records and to submit to onsite inspection and examination by the regulator or securities regulatory authority, and

(b) provide an undertaking to provide the regulator or securities regulatory authority with an opinion of legal counsel that

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(i) the person or company has the power and authority to provide the regulator or securities regulatory authority with access to its books and records, and

(ii) the person or company has the power and authority to submit to onsite inspection and examination by the regulator or securities regulatory authority.

(3) A person or company applying for recognition as a trade repository whose head office or principal place of business is located in a foreign jurisdiction must file Form 96-101F2 *Trade Repository Submission to Jurisdiction – Appointment of Agent for Service of Process*.

(4) No later than the 7th day after becoming aware of an inaccuracy in or making a change to the information provided in Form 96-101F1 *Application for Recognition – Trade Repository Information Statement*, the person or company who has filed the Form 96-101F1 *Application for Recognition – Trade Repository Information Statement* must file an amendment to Form 96-101F1 *Application for Recognition – Trade Repository Information Statement*. in the manner set out in Form 96-101F1 *Application for Recognition – Trade Repository Information Statement*.

Change in information by a recognized trade repository

3. (1) A recognized trade repository must not implement a significant change to a matter set out in Form 96-101F1 *Application for Recognition – Trade Repository Information Statement* unless it has filed an amendment to the information provided in Form 96-101F1 *Application for Recognition – Trade Repository Information Statement* in the manner set out in Form 96-101F1 *Application for Recognition – Trade Repository Information Statement* no later than 45 days before implementing the change.

(2) Despite subsection (1), a recognized trade repository must not implement a change to the information provided in Exhibit I (Fees) of Form 96-101F1 *Application for Recognition – Trade Repository Information Statement* unless it has filed an amendment to the information provided in Exhibit I in the manner set out in Form 96-101F1 *Application for Recognition – Trade Repository Information Statement* no later than 15 days before implementing the change.

(3) For a change to a matter set out in Form 96-101F1 *Application for Recognition – Trade Repository Information Statement* other than a change referred to in subsection (1) or (2), a recognized trade repository must file an amendment to the information provided in Form 96-101F1 *Application for Recognition – Trade Repository Information Statement* in the manner set out in Form 96-101F1 *Application for Recognition – Trade Repository Information Statement* by the earlier of

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(a) the close of business of the recognized trade repository on the 10th day after the end of the month in which the change was made, and

(b) the time the recognized trade repository publicly discloses the change.

Filing of initial audited financial statements

4. (1) A person or company applying for recognition as a trade repository must file audited financial statements for its most recently completed financial year as part of its application for recognition as a trade repository.

(2) The financial statements referred to in subsection (1) must

(a) be prepared in accordance with one of the following:

(i) Canadian GAAP applicable to publicly accountable enterprises;

(ii) IFRS;

(iii) U.S. GAAP, if the person or company is incorporated or organized under the laws of the United States of America or a jurisdiction of the United States of America,

(b) identify in the notes to the financial statements the accounting principles used to prepare the financial statements,

(c) disclose the presentation currency, and

(d) be audited in accordance with one of the following:

(i) Canadian GAAS;

(ii) International Standards on Auditing;

(iii) U.S. AICPA GAAS or U.S. PCAOB GAAS, if the person or company is incorporated or organized under the laws of the United States of America or a jurisdiction of the United States of America.

(3) The financial statements referred to in subsection (1) must be accompanied by an auditor's report that

(a) is prepared in accordance with the same auditing standards used to conduct the audit and

(i) if prepared in accordance with Canadian GAAS or International Standards on Auditing, expresses an unmodified opinion, or

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(ii) if prepared in accordance with U.S. AICPA GAAS, or U.S. PCAOB GAAS, expresses an unqualified opinion,

(b) identifies all financial periods presented for which the auditor has issued the auditor's report,

(c) identifies the auditing standards used to conduct the audit,

(d) identifies the accounting principles used to prepare the financial statements, and

(e) is prepared and signed by a person or company that is authorized to sign an auditor's report under the laws of a jurisdiction of Canada or a foreign jurisdiction, and that meets the professional standards of that jurisdiction.

Filing of annual audited and interim financial statements by a recognized trade repository

5. **(1)** A recognized trade repository must file annual audited financial statements that comply with the requirements set out in subsections 4(2) and 4(3) no later than the 90th day after the end of its financial year.

(2) A recognized trade repository must file interim financial statements no later than the 45th day after the end of each interim period.

(3) The interim financial statements referred to in subsection (2) must

(a) be prepared in accordance with one of the following:

(i) Canadian GAAP applicable to publicly accountable enterprises;

(ii) IFRS;

(iii) U.S. GAAP, if the person or company is incorporated or organized under the laws of the United States of America or a jurisdiction of the United States of America, and

(b) identify in the notes to the financial statements the accounting principles used to prepare the financial statements.

Ceasing to carry on business

6. **(1)** A recognized trade repository that intends to cease carrying on business as a trade repository in the local jurisdiction must make an application and file a report on Form 96-101F3 *Cessation of Operations Report For Recognized Trade Repository* no later than the 180th day before the date on which it intends to cease carrying on that business.

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(2) A recognized trade repository that involuntarily ceases to carry on business as a trade repository in the local jurisdiction must file a report on Form 96-101F3 *Cessation of Operations Report for Recognized Trade Repository* as soon as practicable after it ceases to carry on that business.

Legal framework

7. (1) A recognized trade repository must establish, implement, maintain and enforce written rules, policies and procedures reasonably designed to ensure a well-founded, clear, transparent, and enforceable legal basis for each material aspect of its activities.

(2) Without limiting the generality of subsection (1), a recognized trade repository must establish, implement, maintain and enforce written rules, policies and procedures that are not contrary to the public interest and that are reasonably designed to ensure that

(a) its rules, policies and procedures and contractual arrangements are consistent with applicable law,

(b) the rights and obligations of its users, owners and regulators with respect to the use of its information are clear and transparent, and

(c) the agreements that it enters into and supporting documentation clearly state service levels, rights of access, protection of confidential information, intellectual property rights and operational reliability.

(3) Without limiting the generality of subsection (1), a recognized trade repository must implement and enforce policies that clearly establish the status of records of contracts in its repository and whether those records of contracts are the legal contracts of record.

Governance

8. (1) A recognized trade repository must establish, implement, and maintain written governance arrangements that are well-defined, clear and transparent, set out a clear organizational structure with consistent lines of responsibility, and are reasonably designed to do each of the following:

(a) provide for effective internal controls;

(b) promote the safety and efficiency of the recognized trade repository;

(c) ensure effective oversight of the recognized trade repository;

(d) support the stability of the broader financial system and other relevant public interest considerations;

(e) properly balance the interests of relevant stakeholders.

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(2) A recognized trade repository must establish, implement, maintain and enforce written rules, policies and procedures reasonably designed to identify and manage existing and potential conflicts of interest.

(3) A recognized trade repository must publicly disclose on its website

(a) the governance arrangements established in accordance with subsection (1), and

(b) the rules, policies and procedures established in accordance with subsection (2).

Board of directors

9. (1) A recognized trade repository must have a board of directors.

(2) The board of directors of a recognized trade repository must include

(a) individuals who have an appropriate level of skill and experience to effectively and efficiently oversee the management of its operations in accordance with all relevant laws, and

(b) appropriate representation by individuals who are independent of the recognized trade repository.

(3) The board of directors of a recognized trade repository must, in consultation with the chief compliance officer of the recognized trade repository, resolve conflicts of interest identified by the chief compliance officer.

(4) The board of directors of a recognized trade repository must meet with the chief compliance officer of the recognized trade repository on a regular basis.

Management

10. (1) A recognized trade repository must establish, implement, maintain and enforce written rules, policies and procedures that

(a) specify the roles and responsibilities of management, and

(b) ensure that management has the experience, competencies, integrity and mix of skills necessary to discharge its roles and responsibilities.

(2) A recognized trade repository must notify the regulator or securities regulatory authority no later than the 5th business day after appointing or replacing any of its chief compliance officer, chief executive officer or chief risk officer.

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Chief compliance officer

11. (1) The board of directors of a recognized trade repository must appoint a chief compliance officer with the appropriate experience, competencies, integrity and mix of skills necessary to serve in that capacity.

(2) The chief compliance officer of a recognized trade repository must report directly to the board of directors of the recognized trade repository or, if so directed by the board of directors, to the chief executive officer of the recognized trade repository.

(3) The chief compliance officer of a recognized trade repository must

(a) establish, implement, maintain and enforce written rules, policies and procedures designed to identify and resolve conflicts of interest,

(b) establish, implement, maintain and enforce written rules, policies and procedures designed to ensure that the recognized trade repository complies with securities legislation,

(c) monitor compliance with the rules, policies and procedures required under paragraphs (a) and (b) on an ongoing basis,

(d) report to the board of directors of the recognized trade repository as soon as practicable upon becoming aware of a circumstance indicating that the recognized trade repository, or an individual acting on its behalf, has not complied with securities legislation in a jurisdiction in which it operates and one or more of the following apply:

(i) the non-compliance creates a risk of harm to a user;

(ii) the non-compliance creates a risk of harm to the capital markets;

(iii) the non-compliance is part of a pattern of non-compliance;

(iv) the non-compliance may impact the ability of the recognized trade repository to carry on business as a trade repository in compliance with securities legislation,

(e) report to the board of directors of the recognized trade repository as soon as practicable upon becoming aware of a conflict of interest that creates a risk of harm to a user or to the capital markets, and

(f) prepare and certify an annual report assessing compliance by the recognized trade repository, and individuals acting on its behalf, with securities legislation and submit the report to the board of directors.

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(4) Concurrently with submitting a report under paragraph (3)(d), 3(e) or 3(f), the chief compliance officer must file a copy of the report with the regulator or securities regulatory authority.

Fees

12. All fees and other material costs imposed by a recognized trade repository on its participants must be

(a) fairly and equitably allocated among participants, and

(b) publicly disclosed on its website for each service it offers with respect to the collection and maintenance of derivatives data.

Access to recognized trade repository services

13. (1) A recognized trade repository must establish, implement, maintain and enforce written rules, policies and procedures that establish objective risk-based criteria for participation that permit fair and open access to the services it provides.

(2) A recognized trade repository must publicly disclose on its website the rules, policies and procedures referred to in subsection (1).

(3) A recognized trade repository must not do any of the following:

(a) unreasonably prohibit, condition or limit access by a person or company to the services offered by it;

(b) permit unreasonable discrimination among its participants;

(c) impose a burden on competition that is not reasonably necessary and appropriate;

(d) require a person or company to use or purchase another service to utilize the trade reporting service offered by the trade repository.

Acceptance of reporting

14. A recognized trade repository must accept derivatives data from a participant for a transaction in a derivative of the asset class or classes set out in the recognition order for the trade repository.

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Communication policies, procedures and standards

15. A recognized trade repository must use or accommodate relevant internationally accepted communication procedures and standards in order to facilitate the efficient exchange of data between its systems and those of

(a) its participants,

(b) other trade repositories,

(c) clearing agencies, exchanges, and other platforms that facilitate derivatives transactions, and

(d) other service providers.

Due process

16. (1) Prior to making a decision that directly and adversely affects a participant or an applicant that applies to become a participant, a recognized trade repository must give the participant or applicant an opportunity to be heard or to make representations.

(2) A recognized trade repository must keep records of, give reasons for, and provide for reviews of its decisions, including, for each applicant, the reasons for granting, denying or limiting access.

Rules, policies and procedures

17. (1) The rules, policies and procedures of a recognized trade repository must

(a) be clear and comprehensive and provide sufficient information to enable a participant to understand its rights and obligations in accessing the services of the recognized trade repository and the risks, fees, and other material costs that will be incurred by it in using the services of the recognized trade repository, and

(b) be reasonably designed to govern all aspects of the services offered by the recognized trade repository with respect to the collection and maintenance of derivatives data and other information on a completed transaction.

(2) The rules, policies and procedures of a recognized trade repository must not be inconsistent with securities legislation.

(3) A recognized trade repository must monitor compliance with its rules, policies and procedures on an ongoing basis.

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(4) A recognized trade repository must establish, implement, maintain and enforce written rules, policies and procedures for sanctioning non-compliance with its rules, policies and procedures.

(5) A recognized trade repository must publicly disclose on its website

(a) the rules, policies and procedures referred to in this section, and

(b) its procedures for adopting new rules, policies and procedures or amending existing rules, policies and procedures.

(6) A recognized trade repository must file its proposed new or amended rules, policies, and procedures for approval in accordance with the terms and conditions of its recognition order, unless the order explicitly exempts the recognized trade repository from this requirement.

Records of data reported

18. (1) A recognized trade repository must design its recordkeeping procedures to ensure that it records derivatives data accurately, completely and on a timely basis.

(2) A recognized trade repository must keep, in a safe location and in a durable form, records of derivatives data in relation to a transaction for 7 years after the date on which the transaction expires or terminates.

(3) A recognized trade repository must create and maintain at least one copy of each record of derivatives data required to be kept under subsection (2), for the same period as referenced in subsection (2), in a safe location and in a durable form, separate from the location of the original record.

Comprehensive risk-management framework

19. A recognized trade repository must establish, implement, and maintain a written risk-management framework to comprehensively manage risks including general business, legal, and operational risks.

General business risk

20. (1) A recognized trade repository must establish, implement, and maintain appropriate systems, controls and procedures to identify, monitor, and manage its general business risk.

(2) Without limiting the generality of subsection (1), a recognized trade repository must hold sufficient insurance coverage and liquid net assets funded by equity to cover potential general business losses in order that it can continue operations and services as

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a going concern in order to achieve a recovery or an orderly wind down if those losses materialize.

(3) For the purposes of subsection (2), a recognized trade repository must hold, at a minimum, liquid net assets funded by equity equal to six months of current operating expenses.

(4) A recognized trade repository must identify scenarios that may potentially prevent it from being able to provide its critical operations and services as a going concern and assess the effectiveness of a full range of options for an orderly wind-down.

(5) A recognized trade repository must establish, implement, maintain and enforce written rules, policies and procedures reasonably designed to facilitate its orderly wind-down based on the results of the assessment required by subsection (4).

(6) A recognized trade repository must establish, implement, maintain and enforce written rules, policies and procedures to ensure that it or a successor entity, insolvency administrator or other legal representative, will continue to comply with the requirements of subsection 6(2) and section 37 in the event of the bankruptcy or insolvency of the recognized trade repository or the wind-down of the recognized trade repository's operations.

System and other operational risk requirements

21. (1) A recognized trade repository must establish, implement, maintain and enforce appropriate systems, controls and procedures to identify and minimize the impact of the plausible sources of operational risk, both internal and external, including risks to data integrity, data security, business continuity and capacity and performance management.

(2) The systems, controls and procedures established pursuant to subsection (1) must be approved by the board of directors of the recognized trade repository.

(3) Without limiting the generality of subsection (1), a recognized trade repository must

(a) develop and maintain

(i) an adequate system of internal controls over its systems, and

(ii) adequate information technology general controls, including without limitation, controls relating to information systems operations, information security and integrity, change management, problem management, network support and system software support,

(b) in accordance with prudent business practice, on a reasonably frequent basis and, in any event, at least annually

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(i) make reasonable current and future capacity estimates, and

(ii) conduct capacity stress tests to determine the ability of those systems to process transactions in an accurate, timely and efficient manner, and

(c) promptly notify the regulator or securities regulatory authority of a material systems failure, malfunction, delay or other disruptive incident, or a breach of data security, integrity or confidentiality, and provide a post-incident report that includes a root-cause analysis as soon as practicable.

(4) Without limiting the generality of subsection (1), a recognized trade repository must establish, implement, maintain and enforce business continuity plans, including disaster recovery plans reasonably designed to

(a) achieve prompt recovery of its operations following a disruption,

(b) allow for the timely recovery of information, including derivatives data, in the event of a disruption, and

(c) provide for the exercise of authority in the event of an emergency.

(5) A recognized trade repository must test its business continuity plans, including disaster recovery plans, at least annually.

(6) For each of its systems for collecting and maintaining reports of derivatives data, a recognized trade repository must annually engage a qualified party to conduct an independent review and prepare a report in accordance with established audit standards to ensure that the recognized trade repository is in compliance with paragraphs (3)(a) and (b) and subsections (4) and (5).

(7) A recognized trade repository must provide the report prepared in accordance with subsection (6) to

(a) its board of directors or audit committee promptly upon the completion of the report, and

(b) the regulator or securities regulatory authority not later than the 30th day after providing the report to its board of directors.

(8) A recognized trade repository must publicly disclose on its website all technology requirements regarding interfacing with or accessing the services provided by the recognized trade repository

(a) if operations have not begun, sufficiently in advance of operations to allow a reasonable period for testing and system modification by participants, and

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(b) if operations have begun, sufficiently in advance of implementing a material change to technology requirements to allow a reasonable period for testing and system modification by participants.

(9) A recognized trade repository must make available testing facilities for interfacing with or accessing the services provided by the recognized trade repository

(a) if operations have not begun, sufficiently in advance of operations to allow a reasonable period for testing and system modification by participants, and

(b) if operations have begun, sufficiently in advance of implementing a material change to technology requirements to allow a reasonable period for testing and system modification by participants.

(10) A recognized trade repository must not begin operations in the local jurisdiction unless it has complied with paragraphs (8)(a) and (9)(a).

(11) Paragraphs (8)(b) and (9)(b) do not apply to a recognized trade repository if

(a) the change to the recognized trade repository's technology requirements must be made immediately to address a failure, malfunction or material delay of its systems or equipment,

(b) the recognized trade repository immediately notifies the regulator or securities regulatory authority of its intention to make the change to its technology requirements, and

(c) the recognized trade repository publicly discloses on its website the changed technology requirements as soon as practicable.

Data security and confidentiality

22. (1) A recognized trade repository must establish, implement, maintain and enforce written rules, policies and procedures reasonably designed to ensure the safety, privacy and confidentiality of the derivatives data.

(2) A recognized trade repository must not release derivatives data for commercial or business purposes unless one or more of the following apply:

(a) the derivatives data has otherwise been disclosed pursuant to section 39;

(b) the counterparties to the transaction have provided the recognized trade repository with their express written consent to use or release the derivatives data.

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Confirmation of data and information

23. (1) Subject to subsection (2), a recognized trade repository must establish, implement, maintain and enforce written rules, policies and procedures to confirm with each counterparty to a transaction, or agent acting on behalf of such counterparty, that the derivatives data that the recognized trade repository receives from a reporting counterparty, or from a party to whom a reporting counterparty has delegated its reporting obligation under this Instrument, is accurate.

(2) A recognized trade repository need only confirm the accuracy of the derivatives data it receives with those counterparties that are participants of the recognized trade repository.

Outsourcing

24. If a recognized trade repository outsources a material service or system to a service provider, including to an associate or affiliated entity of the recognized trade repository, the recognized trade repository must do each of the following:

(a) establish, implement, maintain and enforce written rules, policies and procedures for the selection of a service provider to which a material service or system may be outsourced and for the evaluation and approval of such an outsourcing arrangement;

(b) identify any conflicts of interest between the recognized trade repository and a service provider to which a material service or system is outsourced, and establish, implement, maintain and enforce written rules, policies and procedures to mitigate and manage those conflicts of interest;

(c) enter into a written contract with the service provider that is appropriate for the materiality and nature of the outsourced activity and that provides for adequate termination procedures;

(d) maintain access to the books and records of the service provider relating to the outsourced activity;

(e) ensure that the regulator or securities regulatory authority has the same access to all data, information and systems maintained by the service provider on behalf of the recognized trade repository that it would have absent the outsourcing arrangement;

(f) ensure that all persons conducting an audit or independent review of the recognized trade repository under this Instrument has appropriate access to all data, information and systems maintained by the service provider on behalf of the recognized trade repository that such persons would have absent the outsourcing arrangement;

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(g) take appropriate measures to determine that a service provider to which a material service or system is outsourced establishes, maintains and periodically tests an appropriate business continuity plan, including a disaster recovery plan in accordance with the requirements set out in section 21;

(h) take appropriate measures to ensure that the service provider protects the safety, privacy and confidentiality of derivatives data and of users' confidential information in accordance with the requirements set out in section 22;

(i) establish, implement, maintain and enforce written rules, policies and procedures to regularly review the performance of the service provider under the outsourcing agreement.

PART 3
DATA REPORTING

Reporting counterparty

25. (1) The reporting counterparty with respect to a transaction involving a local counterparty is

(a) if the transaction is cleared through a reporting clearing agency, the reporting clearing agency,

(b) if paragraph (a) does not apply to the transaction and the transaction is between a derivatives dealer and a counterparty that is not a derivatives dealer, the derivatives dealer,

(c) if neither paragraph (a) nor (b) applies to the transaction and the transaction is between a Canadian financial institution that is not a derivatives dealer and a counterparty that is not a Canadian financial institution or a derivatives dealer, the Canadian financial institution,

(d) if none of paragraphs (a) to (c) apply to the transaction and the counterparties have, at the time the transaction occurs, agreed in writing that one of them will be the reporting counterparty, the counterparty determined to be the reporting counterparty under the terms of that agreement, and

(e) in each other case, each local counterparty to the transaction other than an individual.

(2) Each local counterparty to a transaction to which paragraph (1)(d) applies must keep a record of the written agreement referred to in paragraph (1)(d) for 7 years after the date on which the transaction expires or terminates.

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

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

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

(4) No later than the end of the 5th day after the day of execution of a transaction to which paragraph (1)(e) applies, each local counterparty to the transaction must submit to the regulator, in an electronic format, a document identifying each of the following:

(a) the unique transaction identifier assigned to the transaction by the recognized trade repository to which the local counterparty reported the transaction;

(b) the unique transaction identifier assigned to the transaction by the recognized trade repository to which the other local counterparty reported the transaction.

Duty to report

26. (1) A reporting counterparty to a transaction involving a local counterparty must report, or cause to be reported, the data required to be reported under this Part to a recognized trade repository.

(2) A reporting counterparty in respect of a transaction is responsible for ensuring that all reporting obligations in respect of that transaction have been fulfilled.

(3) A reporting counterparty may delegate its reporting obligations under this Instrument, but remains responsible for ensuring the timely and accurate reporting of derivatives data required by this Instrument.

(4) Despite subsection (1), if no recognized trade repository accepts the data required to be reported under this Part, the reporting counterparty must electronically report the data required to be reported under this Part to the regulator or securities regulatory authority.

(5) A reporting counterparty satisfies the reporting obligation in respect of a transaction required to be reported under subsection (1) if each of the following applies:

(a) the transaction is required to be reported solely because a counterparty to the transaction is a local counterparty pursuant to paragraph (b) of the definition of "local counterparty";

(b) the transaction is reported to a recognized trade repository pursuant to

(i) the securities legislation of a province of Canada other than the local jurisdiction, or

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(ii) the laws of a foreign jurisdiction listed in Appendix B; and

(c) the reporting counterparty instructs the recognized trade repository referred to in paragraph (a) to provide the regulator or securities regulatory authority with access to the derivatives data that it is required to report under this Instrument and otherwise uses its best efforts to provide the regulator or securities regulatory authority with access to such derivatives data.

(6) A reporting counterparty must report all derivatives data relating to a transaction to the same recognized trade repository to which the initial report was made or, if the initial report was made to the regulator or securities regulatory authority under subsection (4), to the regulator or securities regulatory authority.

(7) A reporting counterparty must not submit a report to a recognized trade repository that is false, inaccurate or misleading.

(8) A reporting counterparty must report an error or omission in the derivatives data it has reported as soon as technologically practicable upon discovery of the error or omission, and in no event later than the end of the business day following the day of discovery of the error or omission.

(9) A local counterparty, other than the reporting counterparty, must notify the reporting counterparty of an error or omission with respect to derivatives data relating to a transaction to which it is a counterparty, as soon as technologically practicable upon discovery of the error or omission, and in no event later than the end of the business day following the day of discovery of the error or omission.

(10) A reporting clearing agency must report derivatives data to the recognized trade repository specified by a local counterparty and may not report derivatives data to another trade repository without the consent of the local counterparty if each of the following applies:

(a) the reporting counterparty to a transaction is the reporting clearing agency;

(b) the local counterparty to the transaction that is not a reporting clearing agency has specified a recognized trade repository to which derivatives data in respect of that transaction is to be reported.

Identifiers, general

27. A reporting counterparty must include the following in every report required by this Part:

(a) the legal entity identifier of each counterparty to the transaction as set out in section 28;

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(b) the unique transaction identifier for the transaction as set out in section 29;

(c) the unique product identifier for the transaction as set out in section 30.

Legal entity identifiers

28. (1) A recognized trade repository must identify each counterparty to a transaction that is required to be reported under this Instrument in all recordkeeping and all reporting required under this Instrument by means of a single legal entity identifier.

(2) Subject to subsection (4), the legal entity identifier referred to in subsection (1) must be a unique identification code assigned to a counterparty in accordance with the standards set by the Global Legal Entity Identifier System.

(3) Subject to subsection (4), a local counterparty must comply with all applicable requirements imposed by the Global Legal Entity Identifier System.

(4) If the Global Legal Entity Identifier System is unavailable to a counterparty to a transaction at the time when a report under this Instrument is required to be made, each of the following applies:

(a) each counterparty to the transaction must obtain a substitute legal entity identifier which complies with the standards established March 8, 2013 by the Legal Entity Identifier Regulatory Oversight Committee for pre-legal entity identifiers;

(b) a local counterparty must use the substitute legal entity identifier until a legal entity identifier is assigned to the counterparty in accordance with the standards set by the Global Legal Entity Identifier System as required under subsection (2);

(c) after the holder of a substitute legal entity identifier is assigned a legal entity identifier in accordance with the standards set by the Global Legal Entity Identifier System as required under subsection (2), the local counterparty must ensure that it is identified only by the assigned legal entity identifier in all derivatives data reported pursuant to this Instrument in respect of transactions to which it is a counterparty.

Unique transaction identifiers

29. (1) A recognized trade repository must identify each transaction that is required to be reported under this Instrument in all recordkeeping and all reporting required under this Instrument by means of a unique transaction identifier.

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(2) A recognized trade repository must assign a unique transaction identifier to a transaction, using its own methodology or incorporating a unique transaction identifier previously assigned to the transaction.

(3) A recognized trade repository must not assign more than one unique transaction identifier to a transaction.

Unique product identifiers

30. (1) In this section, "unique product identifier" means a code that uniquely identifies a derivative and is assigned in accordance with international or industry standards.

(2) A reporting counterparty must identify each transaction that is required to be reported under this Instrument in all recordkeeping and all reporting required under this Instrument by means of a unique product identifier.

(3) A reporting counterparty must not assign more than one unique product identifier to a transaction.

(4) If international or industry standards for a unique product identifier are unavailable for a particular derivative when a report is required to be made to a recognized trade repository under this Instrument, a reporting counterparty must assign a unique product identifier to the transaction using its own methodology.

Creation data

31. (1) A reporting counterparty, upon execution of a transaction that is required to be reported under this Instrument, must report the creation data relating to that transaction to a recognized trade repository.

(2) A reporting counterparty in respect of a transaction must report creation data in real time.

(3) Despite subsection (2), if it is not technologically practicable to report creation data in real time, a reporting counterparty must report creation data as soon as technologically practicable and in no event later than the end of the business day following the day on which the data would otherwise be required to be reported.

Life-cycle event data

32. (1) A reporting counterparty reporting a transaction required to be reported under this Instrument must report all life-cycle event data to a recognized trade repository by the end of the business day on which the life-cycle event occurs.

(2) Despite subsection (1), if it is not technologically practicable to report life-cycle event data by the end of the business day on which the life-cycle event occurs, the reporting

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counterparty must report life-cycle event data no later than the end of the business day following the day on which the life-cycle event occurs.

Valuation data

33. (1) A reporting counterparty reporting a transaction required to be reported under this Instrument must report valuation data based on industry accepted valuation standards to a recognized trade repository

(a) daily, based on relevant closing market data from the previous business day, if the reporting counterparty is a reporting clearing agency, a derivatives dealer or a Canadian financial institution, or

(b) quarterly, as of the last day of each calendar quarter, if the reporting counterparty is not a reporting clearing agency, a derivatives dealer or a Canadian financial institution.

(2) Despite subsection (1), valuation data required to be reported pursuant to paragraph (1)(b) must be reported to the recognized trade repository no later than the 30th day after the end of the calendar quarter.

Pre-existing transactions

34. (1) Despite section 31 and subject to subsection 43(2), a reporting counterparty to a transaction required to be reported under this Instrument is required to report only the creation data indicated in the column in Appendix A entitled "Required for Pre-existing Transactions" on or before **[date to be determined]** if each of the following applies:

(a) the reporting counterparty is a reporting clearing agency, a derivatives dealer or a Canadian financial institution;

(b) the transaction was entered into before **[date to be determined]**;

(c) there were outstanding contractual obligations with respect to the transaction on **[date to be determined]**.

(1.1) Despite section 31 and subject to subsection 43(3), a reporting counterparty to a transaction required to be reported under this Instrument is required to report only the creation data indicated in the column in Appendix A entitled "Required for Pre-existing Transactions" on or before **[date to be determined]** if each of the following applies:

(a) the reporting counterparty is not a reporting clearing agency, a derivatives dealer or a Canadian financial institution;

(b) the transaction was entered into before **[date to be determined]**;

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(c) there were outstanding contractual obligations with respect to the transaction on **[date to be determined]**.

(2) If subsection (1) or (1.1) applies to a transaction, the obligation of a reporting counterparty to report life-cycle event data under section 32 commences only after the reporting counterparty has reported creation data in accordance with subsection (1) or (1.1).

(3) If subsection (1) or (1.1) applies to a transaction, the obligation of a reporting counterparty to report valuation data under section 33 commences only after the reporting counterparty has reported creation data in accordance with subsection (1) or (1.1).

Timing requirements for reporting data to another recognized trade repository

35. Despite subsection 26(6) and the data reporting timing requirements set out in sections 31, 32, 33 and 34, if a recognized trade repository ceases operations or stops accepting derivatives data for a certain asset class of derivatives, a reporting counterparty may fulfill its reporting obligations under this Instrument by reporting the derivatives data to another recognized trade repository or, if there is not an available recognized trade repository, the regulator or securities regulatory authority.

Records of data reported

36. (1) A reporting counterparty must keep transaction records for 7 years after the date on which the transaction expires or terminates.

(2) A reporting counterparty must keep records referred to in subsection (1) in a safe location and in a durable form.

PART 4
DATA DISSEMINATION AND ACCESS TO DATA

Data available to regulators

37. (1) A recognized trade repository must, at no cost,

(a) provide to the regulator or securities regulatory authority direct, continuous and timely electronic access to such data in the possession of the recognized trade repository as is required by the securities regulatory authority,

(b) accept and promptly fulfil a data request from the regulator or securities regulatory authority,

INCLUDES COMMENT LETTERS

(c) create and make available to the regulator or securities regulatory authority aggregate data derived from data in the possession of the recognized trade repository as is required by the regulator or securities regulatory authority, and

(d) disclose to the regulator or securities regulatory authority the manner in which the derivatives data provided under paragraph (c) has been aggregated.

(2) A recognized trade repository must conform to internationally accepted regulatory access standards applicable to trade repositories.

(3) A reporting counterparty must use its best efforts to provide the regulator or securities regulatory authority with access to all derivatives data that it is required to report pursuant to this Instrument, including instructing a trade repository to provide the regulator or securities regulatory authority with access to such data.

Data available to counterparties

38. (1) A recognized trade repository must provide all counterparties to a transaction with timely access to all derivatives data relevant to that transaction which is submitted to the recognized trade repository.

(2) A recognized trade repository must have appropriate verification and authorization procedures in place to deal with access pursuant to subsection (1) by a non-reporting counterparty or a party acting on behalf of a non-reporting counterparty.

(3) Each counterparty to a transaction is deemed to have consented to the release of all derivatives data required to be reported or disclosed under this Instrument.

(4) Subsection (3) applies despite any agreement to the contrary between the counterparties to a transaction.

Data available to public

39. (1) A recognized trade repository must, on a periodic basis, create and make available to the public, at no cost, aggregate data on open positions, volume, number and, where applicable, price, relating to the transactions reported to it pursuant to this Instrument.

(2) The periodic aggregate data made available to the public pursuant to subsection (1) must be complemented at a minimum by breakdowns, where applicable, by currency of denomination, geographic location of reference entity or asset, asset class, contract type, maturity and whether the transaction is cleared.

(3) A recognized trade repository must make transaction level reports of the data indicated in the column in Appendix A entitled “Required for Public Dissemination” for each transaction reported pursuant to this Instrument available to the public at no cost not later than

INCLUDES COMMENT LETTERS

(a) the end of the day following the day on which it receives the data from the reporting counterparty to the transaction, if at least one of the counterparties to the transaction is a reporting clearing agency, a derivatives dealer or a Canadian financial institution, or

(b) the end of the second day following the day on which it receives the data from the reporting counterparty to the transaction, if none of the counterparties to the transaction is a reporting clearing agency, a derivatives dealer or a Canadian financial institution.

(4) In disclosing transaction level reports required by subsection (3), a recognized trade repository must not disclose the identity of either counterparty to the transaction.

(5) A recognized trade repository must make the data required to be made available to the public under this section available in a usable form through a publicly accessible website or similar medium.

(6) Despite subsections (1) to (5), a recognized trade repository is not required to make public derivatives data for transactions entered into between affiliated entities.

PART 5
EXCLUSIONS

Exclusion from reporting trades of commodities derivatives

[Option #1] 40. Despite Part 3, a reporting counterparty is not required to report derivatives data for a transaction to which each of the following applies:

(a) the transaction relates to a derivative the asset class of which is a commodity other than cash or currency;

(b) each counterparty is not a derivatives dealer or a Canadian financial institution;

(c) each counterparty has, at the time of the transaction, less than $250,000,000 aggregate notional value, without netting, under all its outstanding transactions in derivatives the asset class of which is a commodity other than cash or currency, including the additional notional value related to that transaction.

[Option #2] 40. Despite Part 3, a local counterparty is under no obligation to report derivatives data for a transaction if each of the following applies:

(a) the transaction relates to a derivative the asset class of which is a commodity other than cash or currency;

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(b) the local counterparty is not a derivatives dealer;

(c) the local counterparty has less than $500,000 aggregate notional value, without netting, under all its outstanding transactions, at the time of the transaction including the additional notional value related to that transaction.

41. Despite any other section of this Instrument, a reporting counterparty is not required to report derivatives data for a transaction between

(a) the government of a local jurisdiction, and

(b) a crown corporation or agency that forms part of a consolidated entity with that government for accounting purposes.

PART 6
EXEMPTIONS

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

PART 7
TRANSITION PERIOD AND EFFECTIVE DATE

Transition period

43. (1) Part 3 does not apply so as to require a reporting counterparty that is not a reporting clearing agency, a derivatives dealer or a Canadian financial institution to make a report under Part 3 until **[date to be determined]**.

(2) Part 3 does not apply to a transaction entered into before [**date to be determined**] that expires or terminates not later than **[date to be determined]** if the reporting counterparty to the transaction is a reporting clearing agency, a derivatives dealer or a Canadian financial institution.

(3) Part 3 does not apply to a transaction entered into before [**date to be determined**] that expires or terminates not later than **[date to be determined]** if the reporting counterparty to the transaction is not a reporting clearing agency, a derivatives dealer or a Canadian financial institution.

Effective date

44. (1) Parts 1, 2, 4, and 6 come into force on **[date to be determined]**.

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(2) Despite subsection (1), subsection 39(3) comes into force on **[date to be determined]**.

(3) Parts 3 and 5 come into force on **[date to be determined]**.

INCLUDES COMMENT LETTERS

APPENDIX A
to
PROPOSED MULTILATERAL INSTRUMENT 96-101
TRADE REPOSITORIES AND DERIVATIVES DATA REPORTING

Minimum Data Fields Required to be Reported to a Recognized Trade Repository

Instructions:

The reporting counterparty is required to provide a response for each of the fields unless the field is not applicable to the transaction.

Data field	Description	Required for Public Dissemination	Required for Pre-existing Transactions
Transaction identifier	The unique transaction identifier as provided by the recognized trade repository or the identifier as identified by the two counterparties, electronic trading venue of execution or clearing agency.	N	Y
Master agreement type	The type of master agreement, if used for the reported transaction.	N	N
Master agreement version	Date of the master agreement version (e.g., 2002, 2006).	N	N
Cleared	Indicate whether the transaction has been cleared by a clearing agency.	Y	Y
Intent to clear	Indicate whether the transaction will be cleared by a clearing agency.	N	N
Clearing agency	LEI of the clearing agency where the transaction is or will be cleared.	N	Y
Clearing member	LEI of the clearing member, if the clearing member is not a counterparty.	N	N
Clearing exemption	Indicate whether one or more of the counterparties to the transaction are exempted from a mandatory clearing requirement.	Y	N
Broker/Clearing intermediary	LEI of the broker acting as an intermediary for the reporting counterparty without becoming a counterparty.	N	N

INCLUDES COMMENT LETTERS

Data field	Description	Required for Public Dissemination	Required for Pre-existing Transactions
Electronic trading venue identifier	LEI of the electronic trading venue where the transaction was executed.	Y (Only "Yes" or "No" to be publicly disseminated)	Y
Inter-affiliate	Indicate whether the transaction is between two affiliated entities. (This field is only required to be reported as of **[insert date]**.)	N	N
Collateralization	Indicate whether the transaction is collateralized. Field Values: • Fully (initial and variation margin required to be posted by both parties); • Partially (variation only required to be posted by both parties); • One-way (one party will be required to post some form of collateral); • Uncollateralized.	Y	N
Identifier of reporting counterparty	LEI of the reporting counterparty or, in case of an individual, its client code.	N	Y
Identifier of non-reporting counterparty	LEI of the non-reporting counterparty or, in case of an individual, its client code.	N	Y
Counterparty side	Indicate whether the reporting counterparty was the buyer or seller. In the case of swaps, other than credit default, the buyer will represent the payer of leg 1 and the seller will be the payer of leg 2.	N	Y
Identifier of agent reporting the transaction	LEI of the agent reporting the transaction if reporting of the transaction has been delegated by the reporting counterparty.	N	N
Jurisdiction of reporting counterparty	If the reporting counterparty is a local counterparty under the derivatives data reporting rules of one or more provinces of Canada, indicate all of the jurisdictions in which it is a local counterparty.	N	N

INCLUDES COMMENT LETTERS

Data field	Description	Required for Public Dissemination	Required for Pre-existing Transactions
Jurisdiction of non-reporting counterparty	If the non-reporting counterparty is a local counterparty under the derivatives data reporting rules of one or more provinces of Canada, indicate all of the jurisdictions in which it is a local counterparty.	N	N
A. Common Data	• These fields are required to be reported for all derivative transactions even if the information may be entered in an Asset field below. • Fields do not have to be reported if the unique product identifier adequately describes those fields.		
Unique product identifier	Unique product identification code based on the taxonomy of the product.	Y	N
Transaction type	The name of the transaction type (e.g., swap, swaption, forwards, options, basis swap, index swap, basket swap, other).	Y	Y
Underlying asset identifier 1	The unique identifier of the asset referenced in the transaction.	Y	Y
Underlying asset identifier 2	The unique identifier of the second asset referenced in the transaction, if more than one. If more than two assets identified in the transaction, report the unique identifiers for those additional underlying assets.	Y	Y
Asset class	Major asset class of the product (e.g., interest rate, credit, commodity, foreign exchange, equity, etc.).	Y	N
Effective date or start date	The date the transaction becomes effective or starts.	Y	Y
Maturity, termination or end date	The date the transaction expires.	Y	Y
Payment frequency or dates	The dates or frequency the transaction requires payments to be made (e.g., quarterly, monthly).	Y	Y
Reset frequency or dates	The dates or frequency at which the price resets (e.g., quarterly, semi-annually, annually).	Y	Y

INCLUDES COMMENT LETTERS

Data field	Description	Required for Public Dissemination	Required for Pre-existing Transactions
Day count convention	Factor used to calculate the payments (e.g., 30/360, actual/360).	Y	Y
Delivery type	Indicate whether transaction is settled physically or in cash.	N	Y
Price 1	The price, yield, spread, coupon, etc., of the derivative. The price/rate should not include any premiums such as commissions, collateral premiums, accrued interest, etc.	Y	Y
Price 2	The price, yield, spread, coupon, etc., of the derivative. The price/rate should not include any premiums such as commissions, collateral premiums, accrued interest, etc.	Y	Y
Price notation type 1	The manner in which the price is expressed (e.g., percent, basis points, etc.).	Y	Y
Price notation type 2	The manner in which the price is expressed (e.g., percent, basis points, etc.).	Y	Y
Price multiplier	The number of units of the underlying reference entity represented by 1 unit of the transaction.	N	N
Notional amount leg 1	Total notional amount(s) of leg 1 of the transaction.	Y	Y
Notional amount leg 2	Total notional amount(s) of leg 2 of the transaction.	Y	Y
Currency leg 1	Currency(ies) of leg 1.	Y	Y
Currency leg 2	Currency(ies) of leg 2.	Y	Y
Settlement currency	The currency used to determine the cash settlement amount.	Y	Y
Up-front payment	Amount of any up-front payment.	N	N
Currency or currencies of up-front payment	The currency in which any up-front payment is made by one counterparty to another.	N	N
Embedded option	Indicate whether the option is an embedded option.	Y	N

INCLUDES COMMENT LETTERS

Data field	Description	Required for Public Dissemination	Required for Pre-existing Transactions
B. Additional Asset Information	These additional fields are required to be reported for transactions in the respective types of derivatives set out below, even if the information is entered in a Common Data field above.		
i) Interest rate derivatives			
Fixed rate leg 1	The rate used to determine the payment amount for leg 1 of the transaction.	N	Y
Fixed rate leg 2	The rate used to determine the payment amount for leg 2 of the transaction.	N	Y
Floating rate leg 1	The floating rate used to determine the payment amount for leg 1 of the transaction.	N	Y
Floating rate leg 2	The floating rate used to determine the payment amount for leg 2 of the transaction.	N	Y
Fixed rate day count convention	Factor used to calculate the fixed payer payments (e.g., 30/360, actual/360).	N	Y
Fixed leg payment frequency or dates	Frequency or dates of payments for the fixed rate leg of the transaction (e.g., quarterly, semi-annually, annually).	N	Y
Floating leg payment frequency or dates	Frequency or dates of payments for the floating rate leg of the transaction (e.g., quarterly, semi-annually, annually).	N	Y
Floating rate reset frequency or dates	The dates or frequency at which the floating leg of the transaction resets (e.g., quarterly, semi-annually, annually).	N	Y
ii) Currency derivatives			
Exchange rate	Contractual rate(s) of exchange of the currencies.	N	Y

INCLUDES COMMENT LETTERS

Data field	Description	Required for Public Dissemination	Required for Pre-existing Transactions
iii) Commodity derivatives			
Sub-asset class	Specific information to identify the type of commodity derivative (e.g., Agriculture, Power, Oil, Natural Gas, Freights, Metals, Index, Environmental, Exotic).	Y	Y
Quantity	Total quantity in the unit of measure of an underlying commodity.	Y	Y
Unit of measure	Unit of measure for the quantity of each side of the transaction (e.g., barrels, bushels, etc.).	Y	Y
Grade	Grade of product being delivered (e.g., grade of oil).	N	Y
Delivery point	The delivery location.	N	N
Load type	For power, load profile for the delivery.	N	Y
Transmission days	For power, the delivery days of the week.	N	Y
Transmission duration	For power, the hours of day transmission starts and ends.	N	Y
C. Options	These additional fields are required to be reported for options transactions set out below, even if the information is entered in a Common Data field above.		
Option exercise date	The date(s) on which the option may be exercised.	Y	Y
Option premium	Fixed premium paid by the buyer to the seller.	Y	Y
Strike price (cap/floor rate)	The strike price of the option.	Y	Y
Option style	Indicate whether the option can be exercised on a fixed date or anytime during the life of the transaction (e.g., American, European, Bermudan, Asian).	Y	Y
Option type	Put/call.	Y	Y

INCLUDES COMMENT LETTERS

Data field	Description	Required for Public Dissemination	Required for Pre-existing Transactions
D. Event Data			
Action	Describes the type of event to the transaction (e.g., new transaction, modification or cancellation of existing transaction, etc.).	Y	N
Execution timestamp	The time and date of execution or novation of a transaction, expressed using Coordinated Universal Time (UTC).	Y	Y (If available)
Post-transaction events	Indicate whether the transaction resulted from a post-transaction service (e.g., compression, reconciliation, etc.) or from a lifecycle event (e.g., novation, amendment, etc.).	N	N
Reporting date	The time and date the transaction was submitted to the trade repository, expressed using UTC.	N	N
E. Valuation data	These additional fields are required to be reported on a continuing basis for all reported derivative transactions, including reported pre-existing transactions.		
Value of transaction calculated by the reporting counterparty	Mark-to-market valuation of the transaction, or mark-to-model valuation	N	N
Valuation currency	Indicate the currency used when reporting the value of the transaction.	N	N
Valuation date	Date of the latest mark-to-market or mark-to-model valuation.	N	N
F. Other details			
Other details	Where the terms of the transaction cannot be effectively reported in the above prescribed fields, provide any additional information that may be necessary.	N	Y

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APPENDIX B
to
PROPOSED MULTILATERAL INSTRUMENT 96-101
TRADE REPOSITORIES AND DERIVATIVES DATA REPORTING

Equivalent Trade Reporting Laws of Foreign Jurisdictions
Subject to Deemed Compliance Pursuant to Subsection 26(5)

The securities regulatory authority has determined that the laws and regulations of each of the following jurisdictions outside of the local jurisdiction are considered equivalent for the purposes of subsection 26(5) of this Instrument.

Jurisdiction	Law, Regulation and/or Instrument

INCLUDES COMMENT LETTERS

FORM 96-101F1
APPLICATION FOR RECOGNITION – TRADE REPOSITORY INFORMATION STATEMENT

Filer:

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

Name(s)

1. Full name of trade repository:

2. Name(s) under which business is conducted, if different from item 1:

3. If this filing makes a name change on behalf of the trade repository in respect of the name set out in item 1 or item 2, enter the previous name and the new name.

   Previous name:
   New name:

Contact information

4. Head office

   Address:
   Telephone:
   Fax:

5. Mailing address (if different):

6. Other offices

   Address:
   Telephone:
   Fax:

7. Website address:

8. Contact employee

   Name and title:
   Telephone:
   Fax:
   E-mail:

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9. Counsel

Firm name:
Lawyer name:
Telephone:
Fax:
E-mail:

10. Canadian counsel (if applicable)

Firm name:
Lawyer name:
Telephone:
Fax:
E-mail:

EXHIBITS

File all Exhibits with the Filing. For each Exhibit, include the name of the trade repository, the date of filing of the Exhibit and the date as of which the information is accurate (if different from the date of the filing). If any required Exhibit is inapplicable, a statement to that effect must be furnished in place of such Exhibit.

Except as provided below, if the filer files an amendment to the information provided in its Filing and the information relates to an Exhibit filed with the Filing or a subsequent amendment, the filer must, in order to comply with section 3 of MI 96-101 *Trade Repositories and Derivatives Data Reporting* (the “TR Instrument”), provide a description of the change, the expected date of the implementation of the change, and file a complete and updated Exhibit. The filer must provide a clean and blacklined version showing changes from the previous filing.

If the filer has otherwise filed the information required by the previous paragraph pursuant to section 17 of the TR Instrument, it is not required to file the information again as an amendment to an Exhibit. However, if supplementary material relating to a filed rule is contained in an Exhibit, an amendment to the Exhibit must also be filed.

Exhibit A – Corporate Governance

1. Legal status:

☐ Corporation

☐ Partnership

☐ Other (specify):

INCLUDES COMMENT LETTERS

2. Indicate the following:

   (1) Date (DD/MM/YYYY) of formation.

   (2) Place of formation.

   (3) Statute under which trade repository was organized.

   (4) Regulatory status in other jurisdictions.

3. Provide a copy of the constating documents (including corporate by-laws), shareholder agreements, partnership agreements and other similar documents, and all subsequent amendments.

4. Provide the policies and procedures to address potential conflicts of interest arising from the operation of the trade repository or the services it provides, including those related to the commercial interest of the trade repository, the interests of its owners and its operators, the responsibilities and sound functioning of the trade repository, and those between the operations of the trade repository and its regulatory responsibilities.

5. An applicant that is located outside of [*insert local jurisdiction*] that is applying for recognition as a trade repository under the local securities legislation must additionally provide the following:

   (1) An opinion of legal counsel that, as a matter of law the applicant has the power and authority to provide the securities regulatory authority with prompt access to the applicant's books and records and submit to onsite inspection and examination by the securities regulatory authority, and

   (2) A completed Form 96-101F2 *Trade Repository Submission to Jurisdiction and Appointment of Agent for Service*.

Exhibit B – Ownership

1. A list of the registered or beneficial holders of securities of, partnership interests in, or other ownership interests in, the trade repository. For each of the persons listed in the Exhibit, please provide the following:

   (1) Name.

   (2) Principal business or occupation and title.

   (3) Ownership interest.

   (4) Nature of the ownership interest, including a description of the type of security, partnership interest or other ownership interest.

INCLUDES COMMENT LETTERS

2. In the case of a trade repository that is publicly traded, if the trade repository is a corporation, please only provide a list of each shareholder that directly owns five percent or more of a class of a security with voting rights.

Exhibit C – Organization

1. A list of partners, officers, governors, and members of the board of directors and any standing committees of the board, or persons performing similar functions, who presently hold or have held their offices or positions during the previous year, indicating the following for each:

   (1) Name.

   (2) Principal business or occupation and title.

   (3) Dates of commencement and expiry of present term of office or position.

   (4) Type of business in which each is primarily engaged and current employer.

   (5) Type of business in which each was primarily engaged in the preceding five years, if different from that set out in item 4.

   (6) Whether the person is considered to be an independent director.

2. A list of the committees of the board, including their mandates.

3. The name of the trade repository's Chief Compliance Officer.

Exhibit D – Affiliated Entities

1. For each affiliated entity of the trade repository provide the name and head office address and describe the principal business of the affiliated entity.

2. For each affiliated entity of the trade repository

   (a) to which the trade repository has outsourced any of its key services or systems described in Exhibit E – Operations of the Trade Repository, including business recordkeeping, recordkeeping of trade data, trade data reporting, trade data comparison, data feed, or

   (b) with which the trade repository has any other material business relationship, including loans, cross-guarantees, etc.,

   provide the following information:

   (1) Name and address of the affiliated entity.

INCLUDES COMMENT LETTERS

(2) The name and title of the directors and officers, or persons performing similar functions, of the affiliated entity.

(3) A description of the nature and extent of the contractual and other agreements with the trade repository, and the roles and responsibilities of the affiliated entity under the arrangement.

(4) A copy of each material contract relating to any outsourced functions or other material relationship.

(5) Copies of constating documents (including corporate by-laws), shareholder agreements, partnership agreements and other similar documents.

(6) For the latest financial year of any affiliated entity that has any outstanding loans or cross-guarantee arrangements with the trade repository, financial statements, which may be unaudited, prepared in accordance with one or more of the following:

(a) Canadian GAAP applicable to publicly accountable enterprises;

(b) IFRS;

(c) U.S. GAAP where the affiliated entity is incorporated or organized under the laws of the United States of America or a jurisdiction of the United States of America.

Exhibit E – Operations of the Trade Repository

1. Describe in detail the manner of operation of the trade repository and its associated functions. This should include, but not be limited to, a description of the following:

(1) The structure of the trade repository.

(2) Means of access by the trade repository's participants and, if applicable, their clients to the trade repository's facilities and services.

(3) The hours of operation.

(4) A description of the facilities and services offered by the trade repository including, but not limited to, collection and maintenance of derivatives data.

(5) A list of the types of derivatives instruments for which data recordkeeping is offered, including, but not limited to, a description of the features and characteristics of the instruments.

(6) Procedures regarding the entry, display and reporting of derivatives data.

INCLUDES COMMENT LETTERS

(7) Description of recordkeeping procedures that ensure derivatives data is recorded accurately, completely and on a timely basis.

(8) The safeguards and procedures to protect derivatives data of the trade repository's participants, including required policies and procedures reasonably designed to protect the privacy and confidentiality of the data.

(9) Training provided to participants and a copy of any materials provided with respect to systems and rules and other requirements of the trade repository.

(10) Steps taken to ensure that the trade repository's participants have knowledge of and comply with the requirements of the trade repository.

(11) A description of the trade repository's risk management framework for comprehensively managing risks including business, legal, and operational risks.

2. The filer must provide all policies, procedures and manuals related to the operation of the trade repository.

Exhibit F – Outsourcing

1. Where the trade repository has outsourced the operation of key services or systems described in Exhibit E – Operations of the Trade Repository to an arms-length third party, including any function associated with the collection and maintenance of derivatives data, provide the following information:

(1) Name and address of the person or company (including any affiliated entities of the trade repository) to which the function has been outsourced.

(2) A description of the nature and extent of the contractual or other agreement with the trade repository and the roles and responsibilities of the arms-length party under the arrangement.

(3) A copy of each material contract relating to any outsourced function.

Exhibit G – Systems and Contingency Planning

1. For each of the systems for collecting and maintaining reports of derivatives data, describe:

(1) Current and future capacity estimates.

(2) Procedures for reviewing system capacity.

(3) Procedures for reviewing system security.

INCLUDES COMMENT LETTERS

(4) Procedures to conduct stress tests.

(5) A description of the filer's business continuity and disaster recovery plans, including any relevant documentation.

(6) Procedures to test business continuity and disaster recovery plans.

(7) The list of data to be reported by all types of participants.

(8) A description of the data format or formats that will be available to the securities regulatory authority and other persons receiving trade reporting data.

Exhibit H – Access to Services

1. A complete set of all forms, agreements or other materials pertaining to access to the services of the trade repository described in item 1(4) in Exhibit E.

2. Describe the types of trade repository participants.

3. Describe the trade repository's criteria for access to the services of the trade repository.

4. Describe any differences in access to the services offered by the trade repository to different groups or types of participants.

5. Describe conditions under which the trade repository's participants may be subject to suspension or termination with regard to access to the services of the trade repository.

6. Describe any procedures that will be involved in the suspension or termination of a participant.

7. Describe the trade repository's arrangements for permitting clients of participants to have access to the trade repository. Provide a copy of any agreements or documentation relating to these arrangements.

Exhibit I – Fees

1. A description of the fee model and all fees charged by the trade repository, or by a party to which services have been directly or indirectly outsourced, including, but not limited to, fees relating to access and the collection and maintenance of derivatives data, how such fees are set, and any fee rebates or discounts and how the rebates and discounts are set.

INCLUDES COMMENT LETTERS

CERTIFICATE OF TRADE REPOSITORY

The undersigned certifies that the information given in this report is true and correct.

DATED at ____________ this ________ day of _________________, 20____

____
(Name of trade repository)

____
(Name of director, officer or partner – please type or print)

____
(Signature of director, officer or partner)

____
(Official capacity – please type or print)

IF APPLICABLE, ADDITIONAL CERTIFICATE OF TRADE REPOSITORY THAT IS LOCATED OUTSIDE OF [*insert local jurisdiction*]

The undersigned certifies that

1. it will provide the securities regulatory authority with access to its books and records and will submit to onsite inspection and examination by the securities regulatory authority;

2. as a matter of law, it has the power and authority to

   (a) provide the securities regulatory authority with access to its books and records, and

   (b) submit to onsite inspection and examination by the securities regulatory authority.

DATED at ____________ this ________ day of _________________, 20____

____
(Name of trade repository)

____
(Name of director, officer or partner – please type or print)

____

INCLUDES COMMENT LETTERS

(Signature of director, officer or partner)

____

(Official capacity – please type or print)

INCLUDES COMMENT LETTERS

FORM 96-101F2
TRADE REPOSITORY SUBMISSION TO JURISDICTION AND APPOINTMENT OF AGENT FOR SERVICE OF PROCESS

1. Name of trade repository (the "Trade Repository"):

 ____

2. Jurisdiction of incorporation, or equivalent, of the Trade Repository:

 ____

3. Address of principal place of business of the Trade Repository:

 ____

4. Name of the agent for service of process for the Trade Repository (the "Agent"):

 ____

5. Address of the Agent in [*insert local jurisdiction*]:

 ____

6. The Trade Repository designates and appoints the Agent as its agent upon whom may be served a notice, pleading, subpoena, summons or other process in any action, investigation or administrative, criminal, quasi-criminal, penal or other proceeding arising out of or relating to or concerning the activities of the Trade Repository in [*insert local jurisdiction*]. The Trade Repository hereby irrevocably waives any right to challenge service upon its Agent as not binding upon the Trade Repository.

7. The Trade Repository agrees to unconditionally and irrevocably attorn to the non-exclusive jurisdiction of (i) the courts and administrative tribunals of [*insert local jurisdiction*] and (ii) any proceeding in any province or territory arising out of, related to, concerning or in any other manner connected with the regulation and oversight of the activities of the Trade Repository in [*insert local jurisdiction*].

8. The Trade Repository shall file a new submission to jurisdiction and appointment of agent for service of process in this form at least 30 days before the Trade Repository ceases to be recognized or exempted by the Commission, to be in effect for six years from the date it ceases to be recognized or exempted unless otherwise amended in accordance with item 9.

9. Until six years after it has ceased to be a recognized or exempted by the Commission from the recognition requirement under the securities legislation of [*insert local*

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jurisdiction], the Trade Repository shall file an amended submission to jurisdiction and appointment of agent for service of process in this form at least 30 days before any change in the name or above address of the Agent.

10. This submission to jurisdiction and appointment of agent for service of process shall be governed by and construed in accordance with the laws of [*insert local jurisdiction*].

Dated: ________________________________

____
Signature of the Trade Repository

____
Print name and title of signing
officer of the Trade Repository

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AGENT

CONSENT TO ACT AS AGENT FOR SERVICE

I, ____ (name of Agent in full; if Corporation, full Corporate name) of ____(business address), hereby accept the appointment as agent for service of process of ____(insert name of Trade Repository) and hereby consent to act as agent for service pursuant to the terms of the appointment executed by ____ (insert name of Trade Repository) on ____ (insert date).

Dated: ______________________________________

____
Signature of Agent

____
Print name of person signing and, if Agent is not an individual, the title of the person

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FORM 96-101F3
CESSATION OF OPERATIONS REPORT FOR RECOGNIZED TRADE REPOSITORY

1. Identification:

   (1) Full name of the recognized trade repository:

   (2) Name(s) under which business is conducted, if different from item 1A:

2. Date the recognized trade repository proposes to cease carrying on business as a trade repository:

3. If cessation of business was involuntary, date the recognized trade repository has ceased to carry on business as a trade repository:

Exhibits

File all Exhibits with this Cessation of Operations Report. For each exhibit, include the name of the recognized trade repository, the date of filing of the exhibit and the date as of which the information is accurate (if different from the date of the filing). If any required Exhibit is inapplicable, a statement to that effect must be furnished in place of such Exhibit.

Exhibit A

The reasons for the recognized trade repository ceasing to carry on business as a trade repository.

Exhibit B

A list of all derivatives instruments for which data recordkeeping is offered during the last 30 days prior to ceasing business as a trade repository.

Exhibit C

A list of all participants who are counterparties to a transaction whose derivatives data is required to be reported pursuant to MI 96-101 *Trade Repositories and Derivatives Data Reporting* and for whom the recognized trade repository provided services during the last 30 days prior to ceasing business as a trade repository.

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CERTIFICATE OF RECGONIZED TRADE REPOSITORY

The undersigned certifies that the information given in this report is true and correct.

DATED at ____________ this ____________ day of _____________________ 20 _____

____
(Name of trade repository)

____
(Name of director, officer or partner – please type or print)

____
(Signature of director, officer or partner)

____
(Official capacity – please type or print)

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ANNEX D

PROPOSED COMPANION POLICY 96-101
TRADE REPOSITORIES AND DERIVATIVES DATA REPORTING

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PART 1
GENERAL COMMENTS

Introduction

This companion policy (the "Policy") provides guidance on how those members ("participating jurisdictions" or "we") of the Canadian Securities Administrators participating in Multilateral Instrument 91-601 *Trade Repositories and Derivatives Data Reporting* (the "Instrument") interpret various matters in the Instrument.

Except for Part 1, the numbering and headings of Parts, sections and subsections in this Policy correspond to the numbering and headings in the Instrument. Any general guidance for a Part or section appears immediately after the Part or section name. Any specific guidance on a section or subsection follows any general guidance. If there is no guidance for a Part or section, the numbering in this Policy will skip to the next provision that does have guidance.

Unless defined in the Instrument or this Policy, terms used in the Instrument and in this Policy have the meaning given to them in securities legislation, including in National Instrument 14-101 *Definitions*.

Definitions and interpretation of terms in this Policy and in the Instrument

1. (1) In this Policy

"CPMI" means the Committee on Payments and Market Infrastructure;[1]

"FMI" means a financial market infrastructure, as described in the PFMI Report;

"Global LEI System" means the Global Legal Entity Identifier System;

"IOSCO" means the Technical Committee of the International Organization of Securities Commissions;

"ISDA methodology" means the methodology described in the Canadian Transaction Reporting Party Requirements issued by the International Swaps and Derivatives Association, Inc. and dated April 4, 2014;

"LEI" means a legal entity identifier;

"LEI ROC" means the LEI Regulatory Oversight Committee;

"PFMI Report" means the April 2012 final report entitled *Principles for financial market infrastructures* published by CPMI (formerly CPSS) and IOSCO, as amended from time to time;[2]

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[1] Prior to September 1, 2014, CPMI was known as the Committee on Payment and Settlement Systems (CPSS).

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"principle" means, unless the context otherwise indicates, a principle set out in the PFMI Report.

(2) A "life-cycle event" is defined in the Instrument as an event that results in a change to derivatives data previously reported to a recognized trade repository. Examples of a life-cycle event with respect to a transaction would include:

- a change to the termination date for the transaction:
- a change in the cash flows, payment frequency, currency, numbering convention, spread, benchmark, reference entity or rates originally reported;
- the availability of a LEI for a counterparty previously identified by name or by some other identifier;
- a corporate action affecting a security or securities on which the transaction is based (e.g., a merger, dividend, stock split, or bankruptcy);
- a change to the notional amount of a transaction including contractually agreed upon changes (e.g., amortization schedule);
- the exercise of a right or option that is an element of the transaction; and
- the satisfaction of a level, event, barrier or other condition contained in the contract for the transaction.

(3) Paragraph (b) of the definition of "local counterparty" captures entities affiliated with a person or company referred to in paragraph (a) of the definition, provided that such person or company is responsible for the liabilities of the affiliated entity. The participating jurisdictions are of the view that this responsibility must be for all or substantially all of the affiliated entity's liabilities.

While the definition of local counterparty captures an individual resident in the local jurisdiction, paragraph 25(e) of the Instrument excludes individuals from having to report a transaction.

(4) The term "transaction" is used in the Instrument instead of the statutorily defined term "trade", in order to reflect that certain types of activities or events relating to a derivative transaction require the modification of an existing transaction report while others require a unique transaction report. The primary differences between the two definitions are that (i) the term "trade" as defined in the securities legislation includes material amendments and terminations, whereas "transaction" as defined in the Instrument does not, and (ii) the term "transaction", as defined in the Instrument, includes a novation to a clearing agency, whereas "trade" as defined in the securities legislation does not.

A material amendment is not referred to in the definition of "transaction", as a material amendment to an existing transaction is required to be reported as a life-cycle event under section 32. Similarly, a termination is not referred to in the definition of "transaction", as the

[2] The PFMI Report is available on the Bank for International Settlements' website (www.bis.org) and the IOSCO website (www.iosco.org).

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expiry or termination of a transaction is required to be reported as a life-cycle event under section 32 and would not trigger the requirement for a new transaction report.

In addition, the definition of "transaction" in the Instrument includes a novation to a clearing agency. Each transaction resulting from a novation of a bilateral transaction to a clearing agency is required to be reported as a distinct transaction with reporting links to the original transaction.

(5) The term "valuation data" is defined in the Instrument as data that reflects the current value of a transaction. We are of the view that valuation data can be calculated based upon the use of an industry-accepted methodology such as mark-to-market or mark-to-model, or another valuation method that is in accordance with accounting principles and will result in a reasonable valuation of a transaction.[3] We expect that the methodology used to calculate valuation data that is reported with respect to a transaction would be consistent over the entire life of the transaction.

PART 2
TRADE REPOSITORY RECOGNITION AND ONGOING REQUIREMENTS

Part 2 sets out rules relating to the recognition of a trade repository by the local securities authority and establishes ongoing requirements for a recognized trade repository. To obtain and maintain recognition as a trade repository, a person or entity must comply with these rules and requirements in addition to all of the terms and conditions in the recognition order made by the securities regulatory authority.

In order to comply with the reporting obligations contained in Part 3, a reporting counterparty to a transaction involving a local counterparty must report the transaction to a recognized trade repository. Except in Alberta, there is no prohibition on an unrecognized trade repository operating in a local jurisdiction; however, a reporting counterparty that reports a transaction to an unrecognized trade repository would not be in compliance with its reporting obligations under this Instrument with respect to that transaction. In Alberta, securities legislation prohibits a person or company from carrying on business as a trade repository in the province unless recognized as a trade repository by the securities regulatory authority.

The legal entity that applies to be a recognized trade repository will typically be the entity that operates the facility and collects and maintains records of completed transactions reported to the trade repository by other persons or companies. In some cases, the applicant may operate more than one trade repository facility. In such cases, the applicant may file separate forms in respect of each trade repository facility, or it may choose to file one form to cover all of the different trade repository facilities. If the latter alternative is chosen, the applicant must clearly identify the facility to which the information or any changes submitted under this Part of the Instrument apply.

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[3] For example, see International Financial Reporting Standard 13, *Fair Value Measurement*.

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Filing of initial information on application for recognition as a trade repository

2. In determining whether to recognize an applicant as a trade repository under securities legislation, we anticipate that the securities regulatory authority will consider a number of factors, including the following:

- whether it is in the public interest to recognize the trade repository;
- the manner in which the trade repository proposes to comply with the Instrument;
- whether the trade repository has meaningful representation on its governing body;
- whether the trade repository has sufficient financial and operational resources for the proper performance of its functions;
- whether the rules and procedures of the trade repository ensure that its business is conducted in an orderly manner that fosters both fair and efficient capital markets, and improves transparency in the derivatives market;
- whether the trade repository has policies and procedures to effectively identify and manage conflicts of interest arising from its operation or the services it provides;
- whether the requirements of the trade repository relating to access to its services are fair and reasonable;
- whether the trade repository's process for setting fees is fair, transparent and appropriate;
- whether the trade repository's fees are inequitably allocated among the participants, have the effect of creating barriers to access or place an undue burden on any participant or class of participants;
- the manner and process for the securities regulatory authority and other applicable regulatory agencies to receive or access derivatives data, including the timing, type of reports, and any confidentiality restrictions;
- whether the trade repository has robust and comprehensive policies, procedures, processes and systems to ensure the security and confidentiality of derivatives data;
- for trade repositories that are not resident in the local jurisdiction, whether the securities regulatory authority has entered into a memorandum of understanding with the relevant regulatory authority in the trade repository's local jurisdiction; and
- whether the trade repository has been, or will be, in compliance with securities legislation, including compliance with the Instrument and any terms and conditions attached to the recognition order in respect of the trade repository.

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A trade repository that is applying for recognition must demonstrate that it has established, implemented, maintained and enforced appropriate written rules, policies and procedures that are in accordance with standards applicable to trade repositories. We anticipate that these rules, policies and procedures will include, but will not necessarily be limited to, the principles and key considerations and explanatory notes applicable to trade repositories in the PFMI Report. These principles are set out in the following chart, along with the corresponding sections of the Instrument the interpretation of which we consider ought to be consistent with the principles:

Principle in the PFMI Report applicable to a trade repository	***Relevant section(s) of the Instrument***
Principle 1: Legal basis	Section 7 – Legal framework Section 17 – Rules, policies, and procedures (in part)
Principle 2: Governance	Section 8 – Governance Section 9 – Board of directors Section 10 – Management
Principle 3: Framework for the comprehensive management of risks	Section 19 – Comprehensive risk-management framework Section 20 – General business risk (in part)
Principle 15: General business risk	Section 20 – General business risk
Principle 17: Operational risk	Section 21 – System and other operational risk requirements Section 22 – Data security and confidentiality Section 24 – Outsourcing
Principle 18: Access and participation requirements	Section 13 – Access to recognized trade repository services Section 16 – Due process (in part) Section 17 – Rules, policies, and procedures (in part)
Principle 19: Tiered participation arrangements	No equivalent provisions in the Instrument; however, the trade repository may be expected to observe or broadly observe the principle, where applicable.

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Principle in the PFMI Report applicable to a trade repository	***Relevant section(s) of the Instrument***
Principle 20: FMI links	No equivalent provisions in the Instrument; however, the trade repository may be expected to observe or broadly observe the principle, where applicable.
Principle 21: Efficiency and effectiveness	No equivalent provisions in the Instrument; however, the trade repository may be expected to observe or broadly observe the principle, where applicable.
Principle 22: Communication procedures and standards	Section 15 – Communication policies, procedures and standards
Principle 23: Disclosure of rules, key procedures, and market data	Section 17 – Rules, policies, and procedures (in part)
Principle 24: Disclosure of market data by trade repositories	Sections in Part 4 – Data Dissemination and Access to Data

We anticipate that each of the securities regulatory authorities will apply the principles in its oversight activities of a recognized trade repository. Accordingly, in complying with the Instrument, recognized trade repositories will be expected to observe the principles.

We anticipate that the forms filed by an applicant or recognized trade repository under the Instrument will be kept confidential to the extent permitted in the local jurisdiction. We are of the view that the forms generally contain proprietary financial, commercial and technical information, and that the cost and potential risks to the filers of disclosure outweigh the benefit of the principle requiring that forms be made available for public inspection. However, we would expect a recognized trade repository to publicly disclose its responses to the CPSS-IOSCO consultative report entitled *Disclosure framework for financial market infrastructures*, which is a supplement to the PFMI Report.[4] In addition, much of the information that will be included in the filed forms will be required to be made publicly available by a recognized trade repository in accordance with the Instrument or the terms and conditions of the recognition order imposed by a securities regulatory authority.

While we generally expect to keep the information contained in a filed Form 96-101F1 *Application for Recognition – Trade Repository Information Statement* and any amendments to such information confidential, if a securities regulatory authority considers that it is in the public interest to do so, it may require the applicant or recognized trade repository to publicly disclose a summary of the information contained in the form, or in any amendments to the information in the Form.

[4] Publication available on the BIS website (www.bis.org) and the IOSCO website (www.iosco.org).

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Notwithstanding the confidential nature of the forms, we anticipate that an applicant's application itself (excluding forms) will be published for comment for a minimum period of 30 days.

Change in information by a recognized trade repository

3. The participating jurisdiction with which an amendment to the information provided in Form 96-101F1 *Application for Recognition – Trade Repository Information Statement* is filed will endeavour to review such amendment in accordance with subsections 3(1) and 3(2) before the proposed implementation date for the change. However, where the changes are complex, raise regulatory concerns, or when additional information is required, this review may exceed these timeframes.

(1) We would consider a change to be significant when it could impact a recognized trade repository, its users, participants, market participants, investors, or the capital markets (including derivatives markets and the markets for assets underlying a derivative). We would generally consider a significant change to include, but not be limited to, the following:

- a change in the structure of the recognized trade repository, including procedures governing how derivatives data is collected and maintained (included in any back-up sites), that has or may have a direct impact on users in a local jurisdiction;

- a change to the services provided by the recognized trade repository, or a change that affects the services provided, including the hours of operation, that has or may have a direct impact on users in a local jurisdiction;

- a change to means of access to the recognized trade repository's facility and its services, including changes to data formats or protocols, that has or may have a direct impact on users in a local jurisdiction;

- a change to the types of derivative asset classes or categories of derivatives that may be reported to the recognized trade repository;

- a change to the systems and technology used by the recognized trade repository that collect, maintain and disseminate derivatives data, including matters affecting capacity;

- a change to the governance of the recognized trade repository, including changes to the structure of its board of directors or board committees and their related mandates;

- a change in control of the recognized trade repository;

- a change in entities that provide key services or systems to, or on behalf of, the recognized trade repository;

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- a change to outsourcing arrangements for key services or systems of the recognized trade repository;

- a change to fees or the fee structure of the recognized trade repository;

- a change in the recognized trade repository's policies and procedures relating to risk-management, including relating to business continuity and data security, that has or may have an impact on the recognized trade repository's provision of services to its participants;

- the commencement of a new type of business activity, either directly or indirectly through an affiliated entity; and

- a change in the location of the recognized trade repository's head office or primary place of business or the location where the main data servers or contingency sites are housed.

(2) We will generally consider a change in a recognized trade repository's fees or fee structure to be a significant change. However, we acknowledge that recognized trade repositories may frequently change their fees or fee structure and may need to implement fee changes within timeframes that are shorter than the 45-day notice period contemplated in subsection 3(1). To facilitate this process, subsection 3(2) provides that a recognized trade repository may provide information that describes the change to fees or fee structure in a shorter timeframe (at least 15 days before the expected implementation date of the change to fees or fee structure) than is provided for another type of significant change. See section 12 of this Policy for guidance with respect to fee requirements applicable to recognized trade repositories.

(3) Subsection 3(3) sets out the filing requirements for changes to information provided in a filed Form 96-101F1 *Application for Recognition – Trade Repository Information Statement* other than those described in subsections 3(1) or (2). Such changes to information are not considered significant and include the following:

- changes that would not have an impact on the recognized trade repository's structure or participants, or more broadly on market participants, investors or the capital markets;

- changes in the routine processes, policies, practices, or administration of the recognized trade repository that would not impact participants;

- changes due to standardization of terminology;

- corrections of spelling or typographical errors;

- changes to the types of participants of a recognized trade repository that are in a local jurisdiction;

- necessary changes to conform to applicable regulatory or other legal requirements of a jurisdiction in Canada; and

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- minor system or technology changes that would not significantly impact the system or its capacity.

The participating jurisdictions may review filings under subsection 3(3) to ascertain whether the changes have been categorized appropriately. If the securities regulatory authority disagrees with the categorization, the recognized trade repository will be notified in writing. Where the securities regulatory authority determines that changes reported under subsection 3(3) are in fact significant changes under subsection 3(1), the recognized trade repository will be required to file an amendment to Form 96-101F1 *Application for Recognition – Trade Repository Information Statement* that will be subject to review by the securities regulatory authority.

Ceasing to carry on business

6. (1) In addition to filing a completed Form 96-101F3 *Cessation of Operations Report for Recognized Trade Repository*, a recognized trade repository that intends to cease carrying on business in the local jurisdiction as a recognized trade repository must make an application to voluntarily surrender its recognition to the securities regulatory authority pursuant to securities legislation. The securities regulatory authority may accept the voluntary surrender subject to terms and conditions.[5]

Legal framework

7. (1) A recognized trade repository is required to have rules, policies, and procedures in place that provide a legal basis for their activities in all relevant jurisdictions where they have activities, whether within Canada or any foreign jurisdiction.

Governance

8. A recognized trade repository is required to have in place governance arrangements that meet the minimum requirements and policy objectives set out in subsections 8(1) and 8(2).

(3) We expect that interested parties will be able to locate the governance information required by subsections 8(1) and 8(2) through a web search or through clearly identified links on the recognized trade repository's website.

Board of directors

9. The board of directors of a recognized trade repository is subject to various requirements, such as requirements pertaining to board composition and conflicts of interest. To the extent that a recognized trade repository is not organized as a corporation, the requirements relating to the

[5] This will apply in those jurisdictions where securities legislation provides the securities regulatory authority with the power to impose terms and conditions on an application for voluntary surrender. The transfer of derivatives data/information can be addressed through the terms and conditions imposed by the securities regulatory authority on such application.

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board of directors may be fulfilled by a body that performs functions that are equivalent to the functions of a board of directors.

(2) Paragraph 9(2)(a) requires individuals who comprise the board of directors of a recognized trade repository to have an appropriate level of skill and experience to effectively and efficiently oversee the management of its operations. This would include individuals with experience and skills in areas such as business recovery, contingency planning, financial market systems and data management.

Under paragraph 9(2)(b), the board of directors of a recognized trade repository must include individuals who are independent of the recognized trade repository. We generally consider individuals who have no direct or indirect material relationship with the recognized trade repository as independent. We expect that independent directors of a recognized trade repository would represent the public interest by ensuring that regulatory and public transparency objectives are fulfilled, and that the interests of participants who are not derivatives dealers are considered.

Chief compliance officer

11. (1) Subsection 11(1) is not intended to prevent management from hiring the chief compliance officer, but instead requires the Board to approve the appointment.

(3) References to harm to the capital markets in subsection 11(3) may be in relation to domestic or international capital markets.

Fees

12. In assessing whether a recognized trade repository's fees and costs are fairly and equitably allocated among participants as required under paragraph 12(a), we anticipate that the relevant securities regulatory authority will consider a number of factors, including the following:

- the number and complexity of the transactions being reported;
- the amount of the fee or cost imposed relative to the cost of providing the services;
- the amount of fees or costs charged by other comparable trade repositories, where relevant, to report similar transactions in the market;
- with respect to market data fees and costs, the amount of market data fees charged relative to the market share of the recognized trade repository; and
- whether the fees or costs represent a barrier to accessing the services of the recognized trade repository for any category of participant.

A recognized trade repository should provide clear descriptions of priced services for comparability purposes. Other than fees for individual services, a recognized trade repository should also disclose other fees and costs related to connecting to or accessing the trade

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repository. For example, a recognized trade repository should disclose information on the system design, as well as technology and communication procedures, that influence the costs of using the recognized trade repository. A recognized trade repository is also expected to provide timely notice to participants and the public of any changes to services and fees.

Access to recognized trade repository services

13. (3) Under subsection 13(3), a recognized trade repository is prohibited from unreasonably limiting access to its services, permitting unreasonable discrimination among its participants, imposing unreasonable burdens on competition or requiring the use or purchase of another service in order for a person or company to utilize its trade reporting service. For example, a recognized trade repository should not engage in anti-competitive practices such as setting overly restrictive terms of use or engaging in anti-competitive price discrimination. A recognized trade repository should not develop closed, proprietary interfaces that result in vendor lock-in or barriers to entry with respect to competing service providers that rely on the data maintained by the recognized trade repository.

Acceptance of reporting

14. Section 14 requires that a recognized trade repository accept derivatives data for all derivatives of the asset class or classes set out in its recognition order. For example, if the recognition order of a recognized trade repository includes interest rate derivatives, the recognized trade repository is required to accept transaction data for all types of interest rate derivatives that are entered into by a local counterparty. It is possible that a recognized trade repository may accept derivatives data for only a subset of a class of derivatives if this is indicated in its recognition order. For example, there may be recognized trade repositories that accept derivatives data for only certain types of commodity derivatives, such as energy derivatives.

Communication policies, procedures and standards

15. Section 15 sets out the communication standard required to be used by a recognized trade repository in communications with other specified entities. The reference in paragraph 15(d) to "other service providers" may include persons or companies who offer technological or transaction processing or post-transaction services.

Rules, policies and procedures

17. The rules, policies, and procedures of a recognized trade repository must be clear and comprehensive, and include explanatory material written in plain language so that participants can fully understand the system's design and operations, their rights and obligations, and the risks of participating in the system. Moreover, a recognized trade repository should disclose, to its participants and to the public, basic operational information and responses to the CPSS-IOSCO *Disclosure framework for financial market infrastructures*.

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(3) Subsection 17(3) requires that a recognized trade repository monitor compliance with its rules, policies, and procedures. The methodology of monitoring such compliance should be fully documented.

(4) The processes implemented by a recognized trade repository for dealing with non-compliance with its rules and procedures do not preclude enforcement action by any other person or company, including a securities regulatory authority or other regulatory body.

(6) A participating jurisdiction may develop and implement a protocol with the recognized trade repository that will set out the procedures to be followed with respect to the review and approval of rules, policies, and procedures and any amendments thereto. Such a protocol may be appended to and form part of the recognition order. Depending on the nature of the changes to the recognized trade repository's rules, policies, and procedures, such changes may also impact the information contained in Form 96-101F1 *Application for Recognition – Trade Repository Information Statement*. In such cases, the recognized trade repository will be required to file an amendment to Form 96-101F1 *Application for Recognition – Trade Repository Information Statement* with the securities regulatory authority. See section 3 of this Policy for a discussion of filing requirements.

Records of data reported

18. A recognized trade repository may be subject to record-keeping requirements under securities legislation that are in addition to those under section 18 of the Instrument.

(2) The requirement to maintain records for 7 years after the expiration or termination of a transaction, rather than from the date the transaction was entered into, reflects the fact that transactions create on-going obligations and information is subject to change throughout the life of a transaction.

Comprehensive risk-management framework

19. Section 19 sets out requirements for a comprehensive risk-management framework of a recognized trade repository. Set out below are some of our expectations for a recognized trade repository to be able to demonstrate that it meets that requirement.

Features of the framework

We would generally expect that a recognized trade repository would have a written risk-management framework (including policies, procedures, and systems) that enables it to identify, measure, monitor, and manage effectively the range of risks that arise in, or are borne by, the recognized trade repository. A recognized trade repository's framework should include the identification and management of risks that could materially affect its ability to perform or to provide services as expected, such as interdependencies.

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Establishing a framework

A recognized trade repository should have comprehensive internal processes to help its board of directors and senior management monitor and assess the adequacy and effectiveness of its risk-management policies, procedures, systems, and controls. These processes should be fully documented and readily available to the recognized trade repository's personnel who are responsible for implementing them.

Maintaining a framework

We would generally expect that a recognized trade repository would regularly review the material risks it bears from, and poses to, other entities (such as other FMIs, settlement banks, liquidity providers, or service providers) as a result of interdependencies, and develop appropriate risk-management tools to address these risks. These tools should include business continuity arrangements that allow for rapid recovery and resumption of critical operations and services in the event of operational disruptions and recovery or orderly wind-down plans should the trade repository become non-viable.

General business risk

20. (1) We consider general business risk to include any potential impairment of the recognized trade repository's financial position (as a business concern) as a consequence of a decline in its revenues or an increase in its expenses, such that expenses exceed revenues and result in a loss that must be charged against capital or an inadequacy of resources necessary to carry on business as a recognized trade repository.

(2) For the purposes of subsection 20(2), the amount of liquid net assets funded by equity that a recognized trade repository should hold is to be determined by its general business risk profile and the length of time required to achieve a recovery or orderly wind-down, as appropriate, of its critical operations and services, if such action is taken.

(4) The scenarios identified under subsection 20(4) should take into account the various independent and related risks to which the recognized trade repository is exposed.

(5) Plans for the recovery or orderly wind-down of a recognized trade repository should contain, among other elements, a substantive summary of the key recovery or orderly wind-down strategies, the identification of the recognized trade repository's critical operations and services, and a description of the measures needed to implement the key strategies. The recognized trade repository should maintain the plan on an ongoing basis, to achieve recovery and orderly wind-down, and should hold sufficient liquid net assets funded by equity to implement this plan. A recognized trade repository should also take into consideration the operational, technological, and legal requirements for participants to establish and move to an alternative arrangement in the event of an orderly wind-down.

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Systems and other operational risk requirements

21. (1) Subsection 21(1) sets out a general principle concerning the management of operational risk. In interpreting subsection 21(1), the following key considerations should be applied:

- A recognized trade repository should establish a robust operational risk-management framework with appropriate systems, policies, procedures, and controls to identify, monitor, and manage operational risks.
- A recognized trade repository should review, audit, and test systems, operational policies, procedures, and controls, periodically and after any significant changes.
- A recognized trade repository should have clearly defined operational-reliability objectives and policies in place that are designed to achieve those objectives.

(2) The board of directors of a recognized trade repository should clearly define the roles and responsibilities for addressing operational risk.

(3) An adequate system of internal control over systems as well as adequate general information-technology controls are to be implemented to support information technology planning, acquisition, development and maintenance, computer operations, information systems support, and security. Recommended Canadian guides as to what constitutes adequate information technology controls include '*Information Technology Control Guidelines*' from the Canadian Institute of Chartered Accountants and '*COBIT*' from the IT Governance Institute. A recognized trade repository should ensure that its information-technology controls address the integrity of the data that it maintains, by protecting all derivatives data submitted from corruption, loss, improper disclosure, unauthorized access and other processing risks.

Paragraph 21(3)(b) requires a recognized trade repository to thoroughly assess future needs and make systems capacity and performance estimates in a method consistent with prudent business practice at least once a year. This paragraph also imposes an annual requirement for recognized trade repositories to conduct periodic capacity stress tests. Continual changes in technology, risk management requirements and competitive pressures will often result in these activities or tests being carried out more frequently.

Paragraph 21(3)(c) requires a recognized trade repository to notify the securities regulatory authority of any material systems failure. A failure, malfunction, delay or other disruptive incident would be considered "material" if the recognized trade repository would in the normal course of its operations escalate the incident to, or inform, its senior management that is responsible for technology, or if the incident would have an impact on participants. We also expect that, as part of this notification, the recognized trade repository will provide updates on the status of the failure, the resumption of service, and the results of its internal review of the failure.

(4) We are generally of the view that disaster recovery plans should allow the recognized trade repository to provide continuous and undisrupted service, as back-up systems ideally should commence processing immediately. Where a disruption is unavoidable, a recognized trade

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repository is expected to provide prompt recovery of operations, meaning that it resumes operations within 2 hours following the disruptive event. Under paragraph 21(4)(c), an emergency event could include any external sources of operational risk, such as the failure of critical service providers or utilities or events affecting a wide metropolitan area, such as natural disasters, terrorism, and pandemics. Business continuity planning should encompass all policies and procedures to ensure uninterrupted provision of key services regardless of the cause of potential disruption.

(5) We expect that a recognized trade repository will engage relevant industry participants, as necessary, in tests of its business continuity plans, including testing of back-up facilities for both the recognized trade repository and its participants.

(6) For the purpose of subsection 21(6), a qualified party is a person or company or a group of persons or companies with relevant experience in both information technology and in the evaluation of related internal controls in a complex information technology environment, such as external auditors or third party information system consultants. We would generally consider that this obligation could be satisfied by an independent assessment by an internal audit department that is compliant with the International Standards for the Professional Practice of Internal Auditing published by the Institute of Internal Audit. Before engaging a qualified party, the recognized trade repository should notify each relevant securities regulatory authority.

(8) In determining what a reasonable period is to allow participants to make system modifications and test their modified systems, a recognized trade repository should consult with its participants and allow all participants a reasonable opportunity to develop, implement and test systems changes. We expect that the needs of all types of participants would be considered, including those of smaller and less sophisticated participants.

(9) In determining what a reasonable period is to allow participants to test their modified systems and interfaces with the recognized trade repository, we would generally expect a recognized trade repository to consult with its participants. We consider a reasonable period to be a period that would provide all participants a reasonable opportunity to develop, implement and test systems changes. We expect that the needs of all types of participants would be considered, including those of smaller and less sophisticated participants.

Data security and confidentiality

22. **(1)** Rules, policies and procedures to ensure the safety, privacy and confidentiality of derivatives data must include limitations on access to confidential trade repository data and safeguards to protect against persons and companies affiliated with a recognized trade repository from using trade repository data for their personal benefit or the benefit of others.

(2) The purpose of subsection 22(2) is to ensure that users of a recognized trade repository have some measure of control over their derivatives data.

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Confirmation of data and information

23. The purpose of the confirmation requirement in subsection 23(1) is to ensure that the reported information accurately describes the transaction as agreed to by both counterparties.

In cases where the non-reporting counterparty to a transaction is not a participant of the recognized trade repository to which the transaction is reported, the recognized trade repository would not be in a position to confirm the accuracy of the derivatives data with such counterparty. As such, subsection 23(2) provides that a recognized trade repository is not obligated to confirm the accuracy of derivatives data with respect to a transaction with a counterparty to the transaction that is not a participant of the recognized trade repository.

A recognized trade repository may satisfy its obligation under section 23 to confirm the derivatives data reported with respect to a transaction by notice to each counterparty to the transaction that is a participant of the recognized trade repository, or its delegated third-party representative where applicable, that a report has been made naming the participant as a counterparty to a transaction, accompanied by a means of accessing a report of the derivatives data submitted. The policies and procedures of the recognized trade repository may provide that if the recognized trade repository does not receive a response from a counterparty within 48 hours, the counterparty is deemed to confirm the derivatives data as reported.

Outsourcing

24. Section 24 sets out requirements applicable to a recognized trade repository that outsources any of its material services or systems to a service provider. Generally, a recognized trade repository must establish policies and procedures to evaluate and approve these outsourcing arrangements, including assessing the suitability of potential service providers and the ability of the recognized trade repository to continue to comply with securities legislation in the event of bankruptcy, insolvency or the termination of business of the service provider. A recognized trade repository is also required to monitor the ongoing performance of a service provider to which it outsources a key service, system or facility. The requirements under section 24 apply regardless of whether an outsourcing arrangement is with a third-party service provider or an affiliated entity of the recognized trade repository. A recognized trade repository that outsources any of its material services or systems remains responsible for those services or systems and for compliance with securities legislation.

PART 3
DATA REPORTING

Part 3 deals with reporting obligations for a transaction that involves a local counterparty and includes a determination of which counterparty to the transaction will be subject to the duty to report, requirements as to the timing of reports and a description of the data that is required to be reported.

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Reporting counterparty

25. Section 25 sets out a process for determining which counterparty to a transaction is the reporting counterparty and is therefore required to fulfil the reporting obligations under the Instrument.

(1) The hierarchy outlined in subsection 25(1) for determining which counterparty to a transaction will be the reporting counterparty is intended to reflect the counterparty to the transaction that is best suited to fulfill the reporting obligation. For example, for a transaction that is cleared through a clearing agency, the clearing agency is best positioned to report derivatives data and is therefore determined to be the reporting counterparty.

The definition of "derivatives dealer" in the Instrument does not require that a person or company be registered with the local securities regulatory authority in order to meet the definition. Accordingly, where the reporting counterparty to a transaction is a derivatives dealer, as defined in the Instrument, the reporting obligations with respect to the transaction apply irrespective of whether the derivatives dealer is a registrant in the local jurisdiction. Where a person or company that meets the definition of "derivatives dealer" is also a Canadian financial institution, its status as a derivatives dealer prevails for the purposes of section 25.

Paragraph 25(1)(c) reflects our view that a Canadian financial institution, regardless of whether it considers itself derivatives dealer, would be better suited to report a transaction between the Canadian financial institution and a counterparty that is neither a derivatives dealer nor a Canadian financial institution.

For a transaction that is not cleared and is between two derivatives dealers, two Canadian financial institutions or two end-users – that is, a transaction to which none of paragraphs 25(1)(a), (b), or (c) apply – paragraph 25(1)(d) allows the counterparties to agree, in writing, at or before the time the transaction occurs, which counterparty will act as the reporting counterparty for the transaction. The intention of paragraph 25(1)(d) is to facilitate one counterparty reporting while requiring both counterparties to have procedures or contractual arrangements in place to ensure that reporting occurs.

One example of a type of agreement the counterparties may use to determine the reporting counterparty to a transaction is the ISDA methodology, publicly available at www.isda.org, developed for Canada in order to facilitate one-sided transaction reporting and provide a consistent method for determining the party required to act as reporting counterparty.

There is no requirement for counterparties to a transaction to use the ISDA methodology. However, in order for the counterparties to rely on paragraph 25(1)(d), the agreement must meet the conditions in paragraph 25(1)(d). Namely, the agreement must be in written form, have been made at the time of the transaction, and determine the reporting counterparty with respect to the transaction.

(2) Each local counterparty that relies on paragraph 25(1)(d) must fulfil the record-keeping obligations set out in subsection 25(2).

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(4) The reporting requirement in subsection 25(4) is designed to be an incentive for the counterparties to come to an agreement to avoid dual reporting. Dual reporting – where both counterparties independently report the transaction – skews the TR data for the overall market, drastically diminishing the value of the TR data in identifying systemically important entities and informing policy development.

Reporting unique transaction identifiers to the securities regulatory authority will enable the securities regulatory authority to match the two derivatives data reports relating to the single dual-reported transaction. Without the UTI for each transaction, these reports cannot be matched.

We are of the view that the reporting requirement in subsection 25(4) may be satisfied by submitting a facsimile or email containing the required unique transaction identifiers to the securities regulatory authority. No special systems or reporting infrastructure are anticipated to be required to satisfy this requirement.

Duty to report

26. Section 26 outlines the duty to report derivatives data.

(2) Under subsection 26(2), the reporting counterparty for a transaction must ensure that all reporting obligations are fulfilled. This includes reporting of creation data and ongoing requirements such as the reporting of life-cycle event data and valuation data.

(3) Subsection 26(3) permits the delegation of all reporting obligations of a reporting counterparty. This includes reporting of initial creation data, life-cycle event data and valuation data. For example, some or all of the reporting obligations may be delegated to a third-party service provider.

(4) With respect to subsection 26(4), prior to the reporting requirements in Part 3 coming into force, the participating jurisdictions will provide public guidance on how reports for transactions that are not accepted for reporting by any recognized trade repository should be electronically submitted to the local securities regulatory authority.

(5) Subsection 26(5) provides for limited substituted compliance with this Instrument where a transaction has been reported to a recognized trade repository pursuant to the laws of a province of Canada other than the local jurisdiction or of a foreign jurisdiction listed in Appendix B, provided that the additional conditions set out in paragraphs 26(5)(a) and (c) are satisfied.

(6) Subsection 26(6) requires that all derivatives data reported for a given transaction be reported to the same recognized trade repository to which the initial report is submitted or, with respect to transactions reported under subsection 26(4), to the local securities regulatory authority.

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For a bi-lateral transaction that is assumed by a clearing agency (novation), the recognized trade repository to which all derivatives data for the assumed transactions must be reported is the recognized trade repository to which the original bi-lateral transaction was reported.

The purpose of this requirement is to ensure the securities regulatory authority has access to all reported derivatives data for a particular transaction from the same entity. It is not intended to restrict counterparties' ability to report to multiple trade repositories.

(7) We interpret the requirement in subsection 26(7), to report errors or omissions in derivatives data "as soon as technologically practicable" after it is discovered, to mean upon discovery and in any case no later than the end of the business day on which the error or omission is discovered.

(8) Under subsection 26(8), where a local counterparty that is not a reporting counterparty discovers an error or omission in respect of derivatives data that is reported to a recognized trade repository, such local counterparty has an obligation to report the error or omission to the reporting counterparty for the transaction. Once an error or omission is reported by the local counterparty to the reporting counterparty, the reporting counterparty then has an obligation under subsection 26(7) to report the error or omission to the recognized trade repository or to the securities regulatory authority in accordance with subsection 26(6). We interpret the requirement in subsection 26(8) to notify the reporting counterparty of errors or omissions in derivatives data to mean upon discovery and in any case no later than the end of the business day on which the error or omission is discovered.

Legal entity identifiers

28. The Global LEI System is a G20 endorsed initiative[6] for uniquely identifying parties to transactions, designed and implemented under the direction of the LEI ROC, a governance body endorsed by the G20. The Global LEI System serves as a public-good utility responsible for overseeing the issuance of legal entity identifiers globally to counterparties who enter into transactions.

(3) If the Global LEI System is not available at the time a reporting counterparty is required under the Instrument to report derivatives data, including the LEI for each counterparty, with respect to a transaction, a counterparty must use a substitute legal entity identifier. The substitute legal entity identifier must be set in accordance with the standards established by the LEI ROC for pre-LEI identifiers. At the time the Global LEI System is operational, counterparties must cease using their substitute LEI and commence reporting their LEI. The substitute LEI and LEI could be identical.

Unique transaction identifiers

29. A transaction in the context of assigning a unique transaction identifier means a transaction from the perspective of all counterparties to the transaction. For example, both counterparties to a single swap transaction would identify the transaction by the same single identifier. For a bi-

[6] See http://www.financialstabilityboard.org/list/fsb_publications/tid_156/index.htm for more information.

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lateral transaction that is novated to a clearing agency, the reporting of the novated transactions should reference the unique transaction identifier of the original bi-lateral transaction.

Unique product identifiers

30. Section 30 requires that a reporting counterparty identify each transaction that is subject to the reporting obligation under the Instrument by means of a unique product identifier. There is currently a system of product taxonomy that may be used for this purpose.[7] To the extent that a unique product identifier is not available for a particular transaction type, a reporting counterparty would be required to create one using an alternative methodology.

Creation data

31. (2) Subsection 31(2) requires that reporting of creation data be made in real time, which means that creation data should be reported as soon as technologically practicable after the execution of a transaction. In evaluating what will be considered to be "technological practicable", we will take into account the prevalence of implementation and use of technology by comparable counterparties located in Canada and in foreign jurisdictions. The participating jurisdictions may also conduct independent reviews to determine the state of reporting technology.

(3) Subsection 31(3) is intended to take into account the fact that not all counterparties will have the same technological capabilities. For example, counterparties that do not regularly engage in transactions would, at least in the near term, likely not be as well situated to achieve real-time reporting. Further, for certain post-transaction operations that result in reportable transactions, such as trade compressions involving numerous transactions, real time reporting may not currently be practicable. In all cases, the outside limit for reporting is the end of the business day following execution of the transaction.

Life-cycle event data

32. (1) When reporting a life-cycle event, there is no obligation to re-report derivatives data that has not changed – only new data and changes to previously reported data need to be reported. Life-cycle event data is not required to be reported in real time but rather at the end of the business day on which the lifecycle event occurs. The end of business day report may include multiple life-cycle events that occurred on that day.

Valuation data

33. (1) Subsection 33(1) provides for differing frequency of valuation data reporting based on the type of entity that is the reporting counterparty.

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[7] See http://www2.isda.org/identifiers-and-otc-taxonomies/ for more information.

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Pre-existing transactions

34. Section 34 outlines reporting obligations in relation to transactions that were entered into prior to the commencement of the reporting obligations. Some pre-existing transactions are exempted from the reporting obligations in the Instrument, to relieve some of the reporting burden for counterparties and because derivatives data relating to such pre-existing transactions would provide marginal utility to the securities regulatory authority due to the imminent termination or expiry of the transaction.

The derivatives data required to be reported for pre-existing transactions under section 34 is substantively the same as the requirement under CFTC Rule 17 CFR Part 46 *Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps*. Therefore, to the extent that a reporting counterparty has reported pre-existing transaction derivatives data as required by the CFTC rule, this would meet the derivatives data reporting requirements under section 34. This interpretation applies only to pre-existing transactions.

Only the data indicated in the column entitled “Required for Pre-existing Transactions” in Appendix A is required to be reported for pre-existing transactions.

PART 4
DATA DISSEMINATION AND ACCESS TO DATA

Data available to regulators

37. The derivatives data covered by this section is data necessary to carry out the securities regulatory authority’s mandate to protect against unfair, improper or fraudulent practices, to foster fair and efficient capital markets, to promote confidence in the capital markets, and to address systemic risk. This includes derivatives data with respect to any transaction or transactions that may impact capital markets in Canada.

Transactions that reference an underlying asset or class of assets with a nexus to a jurisdiction in Canada can impact capital markets in Canada even if the counterparties to the transaction are not local counterparties. Therefore, the participating jurisdictions have a regulatory interest in transactions involving such underlying interests even if such data is not submitted pursuant to the reporting obligations in the Instrument, but is held by a recognized trade repository.

(1) For the purpose of subsection 37(1) electronic access includes the ability of the securities regulatory authority to access, download, or receive a direct real-time feed of derivatives data maintained by the recognized trade repository.

(2) It is expected that all recognized trade repositories will comply with the access standards and recommendations developed by CPMI (formerly CPSS) and IOSCO and contained in the CPSS-IOSCO final report entitled *Authorities’ access to trade repository data*.[8]

[8] Publication available on the BIS website (www.bis.org) and the IOSCO website (www.iosco.org).

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(3) We interpret the requirement for a reporting counterparty to use best efforts to provide the securities regulatory authority with access to derivatives data to mean, at a minimum, instructing the recognized trade repository to release derivative data to the securities regulatory authority.

Data available to counterparties

38. Section 38 is intended to ensure that each counterparty, and any person acting on behalf of a counterparty, has access to all derivatives data relating to its transaction(s) in a timely manner. The participating jurisdictions are of the view that where a counterparty has provided consent to a recognized trade repository to grant access to data to a third-party service provider, the recognized trade repository will grant such access on the terms consented to.

Data available to public

39. (1) Subsection 39(1) requires a recognized trade repository to make available to the public, free of charge, certain aggregate data for all transactions reported to it under the Instrument (including open positions, volume, number of transactions, and price). It is expected that a recognized trade repository will provide aggregate data by notional amounts outstanding and level of activity. Such aggregate data is expected to be available at no cost on the recognized trade repository's website.

(2) Subsection 39(2) requires that the aggregate data that is disclosed under subsection 39(1) be broken down into various categories of information. The following are examples of the categorized aggregate data required under subsection 39(2):

- currency of denomination (the currency in which the derivative is denominated);
- geographic location of the underlying reference entity (e.g., "Canada" for derivatives which reference the TSX60 index);
- asset class of reference entity (e.g., fixed income, credit, or equity);
- product type (e.g., options, forwards, or swaps);
- cleared or uncleared; and
- maturity (broken down into maturity ranges, such as less than one year, 1-2 years, 2-3 years).

(3) The purpose of the public reporting delays is to ensure that counterparties have adequate time to enter into any offsetting transaction that may be necessary to hedge their positions. These time delays apply to all transactions, regardless of transaction size.

(4) Published data must be anonymized and the names or legal entity identifiers of counterparties must not be published. This provision is not intended to create a requirement for a recognized trade repository to determine whether anonymized published data could reveal the identity of a counterparty based on the terms of the transaction.

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PART 5
EXCLUSIONS

[Option #1] 40. Section 40 provides that the reporting obligations under the Instrument do not apply with respect to a commodity derivatives transaction between two end-users in certain limited circumstances. The exclusion in this section applies only to a transaction relating to a derivative the asset class of which is a commodity other than cash or currency.

The objective of the exclusion is to reduce the reporting burden with respect to commodity derivatives transactions on end-users that may not be systemically important. As such, the exclusion applies only to a transaction where each counterparty is neither a derivatives dealer nor a Canadian financial institution. In accordance with the reporting counterparty waterfall in subsection 25(1), for a transaction with an end-user counterparty, a derivatives dealer or Canadian financial institution would be the reporting counterparty and would therefore have the obligation to report the transaction.

In order for this exclusion to apply, paragraph 40(c) requires that each counterparty to the transaction have less than $250,000,000 aggregate notional value under all outstanding commodity derivatives transactions, including the additional notional value related to that transaction. In calculating this exposure, the notional value of all outstanding transactions relating to a commodity other than cash or currency, with all counterparties, domestic and foreign, should be included. The notional value of a commodity derivatives transaction would be calculated by multiplying the quantity of the commodity by the price for that commodity.

[Option #2] 40. Section 40 provides that the reporting obligations do not apply in certain limited circumstances with respect to a commodity derivatives transaction between two entities that are not derivatives dealers. The exclusion in this section applies only to a transaction relating to a derivative the asset class of which is a commodity other than cash or currency.

This exclusion only applies if a local counterparty that is determined to be the reporting counterparty to a transaction has less than $500,000 aggregate notional value under all outstanding derivatives transactions, including the additional notional value related to that transaction. In calculating this exposure, the notional value of all outstanding transactions, including transactions from all asset classes and with all counterparties, domestic and foreign, should be included. The notional value of a commodity transaction would be calculated by multiplying the quantity of the commodity by the price for that commodity. For a transaction between two local counterparties that are not derivatives dealers, if the reporting counterparty as determined under subsection 25(1) is below the $500,000 threshold and is relying on the section 40 exclusion and the other local counterparty is above the $500,000 threshold, that other local counterparty is required to act as the reporting counterparty for the transaction.

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PART 7
TRANSITION PERIOD AND EFFECTIVE DATE

Effective date

44. (2) The requirement under subsection 39(3) for a recognized trade repository to make transaction level data reports available to the public does not apply until **[date TBD plus [6] months]**.

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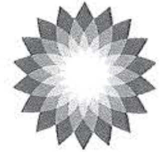

March 24, 2015

To: British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

Via email: mbrady@bcsc.bc.ca

Care Of: Michael Brady
Senior Legal Counsel, Capital Markets
British Columbia Securities Commission
P.O. Box 10142 Pacific Centre
701 West Georgia Street
Vancouver, British Columbia V7Y 1L2

Re: CSA Multilateral Notice and Request for Comment on Proposed Multilateral Instrument 91-101 *Derivatives Product Determination* and Proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* issued January 21, 2015

BP Canada Energy Group ULC and its affiliates **("BP")** appreciate the opportunity to provide the Alberta Securities Commission, the British Columbia Securities Commission, the Financial and Consumer Affairs Authority of Saskatchewan, the New Brunswick Financial and Consumer Services Commission and the Nova Scotia Securities Commission **("Authorities")**, each aforementioned province being an **"MI Jurisdiction"**, with BP's views on the following proposed instruments **("Proposed Instruments")**:

- Multilateral Instrument 91-101 Derivatives: Product Determination **("Scope Rule")**;
- Companion Policy 91-101 Derivatives: Product Determination **("Scope CP")**;
- Multilateral Instrument 96-101 Trade Repositories and Derivatives Data Reporting **("TR Rule")**; and
- Companion Policy 96-101 Trade Repositories and Derivatives Data Reporting **("TR CP")**.

BP's business in Canada encompasses a range of activities including the production, purchase and sale of hydrocarbons and other energy commodities. As a major participant in the marketing and trading of Canadian natural gas, power and crude oil, BP also manages risk and optimizes value across physical and financial markets through its participation in the Canadian over-the-counter (OTC) energy derivatives market.

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BP commends the Authorities in providing simplicity in the following areas of the TR Rule:

i) ***Local Counterparty Definition*** – BP supports the differentiation made by the Authorities in the definition of a local counterparty from that found in the local rules in Manitoba, Ontario and Quebec. The exclusion of mere registration as a derivatives dealer as the basis upon which an entity is deemed a local counterparty considerably alleviates the burden of regulatory oversight on both the Authorities and the entity where no need for oversight is warranted. Without the exclusion, all derivatives engaged in by a foreign-based derivatives dealer registered in an MI Jurisdiction would be subject to reporting, even those derivatives with no connection to the MI Jurisdiction.

ii) ***Reporting Counterparty Waterfall*** – BP supports the streamlined reporting counterparty waterfall and applauds the Authorities in establishing a clear, elegant and non-convoluted hierarchy. The reporting obligation rests appropriately with the parties best placed, in descending order, to report derivatives, having regard to their intermediary role in derivatives transactions, in the case of clearing agencies, or their level of sophistication, in the case of derivatives dealers and financial institutions.

BP respectfully requests the Authorities to consider its comments with respect to the following:

iii) ***Embedded Optionality in the Scope CP*** – BP supports the exclusion to the application of the TR Rule of a contract or an instrument that is a derivative if the contract or instrument is for delivery of a commodity other than cash or currency that is intended to be settled by delivery of the commodity and does not allow for cash settlement in place of delivery. BP also agrees and supports the notion that optionality embedded in a contract or instrument that satisfies the two pronged test for physical commodity contracts, should not in itself, result in the contract or instrument being a reportable derivative,

In that regard, BP finds the language in the Scope Rule clear and unambiguous when read in conjunction with the Scope CP except for the statement set out on page 8 of the Scope CP (excerpt below, emphasis mine):

> Embedded optionality with respect to the volume or quantity, or the timing or manner of delivery, of the commodity to be delivered may be consistent with the intention requirement in subparagraph 1(1)(d)(i) where the terms of the contract make it clear that the parties intend to settle the contract by physical delivery of the commodity and not by cash or any other means. **A contract will not qualify for this exclusion where it can be inferred that the counterparties intend to enter into the contract to achieve an economic outcome that is, or akin to, an option.**

BP finds that the highlighted statement creates some confusion. The statement may suggest that contracts that achieve an economic outcome that is, or akin to, an option but also meet the two pronged test, might not be deemed as excluded derivatives. Such a result would seem to contradict the acknowledgment that a

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contract can be a contract for physical delivery of a commodity and have optionality embedded in it. BP seeks clarity from the Authorities on what the language is attempting to say and queries whether the language is needed at all. In that regard, BP believes that contracts having the characteristics described below would qualify as excluded derivatives, and would ask that the Authorities provide clarification if that is not the case:

Variable Quantity Contracts: Buyer and Seller may agree that the Buyer must, at Seller's option, take a quantity of natural gas (or other commodity) that Seller delivers, which quantity may vary from zero to a set maximum quantity. Another variation of this type of contract is where Seller must, at Buyer's option, deliver a quantity of natural gas that Buyer wishes to take, which quantity may vary from zero to a set maximum quantity. Such contracts are known commonly as firm (variable) quantity contracts, swing deals, peaking deals etc. and are used by sellers and buyers of physical commodities to manage operational, market or other factors impacting their availability of supply, need for supply, or otherwise hedge risk. Such contracts may or may not include a premium for the flexibility they afford either through an additional premium included in the price for the volumes ultimately delivered or as an up-front premium or reservation fee.

Physical "Option "Contracts: Similar to the above, Buyer and Seller may agree, in consideration for the payment of a sum of money by Buyer, that Seller will be obligated to deliver and sell an agreed-upon quantity of natural gas (or other commodity) to the Buyer at an agreed upon Price X upon Buyer notifying Seller of its election to require such delivery, or some other condition precedent occurring (such as the natural gas index price hitting a certain level). In such contracts the election or the condition precedent may never occur, however, upon the election being made or the condition precedent occurring settlement is effected through the physical delivery of the natural gas. There is no additional option to settle through financial payment. The opposite scenario can also occur, where in consideration for the payment of a sum of money by Seller, Buyer will be obligated to receive and purchase an agreed upon quantity of natural gas from Seller at an agreed upon Price. Such contracts may be called a physical call or put option, but the settlement is made by physical delivery; there is no other option at the time the transaction is entered into to elect to settle financially in lieu of the obligation to deliver/receive the natural gas.

iv) ***Dual UTI Submission*** – BP acknowledges that, where parties to a transaction cannot agree that one of the parties will be the reporting counterparty, dual reporting will result. While BP appreciates the Authorities desire to reduce or eliminate the circumstances of dual reporting, BP is concerned with the requirement to have to seek out the other party's unique transaction identifier necessary to comply with subsection 25(4) where agreement has not been reached between the parties on who will report. BP is concerned that this additional burden will create a compliance risk for otherwise compliant and

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reporting parties in the event the other party fails to, or is unwilling to, provide the requisite information.

v) ***Implementation Date and Transition Period*** – BP believes that there must be an adequate period of time for implementation and transition. Parties will need time to adequately prepare to report. This will include time for parties to obtain LEI's, the need to determine the status of counterparties, putting reporting counterparty agreements in place and/or amending agreements; for those parties not already a reporting counterparty in another jurisdiction, time could also be required to put in place the necessary business systems and processes. In this regard, BP urges the Authorities to provide for a minimum period of six months from the date the Final Instrument becomes effective. In addition, BP proposes an implementation date and transition period where neither coincides with the end of the natural gas contract year when a large proportion of physical natural gas annual contracts are negotiated and companies' resources are focused on those activities.

vi) ***Legal Entity Identifiers (LEI)*** – The Authorities have not specifically sought comment on the matter of LEIs. BP, however, requests the Authorities to consider inserting a direct obligation in the TR Rule requiring all counterparties to obtain a LEI. The TR Rule, as currently proposed, presumes all counterparties will obtain a LEI or a pre-LEI but does not expressly mandate counterparties to have done so, except to the limited circumstance set out in subsection 28(4). BP notes that reporting counterparties will have obtained a LEI because of their interaction with the trade repository in reporting the transaction and, arguably, their greater familiarity with the reporting requirements generally. Non-reporting counterparties or end-users, however, may not be as alert to the necessity of obtaining a LEI. BP has experienced some challenges in pressing upon some of its non-dealer counterparties the importance of obtaining a LEI prior to the implementation date and believes that, with a clear and direct regulatory obligation, compliance could be more readily achieved.

vii) ***Exclusions*** – BP Canada believes the end-user exemption being proposed by the Authorities may be attractive to certain market participants, provided it can be practically administered. While BP Canada does not have specific comments on the proposal here, BP Canada would comment that a de minimis type threshold would also have merit in relation to determining whether a party should be required to register as a dealer or not and would request the Authorities consider such a concept when drafting the registration rules.

viii) ***Public Dissemination of Data***: BP Canada would encourage the Authorities to consider and accept the recommendations made by ISDA in its correspondence to the Canadian Securities Administrators ("CSA") dated January 16, 2015 in regards to Public Dissemination Requirements of Commission Rules 91-507 *Trade Repositories and Derivatives Data Reporting* in respect of what information should be subject to public dissemination and the timing for such dissemination. In addition, BP Canada believes that the date for such public dissemination should be consistent between all member constituents of the CSA.

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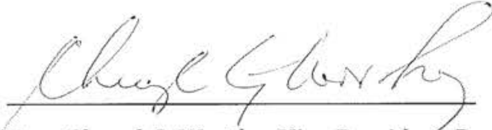
BP supports tailored, fit-for-purpose rules that ensure market transparency and regulatory certainty as appropriate to the derivatives markets. We understand the delicate balance that the Authorities must strike in effecting appropriate regulation without unduly hindering OTC derivative markets. BP respectfully submits its comments set forth in this letter and thanks the Authorities for seeking and considering comments from the stakeholders.

Respectfully submitted,

BP Canada Energy Group ULC



Per: Cheryl G. Worthy, Vice President Regulatory Affairs, NAGP

Per: Antony A. Deakin, Partnerships and Regulatory Affairs Manager, GOA

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March 24, 2015

Dear Sirs/Mesdames:

Re: Proposed Multilateral Instrument 91-101 *Derivatives: Product Determination* and Proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* (together, the "Multilateral Instruments")

INTRODUCTION

The Canadian Market Infrastructure Committee ("**CMIC**")[1] welcomes the opportunity to comment on the proposed Multilateral Instruments.[2]

This letter outlines our views with respect to the proposed Multilateral Instruments from the perspective of harmonization with other provincial rules and with respect to operational feasibility. As a result, a copy of this letter is also being sent to the Ontario Securities Commission (the "**OSC**"), the Autorité des marchés financiers (the "**AMF**") and the Manitoba Securities Commission (the "**MSC**").

CMIC submits that the goal of harmonized regulatory regimes across Canada is of utmost importance. We understand that each Province's existing regime governing derivatives, exchange contracts and securities may contain differences when compared with other existing provincial regimes. However, CMIC is strongly of the view that, substantively, all new rules governing

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[1] CMIC was established in 2010, in response to a request from public authorities, to represent the consolidated views of certain Canadian market participants on proposed regulatory changes. The membership of CMIC consists of the following: Bank of America Merrill Lynch, Bank of Montreal, Bank of Tokyo-Mitsubishi UFJ (Canada), Caisse de dépôt et placement du Québec, Canada Pension Plan Investment Board, Canadian Imperial Bank of Commerce, Deutsche Bank A.G., Canada Branch, Fédération des Caisses Desjardins du Québec, Healthcare of Ontario Pension Plan, HSBC Bank Canada, JPMorgan Chase Bank, N.A., Toronto Branch, Manulife Financial Corporation, National Bank of Canada, OMERS Administration Corporation, Ontario Teachers' Pension Plan Board, Royal Bank of Canada, Sun Life Financial, The Bank of Nova Scotia, and The Toronto-Dominion Bank. CMIC brings a unique voice to the dialogue regarding the appropriate framework for regulating the Canadian OTC derivatives market. The membership of CMIC has been intentionally designed to present the views of both the 'buy' side and the 'sell' side of the Canadian OTC derivatives market, including both domestic and foreign owned banks operating in Canada. As it has in all of its submissions, this letter reflects the consensus of views within CMIC's membership about the proper Canadian regulatory regime for the OTC derivatives market.

[2] Available at: https://www.bcsc.bc.ca/96-101_[MI_Proposed]_210115/

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derivatives across Canada, including trade reporting rules, should be harmonized to the fullest extent possible.

For a more detailed review and commentary about the sections of the Multilateral Instruments which are not harmonized, and corresponding recommendations, CMIC endorses the views expressed in the response letter submitted by ISDA in relation to these proposed Multilateral Instruments under the headings “Local counterparty definition”, the “Definition of affiliated entity”, “reporting counterparty”, “Data available to public”, and “End-user Commodity Transactions Exclusion”.

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

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

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March 24, 2015

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British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

(Collectively called the “**Authorities**”)

c/o: Mr. Michael Brady
Senior Legal Counsel, Capital Markets
British Columbia Securities Commission
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Vancouver, B.C. V7Y 1L2
e-mail: mbrady@bcsc.bc.ca

Dear Sirs/Mesdames:

RE: Multilateral Staff Notice and Request for Comment dated January 21, 2015, pertaining to Proposed Multilateral Instruments 91-101 – *Derivatives Product Determination* and 96-101 - *Trade Repositories and Derivatives Data Reporting*

Capital Power Corporation, together with its affiliates and subsidiaries (collectively “**Capital Power**”), makes this submission to comment on Multilateral Notice and Request for Comments published by the Authorities on January 21, 2015 (the “**Multilateral Notice**”), pertaining to proposed Multilateral Instrument 91-101 – *Derivatives Product Determination* (the “**Proposed Scope Rule**”), its proposed companion policy (“**Proposed Scope CP**”), proposed Multilateral Instrument 96-101 -*Trade Repositories and Derivatives Data Reporting* (the “**Proposed TR Rule**”) and its proposed companion policy (“**Proposed TR CP**”). This letter will refer collectively to the Proposed Scope Rule, the Proposed TR Rule and their respective proposed companion policies as the “Proposed Rules”.

Capital Power appreciates the opportunity to comment, and commends the Authorities for seeking public input, on the Proposed Rules. Capital Power generally supports the efforts of the Authorities, working in conjunction with the Canadian Securities Administrators (“**CSA**”), to establish a regulatory regime for the Canadian over-the-counter (“**OTC**”) derivatives market, in order to address Canada’s G-20 commitments. To that end, Capital Power respectfully urges the Authorities to develop regulations that strike a balance between not unduly burdening derivatives market participants while at the same time addressing the need to introduce effective regulatory oversight of derivatives and derivatives market activities. Capital Power is

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a member of the International Energy Credit Association ("**IECA**") and fully supports the comments submitted by the IECA, in their March 19, 2015 letter, in response to the Multilateral Notice.

Capital Power is a growth-oriented North America power producer headquartered in Edmonton, Alberta. Capital Power develops, acquires, operates and optimizes power generation from a variety of energy sources, including coal, natural gas, biomass and wind. Capital Power owns more than 2700 megawatts of power generation capacity across 15 facilities in Canada and the United States, and owns 371 megawatts of capacity through power purchase arrangements. An additional 1020 megawatts of owned generation capacity is under construction or in advanced stages of development in Alberta and Ontario.

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

Before providing comments to some of the specific questions that the Authorities posed in the Multilateral Notice, Capital Power would like to draw the Authorities' attentions to the structure of, and some transactions associated with, the Alberta wholesale and retail electricity markets. We would also like to point out some interpretative challenges and nuances those transactions and markets create in the context of the Proposed Rules, particularly the concept of "*settlement by delivery of a commodity*" in section 2(1)(d)(i) of the Proposed Scope Rule. We thank the Authorities for recognizing, in the Proposed Scope CP, that electricity is a commodity capable of being physically delivered.

ALBERTA ELECTRICITY MARKETS:

The wholesale electricity market in Alberta (and Ontario) is unique in Canada because it is "deregulated", which means that the wholesale price of electricity is determined by market forces of supply and demand in an open and competitive market place between independent market participants that include generators, transmission and distribution companies, marketers, retailers, municipal utilities and large consumers. This is contrasted to "regulated" markets in the other provinces in which large government-owned integrated public utilities own and control all aspects of the electricity value-chain from generation to sale and delivery to the ultimate consumer. The term "deregulated" is a misnomer however because Alberta's electricity market is extensively regulated through the EUA, and other statutes, by the Alberta Utilities Commission ("**AUC**"), the Independent System Operator, operating as the Alberta Independent System Operator ("**AESO**") and the Market Surveillance Administrator ("**MSA**"), among others.

As stated above, the Alberta electricity market is constituted as a Power Pool under the EUA. The AESO operates the Power Pool to ensure fair, efficient, open and competitive market access. The MSA and AUC monitor and enforce market participant behaviour and market rule compliance.

Power Pool and "Delivery" of Wholesale Electricity:

The EUA requires that all electricity imported into Alberta, or generated in Alberta and not consumed on site, be exchanged through the Power Pool. The physical characteristics of electricity are such that: (i)

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production (generation) and consumption (load) must match each other nearly perfectly and in real-time to maintain system reliability, because large volumes of electricity cannot yet be economically stored; and (ii) once generated, one unit of electricity (MW) is indistinguishable from another, so the use of a common trading pool (the Power Pool) obviates the need to try to track individual MWs of consumption back to a particular source of generation[1].

The Power Pool therefore functions as a real-time spot market for the physical exchange of bulk wholesale electricity, matching demand with the lowest priced supply to establish an hourly pool price for all electricity exchanged through the pool during that hour. "Delivery" of electricity through the Power Pool is accomplished by generators supplying electricity to the pool and loads consuming that electricity from the pool at essentially the same instant it is generated. Settlement of electricity exchanged through the Power Pool occurs after the fact, typically on a monthly basis, and is facilitated by the AESO, which credits generators for electricity they deliver to the pool at the applicable hourly pool prices and debits loads for electricity that they draw from the pool at the applicable hourly pool prices.

In addition to the real-time spot market for electricity that the Power Pool represents, the EUA allows parties to enter into forward physical contracts for the purchase and sale of electricity. These are called "direct sales agreements" under the EUA[2], or "Net Settlement Instructions" or "NSIs" under the AESO's rules[3].

Net Settlement Instructions and "Delivery" of Electricity:

NSIs provide electricity market participants with an alternative to buying and selling at the hourly Power Pool price and can therefore act as a hedge against price volatility. They allow buyers and sellers to enter directly into contracts with other pool participants for an agreed amount of power, at a negotiated price, over a specified period of time in the future. The AESO has no visibility into the contracted price; however the AESO must have visibility into the MW volumes sold for each NSI in order to net those volumes against actual metered volumes that the NSI parties exchange through the pool. This visibility allows the AESO to determine the amount of MWs settled by the parties through the AESO for actual metered volumes[4]. The NSI parties settle directly between themselves the contracted volumes at the contracted prices.

NSIs replicate what, absent the Power Pool structure, would be a direct sale and delivery of physical electricity between a generator and a load. Because of the pool structure however, the "delivery" of physical electricity under an NSI still occurs by the real-time exchange of electricity through the Power Pool, as it does in any other wholesale electricity transaction exchanged through the pool.

Retail Transactions and "Delivery" of Electricity:

A third aspect of the Alberta electricity market in which the Power Pool is relevant and the concept of "delivery" is nuanced is the retail electricity market. Electricity consumers in Alberta can purchase

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[1] Market Surveillance Administrator, Alberta Wholesale Electricity Market, Sept. 29, 2010, pg. 7, http://albertamsa.ca/uploads/pdf/Reports/Reports/Alberta%20Wholesale%20Electricity%20Market%20Report%2009 2910.pdf

[2] *Electric Utilities Act*, Statutes of Alberta 2003, Ch. E-5.1, Sec. 19(1). See also Sec. 19(2) for requirements that electricity exchanged through direct sales agreements, or "forward contracts" (i.e. exchange traded forward electricity contracts), must be undertaken in accordance with AESO rules.

[3] AESO Rules 103.5, see also : http://www.aeso.ca/downloads/Pool_Participant_Manual_-_Net_Settlement_Instructions_-_Sept_2011.pdf.

[4] *Ibid.*

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electricity directly through the Power Pool at the hourly spot price, or they may arrange for electricity supply from Retailers[5] by appointing such Retailers as their agent and retailer of record. Electricity supply arranged by Retailers may be at prices other than the hourly spot price, including at fixed, capped or collared prices, all as may be negotiated between the Retailer and the consumer. In addition to arranging for the supply of electricity from the pool, Retailers provide consumers with various load settlement and account management services in connection with the customer's consumed electricity.

Within the retail electricity market in Alberta, "delivery" of electricity to an end-use customer (like a home-owner or small business) by an electricity Retailer involves the Retailer arranging for the delivery of electricity from the Power Pool to the customer's electricity meter through the inter-connected electric transmission and distribution system. Within Alberta's deregulated electricity market Retailers do not own their own power generation, transmission or distribution assets, so all that a Retailer is able to do is act as a customer's agent to arrange for electricity purchase from the pool, arrange for delivery of that electricity by transmission and distribution utilities to the customer and then settle, on behalf of the customer, for the procured and delivered electricity with the relevant third parties.

Ancillary Services and "Delivery" of Electricity:

A fourth aspect of the Alberta electricity market that is relevant to the issue of "delivery" of electricity are transactions referred to as "Ancillary Services". A full discussion of Ancillary Services is beyond the scope of this letter but examples of them include "operating reserves", "transmission must run service", "black start services" and "load shed scheme services"[6]. The EUA defines them as follows:

> *"ancillary services" means those services required to ensure that the interconnected electric system is operated in a manner that provides a satisfactory level of service with acceptable levels of voltage and frequency*;[7]

The AESO procures ancillary services from generators and loads either directly or through openly competitive procurement processes, including the online exchange known as WattEx, which is operated by NGX[8]. AESO uses ancillary services to maintain the stability and integrity of the Alberta interconnected electricity system.

With respect to the concept of "delivery of electricity" in the context of ancillary services, depending on the particular type of ancillary service (for example "operating reserves"), the party providing the service to AESO may be required to either deliver, or refrain from delivering, certain volumes and/or voltages and/or frequencies of electricity to the Power Pool at particular times. Any electricity delivered to the pool as a result of ancillary service transactions is exchanged through the Power Pool as any other electricity delivered to the pool.

Applicability to the Proposed Scope Rule:

Applying the foregoing discussion about Alberta electricity markets to the Proposed Scope Rule, and to comment in part specifically to Question 1 posed in the Multilateral Notice (i.e. whether the Proposed Scope Rule provides sufficient clarity as to the contracts and instruments that are subject to trade reporting), Capital Power submits that the Proposed Scope Rule, particularly the concept of "intended to be settled by delivery of a commodity" in section 2(1)(d)(i), does not clearly address the nuances of

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[5] *Electric Utilities Act*, Statutes of Alberta 2003, Ch. E-5.1, Sec. 1(1)(uu).
[6] http://www.aeso.ca/market/5093.html
[7] *Electric Utilities Act*, Statutes of Alberta 2003, Ch. E-5.1, Sec. 1(1)(b).
[8] http://www.ngx.com/?page_id=88

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exchange of physical electricity through the Alberta Power Pool. As a result, it is unclear whether the types of transactions described above would be subject to trade reporting or not?

Capital Power submits that such transactions would not be subject to trade reporting. Capital Power submits that such transactions are, despite the nuances of the Power Pool structure, either: (i) "*excluded derivatives*" within the meaning of section 2(1)(d)(i) and (g) (i.e. "*exchange traded*" in the case of ancillary services traded on WattEx) of the Proposed Scope Rule; or (ii) "*additional contracts not considered to be derivatives*" as described in the Proposed Scope CP.

With respect to bulk wholesale electricity transactions, NSIs, non-WattEx traded ancillary services and the language in section 2(1)(d)(i), Capital Power submits that the intention to settle such transactions by actual delivery of electricity is both evidenced, and satisfied, by market participants complying with the requirement, under the EUA, that all electricity in Alberta be exchanged through the Power Pool. In other words, although electricity in Alberta generally cannot be delivered (except in cases of on-site production and consumption) directly by generators to loads, the exchange of electricity through the Power Pool satisfies the "delivery" requirement for the purposes of the Proposed Scope Rule. Settlement of electricity exchanged through the pool is typically cash settlement with the AESO, but such cash settlement is not allowed in place of the statutory requirement to actually exchange electricity through the pool.

With respect to retail electricity contracts, Capital Power submits that such contracts are either: (i) "*excluded derivatives*" under section 2(1)(d)(i); or (ii) "*additional contracts not considered to be derivatives*", in particular, that they are "*consumer contracts to purchase non-financial products or services at a fixed, capped or collared price*" as described in the Proposed Scope CP. With respect to romanette (i) in the preceding sentence, Capital Power submits that the "intent to deliver" requirement is satisfied by (A) the contractual obligation of a Retailer to arrange for both the supply of electricity to the consumer from the Power Pool and the delivery of that electricity to the customer's meter through the inter-connected electric system, and (B) the contractual obligation of the customer to accept and pay for the electricity arranged for by the Retailer. Additionally, Retailers and their customers do in fact regularly arrange for and take delivery of contracted quantities of electricity at contracted prices in their ordinary course of dealings and cash settlement in place of arranging for and taking the electricity is typically not allowed under such contracts. With respect to romanette (ii) in the sentence above, as mentioned earlier, Retailers provide load settlement, account management and related services to their customers in conjunction with arranging for electricity supply, the prices in such contracts are negotiated between Retailer and customer and they are often based on fixed, capped or collared prices in relation to the hourly Alberta Power Pool spot price.

Capital Power respectfully requests that the Authorities please clarify, either in the Proposed Scope Rule or Proposed Scope CP, that the kinds of Alberta Power Pool transactions described above are not subject to trade reporting, or at least please state if the Authorities disagree with Capital Power's conclusions in this regard? Alternatively, because the Alberta Power Pool market structure is unique to Alberta, Capital Power respectfully requests that the Alberta Securities Commission issue an order, under Sec. 10 of the *Alberta Securities Act* ("**ASA**"), designating physical electricity transactions associated with the Power Pool not to be derivatives under the ASA.

We note that the ASC issued an order to the Alberta Power Pool Council on December 21, 1995 (the "**1995 Order**"), upon enactment of the EUA and with respect to OTC derivatives arising out of the operation of the Alberta Power Pool[9]. The 1995 Order exempted Power Pool participants and other

[9] http://albertasecurities.com/Notices%20Decisions%20Orders%20%20Rulings/Issuers/ALBERTA%20POWER%20POOL%20COUNCIL%20-%20ORDER%20-%20%201995-12-21%20-%202350035.pdf

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qualified parties from the prospectus and registration requirements of the ASA at that time. The 1995 Order expired according to its terms on December 21, 1997.

Capital Power respectfully submits that a new order clarifying the status of Power Pool transactions as derivatives, or not, under the ASA would provide much needed clarity to Alberta Power Pool participants as they struggle to understand, and prepare to comply with, the derivatives regulatory regime being developed by the CSA. Capital Power further submits that a designation that Power Pool transactions are not derivatives under the ASA, and thus exempt from derivatives regulation, is justified and appropriate because of the fulsome regulatory regime, including financial qualifications for market participants, which already governs such transactions under the EUA and AESO Rules.

Furthermore, such an exemption would be consistent with the approach adopted by the U.S. Commodity Futures and Trading Commission ("**CFTC**"), in their Final Order dated April 2, 2013, which exempted specified electricity related transactions, in markets regulated by several U.S. independent system operators and regional transmission organizations, from almost all of the provisions of the U.S. Commodity Exchange Act and the CFTC's regulations, including trade reporting requirements (the "**ISO/RTO Order**")[10]. Many of the exempted transactions in the ISO/RTO Order are very similar to transactions in the Alberta Power Pool and subject to similar existing regulatory frameworks. Accordingly, Capital Power respectfully submits that a similar exemption for Alberta Power Pool transactions and market participants from the CSA's proposed derivatives regulatory framework would be both logical and justified.

SPECIFIC COMMENTS TO QUESTIONS:

Capital Power has the following specific comments in reply to the specific questions posed by the Authorities in the Multilateral Notice. The numbered paragraphs below correspond to the numbering of the questions, as set out in the Multilateral Notice, to which Capital Power has comments (i.e. we have not commented on every question posed).

(a) The Proposed Scope Rule and Proposed Scope CP:

2. Embedded Optionality

Capital Power supports the approach proposed by the Authorities, that certain optionality embedded in an agreement to change volume, quantity, timing or manner of delivery of a commodity (and potentially other forms of optionality such as with respect to price) will not, in itself, result in the agreement being a derivative. Capital Power submits the approach is appropriate because such optionality should not, in itself, negate the intent of the parties to deliver and receive a commodity if the optionality is exercised. Capital Power agrees with the Authorities' comments that such intent must be determined by reviewing the contract and the conduct of the parties as a whole, including whether the contract allows, from the outset, for cash settlement in place of delivery of the commodity upon exercise of the option.

Optionality with respect to volume, time, manner, price, etc., is common in commercial agreements for purchases and sales of commodities and is typically included for practical and efficiency reasons, including hedging risks associated with the production or consumption of a commodity. For example, at the time of entering into an agreement to purchase and sell carbon offsets at a future date, the seller may be unsure of the exact number of offsets he may be able to deliver, or the exact date of delivery, because production of the offsets may be contingent on variable factors associated with the underlying carbon reduction project. The buyer may be unsure of the exact number of offsets that she may need for her business'

[10] http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2013-07634a.pdf

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carbon reductions compliance purposes. Optionality in such circumstances allows parties the flexibility to tailor their agreement to suit their respective commercial needs for the relevant commodity and should not simply because of that flexibility, in itself, negate the intent to deliver or take the commodity, as determined based on a holistic review of the contract and the conduct of the parties.

Zero or nominal optionality requires clarification

One point in connection with the embedded optionality concept that Capital Power submits the Authorities should clarify however, is in cases where the optionality allows the parties to deliver or receive zero, or nominal, volumes of a commodity. Capital Power submits that such zero or nominal volume optionality should not, in itself, negate the intent to deliver and make the contract a reportable derivative. Capital Power submits that the same holistic analysis described above should apply to such optionality.

Applied to the example of the carbon offset transaction above, the underlying carbon reduction project may not generate any carbon offsets in a particular year (for reasons that may be both within and outside the control of the seller), so he would want the option to deliver zero or nominal volumes. On the other hand, in any given year, buyer's business may not have any carbon reduction compliance obligations, so she would want the option to take zero or nominal volumes of offsets in such year. In such circumstances the zero or nominal optionality again simply provides commercial flexibility to the parties and should not absent other indicators, in particular cash settlement from the outset in lieu of delivery, make the contract a reportable derivative for the purposes of the Proposed Rules.

Viewed from a risk-based analysis perspective, Capital Power does not believe that contracts for delivery of a physical commodity that contains optionality of the kinds described above, and in the Proposed Scope CP, pose systemic risk to Canada's financial system. Accordingly, such contracts and options should not need to be regulated, including reported, in the same manner as derivatives and options on financial commodities.

(b) The Proposed TR Rule and Proposed TR CP:

4. Exclusion of registered derivatives dealers from local counterparty definition

Capital Power appreciates the oral explanation that representatives for the Authorities provided, during their February 26th webinar on the Proposed Rules, about why the local counterparty definition in the Proposed TR Rule excludes entities that are registered as derivatives dealers, or in another category, under securities legislation of a Canadian province or territory. Capital Power agrees that there is little value in requiring "foreign" dealers (i.e. those not registered in the home jurisdiction of any one of the Authorities) to report their derivatives trades to the Authorities, by capturing such dealers within the definition of "local counterparty", unless those trades otherwise involve a local counterparty within one of the Authorities' home jurisdictions. For example, there would be little value to the ASC in having a derivatives dealer registered in Quebec deemed a "local counterparty" in Alberta, and therefore have to report all of its derivatives trades to the ASC, even those trades not otherwise involving Alberta local counterparties. Accordingly, Capital Power submits that the exclusion of such foreign registrants from the definition of local counterparty is appropriate.

6. Reporting Counterparty Waterfall and Derivatives Dealer Definition

Capital Power supports the proposed hierarchy in the reporting counterparty waterfall in Section 25 of the Proposed TR Rule. Capital Power believes that the hierarchy properly allocates reporting responsibility, as

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among various categories of derivatives market participants, to those best suited to fulfil the reporting responsibilities.

Capital Power submits however, that to avoid any confusion under the reporting counterparty waterfall, the definition of “derivatives dealer” should be clarified to indicate in which jurisdiction an entity must be “…*engaging in the business of trading in derivatives*…” (the CSA has previously described that phrase as the “business trigger for dealing in derivatives”) in order to be caught by the definition and thereby, *prima facie,* be deemed as the reporting counterparty in most instances. This clarification is particularly important since, as discussed above, the definition of local counterparty excludes foreign registrants.

Capital Power notes that the derivatives dealer definitions, in each of the respective TR Rules (or TR Regulation) already in place in Manitoba, Ontario and Quebec, specify that the business trigger for dealing in derivatives activity take place in Manitoba, Ontario or Quebec respectively. The definition of derivatives dealer in the Proposed TR Rule is silent on the jurisdictional point. Capital Power is unsure whether this silence was intentional or unintentional on the part of the Authorities but believes that the point should be clarified to pre-empt any confusion.

To illustrate the potential for confusion, please consider a situation in which one party to a derivatives trade is a non-dealer local counterparty in one of the Authorities’ jurisdiction, say Alberta, but the other party to the trade was a “foreign” party, say a New York based swap dealer. Assume that the trade with the Alberta local counterparty was the only trade with an Alberta nexus for the New York swap dealer. The business trigger for dealing in derivatives concept does not exist under the regulations provided by the CFTC with respect to swap dealer determination or swap data reporting and could, therefore, be unfamiliar concepts for the New York swap dealer.

Because the TR Rule will only apply in the respective provinces of the Authorities’ jurisdiction, and the derivatives dealer definition lacks jurisdictional specificity, the New York swap dealer might reasonably conclude that it is not a derivatives dealer in Alberta. As a result, the non-dealer Alberta local counterparty would have to report the trade under the reporting counterparty waterfall set forth in section 25, even though it might not otherwise be the reporting counterparty for any other trades and the New York swap dealer may be reporting many trades in jurisdictions outside of Canada. Capital Power submits that such an outcome should be avoided because it could place unreasonable and unnecessary compliance burdens on non-dealer local counterparties in the provinces where the Authorities have jurisdiction.

Additionally, confusion as to reporting counterparty status on the part of foreign dealers may result in such dealers being reluctant to enter into trades with local counterparties in the Authorities’ jurisdiction. That could result in market contraction, a decrease in liquidity, and a focusing of risk in derivatives markets as fewer and fewer participants are willing, or able, to transact in those markets. To avoid such potentially negative outcomes, Capital Power asks the Authorities to clarify the jurisdictional nexus in the derivatives dealer definition.

To that end, Capital Power submits that the derivatives dealer definition should specify that a person is a derivatives dealer if they either: (i) engage in the business of trading in derivatives anywhere in the world; or (ii) are registered as a “dealer”, “swap dealer”, or any similar classification, under the derivatives laws of any jurisdiction in the world. Capital Power submits that being registered as a dealer anywhere in the world should be determinative, not for the local counterparty definition (as is the case in Manitoba, Ontario and Quebec), but for both the derivatives dealer definition and by extension the reporting counterparty waterfall under Section 25 of the Proposed TR Rule.

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In addition to clarifying the jurisdictional nexus issue discussed above, Capital Power requests that the Authorities please clarify whether, in determining if a party is a derivatives dealer for the purposes of the Proposed TR Rule, the word “derivatives” as used in the derivatives dealer definition includes or excludes the “excluded derivatives” identified in Section 2(1) of the Proposed Scope Rule? In other words, in determining whether a party is a derivatives dealer or not, should a party consider its activities with respect to either, or both, reportable and/or excluded derivatives, or just reportable derivatives? Capital Power submits that, logically, only reportable derivatives should be considered given that the core purposes of the Proposed Rules apparently include (i) determining what should be reportable and (ii) who should report that which has been determined to be reportable. Anything not reportable should be irrelevant to determining who has to report.

On a more fundamental level, though beyond the scope of the Proposed Rules and this letter, Capital Power submits that the entire concept of being “in the business of trading in derivatives”, that was borrowed from securities markets and lies at the heart of the derivatives dealer definition in the Proposed TR Rule, requires significant modification and clarification in the context of derivatives markets. Derivatives markets are fundamentally different from securities markets in many key respects. Therefore, concepts applicable to securities markets, such as elements determinative of a securities dealer, when applied with only nominal changes to elements determinative of a derivatives dealer, are poorly suited to derivatives markets. Capital Power looks forward to being able to comment to the CSA more substantively on these issues in the future.

9. End-user Commodity Transaction Exemption

Capital Power commends the Authorities for proposing, in Section 40 of the Proposed TR Rule, the $250 million (CAD) aggregate notional value exclusion for reporting trades of commodity derivatives, other than cash or currency, among counterparties who are neither derivatives dealers nor Canadian financial institutions. Capital Power is concerned however, that the $250 million (CAD) threshold is too low, will require trade reporting by small derivatives market end-users who pose no systemic risk, and who will therefore be unnecessarily and unreasonably burdened by trade reporting. Capital Power respectfully requests that the Authorities increase the proposed threshold from $250 million (CAD) to at least $1.0 billion (CAD). Capital Power also respectfully requests that the Authorities provide the analysis conducted by their staffs, in establishing the $250 million (CAD) threshold, so that a more comprehensive review of the threshold can be made by Capital Power and other derivatives market participants.

In addition, Capital Power requests that the Authorities please clarify certain practical-application aspect of the $250 million (CAD) threshold as follows:

- Is the $250 million (CAD) threshold to be calculated over a particular period of time, such as a rolling 12 month period, or is it a “snap-shot in time”?

- Capital Power understands that exceeding the threshold will trigger a reporting requirement but is unclear whether the reporting requirement is only prospective or retrospective? In other words, does Sec. 40 mean to say that once one trade puts a party over the threshold, all of that party’s then outstanding derivatives trades become reportable, or only the one trade that put the party over the threshold and subsequent trades that keep the party over the threshold?

- Assuming the threshold has been exceeded and all or some of a party’s trades are reportable, what happens if at some point in the future the aggregate notional values of the party’s trades fall below the threshold, does that party then cease reporting?

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- At page 24 of the Proposed TR CP, the Authorities state that "*the exclusion applies only to a transaction where each counterparty is neither a derivatives dealer nor a Canadian financial institution.*". Is that to say therefore, that in calculating aggregate notional value of outstanding trades, for the purposes of Sec. 40, an end-user counterparty should not count any trades between itself and a derivatives dealer or Canadian Financial Institution? In other words, the end-user counterparty only need consider if its trades with other end-user counterparties exceed the $250 million (CAD) threshold?

- Sec. 40 states that the $250 million (CAD) threshold is to be determined "*without netting*". Capital Power respectfully submits that netting should be allowed in determining the threshold because standard industry practice among commodity derivatives market participants, in determining both counterparty and overall commodity portfolio risk exposure values, is to net positions. Evidence of the industry standard practice to net exposures can be seen in the provisions of several common standard-form physical and financial derivative master trading agreements, such as the ISDA Master Agreement, GasEDI Base Contract, NAESB Base Contract and EEI Master Power Purchase & Sale Agreement. All of these agreements provide for netting of payments between the parties, not only netting of periodic payments required under specific transactions, but also in the event of default and termination.

- In addition to netting being standard commodity derivative industry practice to determine risk exposures, another standard practice is to determine such exposures based on marked-to-market calculations of specific transactions, rather than to consider gross notional value (i.e. product x volume) as set forth in the Proposed TR Rule and TR CP. Capital Power submits that determining the $250 million (CAD) threshold should be based on standard industry practices, to the extent reasonable possible, to facilitate easier compliance by the industry. Accordingly, Capital Power submits that the $250 million (CAD) threshold should be calculated based on market-to-market positions and not gross notional values.

- How is the $250 million (CAD) threshold to be calculated in the context of trades denominated in currencies other than the Canadian dollar and fluctuations in the values of those currencies relative to the Canadian dollar? Must a party convert the gross notional values of all its derivative trades into Canadian dollars? Assuming the answer to the preceding question is "yes", and as a result of such conversion a party falls above (or below) the $250 million (CAD) threshold, but then at some point in the future, again because of currency exchange fluctuations, it falls below (or above) the threshold, would that party then cease (in the case of falling below the threshold) or commence (in the case of falling above the threshold) reporting as a result of the currency exchange fluctuations?

10. & 11. Implementation, Transition Period and Staged Implementation

During the February 26th webinar on the Proposed Rules, representatives for the Authorities orally stated that, subject to review of comments received on the Proposed Rules, they expected that the Proposed Rules would become effective sometime during the first half of 2016. Capital Power believes that time-frame is appropriate.

Capital Power also believes that it is essential that there be a transition period between the Proposed Rules becoming effective and the date that the first reporting obligations will begin, so that parties can adequately prepare to be the reporting counterparty. Such preparations may include developing new business processes and procedures, determining the reporting hierarchy status of counterparties, amending contracts, putting reporting counterparty agreements in place with equivalent hierarchy

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counterparties, implementing new, or modifying existing, derivatives trade data capture systems, and on-boarding with trade repositories. Many counterparties may become reporting counterparties for the first time and for them these preparations will require dedication of significant financial, technical and human resources.

For example, in terms of trade data capture system vendors and on-boarding with trade repositories, "new" reporting counterparties in the Authorities' jurisdictions may be quite small customers compared to the types of international entities with which such vendors and trade repositories usually do business. In addition, Canada's derivatives markets are only a very small part of global derivatives markets and therefore system vendors and trade repositories may not give Canadian reporting counterparties a very high priority in terms of developing appropriate reporting tools and facilitating on-boarding.

For these reasons, Capital Power submits that staged implementation of the reporting obligation under the Proposed TR Rule is not only appropriate but absolutely essential, particularly for end-user counterparties who may be becoming the reporting counterparty for the first time. Capital Power submits that for such new reporting counterparties a one year transition period between effective date of the Proposed TR Rule and reporting start date would be appropriate. Shorter transition periods may be appropriate for parties already reporting under Manitoba, Ontario and Quebec TR rules at the date the Proposed TR Rule comes into effect. In any event however, Capital Power submits that at least a six month transition period would be appropriate for all reporting counterparties.

OTHER COMMENTS TO PROPOSED TR RULE & TR CP:

Paragraph (b) of local counterparty definition, "…responsible for the liabilities of the counterparty."

Capital Power requests that the Authorities please clarify their comments, in the Proposed TR CP, with respect to the language quoted above from paragraph (b) of the local counterparty definition. These words express the "guaranteed affiliate" concept under that definition. At page 3 of the Proposed TR CP the Authorities state that in their view: "*this responsibility must be for all or substantially all of the affiliated entity's liabilities.*". Would the Authorities please clarify if by "*all or substantially all*", they meant: (i) all of such affiliated entity's liabilities of any kind whatsoever; (ii) just with respect to derivatives trades; (iii) on a trade by trade, or counterparty by counterparty basis; or (iv) some other meaning?

Section 37(3)

Capital Power finds the words "*best efforts*" in Section 37(3) of the Proposed TR Rule, and the associated guidance in the Proposed TR CP, to be too broad and confusing. At page 23 in the Proposed TR CP, the Authorities state that they interpret best efforts to mean "***at a minimum,*** *instructing the recognized trade repository to release derivatives data to the securities regulatory authority.*" (emphasis added). Capital Power asks the Authorities to clarify what else they would expect a reporting party to do to satisfy Section 37(3), if instructing a trade repository to release derivatives data only minimally meets the requirements? Capital Power submits that such instruction is essentially all that a reporting counterparty could reasonably do, or should be expected to do, and that the language in Section 37(3) and the Proposed TR CP should be revised accordingly.

Reporting of inter-affiliate trades

Capital Power respectfully submits that inter-affiliate derivative trades should be reportable in cases in which the trade is between affiliates who are wholly or majority controlled by the same ultimate parent entity and the financial results of the affiliates are reported on a consolidated basis with the parent. Capital

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Power submits that a reporting exemption for such inter-affiliate derivatives trades is appropriate because such trades do not pose systemic risk to Canada's financial system.

Firstly, an exemption from reporting such trades would be consistent with the approach taken by the CFTC.[11] Secondly, it would also be consistent with the CSA's proposal that inter-affiliate trades would be exempt from mandatory clearing under CSA Staff Notices 91-303 – *Proposed Model Provincial Rule on Mandatory Central Clearing of Derivatives*. Thirdly, Capital Power notes (and supports the fact) that under the Proposed TR Rule inter-affiliate derivative trade data would not be publicly disseminated. That being the case however, Capital Power respectfully submits that the compliance burden that will be placed on derivatives market participants, by requiring them to report inter-affiliate derivative trade data only to the Authorities and not to the public, is not justified by the very limited additional market transparency that such reporting would provide **only** to the Authorities, particularly since such inter-affiliate trades are not systemically risky in the first place.

To illustrate our view that such inter-affiliate trades are not systemically risky, please consider the following example corporate structure, which Capital Power submits is a common one in the energy industry:

> A group of four affiliated entities each individually owns a factory for the manufacture of widgets ("**ProductionCos**"). The ProductionCos are all wholly or majority owned by the same "**ParentCo**" and their financial results are reported on a consolidated basis with ParentCo. ParentCo also provides credit support (parental guarantees and/or letters of credit) for the ProductionCos as and when needed.
>
> The four factories require electricity and natural gas to operate. To procure electricity and natural gas, and to hedge against commodity price volatility, the ProductionCos desire to enter into forward contracts for the physical supply of electricity and natural gas and financial derivatives contracts related to those commodities. Each ProductionCo could transact in the market directly with other derivatives market participants to obtain such commodity derivative transactions.
>
> Rather than having each ProductionCo transact on its own behalf, their corporate family has another affiliate, "**TradeCo**", whose function is to transact derivatives on behalf of the entire corporate family, either as a disclosed or undisclosed agent. TradeCo is also wholly or majority owned by ParentCo, its financial results are reported on a consolidated basis with ParentCo and ParentCo provides credit support as and when needed.
>
> TradeCo was established to make negotiating, entering into and administering the corporate family's derivatives activities more efficient. It is more efficient and cost effective for one member of the corporate family to negotiate, execute and administer derivatives trades with external parties than to have four ProductionCos each have to negotiate, enter into and administer such agreements. TradeCo may also trade derivatives with external parties for its own account.
>
> After TradeCo has entered into an "outward facing derivative trade" with an external party as disclosed or undisclosed agent for a ProductionCo, any profits or losses associated with such trade are recorded in the financial ledgers of the relevant ProductionCo on a monthly, quarterly or annual basis simply by means of accounting entries, rather than by the actual exchange of funds. There may or may not be written agreements in place, including trade confirmations, between ProductionCos and TradeCo and each outward facing derivatives trade may or may not have an exactly corresponding inter-affiliate trade. On a monthly, quarterly or annual basis the financial

[11] http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/13-09.pdf

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results of the ProductionCos and TradeCo are rolled up into ParentCo and reported on a consolidated basis.

In the above scenario, Capital Power respectfully submits that, to the extent that any of the above trades might be systemically risky, it is only the outward facing trades with unaffiliated entities that could pose such risk. The inter-affiliate trades are not risky because of the consolidated financial position of the entire corporate family, including the fact that ParentCo is the common credit support provider and common control point for all of its subsidiaries. Accordingly, Capital Power submits that only the outward facing trades should be reportable (assuming they would otherwise be reportable under the Proposed TR Rule).

Additionally, Capital Power notes that in the Proposed TR CP, the Authorities have stated a desire to avoid dual reporting of derivatives trade data. Capital Power submits that requiring reporting of inter-affiliate derivative trade data, particularly on a “one-to-one” or “back-to-back” basis, is in essence requiring dual reporting of such trade data, to the extent that the outward facing trade would be reportable under the Proposed TR Rule in the first instance. The only difference between the outward facing trade and the inter-affiliate trade in such instances would be the identity of the parties and their respective roles as “buyer” or “seller” under the back-to-back trades. That is, if TradeCo was the “buyer” in the outward facing trade with a third party it would be the “seller” in the inter-affiliate trade with ProductionCo.

Based on considerations of systemic risk Capital Power sees no rational for requiring reporting of inter-affiliate trades. Additionally, requiring such reporting by Canadian derivatives market participants when similar reporting is not required in the U.S. under the CFTC’s reporting regulations will put additional compliance burdens on Canadian derivatives market participants and may put them at a competitive disadvantage to U.S. derivatives market participants. For the foregoing reasons Capital Power respectfully submits that inter-affiliate derivatives trades should be exempted from reporting under the Proposed TR Rule in situations in which the affiliates are wholly or majority owned subsidiaries of a common parent, the subsidiaries’ and parent’s financial results are reported on a consolidated basis and the parent provides credit support for the derivatives trading related liabilities of its subsidiaries.

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

Yours Truly,

“***CAPITAL POWER***”

Per: “Zoltan Nagy-Kovacs”

Zoltan Nagy-Kovacs
Senior Counsel

cc. Alberta Electric System Operator, attention Mr. Tom Sloan

Market Surveillance Administrator, attention Mr. Michael Nozdryn-Plotnicki

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March 31, 2015

SENT VIA E-MAIL (mbrady@bcsc.bc.ca)

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

(collectively called the "**Authorities**")

c/o:
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Dear Sirs/Mesdames:

RE: Comment Letter CSA Multilateral Notice and Request for Comment Proposed Multilateral Instrument 91-101 *Derivatives Product Determination* and Proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting*

This letter is in response to the Authorities request for comments regarding the proposed multilateral instruments 91-101 *Derivatives Product Determination* (the "**Scope Rule**") and its proposed Companion Policy (the "**Scope CP**") and 96-101 *Trade Repositories and Derivatives Data Reporting* (the "**TR Rule**") and its proposed Companion Policy (the "**TR CP**"), (collectively, the "**Proposed Instruments**").

We appreciate the opportunity to comment on the Proposed Instruments and though we strongly support the importance of harmonizing the Proposed Instruments with the *Derivatives: Product Determination* rule or regulation ("**91-506**") and the *Trade Repositories and Derivatives Data Reporting* rule or regulation ("**91-507**") each as issued by the Ontario Securities Commission ("**OSC**"), the Manitoba Securities Commission ("**MSC**") and the Autorité des marchés financiers ("**AMF**"), and encourage the Authorities, the OSC, MSC, and AMF to continue to work toward harmonized trade reporting requirements in Canada, we equally strongly support the efforts of the Authorities to draft rules that consider the nuances of the individual Authority's provincial derivatives markets and how these rules would impact these markets.

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As counsel to counterparties ranging from energy producers, energy transporters, and energy trading and marketing organizations to global financial institutions and derivatives market intermediaries, Dentons Canada LLP ("**Dentons**") has extensive involvement with commodity swap transactions from a legal and regulatory perspective. Dentons advised a number of market participants vis-à-vis the reporting requirements of 91-507 and in this letter, we would highlight some of the lessons learnt from helping our clients comply with the reporting requirements under 91-507. We would comment from a legal and regulatory standpoint, as opposed to a business standpoint on certain of the proposals contained in Proposed Instruments, including analysing some of the key differences between the Proposed Instruments, 91-506 and 91-507. We would also respond to certain questions asked by the Authorities in the Proposed Instruments.

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

Major Lessons Learnt from 91-506 and 91-507

a. 91-506

Market participants are still struggling with uncertainty in determining the intent component of the exclusion provided for commodities contracts in subparagraph 2(1) (d)(i) of 91-506. The lack of explanation by the OSC, the MSC and the AMF in their companion policies and policy statement respectively is the cause of this uncertainty.

Specifically in the commodity trading business, different agreements, contracts and transactions are structured for risk-management purposes and do not involve risk-shifting arrangements that would negate the intention to deliver. The lack of an explanation or a list of characteristics to help market participants determine how the OSC, MSC and AMF would interpret the intent component is the source of great uncertainty.

b. 91-507

As the nexus of jurisdiction over a transaction involving a local counterparty begins by determining if an entity is a local counterparty, one of the determinative issues our clients faced was trying to decipher if they would be deemed to be a "derivatives dealer". Consequently, if they would be the "reporting counterparty" in a transaction that is not cleared through a recognized or exempt clearing agency or if the transaction is entered into with a non-derivatives dealer.

The lack of a registration rule that clearly defines the categories of derivatives registrants is a topic that Authorities have heard a lot and we would not expand further on this in this comment letter.

Another major lesson learnt by market participants in complying with 91-507 is the lack of definition of affiliate and clarification of how the regulators who drafted 91-507 would interpret what an affiliate is. From conversations with the regulators on this, market participants were directed to the definition of affiliate in their respective securities acts.

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Key Differences between the TR Rule and the trade reporting rules in effect in Manitoba; Ontario and Quebec

The Authorities have stated that though they "intend that the Scope Rule and the TR Rule be consistent with the corresponding local rules in Manitoba, Ontario and Québec", they are seeking comment in particular on: "whether the proposed differences are appropriate for market participants in our jurisdictions; and whether the proposed differences will result in consequences or issues that are detrimental to market participants, industries or the derivatives market in the jurisdictions and/or in Canada".

The definition of "local counterparty" in the TR Rule

The removal of a counterparty that is registered under the securities legislation of the local jurisdiction as a derivatives dealer or in another category as a consequence of trading in derivatives (i.e., is a locally-registered entity from the local counterparty definition creates a jurisdictional gap of who would be deemed the reporting counterparty if for example an Alberta entity enters into a transaction with a foreign financial institution. The Authorities, in explaining the removal of this category of the definition state that "as a result of this difference in the "local counterparty" definition in the TR Rule, a transaction involving a registrant in the local jurisdiction will **only** be required to be reported under the laws of that local jurisdiction if any one of the following applies:

- the derivatives dealer is organized under the laws of the jurisdiction, or has its head office or principal place of business in the jurisdiction,
- the derivatives dealer is an affiliate of a person referenced in the bullet-point above and that party is responsible for the liabilities of the derivatives dealer, or
- **the other counterparty to the trade is a local counterparty**".[Emphasis added]

Using the explanation above, if a non-dealer Alberta entity enters into an interest rate hedge with a foreign financial institution i.e. a U.S. or European bank that is not organized under the laws of Alberta, the transaction has to be reported because the non-dealer Alberta entity would be a local counterparty and the question to be asked then is who would be the reporting counterparty?

Questions posed by the Authorities

1. Does the Scope CP provide sufficient clarity as to the contracts and instruments that are subject to trade reporting? Please provide specific examples where there is not sufficient clarity.

We commend the Authorities for adding further explanation in the Scope CP that was not provided in the companion policies and policy statement of the MSC, OSC and AMF respectively, which to a certain extent helps determine the intent component of the exclusion provided for commodities contracts in subparagraph 2(1)(d)(i) of the Scope Rule. However, we strongly urge the Authorities to provide greater clarity as many of our clients are still struggling with discerning the intention element. The nuances of certain commodity contracts structured to achieve balance in the supply and demand of the commodity and for risk management purposes do not easily fit into the exclusion in Section 2(1) (d).

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2. The Scope Rule and Scope CP indicate that options to purchase commodities are derivatives but that certain optionality embedded in an agreement to purchase commodities for future delivery will not, in itself, result in the agreement being a derivative. Do you agree with this approach? Please explain.

We agree with this approach.

3. In New Brunswick, Nova Scotia and Saskatchewan the definition of derivative specifically excludes a contract or instrument if the contract or instrument is an interest in or to a security and a trade in the security under the contract or instrument would constitute a distribution. In these provinces these contracts or instruments are defined as securities. Is the inclusion of subsection 3(6) necessary given that these provinces have such a carve-out?

Yes the inclusion is necessary as market participants in these provinces can see in the Scope Rule what is not defined as derivative and would not have to refer to their applicable securities act.

4. Is it appropriate to exclude derivatives dealers from the definition of local counterparty appropriate? Please explain. Do you foresee any issues in the jurisdictions adopting a different definition from Manitoba, Ontario and Québec? Please explain.

Please refer to my comment in page 3 under key differences between the TR Rule and the trade reporting rules in effect in Manitoba; Ontario and Quebec.

7. Do you foresee any difficulties in counterparties agreeing as to who will be the reporting counterparty? If so, explain.

Please refer again to my comment in page 3 under key differences between the TR Rule and the trade reporting rules in effect in Manitoba; Ontario and Quebec.

Conclusion

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

Yours truly,
Dentons Canada LLP

Priscilla Bunke
Associate

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March 18, 2015

DELIVERED VIA ELECTRONIC MAIL

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

(collectively called the "**Authorities**")

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Dear Sirs/Mesdames:

Re: Comment Letter CSA Multilateral Notice and Request for Comment Proposed Multilateral Instrument 91-101 *Derivatives Product Determination* and Proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting*

Enbridge Inc. together with its affiliates, subsidiaries and related entities (collectively "**we**" or "**Enbridge**") hereby respectfully submits these comments in response to the Authorities' request for comments in connection to the Canadian Securities administrators ("**CSA**") Multilateral Notice and Request for Comment Proposed Multilateral Instrument 91-101 *Derivatives Product Determination* (the "**Scope Rule**"); Proposed Companion Policy 91-101CP the "**Scope CP**"); Proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* (the "**TR Rule**") and the Proposed Companion Policy 96-101CP (the "**TR CP**") (collectively the "**Proposed Instruments**"). The Proposed Instruments were published on January 21, 2015, and outline the Authorities' proposals related to, among other things, derivative product determination and derivatives transaction data reporting.

Enbridge appreciates the opportunity to comment on the Scope and TR Rules and commends the Authorities' efforts to address some of the concerns raised by Enbridge and other market participants regarding the Rules 91-506 and 91-507 currently in effect in Ontario, Quebec and Manitoba.

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However, while Enbridge supports the Authorities' general intentions espoused by the CSA 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 despite the Authorities specific proposals that differentiate the Scope and TR Rules from Rules 91-506 and 91-507, some of the key requirements the Authorities are proposing to impose in the Scope and TR Rules on derivatives market participants are over reaching; does not square with economic reality 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 Scope and TR Rules are part of the mechanisms the Authorities are recommending to put in place to establish a regulatory regime for the over-the-counter ("**OTC**") derivatives market in their provincial jurisdictions to support Canada in meeting its G-20 commitments, Enbridge respectfully submits that some of these proposals are not consistent with the regulations being adopted in the United States (the "**U.S.**"), the most important partner to Canadian energy market partners in cross-border derivatives trading. As a result, if these proposals are adopted, entering into derivatives transactions with Canadian energy market participants would become onerous, burdensome and most importantly very costly, thereby putting Canadian energy market participants at a competitive disadvantage and would cause a freeze in the liquidity available in the Canadian OTC derivatives marketplace, which would increase systemic risk in Canada.

Enbridge operates the world's longest and most complex crude oil pipeline system, delivering on average of more than 2.2 million barrels per day to Canada and in the U.S. Enbridge is moving rapidly to access new markets for Canadian and U.S. crude through a suite of commercially secured growth projects being rolled out through 2017. We are currently aiming to open North American markets for up to 1.7 million barrels per day of new production. That includes connecting Canadian oil sands product to refineries in the Houston area through our Gulf Coast Access program; and connecting light oil supply from the Bakken and western Canada to premium markets in the U.S. Midwest, Ontario, and Quebec through our Eastern Access and Light Oil Market Access initiatives. In addition, we are expanding capacity in the Canadian oil sands where Enbridge is the region's leading pipeline operator.

Liquids Pipelines

Enbridge's mainline system is the largest conduit of oil into the United States. We transport 53% of U.S.-bound Canadian production, which accounts for 15% of total U.S. imports.

Gas Pipelines + Processing

Enbridge has extensive natural gas systems both onshore in Canada and the United States, and offshore in the Gulf of Mexico, that transport approximately 45% of the natural gas produced in the deepwater Gulf. We also have midstream processing facilities in both Canada and the U.S., as well as joint-venture interests in the Alliance Pipeline, the Vector Pipeline and the Aux Sable fractionation plant near Chicago.

Gas Distribution

Enbridge is the largest natural gas distributor in Canada. Today, Ontario-based Enbridge Gas Distribution is delivering affordable, clean-burning natural gas to over 2 million residential, commercial and industrial customers.

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Power Generation + Transmission

Enbridge's power generation interests are made up of renewable assets in Canada and the U.S. with the capacity to generate more than 1,800 megawatts (MW) of emissions-free energy— enough to power approximately 600,000 homes. Our first power transmission project went into operation in 2013 and we're currently evaluating additional investment opportunities in this area. We have interests in wind, solar, geothermal, a fuel cell and waste heat recovery facilities with a total generating capacity of more than 1,800 MW of emissions-free energy. Enbridge is Canada's largest solar energy and second largest wind power producer.

Energy Services

Energy Services provides energy supply and marketing services to North American refiners, producers and other customers. Crude oil and NGL marketing services are provided by Tidal Energy (a wholly-owned subsidiary of Enbridge Inc.) which transacts at many North American market hubs.

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 as 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 International Energy Credit Association ("**IECA**") Contracts & Legal Education Group; and the IECA's Canadian Derivatives Regulatory Working Group ("**IECA Canadian Working Group**") and fully supports the comments submitted by the IECA Canadian Working Group with respect to the Scope and TR Rules.

In your request, you have encouraged comments on all aspects of the Proposed Instruments, and you are also seeking comments on specific aspects of the Scope Rule; the Scope CP; the TR Rule and the TR CP. Where they are applicable to Enbridge, we would endeavor to answer some of the questions you have posed on certain aspects of the Proposed Instruments within our comments on aspects of the Proposed Instruments that are of great concern to Enbridge.

I. ENBRIDGE'S SPECIFIC COMMENTS ON THE TR RULE

1. Inter-Affiliate Derivatives

The Authorities do not differentiate between outward-facing derivatives (i.e. market-facing derivatives) and inter-affiliate derivatives in the TR Rule. We believe that the Authorities have not considered the costs to be incurred by end-users such as Enbridge to report inter-affiliate derivatives We have scoured the market to get an estimate of what it would cost Enbridge to secure and maintain a system to report inter-affiliate derivatives. These costs below were presented to Enbridge by builders of reporting systems. These costs are based on one of three possible implementation options.

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

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Cost Type	Amount
License/Subscription	$120,000
Software Configuration	$75,000
In house Cost	$67,200
Total	$262,200

Ongoing Yearly Costs	Amount
Vendor Maintenance	$120,000
MRM and Other Support/Maintenance	$53,760
DTCC Annual Fee	$10,000
Estimated DTCC Maintenance Fee	$1,930
Estimated ICE eConfirm Data Load	$1,728
Estimated ICE Trade Vault Fee	$12,000
Additional Internal ICE Support Costs	$26,880
	$226,298

We strongly urge the Authorities to weigh the high costs to market participants of reporting inter-affiliate derivatives versus the perceived benefits for the Authorities.

In the U.S., the Commodity Futures Trading Commission (the "**CFTC**"), after considering end-users concerns, decided on April 5, 2013 that it did not consider the reporting of inter-affiliate trades to be of benefit to the public interest and as such inter-affiliate trades under certain conditions, are not required to be reported.

Though the Authorities do not specifically address inter-affiliate derivatives in the TR Rule and accordingly under the TR Rule, all derivatives transactions involving a local counterparty will be required to be reported to a recognized trade repository ("TR") or, in limited circumstances, to the relevant Authority, the Authorities do however, recognize and differentiate inter-affiliate derivatives transactions from market-facing derivatives transactions in the context of pre-existing transactions[2] and public dissemination of data[3]. By excluding inter-affiliate derivatives from the requirements of public dissemination of derivatives transactions data, the Authorities have established that it is not prejudicial to the public interest rather it would be damaging to the public interest as publicly disseminating derivatives and pricing data between affiliated entities would not enhance price discovery, as such derivatives transaction and pricing data would already have been publicly disseminated in the form of the related market facing derivative.

The Authorities not distinguishing between market-facing derivatives transactions and inter-affiliate derivatives transactions would mean all end-users will have to report data to a TR in the same form and manner for both market-facing derivatives and inter-affiliate derivatives. This means that even if an end-user is not a reporting counterparty for its market-facing derivatives, and therefore is not required to report derivatives data to a TR, it would nonetheless still be a reporting counterparty with respect to its inter-affiliate derivatives and would have to report inter-affiliate derivatives data to a TR. In other words, many

[2] Inter-Affiliate data field in Appendix A
[3] Subsection 39(6) of the TR Rule.

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end-users such as Enbridge would become reporting counterparties solely because they use inter-affiliate derivatives as part of a prudent risk management program. The Authorities by differentiating some of its reporting requirements from the requirements in Rule 91-507 including the changes in the reporting hierarchy contained specifically in OSC Rule 91-507, suggests to us that the Authorities intend to lessen the burden of reporting derivatives data for end-users by limiting the situations in which an end-user is the reporting counterparty for market-facing derivatives. However, the lack of a differentiation in the TR Rule between market-facing derivatives and inter-affiliate derivatives prevents the reporting burden from being lessened for end-users that employ inter-affiliate derivatives; rather it increases the burden with high costs that derivatives dealers and Canadian Financial Institutions ("**CFIs**") do not have to bear as they already have systems in place for reporting purposes.

Enbridge knows that compliance with the TR Rule for inter-affiliate derivatives is going to prove very time-consuming, onerous and costly for Enbridge as Enbridge does not have the resources and dedicated staff that derivatives dealers and CFIs have to comply with the TR Rule. We believe that regulation of inter-affiliate derivatives should square with economic reality as inter-affiliate derivatives transactions do not increase systemic risk either by creating counterparty credit risk or increasing interconnectedness between major CFIs. We have heard the Authorities justify the requirement for reporting inter-affiliate derivatives as part of your future market surveillance efforts to have market oversight over the Canadian derivatives market. In that regard, we urge the Authorities to consider the underlying rationale behind the G20 nations' commitments made in 2009, imposing a costly burden on end-users who use inter-affiliate derivatives for prudent risk management purposes; the CFTC coming to the realization that there is no benefit for inter-affiliate derivatives to be reported inter-affiliate derivatives and reconcile all these factors with its justification for requiring inter-affiliate derivatives reporting. Requiring inter-affiliate derivatives reporting in Canada, when similar transactions entered into within corporate groups in the U.S. do not have to be reported, would make it more expensive to do the same transactions within corporate groups in Canada and put Canadian market participants at a competitive disadvantage.

Inter-affiliate derivatives are used by end-users such as Enbridge to transfer risk within a corporate group in order to manage it more effectively. The negotiation of the master agreements required to transact derivatives is complex and time consuming (sometimes taking months or years). It is more effective for a large corporation with a complex organizational chart to have a handful of market facing entities and to sleeve the derivative transactions to the internal entity that has the exposure that requires hedging. The credit risk associated with the sleeving of the derivatives is always borne by the entity itself (if it has an external credit rating) or by the entity that provides financial assurances to the external counterparty to support the transactions with the market-facing entity. For credit risk to be created by the internal entities receiving the sleeved transactions, the entity providing the financial assurances (which would be the entity with the external credit rating, most likely the parent company) would have to be insolvent. Requiring Enbridge and other end-user participants to comply with the same reporting requirements for both external derivatives and inter-affiliate derivatives would create costs without any corresponding benefit (as the trades are simply passed through the external facing Enbridge entity) and place substantial burdens on end-users and consumers.

Further, the data fields required to be reported under the TR Rule when multiplied by the number of inter-affiliate derivatives creates a drain on the internal resources of end-users such as Enbridge. For example, Enbridge has calculated that the submission of all its internal derivatives data to a TR would require its internal systems to account for 54 minimum data fields as listed in Appendix A. While many fields would be "not applicable" or left blank, the required coding nonetheless will have to account for all fields, regardless of whether all fields actually apply to inter-affiliate derivatives.

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To give you some context regarding the CFTC's decision of April 5, 2013, to grant the conditional permanent no-action relief for "swaps between affiliated entities", the CFTC had received multiple requests from market participants to provide no-action relief from swap data reporting obligations provided in parts 45 and 46 of its regulations and the reporting requirements related to the end-user exception from required clearing under its regulation 50.50(b), for swaps between affiliates within the same corporate group ("**Intra-group Swaps**"). Market participants like Enbridge had submitted to the CFTC that such Intra-group Swaps are used only for managing risk within a corporate group, and therefore do not increase overall systemic risk or warrant the same reporting requirements as external swaps (i.e., swaps with unaffiliated entities) ("outward-facing swaps"). In addition, certain market participants had reported that compliance with parts 45 and 46 of the Commission's reporting rules for intra-group swaps was proving difficult and extremely costly for market participants that lack the resources and dedicated staff of more sophisticated financial entities such as swap dealer ("**SDs**") and major swap participants ("**MSPs**") and large hedge funds.

The CFTC granted the permanent no-action relief[4] granting conditional no-action relief to certain entities other than SDs or MSPs from certain reporting obligations under Part 45 and Part 46 of the its regulations and the reporting requirements related to the end-user exception from required clearing under regulation 50.50(b) with respect to certain Intra-group Swaps.

In relation to the CFTC's no-action relief from its reporting requirements for intra-group swaps, Enbridge meets the conditions imposed by the CFTC to avail itself of this permanent conditional no-action relief and as a result, its U.S. affiliates and sponsored investments do not have any reporting obligations vis-à-vis their inter-affiliate swaps.

Finally on this issue, Enbridge is of the opinion that its inter-affiliate derivatives transactions data will not be useful to the Authorities since it is used only for managing its corporate group's internal risk (by among other things allowing for the netting and set-off of all transactions between parties), and, indeed, could distort the market picture for derivatives. For example, many end-users book inter-affiliate foreign exchange transactions at daily or period-ending accounting rates which they also use for other inter-affiliate cross-currency transactions and company-wide financial statement translation. The inclusion of such inter-affiliate derivatives data with these rates in the TR could distort the data when comparing to other market-facing derivatives and will make it that much harder for the Authorities to have a true picture of what is taking place in the market. As a result, Enbridge strongly urges the Authorities to exclude or exempt inter-affiliate derivatives transactions from the reporting requirements as derivatives that are exactly mirrored from an entity's outward-facing derivatives which would mean double counting of a market-facing derivative that has already being reported by a derivatives dealer or a CFI. Any argument that the inter-affiliate reporting should be retained for harmonization purposes should be considered to be moot given that the TR rules in the various jurisdictions (Manitoba, Quebec, Ontario) have already deviated from each other. The most efficient and cost effective rule should be enacted for end-users and others who do not create systemic risk in the market and who did not cause the financial crisis in 2008.

2. Exclusions in Part 5

In Part 5, Section 40, the Authorities have proposed two different options to exclude otherwise reportable commodity derivatives. Option #1 seems the most appropriate for the end-user community as it excludes any transactions between two end-users that are below the $250,000,000 threshold. There are a few issues with section 40(c) that need to be clarified or amended.

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[4] http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/13-09.pdf

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(a) Enbridge has a concern with the requirement that the reporting counterparty "know" what their counterparty has, at the time of the transaction, for outstanding commodity transactions. There is no way for parties to confirm this without assistance from their counterparty and it will be difficult to obtain that information at the time of the transaction. This requirement is unworkable;

(b) Enbridge understands that the $250,000,000 threshold would be a daily rolling amount. Practically speaking, there needs to be more clarity on how this threshold and the associated reporting would be handled by parties. Do all amounts under commodity agreements have to be converted to Canadian currency? At what exchange rate? As of the transaction date? If transactions needed to be reported one month because the entity exceeded the threshold, and then new transactions were excluded the next month because the entity fell under the threshold, how would parties manage this in their internal reporting systems? If an automatic notification or a report was required to be generated, this would require an additional expenditure by end-users on their IT systems as they currently are not as sophisticated as other parties (for example, CFIs).

(c) A $250,000,000 threshold is too small and will require too many smaller energy companies to report. In the U.S. the *de minimis* threshold is 8 billion U.S. dollars. This is the threshold that applies to Canadian energy companies with U.S. affiliates. As a result, transactions that are not reportable in the U.S. are reportable in Canada. Enbridge would suggest that a threshold of a minimum of $1 billion Canadian dollars would be more appropriate.

(d) Enbridge urges the authorities to allow netting when a party is determining if it is breaching the threshold in Section 40. All industry standard commodity trading agreements (including the GasEDI, NAESB and various crude oil and NGL general terms and conditions) allow the parties to net their exposures to each other for both payment purposes and in default scenarios.

(e) Section 40 does not contemplate that commodity derivatives may be traded on an exchange or a clearinghouse and as a result already reported by the exchange or the clearinghouse to the Authorities. Any commodity derivatives traded in such a manner should be excluded from the threshold calculation as they have already been reported.

3. Reporting Waterfall

The reporting waterfall as set out in the TR Rule is appropriate as it gives responsibility for reporting to the entities that are most capable of providing that information in a timely and accurate manner (being the derivatives dealers and CFIs). One concern though is with the current definition of "derivatives dealer". As an example, if an Alberta energy company was dealing with a foreign bank, if the foreign bank does not fall under the definition of "derivatives dealer" then the Alberta energy company (with the less sophisticated reporting systems or none at all apart from its booking transactions through its accounting system) would end up reporting the transaction instead of the foreign bank unless the Alberta energy company could convince the foreign bank to be the reporting party under a written agreement. This adds not only to the burden of the Alberta energy company, but to the foreign bank to execute written agreements with all its counterparties instead of the rules mandating that the foreign derivatives dealer report. A possible solution would be to amend the definition of "derivatives dealer" to include the jurisdiction in which an entity is engaging in the business of trading derivatives. There should be consistency across jurisdictions with respect to the definition of "derivatives dealer" so parties can be confident that a derivative dealer in one jurisdiction in Canada is a derivative dealer in all jurisdictions.

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4. Section 37(3)

The use of the words "best efforts" in this section is problematic as Canadian courts have interpreted "best efforts" to mean using efforts that may impact a party's economic interests to fulfil the obligation. Enbridge would suggest that in Canada, the use of "reasonable efforts" is more appropriate and would request that this section be amended by the Authorities. Without further clarification in the TR CP, parties may have to go beyond what would be considered reasonable from a commercial perspective. In addition, if the TR refuses, what further actions could the reporting counterparty pursue to force the TR to provide the information? It may be that this section should be removed and the Authorities can address this issue with the TRs as they apply for recognition or approval from the Authorities.

5. Section 38(4)

This section would override any confidentiality agreement or section within an agreement between the parties. Enbridge would suggest that the Authorities provide a safe harbour for parties similar to the U.S.[5]

6. Local Counterparty Definition – "responsible for the liabilities"

The wording in the local counterparty definition of "responsible for the liabilities" is in the Rule 91-507 and it remains problematic. This requires a subjective analysis of the relationship between the affiliated entity and the counterparty, which may change over time and is very dependent on the facts and circumstances of the moment when the counterparty is called upon to take on the liabilities of the affiliated entity. The Authorities should put some parameters around this wording, such as, "being responsible for the liabilities related to derivative trading" which would change this section from a subjective test to an objective one, and would be easily understood by market participants.

7. Implementation

Providing for staged implementation and a transition period would be ideal for all parties. Enbridge understands that the proposed date for implementation and compliance will be sometime in 2016, provided the effective date of the TR and Scope Rules is in 2015. This would provide sufficient time for parties to execute reporting agreements with their counterparties, be on-boarded with the various TRs, set-up internal reporting systems and resource those positions. Enbridge believes that a 6 month time period (at a minimum) from the effective date of both the final TR Rule plus the recognition of the TRs in each jurisdiction (to allow for an orderly on-boarding process) is appropriate. In addition, parties will require time to negotiate reporting agreements with potentially hundreds of counterparties depending on their counterparty list. This will take time and resources, even if there is an industry standard document that does not require much modification. This would be similar to the experience in the U.S. with the ISDA Dodd Frank Protocols and the IECA end-user friendly agreements executed between end-users and swap dealers to comply with the August 2012 and March 2013 ISDA Protocols and should be taken into account when deciding on an appropriate transition period.

II. ENBRIDGE'S SPECIFIC COMMENTS ON THE SCOPE RULE

1. Embedded Optionality in Commodity Transactions

Enbridge urges the Authorities to clarify that if the embedded option in a commodity agreement is for a zero or a nominal amount that the commodity agreement shall be excluded as an '*Excluded Derivative*'

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[5] http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/ltrguidebook053112.pdf

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under Section 2(d) of the Scope Rule. There may be practical commercial reasons why a commodity agreement includes an option for a zero or nominal volume (e.g. peaking supply contracts with a natural gas utility that allow for quantities from zero to a maximum daily volume which allow the utility to call on additional natural gas supply on days when there is an additional requirement for heating or cooling) and the commodity agreement should not be considered to be a derivative solely because it contains an option for a zero or nominal volume without reviewing all facts and circumstances.

2. Determination of what derivatives would be excluded under Paragraph 2(1)(c) and Paragraph 2(1)(d) of the Scope Rule

Enbridge commends the Authorities for providing some guidance in the Scope CP on paragraph 2(1)(d) of the Scope Rule that excludes commodity contracts that is intended by the counterparties at the time of the execution of the transaction, to be settled by delivery. End-users require optionality in their agreements to ensure they are managing their risks effectively as not all risks are known or quantifiable at the time of execution of an agreement. The assessment of the intention of the parties using not only the terms of the agreement but also the facts and circumstances is appropriate.

However, as the Authorities could not possibly provide an exhaustive menu of derivatives that could fall under this exclusion or list a panoply of factual scenarios that would be deemed not to negate the intention to deliver, Enbridge urges the Authorities to copy the U.S. regulatory agencies the CFTC and the Securities Exchange Commission ("**SEC**") in further defining a derivative to provide a clear interpretation regarding the applicability of the exclusion in Paragraph 2(1)(c) and paragraph 2(1)(d) from the derivative definition in their particular province with respect to currency exchange contracts and commodities contracts.

In addition, Enbridge encourages the Authorities to make it possible for any entity that is not sure if certain of its currency exchange or commodity contracts may be subject to the exclusion in paragraph 2(1) (c) and paragraph 2(1) (d) of the Scope Rule to be able to submit a request to the applicable Authority to provide an interpretation of whether a particular agreement, contract, or transaction (or class thereof) is a derivative. Under the U.S. final rules, it is possible for a person to make a request jointly from the CFTC and the SEC. In making such a request, the requesting party in the U.S., must provide: all material information; a statement of the economic characteristics and purpose of the transaction; the requesting party's determination as to whether the transaction should be characterized as a swap, a security-based swap, or a mixed swap and the basis for such determination; and any other information requested by either the CFTC or the SEC. In turn, the CFTC and the SEC under the rules, are obliged if they decide to make a joint determination, to issue an interpretation within 120 days after receipt of a complete submission requesting a joint interpretation. The CFTC and the SEC may seek public comment with respect to such a joint interpretation; if they do, the 120-day deadline will be stayed during the comment period, but will recommence the business day after the public comment period ends. If they do not issue a joint interpretation within the prescribed time period, the rules require each of them to publicly provide the reasons for not having done so.

This would give market participants an opportunity to seek determination from the Authorities where there is uncertainty.

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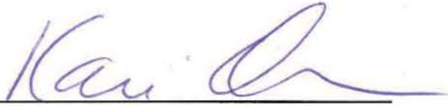
III. **CONCLUSION**

Enbridge thanks the Authorities again for the opportunity to submit our comments on the Proposed Instruments and sincerely hope the Authorities would consider our comments and recommendations as the Authorities draft its final rules to establish a regulatory regime for the OTC derivatives market in the multilateral jurisdictions 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

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encana

March 24, 2015

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British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

Dear Sirs/Mesdames:

RE: Encana Corporation – Comments on CSA Proposed Multilateral Instrument 91-101 – Derivatives Product Determination and Proposed Multilateral Instrument 96-101 Trade Repositories and Derivatives Data Reporting

Encana Corporation ("Encana") is pleased to respond to the request for comments by the British Columbia Securities Commission; the Alberta Securities Commission; the Financial and Consumer Affairs Authority of Saskatchewan; the Financial and Consumer Services Commission (New Brunswick) and the Nova Scotia Securities Commission (collectively "the **Authorities**") with respect to the above captioned.

Specific Comments and Responses to the Authorities' Questions

(a) The Scope Rule and Scope CP

"1. Does the Scope CP provide sufficient clarity as to the contracts and instruments that are subject to trade reporting? Please provide specific examples where there is not sufficient clarity."

ENCANA COMMENT: In general, the Scope CP provides sufficient clarity as to the contracts and instruments subject to trade reporting.

"2. The Scope Rule and Scope CP indicate that options to purchase commodities are derivatives but that certain optionality embedded in an agreement to purchase commodities for

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future delivery will not, in itself, result in the agreement being a derivative. Do you agree with this approach? Please explain."

ENCANA COMMENT: Yes, Encana agrees. We believe that the key concept for excluding certain optionality from the scope of trade reporting is the intent by both parties to physically make and take delivery of the underlying asset or commodity. This concept appears to be reflected in the Scope Rule and Scope CP. Does this exemption include transactions in which both parties intend to make and take delivery of a physical asset even if terms of the transaction provide one or both parties the right to revise the delivered quantity from zero to an agreed-upon maximum over the term of the deal?

(b) The TR Rule and TR CP
"Local counterparty definition"

Encana has no answers to questions 4 and 5 as posed by the Authorities, but we seek clarification pertaining to the local counterparty definition and the definition of affiliated entity.

ENCANA QUESTIONS: Will the Authorities recognize substitute compliance if derivative transactions are reported to a non-Canadian trade repository. The Authorities have stated in the companion policy to the Trade Reporting Rule 96-101 that "Subsection 26(5) provides for limited substituted compliance with this Instrument where a transaction has been reported to a recognized trade repository pursuant to the laws of a province of **Canada** other than the local jurisdiction or of a foreign jurisdiction listed in Appendix B, provided that the additional conditions set out in paragraphs 26(5) (a) and (c) are satisfied" [Emphasis added]. Encana questions whether the authorities would deem reporting to a non-Canadian trade repository as substitute compliance as provided for Canadian recognized trade repositories in Subsection 26(5). For example, if Encana's counterparty to a derivative transaction is a US entity obligated to report initial, lifecycle and valuation trade details to a swap data repository under Dodd-Frank regulations, will the Authorities accept this as Encana's compliance with Alberta derivative regulations related to trade reporting? If not, will Encana (as the local counterparty) be obligated to duplicate this reporting? And will Encana's counterparty be required to duplicate this reporting to a Canadian-approved or -recognized trade repository?

"Definition of affiliated entity"

ENCANA QUESTIONS: Encana notices that the Authorities have not differentiated between reporting of derivatives transactions done with market counterparties from derivatives transactions done internally within a corporate group. Do the Authorities expect derivative transactions between affiliates to be reported to a trade repository, even if the results of these two entities are consolidated into a single set of financial statements? If yes, Encana would like the Authorities to please clarify what systemic or other risks do these inter-affiliate transactions pose to the market. Other jurisdictions do not require the reporting of inter-affiliate transactions. In the US, for example, the CFTC gave conditional no-action relief exempting inter-affiliate reporting.

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End-user Commodity Transactions Exemption

"9. Section 40 of the proposed TR Rule contemplates an exemption from trade reporting for commodity-based derivatives transactions that differs from the section 40 exemption in the existing TR rules in Manitoba, Ontario and Québec. The proposed TR Rule would exempt commodity-based transactions between two end-users provided each counterparty is below a threshold of $250,000,000 aggregate notional value, without netting, under all of its outstanding commodity-based derivatives transactions."

ENCANA QUESTIONS: What was the basis for establishing this limit at $250 million? What happens if the aggregate notional value of one or both counterparties becomes greater than $250 million subsequent to the execution of the transaction between the two end-users? This could happen for several reasons, including incremental transactions by one or both parties; or changes to the notional value in Canadian dollars of foreign currency denominated transactions due to changes in foreign exchange rates.

"(f) One of the policy rationales for requiring derivatives trade reporting is to increase transparency. To what extent is lack of transparency in respect of commodity derivatives a concern? Please explain."

ENCANA COMMENT: Up to now Encana has not considered lack of transparency in respect of commodity transactions to be an issue. We see that markets are, more or less, transparent depending on the number of active participants and the tenor and complexity of each transaction.

"(h) Would the adoption of a section 40 exemption threshold at $250 million, or at a significantly higher level, result in systemic risk in Canada or in any of the participating jurisdictions? Please specify and explain."

ENCANA COMMENT: Setting a threshold for exemption from trade reporting will not likely change transacting behaviours because there are already few commodity derivative transactions between end-users. Derivative transactions involving only one end-user would be required to be reported by the other party to the transaction.

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ANNEX C
PART 4
DATA DISSEMINATION AND ACCESS TO DATA

"Data available to public"

"39. (1) A recognized trade repository must, on a periodic basis, create and make available to the public, at no cost, aggregate data on open positions, volume, number and, where applicable, price, relating to the transactions reported to it pursuant to this Instrument."

ENCANA COMMENT: While the requirement to make OTC derivative transaction data available to regulators was part of the commitment Canada made to the G20, we believe making transaction data available to the public was not a commitment. Why is there a requirement for trade repositories to make any data available to the public? Some derivative markets are so illiquid that making trade data available to the public within one or two days of trade execution may (1) enable the identity of one or both counterparties to be deduced, or (2) increase the cost of transacting to end-users trying to hedge commercial exposures.

"41. Despite any other section of this Instrument, a reporting counterparty is not required to report derivatives data for a transaction between

(a) the government of a local jurisdiction, and

(b) a crown corporation or agency that forms part of a consolidated entity with that government for accounting purposes."

ENCANA QUESTION: Does this exclusion mean that data does not need to be reported for derivative transactions between (for example) Alberta Treasury Branch and Powerex? If yes, this would seem to contradict the objective of increasing market transparency.

APPENDIX A
Minimum Data Fields Required to be Reported to a Recognized Trade Repository

Data field: "Inter-affiliate"

ENCANA COMMENT: Please refer to question on reporting inter-affiliate derivative transaction data, above.

"A. Common Data"
Data field: "Delivery type

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ENCANA COMMENT: This field indicates whether a transaction is settled physically or in cash. However, the Scope Rule excludes from reporting derivative transactions that are intended to be settled physically. Please explain the contradiction.

Data field: "Delivery point"

ENCANA COMMENT: Please refer to the question on the Delivery type data field.

APPENDIX B
Equivalent Trade Reporting Laws

ENCANA COMMENT: This list is currently blank. When will this list of equivalent trade reporting laws be provided?

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, by its
authorized agent, Encana Services Company Ltd.

Per: Scott Dalton
Director, Risk Management

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

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March 23, 2015

VIA ELECTRONIC MAIL

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

(collectively, the "**Authorities**")

c/o: Mr. Michael Brady
Senior Legal Counsel, Capital Markets
British Columbia Securities Commission
P.O. Box 10142 Pacific Centre
701 West Georgia Street
Vancouver, B.C. V7Y 1L2
e-mail: mbrady@bcsc.bc.ca

Dear Sirs/ Mesdames:

Re: CSA Multilateral Notice and Request for Comment dated January 21, 2015

ENMAX Corporation, together with its subsidiaries (collectively "**ENMAX**"), provide this comment letter in response to the CSA Multilateral Notice and Request for Comment dated January 21, 2015, requesting comments on the following instruments:

- proposed Multilateral Instrument 91-101 Derivatives: *Product Determination* (the "**Scope Rule**");
- proposed Companion Policy 91-101 *Derivatives: Product Determination* (the "**Scope CP**");
- proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* (the "**TR Rule**"); and
- proposed Companion Policy 96-101 *Trade Repositories and Derivatives Data Reporting* (the "**TR CP**");

(collectively, the "**Proposed Instruments**").

ENMAX appreciates the opportunity to comment on the Proposed Instruments and commends the Authorities for seeking input from stakeholders. ENMAX supports the regulatory progress which has been made towards meeting Canada's G-20 commitments and we encourage the

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Authorities to continue to work collaboratively with stakeholders to meet those commitments without unduly burdening market participants.

ENMAX – who we are

ENMAX Corporation is an electric utility company headquartered in Calgary, Alberta. ENMAX Corporation, through its subsidiaries and predecessors, has a history of delivering electricity to Calgarians for over 100 years and, with deregulation, now provides retail services to approximately 886,000 electricity and gas customer sites throughout Alberta. ENMAX Power Corporation is a regulated subsidiary of ENMAX Corporation which owns, operates and maintains the electricity distribution and transmission network in and around Calgary. ENMAX Energy Corporation is a subsidiary of ENMAX Corporation which operates in Alberta's competitive electricity market, and provides electricity and natural gas products and retail services to residential, businesses and industrial clients. As at April 1, 2015 ENMAX will control approximately 2,755 MW of generation capacity from a diverse asset base consisting of coal, wind and natural gas generation facilities.

ENMAX uses derivative transactions to hedge its retail supply obligations and manage risk associated with price fluctuations in commodity markets. ENMAX trading activity is primarily related to the purchase and sale of electricity and natural gas. Where commercially prudent, ENMAX engages in financial derivative transactions, including interest rate and foreign exchange derivatives. Derivative transactions are entered into primarily to mitigate risk associated with ENMAX's core business activity in Alberta's energy markets, and are not used for speculative trading or investment purposes. ENMAX's trading counterparties include other participants in the electricity or natural gas markets and financial institutions. Trading activity takes place primarily through electronic exchanges and clearing platforms, including the Intercontinental Exchange ("**ICE**"), Chicago Mercantile Exchange ("**CME**"), Natural Gas Exchange ("**NGX**"), and Alberta Watt Exchange Limited ("**WattEx**"). The remainder are transacted directly or indirectly with counterparties over the counter, primarily via brokerage transactions.

The Alberta electricity market

The electricity market in Alberta operates under a robust and comprehensive regulatory regime. This market is primarily regulated through the *Electric Utilities Act*, but also by other legislation including the *Alberta Utilities Commission Act*, *Rural Utilities Act*, *Fair Trading Act*, *Hydro and Electric Energy Act*, *Small Power Research and Development Act* and the *Gas Utilities Act*. A number of entities are involved in the regulation and operation of this industry, including the Alberta Utilities Commission, the Alberta Independent System Operator, the Market Surveillance Administrator, the Utilities Consumer Advocate, and the Balancing Pool. The structure of the Alberta electricity market is unique in Canada in that it is a market based system which encourages competition between market participants, rather than the traditional system of government owned and controlled utilities.

Application of the Proposed Instruments to Alberta's unique electricity market will result in interpretive challenges. Consideration on the structure of this market is provided in the letter prepared by Capital Power Corporation commenting on the Proposed Instruments. ENMAX has reviewed that letter in draft and agrees with Capital Power Corporation's description of the structure of Alberta's electricity market and for the need to clarify the Proposed Instruments and provide exceptions for certain transactions and agreements specific to the electricity market,

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where appropriate. ENMAX appreciates the opportunity to contribute to the development of the Proposed Instruments and provides the following additional comments.

1. The Scope Rule and Scope CP

Transactions for the delivery of a commodity may contain optionality simply because supply and demand requirements cannot always be accurately known in advance. As such, commodity contracts that allow for optionality are necessary to respond to market realities. ENMAX agrees with the Authorities that embedded optionality with respect to the volume or quantity, or the timing or manner of delivery, of a commodity to be delivered should not, in itself, result in an agreement being treated as a derivative. So long as the embedded optionality does not undermine the overall nature or primary intent of the transaction(s) as being settled predominantly by delivery of a physical commodity, the mechanism by which such embedded optionality is itself settled should not change the overall characterization of an agreement. For example, if a user of electricity consumes either more or less of that commodity than anticipated, then the volumes above or below estimated consumption may be settled against market. This embedded optionality cannot be severed from the overall agreement, but may be viewed as constituting a financial component additional to the delivery of the physical product.

ENMAX requests clarification that this type of arrangement, the dominant characteristic being for physical delivery of a commodity, may properly be considered as "additional contracts not considered to be derivatives" pursuant to Section 2.1 of the Scope CP (specifically as consumer contracts to purchase non-financial products or services at a fixed, capped or collared price) or, in the alternative, commodity contracts pursuant to Section 2.1(d) of the Scope CP. ENMAX views these agreements as commercial agreements which are essential to the electricity market, and does not believe that an arrangement which provides for the delivery of a commodity, but contains optionality of the kind described above, presents a source of systemic risk to Canada's financial system and accordingly should not be treated in the same manner as other derivate products which may. ENMAX does not believe these agreements should be subject to the Proposed Instruments.

2. Reporting counterparty waterfall and the concept of "derivative dealer"

Further amendment to and guidance on the concept of "derivative dealer" is required as this definition is too broad. Characterization as a dealer has significant and potentially costly consequences under the Proposed Instruments. As drafted, there is significant uncertainty as to the scope and applicability of this definition.

ENMAX believes this concept is not intended to apply to entities which engage in derivative transactions for the sole or primary purpose of hedging and managing commercial risk or to entities which engage in proprietary trading directly associated with optimizing physical assets. However, the definition of derivative dealer as an entity "... engaging in the business of trading in derivatives as principal or agent" is potentially broad enough to have application to all entities which engage in the trade of derivatives. ENMAX takes the position that trading does not equate to dealing, and an important distinction exists between an entity which engages in the business of trading in derivatives and an entity which engages in the business of dealing in derivatives. Rather than have the Scope CP limit the definition of who is and is not a "derivative dealer", ENMAX submits that the Scope Rule should clearly denote such a distinction.

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3. End-user commodity transaction exemption threshold

ENMAX agrees with the Authorities proposal to include an exemption from trade reporting for counterparties with commodity-based derivatives transactions below a threshold of $250,000,000. ENMAX submits that this threshold better reflects market realities than the $500,000 threshold proposed in the alternative. However, if the Authorities wish to relieve this class of market participant from trade reporting obligations, then a threshold higher than the $250,000,000 may be justified. This is especially the case if the threshold is determined based on aggregate notional value, without netting. ENMAX submits that it may be appropriate to allow netting in determining the threshold as this may provide a better measure by which to gauge counterparty and portfolio risk, especially in markets which are highly liquid as is often the case with regard to energy commodities. As derivative transactions between two end-users related to the physical delivery of a commodity are unlikely to create the type of systemic risk the Proposed Instruments are intended to address, a further increase may be appropriate. Indeed, many entities engaged in commodity-based derivatives transactions do so to hedge or manage commercial risk. Setting the threshold too low may cause those entitles to reassess the value of participating in such transactions in light of the regulatory burden, potentially creating a situation which results in an increase, rather than lessening, of market risk.

Additional clarification on the consequences of an entity exceeding, or, in the alternative, dropping below the defined threshold would also be appreciated. In this event, what reporting or other obligations under the Proposed Instruments become applicable or inapplicable?

4. Implantation and transition period

ENMAX supports the staged implementation of reporting obligations under the Proposed Instruments. Many entities will become reporting counterparties for the first time under the Proposed Instruments, and all market participants will need to analyze, build, adjust and test systems and amend operational procedures before reporting obligations commence. Entities will, among other things, need to develop or amend business and governance processes and procedures, review agreements to determine the applicability of the Proposed Instruments, determine the reporting status of counterparties, enter into agreements to allocate reporting obligations, acquire new or modify existing derivatives trade data capture systems, and become enabled with trade repositories. These preparations will require the dedication of significant financial, technical and human resources, all of which will increase with shorter implementation dates.

ENMAX suggests that a one year transition period between the effective date of the Proposed Instruments and the start of reporting obligations is an appropriate and sufficient period to allow for compliance. To the extent the Authorities are able to provide advance guidance on anticipated timelines for implementation, this will better enable market participants to prepare and would allow market participants the advance notice required to plan and budget for the work associated with compliance.

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ENMAX appreciates the opportunity to comment on the Proposed Instruments and commends the Authorities for seeking public input. ENMAX supports the regulatory progress and looks forward to working collaboratively with the Authorities to continue to work towards meeting Canada's G-20 commitments.

Yours very truly,

ENMAX Corporation

Andrew Grant
Legal Counsel, ENMAX Corporation

ASG/jed

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March 24, 2015
File No.: 999002.16764/14830

Via Email

British Columbia Securities Commission
P.O. Box 10142 Pacific Centre
701 West Georgia Street
Vancouver, B.C. V7Y 1L2

Attention: Michael Brady
Senior Legal Counsel, Capital Markets.

Dear Sirs/Mesdames:

Re: CSA Multilateral Notice and Request for Comment ("CSA Notice") – Proposed Multilateral Instrument 91-101 – *Derivatives Product Determination* (the "Scope Rule") and Proposed Multilateral Instrument 96-101 – *Trade Repositories and Derivatives Data Reporting* (the "TR Rule")

We are writing in response to the request for comments in respect of the Scope Rule and its companion policy (the "**Scope CP**") and the TR Rule and its companion policy (the "**TR CP**") published on behalf of the Alberta Securities Commission, the British Columbia Securities Commission, the Financial and Consumer Affairs Authority of Saskatchewan, the New Brunswick Financial and Consumer Services Commission and the Nova Scotia Securities Commission (collectively, the "**Authorities**").

This letter is being provided on behalf of our client, an energy industry market participant. Our client is not a broker and is not a swap dealer, major swap participant or financial entity under *The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*.

The first part of our letter responds to a number of specific questions raised in the CSA Notice. The second part of our letter provides additional comments.

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Part 1: Response to Specific Questions

The following sets out our client's responses to five of the specific questions raised by the Authorities. The numbering of the questions follows the numbering in the CSA Notice.

(a) The Scope Rule and Scope CP

1. Does the Scope CP provide sufficient clarity as to the contracts and instruments that are subject to trade reporting? Please provide specific examples where there is not sufficient clarity.

We understand that a contract for the delivery of a physical commodity will be exempt from the requirements of the Scope Rule if the contract meets the tests in Sections 2(1)(d)(i) and (ii) of the Scope Rule: generally, intention to deliver, and actual physical delivery. However, the Scope CP does not provide sufficient clarity whether:

(A) the analysis in the Scope CP with respect to cash settlement, and specifically, regarding termination provisions, that applies to the first part of the test (intent), would also apply to the second part of the test (delivery), provided such provisions were not used to mask a lack of intent; and

(B) liquidated damages provisions, like termination provisions, would not ordinarily be interpreted as providing for *"cash settlement in place of delivery"*.

Cash Settlement

The Scope CP notes that a termination provision in a commodity contract —as a provision permitting a form of cash settlement— would not necessarily negate the intent to deliver component of the test required under Section 2(1)(d)(i) of the Scope Rule. However, because the Scope CP suggests that standard termination provisions may in fact be considered *"cash settlement"* provisions, the guidance to Section 2(1)(d)(i) affects the interpretation of Section 2(1)(d)(ii), which permits cash settlement as an exception to actual delivery in only limited circumstances. As a result, the guidance in the Scope CP suggests that standard termination provisions may cause a transaction not to qualify as a derivative excluded from the Scope Rule *even when the intention requirement is met*. Hence our client recommends that the guidance clarify that such provisions would not necessarily negate either the intention requirement in section 2(1)(d)(i), or be considered a provision for cash settlement under section 2(1)(d)(ii), as long as the counterparties have the requisite intention under section 2(1)(d)(i). The

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analysis should also explicitly apply to liquidated damages provisions, which are similar in nature for the purposes of such analysis.

Additionally, the Scope CP states that cash settlement in certain circumstances would be permitted, such as where settlement results from events to which typical force majeure clauses would apply. This example is confusing and adds difficulty in properly interpreting the Scope Rule and reconciling the Scope Rule with the operation of energy commodities contracts in practice, since force majeure clauses excuse performance altogether – both physical delivery and cash settlement.

Liquidated Damages

The Scope CP states that certain provisions in a commodity contract "permit some form cash settlement" but are "included in the contract for practical and efficiency reasons" and may be consistent with the intention requirement of Section 2(1)(d)(i) of the Scope Rule. The Scope CP states that such provisions may include "a provision where cash settlement is triggered by a termination right arising as a result of the breach of the terms of the contract or an event of default thereunder". Because liquidated damages provisions are integral to commodities contracts and are widely and frequently used in practice, they warrant specific mention in the Scope CP, similar to termination provisions, and should be similarly characterized as providing for some form of cash settlement consistent with the intention requirement of the test, and permitted on the basis that they are included for practical and efficiency reasons.

Liquidated damages provisions are contained within various physical energy trading agreements, including well established and broadly used standard form energy commodity trading agreements published by industry organizations (such as NAESB (North American Energy Standards Board), EEI (Edison Electric Institute), and the power and gas annexes to the ISDA (International Swap Dealers Association, Inc.) Agreement, among others), or similar agreements.

Such agreements pre-date the Scope Rule and have broad and longstanding use within the energy industry. Rights to liquidated damages are usually triggered by something not expected by the parties when the contract was executed, and such circumstances should generally meet the requirements of Section 2(1)(d)(ii) of the Scope Rule (i.e., delivery is rendered impossible or commercially unreasonable by an intervening event or occurrence not reasonably within the control of the counterparties). However, the language of the agreements does not explicitly provide for such requirements, and a local counterparty would not likely be able to successfully negotiate any modification to a basic, well-understood provision for liquidated damages with a counterparty located outside of

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Canada for the purpose of certainty that the provision would not offend the Scope Rule. Hence, our client recommends that the liquidated damages provisions be specifically referred to in the Scope CP along with termination provisions.

2. The Scope Rule and Scope CP indicate that options to purchase commodities are derivatives but that certain optionality embedded in an agreement to purchase commodities for future delivery will not, in itself, result in the agreement being a derivative. Do you agree with this approach? Please explain.

Optionality may be embedded in a forward contract, including with respect to price, quantity, delivery date or delivery point. Our client agrees with the proposed approach of the Authorities, and submits that embedded optionality does not necessarily undermine the nature of the agreement as a physical supply agreement, particularly where the intent to deliver is maintained, both parties are commercial parties that regularly make or take delivery in the ordinary course of business, and the optionality is not separately marketable from the agreement itself.

(b) The TR Rule and TR CP

Reporting counterparty waterfall

6. Section 25 of the proposed TR Rule allows the counterparties to a transaction where either both are derivatives dealers, Canadian financial institutions or not derivatives dealers or Canadian financial institutions to agree on who will be the reporting counterparty. Is this appropriate? Will this be effective in ensuring that the reporting obligation will be applied to the appropriate counterparty? Please provide specific examples or analysis.

Permitting counterparties of the same category the option of agreeing as to who will be the reporting counterparty is appropriate. However, this assumes that the counterparties are able to determine that both counterparties fit into the same category. Our client has concerns regarding the definition of the term "derivative dealer". These concerns are discussed in Part II of this comment letter. Our client also has concerns regarding the introduction of the category of "Canadian financial institutions" as a reporting counterparty. These concerns are discussed in question 8 below.

Our client believes it is a commercial end user and not a derivatives dealer but given the concerns regarding the interpretation of derivatives dealer as discussed below, requests guidance be provided to clarify when a commercial end user would not be included within the definition of derivatives dealer. Additional guidance with respect to the

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meaning of the phrase "in the business of trading derivatives", would be helpful, including whether trading in OTC derivatives primarily for hedging purposes would be included in the meaning.

Our client is also concerned that classification as a "derivatives dealer" for reporting purposes only under the TR Rule will be inconsistent with international regimes, and that practically, non-Canadian counterparties who are not dealers under their legislative regime will resist any responsibility in the capacity of "dealer". The term "dealer" is fundamentally well understood within the OTC derivatives market and should not have a definition that is particular to the jurisdictions of the Authorities. Our client is concerned that in such circumstances the reporting obligation will not be applied to the appropriate counterparty.

Provided that the issue of classification within the reporting counterparty waterfall is addressed, our client supports the approach of recognizing the right of the parties to enter into agreements regarding reporting obligations. However, our client believes additional guidance should be provided in the TR CP confirming that a non-reporting counterparty has no duty to verify that the reporting was completed by the reporting counterparty and would not be liable for a reporting counterparty's failure to report or for errors in such reporting. We note that section 26(9) of the TR Rule imposes an obligation on the non-reporting counterparty to notify the reporting counterparty of an error or omission upon discovery. However, there is no discussion in the TR CP about whether a non-reporting counterparty is required to review the reports filed by the reporting counter-party to determine whether a report was filed and whether it contained errors.

7. Do you foresee any difficulties in counterparties agreeing as to who will be the reporting counterparty? If so, explain.

As noted above, our client has concerns regarding the interpretation of the term "derivative dealer" and the introduction of the category of "Canadian financial institutions". These concerns are discussed in Part II of this comment letter and in the response to question 8 below.

8. Does the inclusion of a Canadian financial institution in the reporting counterparty waterfall create any issues? Please provide specific examples of complications or analysis of potential scenarios.

Our client believes that it would be useful to include foreign financial institutions as well as Canadian financial institutions. Given the reporting counterparty hierarchy identifies Canadian financial institutions separately from derivative dealers, a foreign financial

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institution may take the position that it does not qualify as a derivatives dealer or a Canadian financial institution and as it is not a local counterparty, it is not a reporting counterparty. We anticipate that it will be difficult for local counterparties to deal with large foreign financial institutions who may view themselves as not subject to Canadian laws. Hence, addressing the application of the reporting counterparty waterfall to foreign financial institutions in the TR Rule would be helpful in dealing with these entities.

Part 2: Additional Comments

Our client's additional comments address the meaning of *"derivatives dealer"* as used in or related to the TR Rule.

(a) Interpretation of Derivatives Dealer

The TR Rule defines a derivatives dealer as "*a person or company engaging in or holding himself, herself or itself out as engaging in the business of trading in derivatives as principal or agent*".

Our client believes that the meaning of *"derivatives dealer"* should focus on *"dealing"* activities rather than *"trading"* activities, and that additional guidance, which could include a definition of "end user" as discussed above, is necessary for proper interpretation of this term.

1. ***<u>Guidance</u>***

The TR CP does not provide any additional detail with respect to the interpretation of *"derivatives dealer"*. The CSA Consultation Paper 91-407 *Derivatives: Registration* (**"CP 91-407"**) provides some guidance regarding the interpretation of *"derivatives dealer"*, including outlining some general indicia of the business of trading derivatives. However, the guidance provided to discuss the indicia is very general in nature and therefore market participants may not be able to place much reliance on these statements. Without further clarification, the guidance contained in CP 91-407 could easily be interpreted to include most market participants. For example, the guidance provided in respect of *"market making"* is general and does not necessarily reflect industry interpretation. The guidance in respect of both the remuneration and solicitation indicia is also quite general and not tied to dealer activities such as market making or intermediating trades. Without further guidance, the indicia are not helpful in determining whether a market participant would be considered a derivatives dealer.

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We also note that it is not yet clear whether the definition of *"derivatives"* in the Scope Rule will be used to interpret the term *"derivatives dealer"* for the purposes of registration, with the result that an entity trading only or primarily excluded derivatives (such as those related to physically delivered commodities or exchange traded derivatives) would not be considered a *"derivatives dealer"* on the basis that the derivatives at issue are excluded derivatives by definition. The business trigger for derivatives dealer registration should be focussed on dealing in derivatives that are not excluded derivatives consistent with the TR Rule. The guidance should address the nature of the derivatives that are the subject of the dealing activity. Otherwise, it is unclear whether counterparties that are not considered *"derivatives dealers"* for purposes of the TR Rule might still be considered *"derivatives dealers"* for purposes of registration, creating uncertainty and confusion for no apparent beneficial reason.

2. Nature or Level of Activity

CP 91-407 does not address the nature or level of activity required to trigger registration or provide for a *de minimis* exemption. In particular, there is no confirmation that a small quantity of incidental trades of derivatives or simply using derivatives to hedge or mitigate risk would not be considered to be "*in the business*" of trading derivatives. On the contrary, CP 91-407 specifically notes 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" [Emphasis Added]. Instead the guidance in CP 91-407 is drafted in an expansive manner without apparent regard to the impact on the market and without providing justification as to why an expansive interpretation is required or appropriate for the Canadian market. Guidance in the TR CP on the nature and level of activities required to satisfy the definition of a derivatives dealer is needed so that a commercial end user is able to determine that it is not a derivative dealer.

Our client notes that providing a *de minimis* exemption would provide some context to the general indicia provided in CP 91-407 and would promote harmonization between the U.S. and Canadian regimes. Explaining how a derivatives dealer differs from a commercial end user would also provide some context to the general indicia provided in CP 91-401. In the absence of a *de minimis* exemption or more detailed guidance regarding the nature and level of activity required to trigger registration (or reporting for the purposes of the TR Rule), it is unclear whether a counterparty entering into any quantity of incidental trades of derivatives that are not excluded derivatives could be considered to be "*in the business*" of trading derivatives. However, our client submits that would be an unreasonable conclusion and urges further consideration of the guidance.

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Moreover, we note that a key component of the registration requirement for dealers is the imposition of fiduciary duties through the gatekeeper and business conduct obligations. We submit that imposing such obligations on a commercial end user would not be appropriate where the commercial end user is trading for its own account with persons that are qualified parties. It is unclear why a commercial end user that does not provide financial services or dealer services to third parties, does not carry out derivatives dealing activities, and enters into derivative transactions for its own account with arm's length qualified parties should be subject to registration and hence fiduciary duties. If both parties are qualified parties, it would seem inappropriate that one or both parties owe a duty to the other. The guidance in CP 91-407 does not address the need for registration in such circumstances. If the concern is in respect of systemic risk, that concern should be addressed by the large derivatives participant registration category.

In summary, our client recommends that the definition of *"derivatives dealer"* be amended to focus on *"dealing"* activities rather than *"trading"*, and that guidance be provided in the TR Rule regarding the interpretation of "*derivatives dealer*". The guidance should clarify the uncertainty arising from CP 91-407. In particular, the guidance to the TR Rule should:

1. make it clear that the business trigger for derivatives dealer status is focussed on true "dealing" activities (market making activities and intermediary activities) and not on general activities undertaken by commercial end users;

2. provide additional guidance on the nature and level of activity required to satisfy the definition of derivatives dealer which clearly differentiates a commercial end user from a derivative dealer; and

3. provide a *de minimis* exemption precluding dealer status for those under the threshold equivalent to that available in the U.S.

These recommendations apply equally to the proposed registration rule.

(b) Transaction Reporting Exemption

The TR Rule does not permit reporting counterparties to satisfy reporting obligations by meeting reporting obligations in other recognized jurisdictions, including other provinces and the US except in very limited circumstances as set out in section 26(5) of the TR Rule. Our client believes that expanding Section 26(5) would assist in reducing unnecessary duplicative reporting. It is not clear why substituted compliance permitted

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under Section 26(5) is so limited. Our client urges the Authorities to expand the provision of substituted compliance to all reporting counterparties.

Our client appreciates the opportunity to provide these comments and would be pleased to provide any further clarification or information as may be needed.

Respectfully submitted,

FASKEN MARTINEAU DuMOULIN LLP

Lata Casciano

LCC/cab

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DELIVERED VIA ELECTRONIC MAIL

Mar 31, 2015

British Columbia Securities Commission
701 West Georgia Street
Vancouver, BC
V7Y 1L2

Attention: Mr. Michael Brady, Senior Legal Counsel

Dear Mr. Brady:

Re: FortisBC Energy Inc. (FEI) and FortisBC Inc. (FBC), (together, FortisBC) Comments re MI 91-101 Derivatives: Product Determination and MI 96-101 Trade Repositories and Derivatives Data Reporting

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1. Introduction

The Alberta Securities Commission, the British Columbia Securities Commission, the Financial and Consumer Affairs Authority of Saskatchewan, the New Brunswick Financial and Consumer Services Commission and the Nova Scotia Securities Commission (the Authorities) published proposed Multilateral Instrument 91-101 Derivatives: Product Determination (the Scope Rule) and proposed Multilateral Instrument 96-101 Trade Repositories and Derivatives Data Reporting (the TR Rule) for comment. Previously, the Canadian Securities Administrators (CSA) OTC Derivatives Committee (the Committee) had published the CSA Staff Consultation Paper 91-301 regarding Model Provincial Rules – Derivatives: Product Determination and Trade Repositories and Derivatives Data Reporting (the Model Rules, subsequently Updated Model Rules). These have been drafted based on existing provisions of Ontario securities law. The CSA had requested comments from affected users on the Updated Model Rules so that it may make appropriate changes and enable each jurisdiction to develop its own rules. FortisBC provided comments on Feb 4, 2013.

The driving force behind these rules is the Committee's requirement to implement G-20 commitments. These include requirements that all standardized over-the-counter (OTC) derivatives contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties. They also require that OTC derivatives contracts be reported to trade repositories (TR) and non-centrally cleared contracts should be subject to higher capital requirements.

In developing the rules, the Committee seeks to implement effective regulatory oversight of derivatives markets without unduly burdening market participants. Where possible, rules will be harmonization with international standards and consistent across Canadian jurisdictions.

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This letter includes FortisBC's previous comments and any concerns related to the Updated Model Rules, Scope Rule and TR Rule. FortisBC's primary interest in the proposed Rules is to ensure that it is able to continue to effectively manage costs for its customers without additional material administrative requirements or costs. Once the Rules are established for the individual jurisdictions, FortisBC would like the opportunity to review, understand and potentially comment on them.

2. FortisBC Use of Derivatives

In order to mitigate the risk of market price movements on its natural gas rates for customers, FEI has actively engaged in OTC natural gas commodity hedging in the past. FEI has undertaken hedging to protect customers and not for speculative purposes.

FortisBC has also engaged in physical gas commodity trading and enters into forward electricity contracts for the purposes of managing costs for customers. As will be discussed in this letter, FortisBC believes that these types of transactions should not be classified as derivatives per the Scope Rules definitions and therefore not subject to the pending derivatives legislation.

FortisBC's financial hedging and physical commodity purchases and trading strategies and plans have been subject to approval by the British Columbia Utilities Commission on a regular basis before their implementation.

Because FortisBC performs financial hedging and physical trading to mitigate risks and reduce 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 much of the reporting and capital and margin requirements.

3. Comments Regarding Scope Rule – Derivatives: Product Determination

The purpose of the Scope Rule is to establish the types of derivatives that will be subject to the requirements of the Trade Repositories and Derivatives Data Reporting (TR Rule). As previously stated, FortisBC's primary concern regarding the Model Rule relating to Product Determination relates to the definition of a derivative. In particular, FortisBC believes there should be greater clarity relating to physically delivered commodity contracts or instruments that are excluded from being derivatives. According to the Model Rule, an instrument is not a derivative if it is for immediate or deferred delivery of a physical commodity other than cash or a currency and:

- Requires counterparties make or take physical delivery;
- Does not allow for cash settlement in place of physical delivery;
- Is intended by the counterparties to be physically settled.

FortisBC would like to point out that there are often circumstances in physical commodities markets where physical delivery is intended but instead does not take place and cash settlement occurs. These are often referred to as net-offs or book-outs in the natural gas and

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electricity markets. In these arrangements, an end user, such as FortisBC, may purchase physical commodity supply for a period (such as a month or season) in the future, with the intent to physically take the supply from the counterparty. However, once into that period, FortisBC may wish to sell off that physical supply on a particular day, perhaps due to lower customer requirements caused by reduced weather demand. Therefore, FortisBC may sell some or all of this supply back to the same counterparty. In the case where it is all sold back, because the purchase and sell volumes are the same, the parties may choose to not physically flow any of the supply and opt for cash settlement. This helps reduce operational requirements, time and costs for the parties.

These types of arrangements may occur repeatedly as they provide flexibility for utility end users in managing customer load variability and costs. In fact, FortisBC may enter into these arrangements knowing that its actual customer load can vary significantly from its forecasted requirements at the time the arrangement is put in place, and therefore that a net-off or book-out and a cash settlement may occur later – however, FortisBC does not know exactly when, or if, it will happen. Therefore, FortisBC has concerns with the wording in the Model Rules under Section 2: Excluded Derivatives (end of paragraph five) which states:

"Additionally, in situations where a market participant settles contracts in cash on a repeated basis, we take the position that irrespective of contractual requirements for physical settlement, this may be evidence of a party's intention not to physically settle".

FortisBC believes that its arrangements that are originally entered into with the original intent of physical delivery, but may result in a net-off or book-out, should be excluded from being a derivative even if cash settlement in place of physical delivery occurs on a repeated basis. This is because these arrangements are intended to help manage physical supply and costs for customers, rather than for the purposes of speculating on market prices for financial gain or market manipulation. Additionally, the electric contract book-outs are occurring after entering into the original arrangement due to decreases in service load requirements (which could be caused by factor such as decreased customer electricity demand and/or weather) or transmission outages, both which are not within control of the FortisBC and as such differ from traditional derivative contracts that carry the characteristics of incremental financial risk.

FortisBC also seeks clarification whether these book-outs, which are caused by factors beyond the control of the utility, are scoped into excluded derivatives, as defined under section 2(1)(d)(ii) of Proposed Multilateral Instrument 91-101 which requires that "delivery is rendered impossible or commercially unreasonable by an intervening event or occurrence not reasonably within the control of the counterparties". If the book-outs caused by reduced service load requirements from customers or transmission outages do not fall within the scope of excluded derivatives, then FortisBC argues that the definition is unreasonable and requires further clarity.

Another arrangement frequently used by FEI to manage customer load variability and gas costs relates to peaking supply. FEI will often enter into peaking supply arrangements with a counterparty wherein FEI has the right to call on physical supply for a limited number of days

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during the peak winter season. Again, this type of arrangement helps FEI manage load variability and costs for customers. Whether FEI calls on this supply or not, a fee is paid by FEI to the counterparty for this optionality. FEI's intent is to physically take delivery if customer load requirements dictate, however it may not require the supply in the end. In this case, there is not a cash settlement in place of physical delivery but rather cash is paid to have the option of physical delivery. FEI also believes that this type of arrangement should be excluded from being a derivative.

Within the Model Rules, the Committee does discuss cash settlements related to contract termination, breach or frustration provisions and force majeure events that are outside the control of the parties. These do not make an otherwise firm obligation for physical delivery merely an option for physical delivery with cash settlement and so are excluded from being derivatives.

FortisBC believes that the Updated Model Rules and the proposed Scope Rule addresses these types of arrangements it enters into, as described herein, are also excluded from being derivatives and therefore the derivatives regulation but seeks further clarity regarding events not reasonably within the control of the counterparties:

Updated Model Rules Section 2(d) (i) of the Explanatory Guidance - Paragraph 7 - Situations may exist where, after entering into the contract for delivery of the commodity, the counterparties enter into an agreement that terminates their obligation to deliver or accept delivery of the commodity (often referred to as a "book-out" agreement)….We will generally not consider a book-out to be "derivative" product provided that, at the time of execution of the original contract, the counterparties intended that the commodity would be delivered.

Proposed Scope Rule under Section 2(d) (ii) of the Companion Policy - does not allow for cash settlement in place of delivery except where all or part of the delivery is rendered impossible or commercially unreasonable by an intervening event or occurrence not reasonably within the control of the counterparties, their affiliated entities, or their agents;

Subparagraph 2(d) (ii) Explanatory Guidance Updated Model Rules – In general, we consider examples of events not reasonably within the control of the counterparties would include:

- *Events to which typical force majeure clauses would apply,*
- *Problems in delivery systems such as the unavailability of transmission lines for electricity or a pipeline for oil or gas where an alternate method of delivery is not reasonably available, and*
- *Problems incurred by a counterparty in producing the commodity that they are obliged to deliver such as a fire at an oil refinery or a drought preventing crops from growing where an alternative source for the commodity is not reasonably available.*

4. Comments Regarding MI 96-101 – Trade Repositories and Derivatives Data Reporting

As previously stated FortisBC also had concerns regarding the Model Provincial Rule – Trade Repositories and Derivatives Data Reporting and so provided comments on Feb 4, 2013 and restated here within.

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The Model Rule requires that all derivatives transactions be reported to a central Trade Repository. The Model Rule also determines the parties responsible for reporting to a TR. In some cases, this may include end users. At a minimum, it is expected that end users be able to access TRs to confirm their transactions reported by other parties. TRs will be established by the marketplace, as companies interested in being TRs will make an application to do so.

FortisBC understands that fees may be charged by TRs to cover costs relating to data reporting and access. The Model Rule states that fees imposed by TRs should be fair and publicly disclosed for each service offering. FortisBC would like to emphasize its view that these fees should not be material in amount or change significantly from year to year as they will be costs that our utility customers will have to pay. We believe that the issues regarding fees have been addressed adequately in Section 12 of the proposed TR Rule.

Section 12 – all fees and other material cost imposed by a designated trade repository on its participants must be

(a) Fairly and equitably allocated among participants, and
(b) Publicly disclosed for each service it offers with respect to the collection and maintenance of derivatives data

FortisBC would like to vehemently express its concerns regarding data transparency and the TR making transaction data available to the public. FEI purchases natural gas at a number of market hubs in B.C. and uses financial hedges to manage price risk at these hubs. While some market hubs are very liquid, such as the AECO/NIT market hub proxy for Alberta gas, others are not so liquid. In particular, the Sumas market hub is relatively illiquid, with a small number of buyers and sellers. As part of its previous price risk management strategy, in the past FEI typically hedged its Sumas price exposure for each winter period. FEI is concerned that, given the small amount of trading at this hub, making the derivatives data available to the public for this hub could compromise FEI's hedging position or strategy if it needed to hedge the Sumas price in the future. FEI would prefer that this data is made public in such a manner that protects FEI's positions and strategies to manage price risk and costs for its customers. FortisBC is also concerned with the public availability of any pricing data associated with its forward electricity contracts as these are usually negotiated in confidence with the counterparty. If this pricing is made available to competing counterparties, it could compromise FortisBC's ability to competitively enter into pricing power supply that assists in managing costs for its customers.

FortisBC has some comments regarding data reporting to a TR. FortisBC understands that the Committee is interested in harmonizing derivatives reporting rules with other jurisdictions. However, greater clarity is needed regarding the ability for reporting to a TR in one jurisdiction to satisfy the reporting requirements to a TR under another jurisdiction. For example, if FortisBC, as an end user subject to the B.C. reporting requirements, transacts with a derivatives dealer subject to the U.S. reporting requirements per Dodd-Frank regulations, does the derivatives dealer report under both jurisdictions or just in accordance with the U.S. Dodd-Frank regime? And if it reports only under Dodd-Frank rules and to a U.S. TR, does the Committee recognize

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this as substitute reporting under the B.C. TR? Also, is there a situation where FortisBC may have to report derivatives transactions, other than where its counterparty is not a derivatives dealer, adviser or large derivatives participant? FEI believes there needs to be greater clarity regarding the degree of similarity between two jurisdictions that will be required for the administrators in either jurisdiction to grant permission for substituted compliance. FortisBC believes that these questions have been remedied in the TR rule under Section 25 and 26 and it focuses on the issues regarding reporting local counterparty and substituted compliance.

While FortisBC may not be subject to reporting requirements under the Model Rules for the most part due to its assumed end user status, FortisBC would like to know more about the penalties for non-compliance with regard to reporting. Specifically, what are the types of non-compliance and penalties for each type of violation? FortisBC believes a grace period once implementation of the legislation begins is appropriate until parties are more familiar with the requirements.

While FortisBC's counterparties may do most of the required TR reporting, FortisBC would still be required to keep records of the derivatives data for each transaction for a minimum of seven years after the transaction has expired. The Updated Model Rules Section 17 confirm that the requirement to maintain records for seven years after the expiration or termination of a transaction, rather than from the date the transaction was entered into, which reflects the fact that transactions create on-going obligations and information is subject to change throughout the life of a transaction.

Section 35 of the Updated Model Rule describes the reporting regarding valuation data. It states that valuation data must be reported to the TR at the end of each business day by derivatives dealers and also at the end of each quarter for all reporting counterparties that are not derivatives dealers. This quarterly valuation data reporting would only be performed by FortisBC as an end user if it were a reporting counterparty and therefore dealing with a party who is not a derivatives dealer, adviser or large derivatives participant. FortisBC had requested to know the specific data requirements which are now available in Appendix A of Model Provincial Rule – Trade Repositories and Derivatives Data Reporting Minimum Data Fields Required to be Reported to a Designated Trade Repository.

FortisBC also believes that a listing of which companies are derivatives dealers, advisers, large derivatives participants and end users should be updated as participants register. This would help participants in determining their roles in terms of reporting and other obligations under the regulation.

The Committee had requested specific feedback on subsection 40(2) of the TR rule that provides an exemption for reporting requirements for derivatives transactions in the physical commodity market involving market participants with small derivatives exposures. The exemption rule releases a party from reporting if it is not a dealer or adviser and has less than $500,000 aggregate notional value under all its outstanding transactions. FortisBC believes that this exemption is to remove any administrative reporting burden for small volume end users who

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are unlikely to pose any threat to financial markets. FortisBC believes that the $500,000 amount is so minimal that it is almost equivalent to having no minimum threshold at all, given that parties often enter into transactions up to a year or longer and market prices can fluctuate significantly. FortisBC suggests that a more meaningful threshold in the order of $10 million might be more appropriate. For example, a small volume end user hedging 5,000 GJ per day (about half a standard gas contract) for 365 days at about $5.50/GJ would result in a notional value of about $10 million. As FortisBC's past notional values have far exceeded this threshold, FortisBC does not believe it would qualify for this exemption. Therefore, while FortisBC has suggested increasing the threshold amount, the Committee should place more weight on comments received by small volume end users when determining the threshold as these users will be directly impacted. FortisBC acknowledges that under Part 5: Exclusions subsection 40 Option #1, the proposed exemption for commodity-based transactions between two end-users below threshold of $250,000,000 aggregate notional value, without netting, under all outstanding commodity based derivatives will help reduce the reporting burden on end-users that may not be systemically important.

5. 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 electricity 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,

Cynthia Des Brisay

VP, Energy Supply and Resource Development

FortisBC Energy Inc.

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March 24, 2015

Via Electronic Submission

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

c/o Michael Brady
Senior Legal Counsel, Capital Markets
British Columbia Securities Commission
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Re: Proposed Multilateral Instrument 91-101 Derivatives: *Product Determination* (the "Scope Rule"), Proposed Multilateral Instrument 96-101 - *Trade Repositories and Derivatives Data Reporting* (the "TR Rule") and related Companion Policies

Dear Mr. Brady:

ICE Trade Vault, LLC, ("Trade Vault") appreciates the opportunity to comment on the proposed Scope Rule, TR Rule and related companion policies (collectively, "Proposed Instruments") published by the Alberta Securities Commission, the British Columbia Securities Commission, the Financial and Consumer Affairs Authority of Saskatchewan, the New Brunswick Financial and Consumer Services Commission and the Nova Scotia Securities Commission (each an "Authority" and collectively, the "Authorities"). As background, ICE Trade Vault is designated as a Trade Repository ("TR") in the provinces of Ontario, Quebec and Manitoba. In the United States, ICE Trade Vault is a provisionally registered Swap Data Repository regulated by the Commodity Futures Trading Commission ("CFTC"). ICE Trade Vault, LLC is organized as a U.S. limited liability company in the State of Delaware and is a wholly owned subsidiary of Intercontinental Exchange Holdings, Inc. ("ICE").

ICE is a leading operator of regulated global markets and clearing houses, including futures exchanges, over-the-counter markets, derivatives clearing houses and post-trade services. ICE is a publicly traded corporation (NYSE: ICE) which is known for increasing transparency in the global energy markets. ICE offers its customers the ability to transact in a

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number of markets such as agriculture, credit, energy, equity indexes, foreign exchange and interest rates. ICE is headquartered in Atlanta, Georgia with several offices globally located in centers of trading. Trade Vault's primary office is located at ICE's headquarters with representation in Chicago, Houston, London, Calgary, Winnipeg, Washington D.C., and Singapore.

Executive Summary

Trade Vault supports derivative data reporting if properly applied. Trade Vault commends the efforts of the Authorities to introduce derivatives trade reporting rules that increase market transparency and help ensure financial stability of the derivatives market. Trade Vault also commends the Authorities for the high degree of harmonization between the Proposed Instruments and existing trade reporting rules in Manitoba, Ontario and Quebec. Trade Vault has prepared this comment letter to highlight and discuss: (a) interpretive issues that impact both the Proposed Instruments and trade reporting rules already adopted and (b) proposals for ensuring the effective and efficient regulation and oversight of TRs by each of the Authorities. In particular, Trade Vault wishes to make the following recommendations:

- Clarify role of the Clearing Agency as the sole reporting party for intended to be cleared swaps;
- Remove Canadian financial institutions from the reporting counterparty waterfall;
- Provide clarification on when a TR should create a UTI for a transaction;
- Promote choice of international or industry product taxonomy for UPIs;
- Allow TRs flexibility in the presentation of trade reporting fields;
- Accept LEI field alternatives upon reporting commencement;
- Clarify reporting of off-facility futures and EFRPs;
- Conduct coordinated review of TR applications;
- Simplify and streamline comment process for TR applications;
- Consider legal opinion requirements for non-local TRs;
- Modify the requirement for a TR to deliver audited financials;
- Streamline process for review and approval of changes to TR rules;
- Remove proposed requirements for communication and standardization between TRs;

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- Remove proposed requirement for TRs to disclose confidential system information and costs to process trades;
- Permit changes to a recognized TR's fee schedule in an expedited manner;
- Consider incremental costs and fees for allowing substituted compliance for trade reporting; and
- Consider TR valuation reporting protocols and form of provincial recognition orders.

This letter is divided into three parts. The first part discusses trade reporting requirements. The second part addresses the Scope Rule. The third part discusses TR recognition and ongoing regulation. Also, included as Annex A to this letter are Trade Vault responses to specific questions from the Authorities.

Part I: Trade Reporting Requirements

Clarify that the Clearing Agency is the sole reporting party for intended to be cleared swaps

A key objective of global financial reforms and subsequent regulatory rulemaking is the reduction of credit risk through central clearing counterparty. To that end, global financial reforms imposed mandatory clearing and trade execution requirements. Derivatives mandated to be cleared must be executed on designated venues of execution. As a result of these mandates, a large percentage of derivatives transactions are now executed on exchanges or designated venues of execution and subsequently submitted for clearing.

Clearing requires the original derivative between the counterparties to the trade (the "alpha derivative") to be instantaneously terminated and replaced by different and unique resulting derivatives (the "beta" and "gamma" derivatives) between counterparties and the Clearing Agency ("CA"). The alpha derivative must be terminated by the CA once accepted for clearing in order for the CA to assume its duties as a central counterparty. Once a derivative is accepted for clearing, the CA must notify the original TR via a termination message that the alpha derivative has been terminated and accepted for clearing. In our view, the CA should have the unambiguous obligation to report the termination and resulting beta and gamma derivatives to the TR of its choosing. This is consistent with all other global regulatory reporting regimes. CFTC regulations impose reporting obligations on Derivative Clearing Organizations ("DCO") and allow the DCO to report derivative data to the SDR of its choice.[1] Recently re-proposed U.S. Securities Exchange Commission ("SEC") regulations requires the CA to report the beta and gamma derivatives and acknowledges that these central market entities are the sole holders of the necessary data for cleared swaps.

[1] *See* CFTC Regulation 40.5 Request for Expedited Approval: Chicago Mercantile Exchange Inc., Submission # 12-391: Adoption of New Chapter 10 ("Regulatory Reporting of Swap Data") and Rule 1001 ("Regulatory Reporting of Swap Data"), dated November 9, 2012; CME submission #12-391R amending CME submission #12-391, dated December 6, 2012; CME submission #12-391RC amending CME submission #12-391R, dated December 14,2012.

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We have observed that generally accepted trade reporting practices in Ontario, Quebec and Manitoba result in cleared derivatives reporting beginning once the derivative is accepted for clearing versus reporting at the time of execution. Therefore, the burden of reporting rests solely with the CA. However, to avoid uncertainty, we believe that Canadian trade reporting rules should specifically require this reporting arrangement, either through amendments to the TR Rule or additional companion policy guidance. Amendments or new companion policy guidance should also expressly recognize that a CA is entitled to report all cleared derivatives to the TR of its choice. The act of submitting an intended to be cleared derivative to a CA for clearing should completely discharge any reporting duty for counterparties. Reporting prior to accepting derivatives for clearing is costly, burdensome and introduces another data reporter (and point of failure) into the reporting chain. There is little if any benefit to requiring any party other than the CA to report the derivative data as the intended to be cleared derivative exist for only a few seconds; the same set of information for these derivatives is simultaneously submitted to a clearinghouse as part of the submission process.

Remove Canadian financial institutions from the reporting party hierarchy

The reporting hierarchy contained in the Ontario trade reporting rule prescribes an order of CAs, derivatives dealers and finally non-dealers. ICE Trade Vault recommends that the Authorities conform to this hierarchy in an effort to simplify the reporting hierarchy by removing the category of Canadian financial institutions and adding these institutions to the non-dealer status. Based on Trade Vault's experience in other reporting jurisdictions, a financial institution category creates confusion and burdensome implementation costs for reporting parties with limited oversight benefits. We think that it is problematic for the TR Rule to require market participants to adopt a reporting party hierarchy that is different from Ontario and other non-Canadian jurisdictions Additionally, Canadian financial institutions should not be required to submit valuation data on a daily basis but should instead submit on a quarterly basis like other non-dealers. If a Canadian financial institution is not a dealer, then it likely will not have the systems or infrastructure to comply with a daily reporting obligation. The Authorities should conform valuation reporting requirements to other final provincial trade reporting rules the US reporting rules and eliminate this unnecessary daily reporting burden on Canadian financial institutions.[2]

Where a CA or trading platform has assigned a UTI to a transaction, TRs should not create a new UTI for that transaction

We are supportive of section 29(2) of the TR Rule, which would allow a TR to incorporate a unique transaction identifier ("UTI") previously assigned to a transaction. CAs assign UTIs to trades upon acceptance of a transaction for clearing or novation. Trade Vault recommends that CAs continue this practice. Waiting for TRs to provide UTIs would hinder the

[2] We note that Manitoba and Quebec rules, which include Canadian financial institutions in the reporting hierarchy, do not require Canadian financial institutions to report valuation data on a daily basis.

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clearing and reporting processes since TRs are positioned at the end of the reporting chain. Many trades are multijurisdictional and as such have already been assigned a UTI in these jurisdictions either by the reporting party or that jurisdiction's SDR/TR. If the Canadian TRs were required to also create a UTI for trades with previously assigned UTIs, these trades would have multiple UTIs which would defeat the purpose of a *unique* identifier. TRs should only create UTIs in the instance that trades are bilateral (non-cleared), executed off-platform, there is not already an existing UTI/USI, and at the request of the reporting party.

Promote choice of international or industry product taxonomy systems for UPIs

Section 30 of the TR Rule would require reporting parties to use international or industry standard unique product identifiers ("UPIs") when available. Trade Vault is supportive of this requirement, but we caution that the Authorities should not promote the ISDA product taxonomy over other international or industry standard product taxonomies. Deficiencies have been identified within the ISDA taxonomy and Trade Vault therefore believes it should not be required for use by reporting counterparties nor TRs. Reporting parties need discretion to choose the most appropriate product taxonomy, and should not be required to use an inferior product taxonomy. Choice of taxonomy will ensure more useful reporting to the Authorities, relieve reporting counterparties of the burden of UPI creation when a UPI is not available in a particular taxonomy, and maintain conformity to requirements in the US and other final provincial trade reporting rules.

Allow flexibility in the presentation of trade reporting fields required in Appendix A

Trade Vault commends the Authorities for conforming the data fields listed in Appendix A of the TR Rule to the data fields in the Ontario, Quebec and Manitoba trade reporting rules. As is the case in these provinces, the field names reported on transactions should not have to exactly match the field names listed in Appendix A. So long as the necessary data is reported, TRs should be allowed to map the reported fields to those contained in Appendix A. Trade Vault needs to retain the ability to show US fields in the Canadian TR in order to minimize costs for Canadian reporting parties.

Initially allow trade reporting using alternative forms of LEIs

Upon the reporting commencement date, the Authorities should allow reporting counterparties to submit a client code if the non-reporting party has not yet obtained a LEI or is not eligible for an LEI. It may be difficult for the reporting counterparty to always obtain a LEI for its counterparty, especially upon go-live of trade reporting. Once the LEI is available, it can be populated on transactions and in a relatively easy and cost effective manner to update previously reported transactions stored in Trade Vault. There may also be privacy law issues that may not be resolved at time of the effective reporting dates which prohibit the reporting parties from obtaining the necessary counterparty LEIs.

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Part II: Scope Rule Considerations

Clarify reporting of off-facility futures and EFRPs

Paragraph 2(1)(g) of the Scope Rule would exclude a contract from the reporting requirements if it is traded on one or more prescribed exchanges. Further, the Scope CP confirms that a transaction cleared through a clearing agency but not traded on an exchange is not considered to be exchange traded and is therefore subject to the applicable reporting requirements. To avoid uncertainty, Trade Vault recommends that the Authorities clarify that a futures contract resulting from an off-facility future or an Exchange for Related Position ("EFRP") is not reportable. The swap portion of the contract (e.g., the off-facility future or EFRP) will be reportable, and the Authorities will be able to receive data regarding the swap portion of the contract, but the cleared futures position will not be reportable.

Part III: TR Recognition and Ongoing Regulation

Conduct coordinated review of TR applications

Trade Vault appreciates the efforts of the Authorities to develop harmonized requirements for TR recognition and ongoing requirements. While Trade Vault will be required to apply separately for recognition with each Authority, we strongly encourage staff of the Authorities to coordinate their review and streamline questions and comments to avoid unnecessary duplication. It is our preference to file a single application addressed to each of the Authorities, and then respond to consolidated questions and requests from a small number of representatives speaking on behalf of the Authorities. We understand that each Authority will need to conduct an independent review prior to recognizing any TR in their local jurisdiction; however, our experience is that trade reporting issues are common across Canadian jurisdictions. The Authorities should make every effort to coordinate the review of TR applications. Trade Vault is determined to offer a reasonably priced TR solution to all Canadian market participants. If the recognition process is cumbersome and duplicative, this will increase Trade Vault's costs and ultimately those paid by Canadian participants.

Simplify and streamline the comment process for TR applications

Trade Vault recommends that the Authorities should review and approve TRs without a public comment process. In the provinces of Ontario and Quebec, the public comment process consisted of TR applicants preparing a detailed application letter which OSC and AMF published for a thirty day public comment. None of the three TRs that applied in these provinces received a public comment, but the TRs expended substantial time and financial resources to prepare for this public comment process. Given that (i) TRs are already operating in Ontario, Manitoba and Quebec, (ii) the same rules will substantially apply in the Authorities, and (iii) no public comments were received during the OSC and AMF process, we strongly encourage the Authorities to review TR applications without a public comment process. We anticipate that this

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decision would shorten the TR application review process by up to two months while containing application costs for TR applicants.

Legal opinion requirements for non-local TRs

Subsection 2(2)(B) of the TR Rule would require TR applicants located outside of a province to provide regulators with a legal counsel opinion. Trade Vault is willing to fulfill this requirement, provided that the local Authority is a signatory to the CFTC *Memorandum of Understanding, Cooperation and the Exchange of Information Related to the Supervision of Cross-Border Covered Entities*, dated March 25, 2014 (the "MoU"). As of the date of this letter, British Columbia, Alberta, Manitoba, Ontario and Quebec are signatories to the MoU. In order for any US-based TR applicant, including Trade Vault, to deliver a legal opinion to the securities regulators in Saskatchewan, New Brunswick and Nova Scotia, these provinces must first sign the MoU with the CFTC.

Modify the requirement for a TR to deliver audited financials

Subsection 4(1) and section 5(1) of the TR Rule would require the delivery of entity-level audited financial information. In our view, the TR Rule should be modified to allow for TRs to file entity-level unaudited financials and group level audited financials. Such an amendment would better reflect the reality that most TRs are part of large international conglomerates, and therefore do not prepare unconsolidated audited financials. As part of the recognition process in Ontario, Manitoba and Quebec, Trade Vault received discretionary exemptive relief from these requirements. In our view, it would be consistent with the policy objectives of the Authorities to amend the TR Rule to codify the exemptive relief previously granted in Ontario, Manitoba and Quebec concerning delivery of audited financial information.

Streamline process for review and approval of changes to TR rules

We recommend that the Authorities consider amending or deleting subsection 17(6) of the TR Rule. This subsection would require a recognized TR to file proposed new or amended rules, policies and procedures for approval absent an explicit exemption. This requirement is found in the Ontario and Manitoba local trade reporting rules, and all three TRs approved in Ontario and Manitoba received a conditional exemption from the requirement that alleviates the requirement to file proposed new or amended rules, policies and procedures for approval unless such changes apply specifically to Canadian participants. This requirement does not appear in the Quebec local rule. In our view, the Authorities should delete subsection 17(6) of the TR Rule, consistent with the Quebec trade reporting rule, or amend the TR Rule to codify the exemptive relief granted in Ontario and Manitoba (thus doing away with the need for exemptive relief in any of the Authorities).

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Remove proposed requirements for communication and standardization between TRs

Section 15 of the TR Rule would require a recognized TR to use or accommodate internationally accepted communication procedures and standards in order to facilitate the efficient exchange of data between its systems and those of other entities, including other TRs. TRs should be able to utilize data messaging protocols and submission options for its customers that are most effective and least burdensome. Many market participants have existing infrastructure built to electronic confirmation systems which can be leveraged for reporting derivatives. CAs and exchanges already use versions of FIX or standard XML to discharge their reporting obligations. Attempting to overhaul these systems with different frameworks, such as FpML, would be costly and unnecessary to reporting parties. In the commodities market, many transactions are between non-derivatives dealers and the cost of reporting should take into account their previous IT investments.

Trade Vault believes that a competitive marketplace for TR services will present an opportunity for significant reductions to the cost of trade reporting for all market participants. Customers will be free to choose among a number of execution, clearing, and reporting configurations under commercial terms that meet their needs and lower their costs. Trade Vault does not believe that a data standard should be forced upon participants for submitting to TRs, nor should TRs be forced to interconnect to one another. This would reduce the customer benefits that result from competition. The providers who offer the best service at the best value will earn their customer's business. We therefore recommend the deletion of section 15 of the TR Rule.

Remove the requirement of a TR to disclose confidential system information and costs to process trades

Subsection 12(a) of the TR Rule would require a TR to publicly disclose on its website all fees and other material costs imposed on its participants for each service it offers with respect to the collection and maintenance of derivatives data. Subsection 21(8) of the TR Rule would require a TR to publicly disclose on its website "all technology requirements regarding interfacing with or accessing the services provided" by the TR. Trade Vault understands that, as a recognized TR, clear descriptions of priced services should be provided for comparison purposes and supports this disclosure. However, Trade Vault recommends limited disclosure of other information such as material costs, system design and technology procedures on a public website. This disclosure would require a TR to share confidential information that could adversely affect the TR in a competitive marketplace. For greater certainty, the Authorities should consider modifying subsections 12(a) and 21(8) of the TR Rule or adding companion policy guidance to clarify that a TR is not expected to disclose confidential, proprietary or competitively-sensitive information on a public website.

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Permit changes to a recognized TR's fee schedule in an expedited manner

The Authorities appropriately recognized that TR's will need to implement fee changes within timeframes that are less than the fifteen-day required notice period proposed in subsection 3(1) of the TR Rule. Trade Vault recommends TRs be permitted to change fees with notification the following business day when such changes are immaterial. For example, a conversion factor update may be necessary in the commodities asset class (e.g., converting gallons to barrels for an oil swap). In this case, the fee change is due to a different quantity unit which is not a material change warranting a full review. Due to the dynamic nature of commodity markets, products and data values may not be known prior to invoicing as these values are based on real-time customer trade submissions. As a result, TRs need the ability to update fees based on newly submitted products and invoice their customers in a timely manner which conforms to the practices other provinces of Canada.

Substituted compliance results in increased costs to TRs and reporting parties

Section 26(5) of the TR Rule permits a reporting party may, in certain circumstances, to satisfy its reporting obligation by reporting to a TR recognized in another province of Canada or a foreign jurisdiction listed in Appendix B of the TR Rule. If derivatives data resides in another jurisdictional TR, there is additional complexity for data access by the Authorities and further costs to this TR to ensure this access. As such, it is important for the Authorities to be aware that a TR operating under substituted compliance will need to pass these additional costs along to the reporting parties. In addition, Trade Vault believes all TRs operating under the Authorities' oversight should be required to complete the application process as a condition of substituted compliance. TRs are new central market infrastructures that will serve a critical role by enabling the Authorities to monitor market activity and systemic risk. As such, a formal TR application process is necessary to ensure foreign applicants can fully meet the core principles and operating requirements of the Proposed Instruments. Based on Trade Vault's experience operating in multiple jurisdictions, repository core principles and operating requirements are not equivalent across regions.

Valuation submissions to the Authorities should conform to the approach taken by other provinces and under Dodd-Frank

Subsection 37(1)(c) requires TRs to report an aggregate valuation for a derivative. Trade Vault recommends the Authorities adopt a valuation reporting approach that conforms to the recognition orders issued to TRs in Ontario, Quebec and Manitoba as well as CFTC rules. As an example, the commodity asset class is comprised of fungible contracts with defined trading durations (e.g., monthly). These final instruments define valuation data as the submission of daily marks at the position level which enables TRs to market-to-market the associated positions. In other jurisdictions, Trade Vault presents to authorities detailed position and valuation views for comprehensive risk analysis. For example, a natural gas derivative with a calendar duration and monthly settlement terms would be decomposed into twelve individual positions and the associated monthly valuations would be applied to each position of the entire

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derivative. This approach is in accordance with risk management practices deployed by CAs and allows the monitoring of discrete risks (e.g., heating and cooling seasons). Absent further guidance from the Authorities, which could form part of recognition orders for TRs, the valuation approach of the Proposed Instruments would incorrectly apply a constant or average valuation to each monthly position.

Trade Vault recommends the Authorities adopt identical recognition terms and conditions to those that were adopted in Ontario, Manitoba and Quebec. We respectfully submit that it would be inconsistent with the efforts made by the Authorities to develop harmonized requirements for TR recognition if the recognition terms and conditions in the Authorities are not the same as those in Ontario, Manitoba and Quebec.

Conclusion

In conclusion, transparency and financial stability of the derivatives market are key tenets of Proposed Instruments. The Authorities have made great strides towards increasing market transparency through mandatory derivatives reporting to TRs. Trade Vault looks forward to registering a TR in support of Proposed Instruments and thanks the Authorities for the opportunity to provide comments. Please do not hesitate to contact Kara Dutta (+1.770.916.7812 kara.dutta@theice.com) if you have any questions regarding our comments.

Sincerely,

Bruce A. Tupper
President
ICE Trade Vault, LLC

Kara L. Dutta
General Counsel
ICE Trade Vault, LLC

Melissa Ratnala
Director
ICE Trade Vault, LLC

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Annex A – Ancillary Comments to Proposed Instruments

The follow are responses to the Authorities request for comments on specific aspects of the Proposed Instruments. Questions are numbered in accordance to the notice of the Proposed Instruments and reprinted in italics below with Trade Vault's response immediately following.

Question 6: Section 25 of the proposed TR Rule allows the counterparties to a transaction where either both are derivatives dealers, Canadian financial institutions or not derivatives dealers or Canadian financial institutions to agree on who will be the reporting counterparty. Is this appropriate? Will this be effective in ensuring that the reporting obligation will be applied to the appropriate counterparty? Please provide specific examples or analysis.

Trade Vault Response: Parties to a transaction of the same designation should be allowed to select the reporting counterparty. In addition, the Authorities should require parties of the same designation to select one party to report in order to prevent duplicative reporting. In our view, requiring parties to select one party to report is simpler and more effective than the alternative proposed in subsection 25(4) of the TR Rule.

Question 7: Do you foresee any difficulties in counterparties agreeing as to who will be the reporting counterparty? If so, explain.

Trade Vault Response: If master trading agreements are in place and updated with reporting terms prior to transacting, we do not foresee any issues in selecting the reporting counterparty.

Question 8: Does the inclusion of a Canadian financial institution in the reporting counterparty waterfall create any issues? Please provide specific examples of complications or analysis of potential scenarios.

Trade Vault Response: The inclusion of the Canadian financial institution in the proposed waterfall will create unnecessary issues, confusion and re-work amongst counterparties since most market participants already implemented multi-jurisdictional reporting that does not recognize financial institutions as a distinct designation. Additionally, Canadian financial institution should not be required to submit valuation data on a daily basis but should instead submit quarterly to conform to the existing rules in the US and other final provincial instruments. A daily valuation reporting requirement would impose an unnecessary burden on Canadian financial institutions.

Question 10: We have contemplated that there should be some transitional period between the date on which the proposed TR Rule becomes effective and the date that the first reporting obligations will apply. Is a three month period sufficient for trade repositories to seek and obtain recognition? If not, what period would be sufficient?

Trade Vault Response: In our view, a three-month period is insufficient. While it is our preference for the recognition of trade repositories to happen quickly and efficiently, in our experience, this process will take at least three months and potentially longer if the Authorities

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(i) do not engage in a coordinated application review or (ii) require TR applicants to submit to a public consultation process (each as discussed below). Also, in our experience, reporting counterparties need three months to onboard with a recognized TR after the recognition of the TR. We therefore recommend a minimum six-month transitional period between the date on which the TR Rule becomes effective and the date that the first reporting obligations will apply.

Question 11: As outlined in the proposed TR CP, we have considered staged implementation of the trade reporting obligations such that the requirement might apply to those lower in the trade reporting waterfall at successively later dates. Given that trade reporting obligations will likely apply to end-users in Manitoba, Ontario and Québec by the time the proposed TR Rule becomes effective, is it necessary for the Authorities to consider staged implementation? Is the staged implementation in the proposed TR CP appropriate?

Trade Vault Response: Trade Vault agrees with a staged approached as derivative dealers and CAs have the technical capabilities to report earlier than end-users. A staged approach introduces less risk for a successful launch of TRs and the initiation of reporting by market participants.

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March 19, 2015

Delivered Via Email: mbrady@bcsc.bc.ca

Attention: British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

c/o: Michael Brady,
Senior Legal Counsel, Capital Markets
British Columbia Securities Commission
P.O. Box 10142 Pacific Centre
701 West Georgia Street
Vancouver, British Columbia V7Y 1L2

Dear Sirs/Madams:

Re: CSA Multilateral Notice and Request for Comment – Proposed Multilateral Instrument 91-101 *Derivatives Product Determination* and Proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* published January 21, 2015

The International Energy Credit Association (**"IECA"**) hereby submits the comments contained in this letter on behalf of its members in response to the solicitation for comments made by the staff of the Alberta Securities Commission, the British Columbia Securities Commission, the Financial and Consumer Affairs Authority of Saskatchewan, the New Brunswick Financial and Consumer Services Commission and the Nova Scotia Securities Commission **(collectively, the "Authorities")** in respect of the following published documents:

- Proposed Multilateral Instrument 91-101 *Derivatives: Product Determination* (**"Scope Rule"**);
- Proposed Companion Policy 91-101 *Derivatives: Product Determination* (**"Scope CP"**);
- Proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* (**"TR Rule"**); and
- Proposed Companion Policy 96-101 *Trade Repositories and Derivatives Data Reporting* (**"TR CP"**).

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I. Introduction

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

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

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

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II. Reporting Counterparty Waterfall and Derivatives Dealer Definition

The IECA supports the proposed hierarchy in the reporting counterparty waterfall in section 25 of the TR Rule. The IECA believes that the hierarchy properly allocates reporting responsibility, as among various categories of derivatives market participants, to those best suited to fulfil the reporting responsibilities.

The IECA believes, however, that to avoid any confusion under the reporting counterparty waterfall, the definition of "derivatives dealer" should be clarified to indicate in which jurisdiction an entity must be "*...engaging in the business of trading in derivatives...*" (the Canadian Securities Administrators **("CSA")** has previously described that phrase as the "business trigger for dealing in derivatives") in order to be caught by the definition and thereby, prima facie, be deemed as the reporting counterparty in most instances. This clarification is particularly important since the definition of local counterparty excludes foreign registrants.

The IECA notes that the derivatives dealer definition in each of the respective reporting rules currently effective in the other Canadian jurisdictions, namely Manitoba, Ontario, and Quebec, specify that the business trigger for dealing in derivatives activity take place in Manitoba, Ontario, and Quebec, respectively. The definition of derivatives dealer in subsection 1(1) of the TR Rule is silent on the jurisdictional point. The IECA is unsure whether this silence was intentional or unintentional on the part of the Authorities but believes that the point should be clarified to pre-empt any confusion.

To illustrate the potential for confusion, please consider a situation in which one party to a derivatives trade is a non-dealer local counterparty in one of the Authorities' jurisdiction, say Alberta, but the other party to

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the trade was a "foreign" party, say a New York based swap dealer. Assume that the trade with the Alberta local counterparty was the only trade with an Alberta nexus for the New York swap dealer. The business trigger for dealing in derivatives concept does not exist under the regulations provided by the United States Commodity Futures Trading Commission **("CFTC")** with respect to swap dealer determination or swap data reporting and could, therefore, be unfamiliar concepts for the New York swap dealer.

Because the TR Rule will only apply in the respective provinces of the Authorities' jurisdiction, and the derivatives dealer definition lacks jurisdictional specificity, the New York swap dealer might reasonably conclude that it is not a derivatives dealer in Alberta. As a result, the non-dealer Alberta local counterparty would have to report the trade under the reporting counterparty waterfall set forth in section 25, even though it might not otherwise be the reporting counterparty for any other trades and the New York swap dealer may be reporting many trades in jurisdictions outside of Canada. The IECA submits that such an outcome should be avoided because it could place unreasonable and unnecessary compliance burdens on non-dealer local counterparties in the provinces where the Authorities have jurisdiction.

Additionally, confusion as to reporting counterparty status on the part of foreign dealers may result in such dealers being reluctant to enter into trades with local counterparties in the Authorities' jurisdiction. That could result in market contraction, a decrease in liquidity, and a focusing of risk in derivatives markets as fewer and fewer participants are willing, or able, to transact in those markets. To avoid such potentially negative outcomes, the IECA asks the Authorities to clarify the jurisdictional nexus in the derivatives dealer definition.

To that end, the IECA submits that the derivatives dealer definition should specify that a person is a derivatives dealer if it either: (i) engages in the business of trading in derivatives anywhere in the world, or (ii) is registered as a 'dealer', 'swap dealer', or any similar classification under the derivatives regulations of any jurisdiction in the world. The IECA submits that being registered as a dealer anywhere in the world should be determinatives, not for the local counterparty definition (as is the case under the Manitoba, Ontario, and Quebec reporting regulations), but for both the derivatives dealer definition and, by extension, the reporting counterparty waterfall under Section 25 of the TR Rule.

In addition to clarifying the jurisdictional nexus discussed above, the IECA requests that the Authorities please clarify whether, in determining if a party is a derivatives dealer for the purposes of the TR Rule, the term "derivatives" as used in the derivatives dealer definition includes or excludes the "excluded derivatives" identified in subsection 2(1) of the Scope Rule. In other words, in determining whether a party is a derivatives dealer or not, should a party consider its activities with respect to either, or both, reportable and/or excluded derivatives or just reportable derivatives? The IECA submits that, logically, only reportable derivatives should be considered and therefore derivatives that are not reportable should be irrelevant to determining who has to report.

On a more fundamental level, though beyond the scope of the Scope Rule, TR Rule and this letter, the IECA submits that the entire concept of being "in the business of trading in derivatives", that was borrowed from securities markets and lies at the heart of the derivatives dealer definition in the TR Rule, requires significant modification and clarification in the context of derivatives markets. Derivatives markets are fundamentally different from securities markets in many key respects. Therefore, concepts applicable to securities markets, such as elements determinative of a securities dealer, when applied with only nominal changes to elements determinative of a derivatives dealer, are poorly suited to derivatives markets. The

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IECA looks forward to being able to comment to the Authorities and the rest of the CSA more substantively on these issues in the future.

III. Excluded Derivatives Pursuant to Subsection 2(1)(d) of the Scope Rule

The IECA commends the Authorities for adding further explanation in the Scope Rule that was not provided in the companion policies of the Manitoba, Ontario and Quebec scope rules and which helps determine the intent component of the exclusion provided for commodities contracts in subparagraph 2(1)(d)(i) of the Scope Rule. This Section "requires that the counterparties intend to settle the contract by delivering the commodity." In addition, the Scope CP provides that the "intention can be inferred from the terms of the relevant contract as well as from the surrounding facts and circumstances" and states that "the contract as a whole needs to be reviewed in order to determine whether the counterparties' intention was to actually deliver the commodity."

Notwithstanding the guidance provided under the Scope CP, the IECA requests greater clarity be provided as many of its members find that the intention element is not so easily discernible because of nuances to their contracts structured to achieve balance in the supply and demand of the commodity and, in some cases, as established by legislation and industry practice, as further detailed in Part IV below.

The IECA urges the Authorities to provide greater clarity that would assist market participants in interpreting intention in the exclusion provided for in subparagraph 2(1)(d)(i) and would help avoid the same uncertainty that Manitoba, Ontario and Quebec market participants are struggling with currently. The IECA is aware that it would be difficult, perhaps impossible, for the Authorities to provide an exhaustive list of consumer and commercial agreements, contracts and arrangements that would fall under this exclusion. The IECA believes that its members and other market participants would benefit greatly from an illustrative list of characteristics and factors that are common to commodities contracts intended for delivery which would provide more definitive guidance on whether such contract would be excluded or not.

In this regard, the IECA points to the definition of "swap" provided by the CFTC under the Dodd-Frank Act, which clarifies the forward contract exclusion from the swap and future delivery definition in its regulations. The CFTC uses the term "commercial merchandising transaction" as the bright line and thereby provides sufficient notice to the public regarding how the forward contract exclusion from the definitions of "swap" and "future delivery" is interpreted. In addition, the CFTC provided an illustrative and non-exhaustive list of characteristics and factors that are common to consumer and commercial transactions that market participants could use as guidance in determining whether their transactions fall under the swap definition. Contracts having the following characteristics would not be a swap:

- does not contain payment obligations, whether or not contingent, that are severable from the agreement, contract, or transaction;
- are not traded on an organized market or over-the-counter and, in the case of consumer arrangements, does not involve an asset of which the consumer is the owner or beneficiary, or that the consumer is purchasing, or involves a services provided, or to be provided, by or to the consumer; and

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- in the case of commercial arrangements, are entered into by commercial or non-profit entities as principals, or by their agents, to serve an independent commercial, business, or non-profit purpose, and other than for speculative, hedging, or investment purposes.

Two key characteristics in the CFTC's interpretation that distinguish these agreements, contracts, and transactions from swaps are: (i) the payment provisions of the agreement, contract, or transaction are not severable, and (ii) the agreement, contract, or transaction is not traded on an organized market or over-the-counter. Therefore, such agreements, contracts, or transactions do not involve risk-shifting arrangements with financial entities, as would be the case for swaps.

The CFTC emphasized that this interpretation is not intended to be the exclusive means for consumers, commercial and non-profit entities to determine whether their agreements, contracts, or transactions fall within the swap definition and urged that if there is a type of agreement, contract, or transaction that is not enumerated in its list, or does not have all the characteristics and factors that are listed above, including new types of agreements, contracts, or transactions that may develop in the future, the agreement, contract, or transaction will be evaluated based on its particular facts and circumstances. The CFTC interpretation also states that parties to such an agreement, contract, or transaction may seek an interpretation from the CFTC as to whether the agreement, contract, or transaction is a swap or not.

The IECA believes that the Authorities should adopt a similar approach as that taken by the CFTC and provide sufficient clarity with respect to the intention requirement in certain commodities contracts.

IV. Embedded Optionality in Excluded Derivatives Pursuant to Subsection 2(1)(d) of the Scope Rule

The IECA commends the Authorities for adding further explanation in the Scope CP to help determine the intent element of the exclusion provided for commodities contracts in subsection 2(1)(d)(i) of the Scope Rule. Regarding the inclusion of embedded optionality, the IECA respectfully requests that the Authorities provide additional clarification in the Scope CP, as set forth below.

The Authorities propose excluding any derivative that is a contract or instrument "for delivery of a commodity other than cash or currency" if it satisfies: (a) subparagraph 2(1)(d)(i) of the Scope Rule, which "requires that the counterparties intend to settle the contract by delivering the commodity"; and (b) subparagraph 2(1)(d)(ii) of the Scope Rule, which does not allow for cash settlement in place of delivery except where all or part of the delivery is rendered impossible or commercially unreasonable by an intervening event or occurrence not reasonably within the control of the counterparties, their affiliated entities, or their agents."

The Authorities state in the Scope CP, at page 7, that "intention can be inferred from the terms of the relevant contract as well as from the surrounding facts and circumstances" and "the contract as a whole needs to be reviewed in order to determine whether the counterparties' intention was to deliver the commodity." (Emphasis added.) Regarding evidence of an intention to deliver, the Authorities say in the Scope CP, at page 7, "the contract must create an obligation on the counterparties to make or take delivery of the commodity and not merely an option to make or take delivery.... [A] contract containing a provision that permits the contract to be settled by means other than delivery of the commodity, or that includes an

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option or has the effect of creating an option to settle the contract by a method other than through the delivery of the commodity, would not satisfy the intention requirement and therefore does not qualify for this exclusion." (Emphasis added.)

However, the Authorities then go on to clarify that "standard industry provisions, the effect of which may result in a transaction not being physically settled, may not necessarily negate the intention to deliver. The contract as a whole needs to be reviewed in order to determine whether the counterparties' intention was to actually deliver the commodity. Examples of provisions that may be consistent with the intention requirement under subparagraph 2(1)(d)(i) includes: an option to change the volume or quantity, or the timing or manner of delivery, of the commodity to be delivered." (Emphasis added.)

The Authorities explain further, on page 8 of the Scope CP, that "[e]mbedded optionality with respect to the volume or quantity, or the timing or manner of delivery, of the commodity to be delivered may be consistent with the intention requirement in subparagraph [2](1)(d)(i) where the terms of the contract make it clear that the parties intend to settle the contract by physical delivery of the commodity and not by cash or any other means. A contract will not qualify for this exclusion where it can be inferred that the counterparties intend to enter into the contract to achieve an economic outcome that is, or akin to, an option." (Emphasis added.)

The Authorities also state that "[w]hen determining the intention of the counterparties, we will examine their conduct at execution and throughout the duration of the contract. Factors that we will generally consider include whether a counterparty is in the business of producing, delivering, or using the commodity in question and whether the counterparties regularly make or take delivery of the commodity relative to the frequency with which they enter into such contracts in relation to the commodity." (Emphasis added.)

The Authorities then go on to specify that "[s]ubparagraph 2(1)(d)(ii) requires that … a contract must not permit cash settlement in place of delivery unless physical settlement is rendered impossible or commercially unreasonable as a result of an intervening event or occurrence not reasonably within the control of the counterparties, their affiliates nor their agents."

The IECA and its members hereby inform the Authorities that many of the supply contracts regularly and routinely used by energy companies to provide for the sale and physical delivery of petroleum, natural gas, electricity and other non-financial commodities provide for zero or nominal delivery of a commodity at various times during the term of such contracts. We provide the following examples of arrangements common in the energy industry:

a) Firm, variable contracts, also known as peaking deals – In these types of contracts, the seller is obligated to deliver a quantity of natural gas that buyer, at its sole election, wishes to take or the buyer is obligated to take a quantity of natural gas that seller, at its sole election, wishes to deliver. The quantity of natural gas in these contracts ranges from zero to a set maximum amount because of the variability of the need or supply of natural gas experienced by the buyer or seller, respectively; and

b) Carbon offset transactions – the seller of carbon credits contracts for the option to deliver zero or a nominal amount of carbon credits during a delivery period because the seller may not generate any carbon credits that would be available for delivery during the delivery period. Similarly, a buyer

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of carbon credits may contract for the option to take zero or a nominal amount of carbon credits because its level of operations may not give rise to carbon offset regulatory obligations during the delivery period.

Based on the text of subsection 2(1)(d) of the Scope Rule and the Authorities' clarification regarding embedded optionality provided in the discussion of subsection 2(1)(d) in the Scope CP, the IECA is concerned that such physical commodity supply contracts may not qualify for the exclusion provided in subsection 2(1)(d) of the Scope Rule for contracts that are intended by the counterparties to be settled by delivery of the commodity, solely because such zero or nominal delivery obligations at various times during the term of such contracts could be interpreted as failing to satisfy various requirements of subparagraphs 2(1)(d)(i) and (ii).

The IECA, therefore, respectfully requests that the Authorities add the following clarification, or similar provision, to the Scope CP:

> **"Including the ability to take zero or nominal delivery in an agreement, contract or transaction for the purchase or sale of petroleum, natural gas, electric energy, or any other non-financial commodity will not cause such agreement, contract or transaction to fail to satisfy the exclusion under subsection 2(1)(d) of the Scope Rule, so long as that agreement, contract or transaction (i) is intended to be settled by physical delivery of the commodity and (ii) is between two counterparties in the business of producing, delivering, marketing or using the commodity in question."**

V. Exclusion from Reporting Commodities Derivatives Between Two End-Users

The IECA commends the Authorities for proposing section 40 of the TR Rule to provide an exclusion from the reporting obligation with respect to a derivatives transaction for a commodity other than cash or currency, so long as (a) each counterparty to such transaction is neither a derivatives dealer nor a Canadian financial institution, and (b) at the time of execution of such transaction, each counterparty's aggregate notional exposure under all contracts based on commodities, other than cash or currency, is less than $250 million (CAD)[1]. The IECA respectfully requests that the Authorities increase this threshold significantly from $250 million (CAD) to at least $1.0 billion (CAD).

As explained in the discussion starting at page 24 of the TR CP (Part 5 Exclusions), "[t]he objective of the exclusion is to reduce the reporting burden with respect to commodity derivatives transactions on end-users that may not be systemically important." As further explained in the Authorities' cover letter of January 21, 2015 at page 8 accompanying the TR Rule and the TR CP, "[t]his exemption is intended to reduce the regulatory burden on commodity derivatives market end-users, such as commodity producers, commodity processors and commodity consumers, while still ensuring that the majority of derivatives transaction activity will continue to be reported."

The Authorities' cover letter goes on to say that "[t]he threshold has been established based on analysis conducted by staff of the Authorities. In developing the proposal staff have considered:

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[1] As set forth in the TR CP, the IECA endorses Option #1 to Section 40 of the TR Rule.

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- the potential burden on market participants associated with trade reporting,
- benefits that trade reporting provide to regulators and market participants, and
- whether there would be systemic risks associated with derivatives trades that would not be reported."

The IECA submits that over the course of a typical twelve month period (e.g., the twelve months immediately following the execution of a derivatives transaction between two end-users), a commodity producer, processor or consumer could easily have contracts in effect for an amount greater than the threshold of $250 million (CAD) without creating any systemic risk for the commodities markets or the larger Canadian economy. For example, at a crude oil price per barrel of $75 (USD), a producer, processor, or consumer would only need to have contracts for a quantity of 3,333,000 barrels of crude oil. To put this low threshold into perspective, this would be less than 1% of total crude oil production in 2013 and less than 2% of total marketable natural gas production.

If the Authorities were looking at positions over the course of twelve months in making the above determination of whether a counterparty's aggregate notional exposure exceeded $250 million (CAD), then there are not many commodity producers or processors that would receive any relief from the regulatory burden based on this rather low threshold.

Accordingly, the IECA submits that granting meaningful relief to commodity producers, processors and consumers justifies a much larger threshold of at least $1.0 billion (CAD), approximately 3% of crude oil production and 6% of marketable natural gas production. Similarly, it is difficult to see how such an increase to the threshold would create any systemic risk to the commodity markets or the larger Canadian economy.

Additionally, the IECA respectfully requests that the Authorities provide the analysis conducted by staff of the Authorities so that a more comprehensive review of Section 40 of the TR Rule and TR CP can be made by the IECA and other interested members of the public to review and comment.

VI. Reporting of Inter-Affiliate Derivative Trades

The IECA respectfully submits that inter-affiliate derivative trades should not be reportable in cases in which the trade is between affiliates who are wholly or majority controlled by the same ultimate parent entity and the financial results of the affiliates are reported on a consolidated basis with the parent. The IECA submits that a reporting exemption for such inter-affiliate derivatives trades is appropriate because such trades do not pose systemic risk to the Canadian financial system.

Firstly, an exemption from reporting such trades would be consistent with the approach taken by the CFTC[2]. Secondly, it would also be consistent with the CSA's proposal that inter-affiliate trades would be exempt from mandatory clearing under CSA Staff Notice 91-303 (Proposed Model Provincial Rule on Mandatory Central Clearing of Derivatives). Thirdly, the IECA notes, and supports, that under the TR Rule, inter-affiliate derivatives trade data would not be publicly disseminated. That being the case,

[2] See http://www/cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/13-09.pdf

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however, the IECA respectfully submits that the compliance burden that will be placed on derivatives market participants in requiring them to report inter-affiliate derivative trade data only to the Authorities and not to the public is not justified by the very limited additional market transparency that such reporting would provide **only** to the Authorities, particularly since such inter-affiliate trades are not systemically risky in the first place.
To illustrate our view that such inter-affiliate derivatives trades are not systemically risky, please consider the following example corporate structure, which the IECA submits is a common one in the energy industry:

> A group of four affiliated entities each individually owns a factory for the manufacture of widgets ("ProductionCos"). The ProductionCos are all wholly owned or majority owned by the same "ParentCo" and their financial results are reported on a consolidated basis with ParentCo. ParentCo also provides credit support (through guarantees and/or letters of credit) for the ProductionCos, as and when needed.
>
> The four factories require electricity and natural gas to operate. To procure electricity and natural gas, and to hedge against commodity price volatility, the ProductionCos desire to enter into forward contracts for the physical supply of electricity and natural gas and financial derivatives contracts related to those commodities. Each ProductioCo could transact in the market directly with other derivatives market participants to obtain such commodity derivative transactions.
>
> Rather than having each ProductionCo transact on its own behalf, their corporate family has another affiliate, "TradeCo", whose function is to transact derivatives on behalf of the entire corporate family, either as a disclosed or undisclosed agent. TradeCo is also wholly or majority owned by ParentCo, its financial results are reported on a consolidated basis with ParentCo and ParentCo provides credit support, as and when needed.
>
> TradeCo was established to make negotiating, entering into, and administering the corporate family's derivatives activities more efficient. It is more efficient and cost effective for one member of the corporate family to negotiate, execute and administer derivatives trades with external parties than to have four ProductionCos each have to negotiate, enter into, and administer such agreements. TradeCo may also trade derivatives with external parties for its own account.
>
> After TradeCo has entered into an "outward facing derivative trade" with an external party as disclosed or undisclosed agent for a ProductionCo, any profits or losses associated with such trade are recorded in the financial ledgers of the relevant ProductionCo on a monthly, quarterly, or annual basis simply by means of accounting entries, rather than by the actual exchange of funds. There may or may not be written agreements in place, including trade confirmations, between ProductionCos and TradeCo and each outward facing derivatives trade may or may not have an exactly corresponding inter-affiliate trade. On a monthly, quarterly, or annual basis, the financial results of the ProductionCos and TradeCo are rolled up into ParentCo and reported on a consolidated basis.

In the above scenario, the IECA respectfully submits that, to the extent that any of the above trades might be systemically risky, it is only the outward facing trades with unaffiliated entities that could pose such

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risk. The inter-affiliate trades are not risky because of the consolidated financial position of the entire corporate family, including the fact that ParentCo is the common credit support provider and common control point for all of its subsidiaries. Accordingly, the IECA submits that only the outward facing trades should need to be reported, assuming they would otherwise be reportable under the TR Rule.

Additionally, the IECA notes that in the TR CP, the Authorities state a desire to avoid dual reporting of derivatives trade data. The IECA submits that requiring reporting of inter-affiliate derivative trade data, particularly on a "one-to-one" or "back-to-back" basis, is in essence requiring dual reporting of such trade data, to the extent that the outward facing trade would be reportable under the TR Rule in the first instance. The only difference between the outward facing trade and the inter-affiliate trade in such instances would be the identity of the parties and their respective roles as "buyer" and "seller" under the back-to-back trades. That is, if TradeCo was the "buyer" in the outward facing trade with a third party, it would be the "seller" in the inter-affiliate trade with ProductionCo.

Based on considerations of systemic risk, the IECA sees no rational for requiring reporting of inter-affiliate trades. Additionally, requiring such reporting by Canadian derivatives market participants when such reporting is not required in the United States under CFTC's reporting regulations will put additional compliance burdens on Canadian derivatives market participants and may put them at a competitive disadvantage to derivatives market participants in the United States. For the foregoing reasons, the IECA respectfully submits that inter-affiliate trades should be exempted from reporting in situations in which the affiliates are wholly or majority owned subsidiaries of a common parent, the subsidiaries' and parent's financial results are reported on a consolidated basis, and the parent provides credit support for the derivatives trading relating liabilities of its subsidiaries.

VII. Conclusion

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

Yours truly,

INTERNATIONAL ENERGY CREDIT ASSOCIATION

Priscilla Bunke
Dentons Canada, LLP

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ISDA® Safe, Efficient Markets

BY E-MAIL

March 24, 2015

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

c/o Michael Brady
Senior Legal Counsel, Capital Markets
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Dear Mr. Brady:

Re: Request for Comment on Proposed Multilateral Instrument 91-101 *Derivatives Product Determination* and Proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting*

The International Swaps and Derivatives Association, Inc. ("**ISDA**")[1] appreciates the opportunity to provide the Alberta Securities Commission, the British Columbia Securities Commission, the Financial and Consumer Affairs Authority of Saskatchewan, the New Brunswick Financial and Consumer Services Commission and the Nova Scotia Securities Commission (the "**Authorities**") with comments regarding proposed Multilateral Instrument 91-101 *Derivatives Product Determination* (the "**Scope Rule**"), proposed Companion Policy 91-101 *Derivatives: Product Determination* (the "**Scope CP**"), proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* (the "**TR Rule**") and proposed Companion Policy 96-101 *Trade Repositories and Derivatives Data Reporting* (the "**TR CP**") (collectively, the "**Proposed Instruments**").

ISDA and its members support initiatives to increase transparency, and therefore recognize the importance of the Proposed Instruments. On behalf of our members that may be reporting counterparties, local counterparties and recognized trade repositories, as defined in the Proposed Instruments, ISDA would like to submit our comments and suggestions for the Authorities' consideration. We strongly support the importance of harmonizing the Proposed Instruments with the *Derivatives: Product*

[1] Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 67 countries. These members include a broad range of OTC derivatives market participants including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure including exchanges, clearinghouses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

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Determination rule or regulation ("91-506") and the *Trade Repositories and Derivatives Data Reporting* rule or regulation ("91-507") each as issued by the Ontario Securities Commission ("OSC"), the Manitoba Securities Commission ("MSC") and the Autorité des marchés financiers ("AMF"). As such, many of our comments address both substantive and perceived differences between the Proposed Instruments, 91-506 and 91-507. We encourage the Authorities, the OSC, MSC, and AMF to continue to work toward harmonized trade reporting requirements in Canada.

I. Scope Rule and Scope CP

ISDA agrees that optionality embedded in an agreement to purchase commodities for physical settlement, such as variable quantity or the right to elect delivery by a certain date, does not change the intention to physically deliver the commodity. As a result, any such optionality would not negate physically settled commodity transactions from being classified as excluded derivatives under the Scope Rule. We appreciate the guidance provided in the Scope CP that embedded optionality may be consistent with the intention requirement in subparagraph 1(1)(d)(i), however we are concerned about the last sentence of that paragraph which says "A contract will not qualify for this exclusion where it can be inferred that the counterparties intend to enter into the contract to achieve an economic outcome that is, or is akin to, an option."

It is not clear to us under what circumstances the Authorities would infer that the parties intend to achieve an "economic outcome", and so we are concerned that a physical commodity that otherwise meets the two-pronged test of 2(1)(d) of the Scope Rule may not be considered an excluded derivative for purposes of the rule. We ask that the Authorities provide clarity as to the purpose of this sentence, since as currently drafted we believe it has the potential to create confusion.

II. TR Rule and TR CP

A. Local counterparty definition

Registrants and deemed compliance

ISDA fully supports the exclusion of derivatives dealers from the definition of local counterparty in the TR Rule. Including foreign dealers that may be required to register as derivatives dealers in Canada in the definition of local counterparty greatly inflates the scope of transactions subject to reporting via inclusion of their transactions with foreign counterparties. This may detract from the ability for regulators to oversee and analyze the activity that is most pertinent to the provincial market. With respect to transparency, including these transactions in publicly available aggregated data and transaction level public reporting may diminish the value of these reports to the public and to regulators since they will offer a more global view of market activity, rather than a purely Canadian one.

A requirement to report all their transactions would disadvantage foreign derivatives dealers subject to registration requirements in Canada since their foreign clients may not wish for their transactions to be reported to additional, non-prudential regulators. As a result, some foreign dealers may limit their activity in Canada, potentially impacting the local markets. Therefore, we encourage the OSC, MSC and AMF to amend the definition of local counterparty in 91-507 to align with the TR Rule for the sake of harmonization and to avoid disadvantaging derivatives dealers that may be subject to registration requirements in Ontario, Manitoba or Québec.

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Even though the transactions between foreign derivatives dealers and their foreign counterparties may be subject to substituted compliance under 91-507, this does not alleviate concerns regarding the requirement since the conditions for such alternative compliance are onerous. In practice, the requirement for a reporting counterparty to instruct a Trade Repository ("TR") to provide the transactional data to the provincial regulator(s) still obligates a party to report the relevant provincial jurisdictions to a recognized TR on a trade-by-trade basis, thus limiting the value or efficiency of substituted compliance. In addition, because the TR must be recognized by the provincial regulator, reporting counterparties that utilize a TR for reporting in a jurisdiction listed in Appendix B to 91-507 that is not recognized would not be eligible for deemed compliance. [2] Some accommodation should be made for TRs that are subsidiary entities of a recognized TR and a streamlined recognition process should be allowed for TRs that only wish to obtain recognition for purposes of facilitating deemed compliance for their participants.

In order to more efficiently address both of these conditions, we encourage Canadian regulators to enter into a Memorandum of Understanding ("MOU")[3] with regulators in other jurisdictions to obtain direct access to relevant derivatives data reported subject to another regime's requirements. An MOU between the CSA and a regime specified in Appendix B of 91-507 or the TR Rule should negate the requirement in §26(5)(b) that the relevant TR be recognized by the provincial Authority and eliminate the requirement in §26(5)(c) for a reporting counterparty to instruct a TR to provide access to the data.

Until these hurdles are addressed, it may be easier or necessary for foreign dealers and local counterparties that are affiliated entities to fully report their transactions with foreign counterparties in Canada rather than bifurcate their reporting streams to either report different data fields for transactions with local counterparties vs. non-local counterparties or divide reportable transactions based on whether the foreign TR is recognized in Canada. The operational complexity of meeting the conditions in §26(5) have the practical effect of negating any benefit or efficiency that should result from the application of substituted compliance.

Individuals

As currently drafted, 91-507 does not capture individuals within the definition of "local counterparty"; however, the TR Rule includes a new requirement that individuals should also be included in that definition[4]. This is a significant divergence from 91-507 and will cause significant new compliance costs for market participants.

We question the value of derivatives data for transactions involving individuals to the analysis of systemic risk or the oversight of market conduct, especially considering the inconsistent requirement of such information between the provinces and the operational challenge of identifying individuals that are local counterparties. Since individuals are not eligible for Legal Entity Identifiers ("LEI") and are instead reported via use of a client code, it would be difficult to track any activity by a particular person across reported data. With respect to requiring transactions with individuals in order to understand the full scope

[2] Notably, the TRs authorized for reporting in Europe are not currently recognized in Canada.

[3] We note that the European Securities and Markets Authority has concluded MOUs with each of the Reserve Bank of Australia and the Australian Securities and Investments Commission that provide for direct access to data held in European TRs.

[4] Neither the TR Rule nor the TR CP provide clear direction as to how a "person" should be determined to qualify as a local counterparty since such person would not be "organized under the laws of the local jurisdiction", nor presumably have a head office or principal place of business in accordance with the same conventions that would apply to a "company". We strongly prefer that individuals be removed from the definition of local counterparty, however, if the Authorities determine that individuals will remain then we suggest that subsection (a) of the local counterparty definition be supplemented with text similar to the following: "(iv) in the case of an individual, he or she has his or her principal residence in the local jurisdiction;". We are happy to discuss a proposed definition with the Authorities.

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of the activity in the province, we believe that from a supervisory perspective, this negligible population is not important. Further, it seems inconsistent to exempt certain commodity transactions from reporting while at the same time requiring individuals to be local counterparties and require reporting in these individuals' jurisdictions given that trades concluded with individuals are far less important in volume and size. Individuals transact sporadic, customized and very small notional trades that are not likely to amount to more than a fraction of a percentage of Canadian market total volume.

Although individuals themselves are exempted from reporting, the addition of individuals to the scope of local counterparties would add cost and complexity to reporting conducted by derivatives dealers and local counterparties (which are not individuals). Reporting counterparties subject to 91-507 will not have obtained representations from individuals to confirm their local counterparty status since these transactions are currently only reportable in the jurisdiction(s) relevant to the reporting counterparty. Additional client outreach, which is only applicable to the Proposed Instruments, may be required to confirm the local counterparty status of individuals and maintain static data. We believe that it is not necessary to capture individuals and that the costs of including individuals as local counterparties would outweigh any benefit due to the following:

- The costs related to the additional outreach that will have to be performed by reporting counterparties already covered by 91-507;
- The costs of maintenance of such location records that system-wise are typically captured in different areas of the organization than static information on corporate clients;
- The costs related to the extra care reporting entities will have to ensure around the confidentiality of such information (PIPEDA[5] requirements: even if an address is not considered personal, these issues will necessarily surface in organizations and with individual clients);
- And finally and importantly, because the benefits are tiny. Related transactions that are carried with individuals AND that would not be reported in a specific jurisdiction constitute a negligible fraction of the OTC derivatives Canadian market and by no means constitute any form of systemic risk that regulators should be concerned about.

Therefore, we ask that the Authorities eliminate individuals from the definition of local counterparty.

B. Definition of affiliated entity

Parties cannot be certain they are fully compliant with both the TR Rule and 91-507 when key definitions are disharmonized and subject to potentially different interpretations. We feel strongly that whether a party qualifies as an affiliate that is a local counterparty or whether such party may be subject to an inter-affiliate exemption should be consistent across any trade reporting requirements in Canada. A conservative comparison of the TR Rule and 91-507 yields the conclusion that they are not harmonized and that, as a result, some parties may qualify as an "affiliate" in some provinces and not others. For instance, is it correct to assume that under the TR Rule a trust or partnership could qualify as an affiliate which is a local counterparty, but under 91-507 the same party may not be considered an affiliate or a local counterparty even though the entity that controls it is a local counterparty under both sets of rules?

If the exact delineation is not clear it will create a challenge for parties to accurately and consistently determine their own status as a local counterparty or their qualification for an inter-affiliate exemption

[5] *Personal Information Protection and Electronic Documents Act*

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from public reporting with respect to each rule. A reporting counterparty will have no choice but to obtain and rely on a representation from its counterparties with respect to their status as an affiliate under the relevant local counterparty definition without certainty as to whether provincial distinctions have been appropriately considered. The quality and completeness of the data may be impacted as a result.

Under both the TR Rule and 91-507, a transaction between affiliated entities is not subject to either aggregate or transaction level public reporting. Due to the differences in the way affiliates are defined, it is possible that the transactions of a pair of counterparties may be subject to public reporting under one rule and not the other. Since in order to help protect party anonymity, each TR is anticipated to produce a single, separate report in Canada to meet each of the aggregated public reporting and transaction level public reporting requirements, then the transactions to a pair of counterparties can only either be included or excluded. Unless the definition of affiliates is harmonized, the Authorities, OSC, MSC and AMF will need to agree and publish the public reporting requirement for transactions between counterparties that do not qualify for the inter-affiliate exemption under both rules.

With respect to agreeing to a harmonized definition of affiliate, we believe that a wider definition of affiliate is preferable. Corporate structures involve a variety of entities for tax purposes so it is unclear why only corporations would be included in an affiliated entity definition. The definition of affiliated entity in the TR Rule seems to be sufficiently broad as it includes both partnerships and trusts. Additionally, we appreciate that the definition in the TR Rule does not include the term “deemed”. Its use in 91-507 implies that other relationships may also be affiliates; a definitive definition of what an affiliated entity means is preferable. Finally, we believe that transactions between affiliated entities should equally qualify for an exemption from public dissemination of transaction reporting, an intragroup exemption from mandatory clearing and an exemption from execution on a Derivatives Trading Facility. We recommend that the CSA consider adopting a singular, broad definition of affiliated entity across these rules.

C. Definition of derivatives dealer

The definition of a derivatives dealer under the OSC and MSC versions of 91-507 includes “in Ontario” or “in Manitoba”, respectively. However, the definition of a dealer in the Québec Derivatives Act and the definition of a derivatives dealer in the TR Rule do not have a provincial specific reference. This led us to question whether a party that meets the definition of a derivatives dealer due to its activity in one province would be considered a derivatives dealer in all provinces. Or, for instance, could a party that conducts its primary business as a derivatives dealer in Alberta hedge that activity with a derivatives dealer in British Columbia and deem themselves a non-dealer with respect the latter?

We understand from speaking with the Authorities that the Proposed Instruments should be considered a separate instrument in each participating province, and therefore parties should provide a provincial-specific representation with respect to their status as a derivatives dealer. If we questioned the appropriate interpretation then we expect that others may as well, and so suggest that the Authorities include guidance in the TR CP that clarifies that since the Proposed Instruments are considered a separate instrument in each province, a party should consider its status as derivatives dealer in each jurisdiction.

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D. Reporting counterparty

Reporting clearing agency

ISDA acknowledges that the inclusion of clearing agencies that are willing to provide an undertaking to assume the reporting obligation in the reporting counterparty hierarchy is intended to address gaps in reporting which may occur in the event a transaction is cleared via a clearing agency that is neither recognized nor exempted in a particular province in which the counterparty is a local counterparty. However, there are two primary issues with this approach that we would like to highlight - transparency and completeness.

First, although the definition of a reporting clearing agency refers to a written undertaking provided by the clearing agency, neither a prescribed form nor any specifications for such documentation are included in TR Rule or the TR CP. Despite a similar requirement in the MSC and AMF versions of 91-507, clearing agencies are voluntarily fulfilling the role of the reporting clearing agency without having delivered such an agreement. As a result, there is a lack of transparency with respect to which clearing agencies have officially assumed the role of a *reporting clearing agency*. Members of particular clearing agencies will have been notified of such services, and ISDA has created an unofficial list. But ideally, the Authorities, OSC, MSC and AMF would publish and maintain a table of reporting clearing agencies, including those which are recognized, exempted or have provided a written undertaking in order to facilitate public transparency. Such a list would be useful for local counterparties looking to transact with a new clearing agency, as they would have upfront affirmation that the reporting obligations for their cleared transactions would be met.

Secondly, since a clearing agency is not obligated to accept the role of a reporting clearing agency in a province for which it clears a transaction for a local counterparty but is itself not recognized or exempted, there may be gaps in the reporting of cleared transactions. Clearing agencies need certainty that when they assume the role of a reporting clearing agency in a province that they will not be subject to any obligations beyond those prescribed in the TR Rules. In provinces for which a clearing agency has limited or no current clients that are local counterparties, there may be no commercial incentive to put themselves forward as reporting clearing agency. Since under most global reporting requirements the clearing agency is the designated reporting counterparty, parties have built their reporting architectures to suppress the reporting of cleared transactions. Altering reporting logic to compensate for exceptional cases where a clearing agency has not offered to report may be complex and costly. In instances where the transaction is reported by a clearing agency in another jurisdiction or even another province, a separate report by the party facing the clearing agency in the transaction may result in duplicate and/or inconsistent reporting that could impact the quality of Canadian and global aggregate data.

The scope of potential gaps is likely very limited, but transparency with respect to reporting clearing agencies would provide clarity and certainty. Perhaps these potential gaps will be addressed, at least in part, once the clearing mandate has been established in Canada. In the meantime, any efforts on the part of the Authorities to facilitate transparency and completeness with respect to the reporting responsibility for cleared transactions would be appreciated.

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Reporting counterparty waterfall

ISDA does not foresee an issue with respect to parties to a transaction that are at the same level in the reporting counterparty waterfall in §25 of the TR Rule agreeing on whom will be the reporting counterparty. As acknowledged in the TR CP, ISDA has leveraged the reporting counterparty hierarchy it established with the industry for reporting under the Part 43, Part 45 and Part 46 regulations of the Commodity Futures Trading Commission ("CFTC") to develop the Canadian Transaction Reporting Party Requirements[6] (the "RCP Standard"). The RCP Standard has proven to work well to determine a single reporting counterparty in conjunction with both the CFTC's regulations and 91-507. For transactions which are subject to reporting in both the U.S. and Canada, it facilitates a single reporting counterparty across jurisdictions, thus promoting efficiency and global transaction data quality.

In order to help firms comply with the requirements in §25 of each 91-507 to enter into a corresponding written agreement, ISDA published the ISDA 2014 Multilateral Canadian Reporting Party Agreement (Deemed Dealer Version)[7]. To date, 116 parties have adhered, thereby agreeing to apply the RCP Standard published by ISDA to determine the reporting counterparty to their mutual transactions. As additional parties adhere, the schedule to the agreement is provided by ISDA to the OSC, MSC and AMF on behalf of the adhering parties. ISDA is currently seeking feedback on a draft of a non-dealer version of the agreement, the 2015 Multilateral Canadian Reporting Party Agreement (Non-Dealer Version), which can be used for transactions between local counterparties that will become subject to reporting on or after June 30, 2015 under 91-507. In anticipation of additional trade reporting requirements, the RCP Standard and both versions of the Multilateral Canadian Reporting Party Agreement were designed to be extensible to other provinces and territories in Canada. As administrator of the Multilateral Canadian Reporting Party Agreements, ISDA can help parties to comply with the recordkeeping requirement in §25(2) of the TR Rule and provide transparency to the Authorities with respect to those using the agreements to comply with the requirement in §25(1)(d).

Dual UTI submission

We understand that the requirement in §25(4) of the TR Rule is intended to incentivize parties to enter into agreements which facilitate a single transactional report. ISDA has demonstrated a strong preference for the efficiency of single-sided reporting and the value it adds to the quality of aggregated data. We encourage parties to use the RCP Standard, delegated reporting or another agreed method to determine a single reporting counterparty for each transaction.

However, we are concerned about the use of the Unique Transaction Identifier ("UTI") reporting requirement in §25(4) of the TR Rule to achieve this goal. As conveyed to the MSC with respect to Rule No. 2014-19[8], this provision puts an undue burden on non-dealer local counterparties that are not Canadian financial institutions and further disharmonizes the trade reporting requirements in Canada. Although we can understand the regulatory need to identify duplicates when both parties report, ISDA feels strongly that by definition a UTI is a value that is known and used by both parties to the transaction in the event each reports in Canada and in the event either one or both parties reports in other global jurisdiction(s). Absent use of an agreed UTI, parties could simply report using their internal reference numbers; an approach that does not support the ability of individual regulators or the global regulatory

[6]http://www2.isda.org/attachment/NzMzNA==/Reporting%20Party%20Requirements_Canada_20Mar2015_clean.pdf
[7]http://www2.isda.org/attachment/Njk3NA==/2014%20Sept%2022%20ISDA_2014_Multilateral_Canadian_Reporting_Party_Agreement_Dealer_FINAL.pdf
[8] http://www2.isda.org/attachment/NzI3MQ==/ISDA%20Response%20MSC%2091-507%20Amendments_16Dec14_FINAL.pdf

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community to meaningfully and accurately aggregate data. Use of a single, agreed UTI negates the need for parties to separately obtain, retain and report the UTI used by their counterparty. Rather than adding exceptional processing that is a burden for both local counterparties and the Authorities as the recipient(s), the Authorities should follow the drafting used in Ontario and Québec which places an onus on the parties to ensure that a single UTI is used in accordance with the recommendations of the Financial Stability Board[9].

If both local counterparties report and use the same UTI, the transaction would not be duplicated if the same TR is used. In the event different TRs are used, any duplicate reporting could be easily identified without the need for a separate notification to the Authorities. At a minimum, we ask that the requirement in §25(4) should not apply (i) to parties that utilize the same UTI as their counterparty when reporting a transaction, or (ii) where there is only one local counterparty in the applicable province given that the local regulator will not gain any additional information from the stand-alone report on the UTI used. In either case the requisite notification to the Authority is not necessary to identify duplicate reporting. Providing this exception would encourage local counterparties to establish the technological mechanisms to create and/or consume UTI and the communication lines to transmit them.

E. Identifiers

Legal Entity Identifiers

ISDA recognizes that using LEIs to identify the parties to a reported transaction is a powerful tool that improves the accuracy and usefulness of reported data both within and across global reporting regimes. Reporting counterparties have built the necessary infrastructure to hold LEIs as party of their static data, and as reporting requirements continue to expand across the G20 jurisdictions, the number of parties obtaining LEIs continues to grow.

Despite the advancement of the LEI initiative, reporting counterparties still have counterparties which are not subject to a requirement by their local authority to obtain one. Regardless of the ease and low cost to apply for and maintain an LEI and the outreach efforts undertaken by reporting counterparties, a percentage of parties may not be persuaded to obtain one ahead of their own regulatory requirement. In these limited cases, the reporting counterparty could not comply with 27(a) of the TR Rule and instead would need to provide an alternative party identifier. The TR CP acknowledges the case where a party identifier is not available from the Global LEI System ("GLEI"), but does not address cases where a substitute identifier that is in accordance with GLEI is not available. While not undermining the requirement to identify counterparties with an LEIs, we request that the TR CP recognize the use of alternative party identifiers in limited cases while the requirement to obtain an LEI expands to additional global jurisdictions.

Unique Product Identifiers

ISDA appreciates footnote 7 in the TR CP which acknowledges the ISDA OTC Taxonomy as an acceptable system of product taxonomy for reporting a Unique Product Identifiers ("UPI"). The ISDA OTC Taxonomy is in broad use globally for product identification in reporting, and ISDA is actively engaged with regulators and IOSCO as the global effort to adopt a consistent approach to UPI commences. As part of any participation in the global dialogue, we encourage the Authorities to support

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[9] September 19, 2014, *Feasibility study on approaches to aggregate OTC derivatives data*: http://www.financialstabilityboard.org/wp-content/uploads/r_140919.pdf

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the leveraging of existing industry standards, such as the ISDA OTC Taxonomy, as the UPI or a basis for the UPI for global transaction reporting in order to ease the cost and difficulty for reporting counterparties to comply.

F. Data available to public

Harmonization

With respect to both the aggregate and transaction level reporting requirements in §39, we believe it is crucial that the requirements in Canada be harmonized in order to provide consistent and fair access to data while providing equal protections to preserve anonymity and the Canadian market. We ask that the Authorities consider the recommendations recently made by ISDA[10] to the Canadian Securities Administrators ("CSA") with respect to the transaction level public reporting requirements. We appreciate the recent amendments issued by the OSC[11] and MSC[12], and the exemptive order issued by the AMF[13] that extend the date for transaction level public reporting to July 29, 2016. This timeframe should allow for the analysis of data reported in Ontario, Manitoba and Québec in order to determine whether the current requirements are both beneficial and appropriate. Since limited data may be reported under the TR Rule and available for analysis prior to the deadline under 91-507, the Authorities should ensure that any final requirements under 91-507 with respect to the transaction level public reporting requirements are suitable to and adopted under the TR Rule as well.

Dissemination timing

Under §39(3) of the TR Rule, TRs are required to make available data for transactions involving a clearing agency, derivatives dealer or CFI on T+1; therefore only transactions between two non-dealers would be held until T+2. However, under §39(3) of 91-507, only transactions involving a dealer or derivatives dealer are subject to reporting by T+1. This means that the cleared transactions of a non-dealer and both cleared and uncleared transactions of a non-dealer CFI would be subject to dissemination by the TR by T+1 under the TR Rule but by T+2 under 91-507. We acknowledge that the CSA plans to undertake a review of reported derivatives data in order to reassess the requirements for transaction level public reporting, and that as a result the TR Rule and 91-507 may ultimately be aligned around that informed view.

We encourage an alignment of the timing for transaction level public dissemination as we believe a different requirement adds operational complexity for TRs and could provide unequal treatment to parties based on their local counterparty jurisdiction. Similar to the concern raised above regarding transactions subject to an inter-affiliate exemption, since we assume there will be (and believe there ought to be) a single public transaction report per TR, if the dissemination timings are different the Authorities, OSC, MSC and AMF would need to agree and publish the requirement that applies when a transaction is subject to different dissemination timeframes in different provinces to which the parties are local counterparties. Assuming the lowest threshold would apply, this may be viewed as a disadvantage for counterparties that report under the TR Rule.

[10] http://www2.isda.org/attachment/NzIxNg==/ISDA_Canada_PublicDisseminationLetter_16Jan2015_FINAL.pdf
[11] http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20150212_91-507_derivatives-data-reporting.htm
[12] http://www.msc.gov.mb.ca/legal_docs/legislation/notices/91_507_notice_am_2_package.pdf
[13] http://www.lautorite.qc.ca/files/pdf/bulletin/2015/vol12no6/vol12no6_6-10.pdf

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With respect to which timeframes would be preferable for a uniform approach, we support the T+1 timeframe for transactions involving a clearing agency since cleared products tend to be more liquid and standardized, and therefore a consistent, earlier timeframe for all market participants should not compromise the anonymity of any party. However, requiring an earlier timeframe for reporting of uncleared transactions involving a CFI would be problematic since the CFI status of a party to a transaction is not known to a TR. Even if TRs requested this information as part of their onboarding processes, a particular TR would not be able to collect CFI status for parties which are not on-boarded to its platform, and thus could not consistently apply logic to include uncleared transactions involving CFIs in a T+1 dissemination file. Requiring reporting counterparties to obtain and report CFI status on a transactional basis would add significant cost and effort for both reporting counterparties and TRs for little benefit since most transactions with CFIs would already be subject to dissemination on a T+1 timeframe if the transaction is cleared, the CFI is a derivatives dealer or the CFI faces a counterparty which is a derivatives dealer.

G. End-user Commodity Transactions Exclusion

We support an exclusion for the reporting of commodity transactions for end-users, but believe that for the sake of fairness and operational complexity it is important that the TR Rule and 91-507 align. If based on the Authorities' analysis and the feedback of end-users most likely to be impacted by §40, it is determined that the threshold should be raised and/or the aggregate notional calculation should be based solely on commodity derivatives, then corresponding amendments should be adopted under 91-507. We note that it may be easier for some parties to calculate their aggregate notional based on a single asset class.

We are concerned about the use of the term "each counterparty" in 40(c) of Option #1 in the TR Rule as it implies that the parties must know each others' status under the provision in order to determine whether the transaction may be exempted from reporting. Representations would need to be gathered and maintained for all parties that may qualify for an exemption and corresponding static data implemented as part of reporting architectures. Since a party's aggregate notional as compared to the threshold could change over time, additional representation and systematic changes could be required. This seems to replace a reporting burden with an administrative burden and a different technological burden. Whereas, the use of "each local counterparty" in 40(c) Option #2 of the TR Rule and under 91-507, seems to allow for each local counterparty to independently determine whether it is subject to a reporting exemption for the transaction based on its current aggregate notional. This approach puts less burden on a party that is consistently eligible for the exemption.

It would also be extremely challenging if a party or a pair of counterparties qualified differently for the commodities exclusion either between provinces under the TR Rule or between the TR Rule and 91-507. Parties would have to obtain and maintain provincial specific representations and built separate logic to determine whether the exemption applies in each province relevant to a local counterparty. Such complexity and burden undermines the value of the exclusion, and could drive parties to trade with counterparties in a province for which the transaction would not be subject to reporting.

Regardless of which approach is taken to the commodity exclusion, we do not believe it will have a materially negative impact on market transparency or surveillance. Nor do we believe that a higher threshold would create systemic risk. Most commodity derivatives are physical, rather than synthetic, so fall outside the scope of the TR Rule. The nature of this market does not lend itself to speculation; rather commodity derivatives tend to serve an end-user community with direct exposures.

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H. Exemptions

Although we appreciate the opportunity for a participant to request, and potentially obtain, an exemption from one or more Authorities under §42 of the TR Rule, such process can be extremely onerous when the participant has obligations under the TR Rule in multiple provinces. Though we acknowledge the autonomy of each Authority, we strongly encourage the Authorities to offer a mechanism for a participant to request and obtain an exemption under the TR Rules from all or more than one of the Authorities. Ideally, such mechanism would also allow a party to seek an exemption under both the TR Rule and 91-507, easing the burden for both participants and regulators.

I. Implementation and transition period

Transitional period

We agree that there should be a transitional period between the date on which the proposed TR Rule becomes effective and the date that the first reporting obligations will apply. A three month period may be sufficient for reporting parties to prepare, however such period could overlap but should not run concurrently with the time period for TRs to seek and obtain recognition. Parties that are onboarding to a TR need certainty that their chosen TR will apply for and be granted recognition in all the provinces for which they may have reporting obligations. In order to allow adequate time for both TR recognition and reporting counterparties to onboard to and implement and test in accordance with the requirements of a recognized TR, six months would be a more reliable period.

With the Proposed Instruments, there are multiple Authorities for which each TR has to simultaneously seek recognition. Securing recognition from each of the Authorities may take the majority of or even more than three months, even though some of the TRs have already obtained recognition from OSC, MSC and AMF. Ideally, TRs would be allowed to submit a single application to obtain recognition from the Authorities, regardless of the independent review and authorization that may be required by each Authority. A collaborative process would encourage TRs to seek recognition from all Authorities. If a TR chooses not to seek recognition from all Authorities due to the cost or complexity of the process, then it would adversely affect reporting counterparties that are counting on use of a single TR to meet their reporting obligations in Canada. If reporting counterparties are driven out of those markets due to cost or complexity, it could negatively affect liquidity.

Staged Implementation

Although end-users in Manitoba, Ontario and Québec may be already reporting to a TR, end-users in other provinces will not have built reporting architecture, on-boarded to a TR or gathered the requisite representations they need in order to assume reporting obligations. End-users are less likely to have multi-provincial or multi-jurisdictional reporting obligations, and so many will need to prepare for derivatives data reporting for the first time. Such effort cannot commence in earnest until there is certainty with respect to the reporting obligations that a party will hold and the timing of such obligations. Therefore, a staged implementation for non-dealers subject to the Proposed Instruments is both necessary and appropriate.

Pre-existing transactions

We support the proposed 90 day additional phasing for reporting pre-existing trades subsequent to the relevant implementation date for reporting commencement. In accordance with our support for staged

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implementation for reporting of new transactions, many market participants will be reporting pre-existing transactions for the first time and will benefit from additional time to prepare for and comply with these requirements. A separate, subsequent phase for reporting pre-existing transactions will benefit data quality as reporting counterparties will not be working to prepare for and comply with both sets of requirements simultaneously.

In §43(2) and (3), the TR Rule provides that the scope of reportable pre-existing transactions excludes those which are no longer live as of deadline for reporting pre-existing deadline (the "pre-existing deadline"). Aside from transactions for which the maturity or termination date precedes the pre-existing deadline, a reporting counterparty cannot predict which transactions may be subject to a negotiated unwind, novation, credit event or other termination event that will render the trade no longer subject to reporting. Therefore, a reporting counterparty which exercises its option to report its pre-existing transactions prior to the relevant pre-existing deadline may actually over-report. Since in retrospect some transactions weren't required to be reported, the consent a reporting counterparty has obtained from its counterparties may be insufficient and the reporting counterparty may be considered to be in breach of data privacy restrictions.

Although this may not have been an intended consequence of the text in §34 of 91-507, the concerns explained above have deterred some reporting counterparties from reporting their pre-existing transactions in advance of the April 30, 2015 deadline under 91-507, which means the TRs will be inundated with parties seeking to fulfill their obligations on or as close to that deadline as possible. This situation can be easily remedied by clarifying in TR CP that the scope of pre-existing transactions excludes those which are no longer live as of the date on which the reporting counterparty fulfills its obligation, either on or before the pre-existing deadline.

III. Conclusion

ISDA and its members thank the Authorities for their consideration of the comments regarding the Proposed Instruments provided herein. We welcome any questions you may have with respect to our recommendations and are happy to provide any additional feedback or information as may be helpful to your consideration.

Please contact me or ISDA staff if you have any questions or require further input.

Sincerely,

Katherine Darras
General Counsel, Americas
International Swaps and Derivatives Association, Inc.

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March 24, 2015

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Re: *Request for Comment on Proposed Multilateral Instrument 96-101 Trade Repositories and Derivatives Data Reporting*

Dear Mr. Brady:

Markit[1] appreciates the opportunity to provide the Alberta Securities Commission, the British Columbia Securities Commission, the Financial and Consumer Affairs Authority of Saskatchewan, the New Brunswick Financial and Consumer Services Commission and the Nova Scotia Securities Commission (the "Authorities") with comments regarding the proposed Multilateral Instrument 96-101 Trade Repositories and Derivatives Data Reporting rules (the "TR Rule").[2]

I. Introduction

Markit is a leading global diversified provider of financial information services. We provide products that enhance transparency, reduce risk and improve operational efficiency. By setting common standards and providing shared solutions that facilitate market participants' compliance with regulatory requirements, many of Markit's services help level the playing field between small and large firms and herewith foster a competitive marketplace.[3] Our customers include banks, hedge funds, asset managers, central banks, regulators, auditors, fund administrators and insurance companies. Founded in 2003, we employ over 3,500 people in 10 countries. Markit shares are listed on Nasdaq under the symbol MRKT.

MarkitSERV,[4] a wholly-owned subsidiary of Markit, provides trade processing, confirmation, matching, and regulatory reporting services for participants in OTC derivatives markets across regions and asset classes. Such services, which are offered also by various other providers,

[1] Please see www.markit.com for further information.

[2] See Proposed Multilateral Instrument 96-101 trade repositories and Derivatives Data Reporting, http://www.albertasecurities.com/Regulatory%20Instruments/5042659-v1-CSA_Notice_and_RFC_on_Proposed_MI_91-101_and_96-101_91.101.pdf.

[3] For example, Markit's KYC Services provide a standardized end-to-end managed service that centralizes "Know Your Client" (KYC) data and process management.

[4] Please see www.markitserv.com for further information.

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are widely used by participants in these markets today and are recognized as tools to increase efficiency, reduce cost, and secure legal certainty.

Our legal, operational, and technological infrastructure plays an important role in supporting the OTC derivatives markets in North America, Europe, and the Asia-Pacific region. Globally over 1,500 firms use the various MarkitSERV platforms that process, on average, 80,000 OTC derivative transaction processing events every day. MarkitSERV has also sent over 45 million trade reports to trade repositories worldwide.

Markit generally supports the comments made in relation to the TR Rule by the International Swaps and Derivatives Association (ISDA).[5] In submitting our own comment letter, we wish to emphasize certain points made by ISDA in its comment letter that are particularly important from our perspective as a third-party provider of regulatory reporting services that will ultimately be called upon by our customers to help them comply with new reporting requirements in Canada.

II. Discussion

As discussed in further detail below, we believe that these is potential for the Authorities to better harmonize the TR Rule with the approach taken by other Canadian authorities by (a) requiring that unique trade identifiers be reported by the reporting counterparty if the parties both use the same identifier, and (b) aligning public dissemination timelines. Finally, we recommend that (c) the transition period between the effective and the compliance date of any final regulations should be at least six months.

1. The TR Rule should be better harmonized with the approach to derivatives data reporting taken in Manitoba, Ontario, and Quebec

Markit supports the TR Rule's "largely harmonized" approach.[6] We believe that a harmonious implementation would reduce data errors and facilitate cross-provincial surveillance and analysis and we similarly support international efforts to derivatives data harmonization.[7] There are, however, a few particular areas where the TR Rule rules could be more harmonious with the approaches taken by the Manitoba Securities Commission (MSC), the Ontario Securities Commission (OSC), and the Autorité des marchés financiers of Québec (AMF) (collectively "Other Canadian Authorities") that are particularly important from our vantage point.

a. The dual-sided reporting of unique transaction identifiers (UTI) should not apply when both parties to a trade use the same UTI for the same transaction

Section 25(4) of the TR Rule requires that each local counterparty report the UTI for each trade to the relevant regulator. This would imply that even non-dealer counterparties to a trade with a dealer would have to make this report. This requirement, in our view, would serve to only complicate post-trade processes for non-dealers while doing little to improve the accuracy of the

[5] See ISDA comment letter submitted March 24, 2015.

[6] Canadian Securities Regulators Propose Derivatives Regulatory Rule, Jan. 21, 2015, https://www.securities-administrators.ca/aboutcsa.aspx?id=1315.

[7] See Feasibility study on approaches to aggregate OTC derivatives data, Sept. 19, 2014, http://www.financialstabilityboard.org/wp-content/uploads/r_140919.pdf.

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UTIs in the regulator's records. We therefore recommend that, instead of this unnecessary, redundant reporting to the appropriate regulator, that the reporting counterparty party notify the non-reporting party of the UTI and then require the non-reporting party to store and use this as its UTI for recordkeeping purposes or, in the alternative, that the reporting counterparty and the non-reporting party must agree to the UTI as part of the trade confirmation.

b. Timing delays for public dissemination should be harmonized

Under the TR Rule, only uncleared transactions between two non-dealers would be held from public availability until T+2 while under the Other Canadian Authorities' rules (91-507) only transactions involving a dealer are subject to reporting on a T+1 basis.[8] This means that under the TR Rule, a cleared transaction between two non-dealers would become public at T+1 while under the Other Canadian Regulators' rules these transactions would become public at T+2. We urge the Canadian authorities to come to some common approach on these dissemination standards in order to reduce the potential for regulatory arbitrage as well as the operational complexity created by these differing standards.

2. The transition period between the effective and compliance date of any final regulations should be at least six months

In our experience, following the finalization of regulatory requirements for the reporting of derivatives transactions, reporting counterparties, their reporting agents, and the trade repositories will need sufficient time to ensure the adequate testing of workflows. Specifically, a sufficient amount of time is also needed for firms to analyze, code and extensively test their and the trade repositories' build. Our experience in several jurisdictions has shown that implementations that were rushed are more costly to build to given that compromises will need to be made which in turn lead to costly rework and remediation efforts while reducing the quality of trade data regulators receive. Accordingly, we believe that the Authorities should provide a period of at least six months between the effective and the compliance dates for any final regulations.

* *** *

Markit appreciates the opportunity to comment on the Authorities' proposed TR Rule. We would be happy to elaborate or further discuss any of the points addressed above. In the event you may have any questions, please do not hesitate to contact the undersigned or Salman Banaei at salman.banaei@markit.com.

Yours sincerely,

Marcus Schüler
Head of Regulatory Affairs

[8] Both are found at 39(3) of their respective releases.

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March 24, 2015

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

c/o Michael Brady
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British Columbia Securities Commission
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RE: CSA Staff Notices 91-101 *Derivatives: Product Determination* (the "Scope Rule") and 94-101 *Trade Repositories and Derivatives Data Reporting* (the "TR Rule");

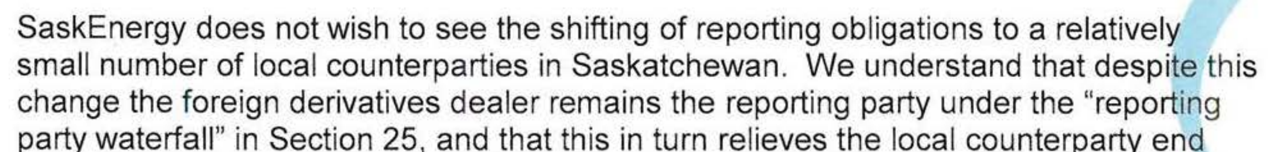
SaskEnergy Incorporated ("SaskEnergy") and TransGas Limited ("TransGas") welcome the opportunity to comment on Multilateral CSA Staff Notices 91-101 and 91-304.

About SaskEnergy and TransGas

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

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

1. Is it appropriate to exclude derivatives dealers from the definition of local counterparty?



SaskEnergy does not wish to see the shifting of reporting obligations to a relatively small number of local counterparties in Saskatchewan. We understand that despite this change the foreign derivatives dealer remains the reporting party under the "reporting party waterfall" in Section 25, and that this in turn relieves the local counterparty end

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user of that obligation. Accordingly, SaskEnergy and TransGas do not see any difficulties with this approach.

Section 25 of the TR provides:

> **Reporting counterparty**
> **25. (1)** The reporting counterparty with respect to a transaction involving a local counterparty is
> (a) if the transaction is cleared through a reporting clearing agency, the reporting clearing agency,
> (b) if paragraph (a) does not apply to the transaction and the transaction is between a derivatives dealer and a counterparty that is not a derivatives dealer, the derivatives dealer,
> (c) if neither paragraph (a) nor (b) applies to the transaction and the transaction is between a Canadian financial institution that is not a derivatives dealer and a counterparty that is not a Canadian financial institution or a derivatives dealer, the Canadian financial institution,
> (d) if none of paragraphs (a) to (c) apply to the transaction and the counterparties have, at the time the transaction occurs, agreed in writing that one of them will be the reporting counterparty, the counterparty determined to be the reporting counterparty under the terms of that agreement, and
> (e) in each other case, each local counterparty to the transaction other than an individual.
>
> **(2)** Each local counterparty to a transaction to which paragraph (1)(d) applies must keep a record of the written agreement referred to in paragraph (1)(d) for 7 years after the date on which the transaction expires or terminates.

2. Do you foresee any difficulties in counterparties agreeing as to who will be the reporting counterparty? If so, explain.

If parties do not agree upon where they fit on the "waterfall" in Section 25, then obtaining an agreement may be difficult.

For the most part, the guidance and explanation provided for various concepts has improved from one consultation paper to the next. However, the reporting party waterfall is largely dependent upon a determination of who is and is not a "derivatives dealer".

This is something a lot of parties are going to have to seek legal advice on, and somewhat speculative legal advice on, because there is no definition (or proposed definition) that allows for a ready answer.

To reduce cost and uncertainty, our preference would be that this concept be addressed with clear business triggers, and that this occur sooner rather than later. We would also like it made clear that, in determining whether a party is a derivatives dealer, exempt

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derivatives under the scope rule (e.g. physically settled commodity transactions) are not to be considered.

In terms of regulatory burden, we would like to see more "tie breakers" in the waterfall and less reliance on agreements amongst the parties. If you define derivatives dealer very broadly, for example, you could have a lot of very disparate market participants who meet that same criteria thus necessitating a multitude of negotiations on reporting, or duplicated reporting. If another layer of prioritization was added, i.e. derivatives dealers who are also financial institutions have the reporting obligation, or monetary threshold based distinctions, it would be helpful.

3. **Section 40 of the proposed TR Rule contemplates an exemption from trade reporting for commodity-based derivatives transactions that differs from the section 40 exemption in the existing TR rules in Manitoba, Ontario and Québec. The proposed TR Rule would exempt commodity-based transactions between two end-users provided each counterparty is below a threshold of $250,000,000 aggregate notional value, without netting, under all of its outstanding commodity-based derivatives transactions.**

The use of aggregate notional value, without netting, creates certainty in some respects. However, it also seems contrary to the practice in our industry of calculating exposures on a mark to market basis, with allowances for netting, as allowed under the ISDA Master Agreement and similar documentation. In most instances the notional value arguably has no reflection on the amount actually at risk, and therefore strikes a poor balance between systemic risk and regulatory burden. If a different methodology could be used that better reflects the aggregate amount at risk that would be preferable.

5. Subsections 1(4) and (5) of the proposed TR Rule include a harmonized interpretation of the terms "affiliated entity" and "control" that is different from the concept of "affiliate" that applies in the corresponding local rules in Manitoba, Ontario and Québec… . Is the TR Rule proposal appropriate?

SaskEnergy and TransGas do not object to the definitions as altered here. The TR Rule still provides for the reporting of inter-affiliate trade data. In a world of parental guarantees and consolidated financial statements, there are differences of opinion as to the value of this data in many instances, and it will not be released to the public in any event. Where any doubt exists that the benefits of the new regulatory regime will not warrant its cost, directly and indirectly, SaskEnergy would argue for some caution, some care, and potentially a narrower scope.

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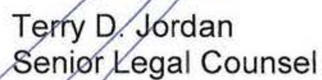
SaskEnergy and TransGas are thankful for the opportunity to provide these comments, and we hope they are of some assistance.

Respectfully submitted,

SASKENERGY INCORPORATED



Terry D. Jordan
Senior Legal Counsel

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Dean Reeve, Executive Vice President
Lori Christie, Executive Director, Gas Supply, Marketing & Rates
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March 24, 2015

VIA ELECTRONIC MAIL

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

c/o:
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Senior Legal Counsel, Capital Markets
British Columbia Securities Commission
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Vancouver, British Columbia
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mbrady@bcsc.bc.ca

Re: Proposed Multilateral Instrument 91-101 Derivatives: Product Determination and Proposed Multilateral Instrument 96-101 Trade Repositories and Derivatives Data Reporting

Dear Sir or Madam:

On behalf of The Canadian Commercial Energy Working Group (the "**Working Group**"), Sutherland Asbill & Brennan LLP hereby submits these comments in response to the request for public comment on (i) Proposed Multilateral Instrument 91-101 Derivatives: Product Determination (the "**Proposed Scope Rule**"), and (ii) Proposed Multilateral Instrument 96-101 Trade Repositories and Derivatives Data Reporting (the "**Proposed TR Rule**") (collectively the "**Proposed Reporting Rules**").[1] The Working Group welcomes the opportunity to provide comments on the Proposed Reporting Rules and looks forward to working with Canadian regulators to help finalize reporting rules responsive to the specific needs of the Canadian derivatives market.

[1] *See* CSA Multilateral Notice and Request for Comment (Jan. 21, 2015), *available at* http://www.albertasecurities.com/Regulatory%20Instruments/5042659-v1-CSA_Notice_and_RFC_on_Proposed_MI_91-101_and_96-101_91.101.pdf.

ATLANTA AUSTIN GENEVA HOUSTON LONDON NEW YORK SACRAMENTO WASHINGTON D.C.

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

I. INTRODUCTION.

The Working Group appreciates the regulatory authorities in Alberta, British Columbia, New Brunswick, Nova Scotia, and Saskatchewan (the "**Participating Jurisdictions**") publishing Proposed Reporting Rules that, in all but a few circumstances, are not materially different from the final reporting rules issued in Manitoba, Ontario, and Quebec.[2] In addition, the Working Group appreciates that the Proposed Reporting Rules' proposed regulatory paradigm mirrors the derivatives reporting paradigm in the United States, and thus may prevent unnecessary burdens on market participants. With a few changes, the Proposed Reporting Rules would establish a derivatives reporting paradigm that provides regulators with the necessary transparency into derivatives markets without imposing undue burdens on derivatives market participants.

II. COMMENTS OF THE WORKING GROUP.

A. The Participating Jurisdictions Should Provide Additional Guidance on Who Qualifies as a "Derivatives Dealer."

The Proposed TR Rule defines "derivatives dealer" as "a person or company engaging in or holding himself, herself, or itself out as engaging in the business of trading in derivatives as principal or agent."[3] The Proposed TR Rule's Companion Policy, however, does not provide additional guidance on the factors or the level of activity that would cause an entity to be deemed by the Participating Jurisdictions as "engaging in or holding himself, herself, or itself out" as a derivatives dealer. Without additional guidance, it is unclear who would qualify as a derivatives dealer for the purposes of the Proposed TR Rule.

Moreover, it is also unclear if the determination of whether an entity is a derivatives dealer for the purpose of the Proposed TR Rule is conducted on a transaction-level basis or if the analysis is based on an entity's derivatives activity in the aggregate. Said another way, if an entity is acting like a derivatives dealer with respect to a particular transaction, is it required to report that transaction as a derivatives dealer? Or, is the determination of whether an entity must report as a derivatives dealer for a particular transaction dependent on that entity's aggregate derivatives activity?

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[2] In each of Manitoba, Ontario, and Quebec, the corresponding rule to the Proposed Scope Rule is Rule 91-506 and the corresponding rule to the Proposed TR Rule is Rule 91-507.

[3] Proposed TR Rule at Section 1(1).

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The Proposed TR Rule's Companion Policy adds to the uncertainty when it states "the definition of 'derivatives dealer' in the Instrument does not require that a person or company be registered with the local securities regulatory authority in order to meet the definition. Accordingly, where the reporting counterparty to a transaction is a derivatives dealer, as defined in the Instrument, the reporting obligations with respect to the transaction apply irrespective of whether the derivatives dealer is a registrant in the local jurisdiction."[4] If this language and the current definition of "derivatives dealer" remain in place once derivatives dealer registration rules are finalized, there could be a conflict between the reporting rules and the registration rules.

As such, the Working Group views the statement above and the proposed definition of "derivatives dealer" as addressing two issues. *First*, stating that, under the Proposed TR Rule, registration as a derivatives dealer is not required for a person to be considered a derivatives dealer is necessary since there are currently no rules in place requiring relevant entities to register as a derivatives dealer.

Second, stating that, under the Proposed TR Rule, registration as a derivatives dealer in a particular province is not required for a person to be considered a derivatives dealer is necessary to effectuate the desired approach to the reporting hierarchy, without requiring derivatives dealers to register as such in each province where they have counterparties.

However, the Working Group is concerned that once the dealer registration rules are in place, the language cited above may be read to require an entity that is not registered as a derivatives dealer to report derivatives as if it were one, giving credence to the previously mentioned transaction-level approach and imposing regulatory burdens on entities not otherwise regulated as dealers.

The Working Group respectfully suggests that the proper analytic approach to determine who qualifies as a dealer is at the aggregate-level. A transaction-by-transaction determination would be difficult and burdensome to administer. As an initial matter, the Working Group recommends that, once final derivatives dealer registration rules are in place, the Participating Jurisdictions amend the definition of "derivatives dealer" in the Proposed TR Rule to capture only an entity that is registered or required to register as a derivatives dealer in a Canadian jurisdiction under the criteria to be set forth in the yet-to-be released final rules requiring derivatives dealer registration. In addition, the Participating Jurisdictions should indicate they plan on amending the Proposed TR Rule derivatives dealer definition in such a manner in the final version of the Proposed TR Rule.

In addition, to provide necessary clarity to market participants on how to conduct an aggregate-level derivatives dealer determination, the Participating Jurisdictions should provide a *de minimis* exception. Specifically, the Participating Jurisdictions should allow entities that engage in derivatives dealing below a certain level to avoid registration and reporting as a derivatives dealer. The Working Group understands that the Participating Jurisdictions will not be able to provide a *de minimis* exception until the registration rules are addressed, but requests that the Participating Jurisdictions do the following if they publish final reporting rules prior to

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[4] Proposed TR Companion Policy at Section 25(1).

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proposed registration rules: (i) indicate that they are planning on providing a *de minimis* exception in any final reporting rules; and (ii) provide an indication as to the order of magnitude of the level of the exception in any final reporting rules. Such an indication would allow market participants to better anticipate their potential derivatives reporting obligations.

B. The Proposed TR Rule's Public Dissemination Requirement Needs Amendments to Provide Market Participants Necessary Protection.

The Proposed TR Rule requires recognized trade repositories to make available to the public certain transaction-specific information for each derivatives transaction required to be reported under the Proposed Reporting Rules, such as underlying commodity, volume, and price.[5]

Pursuant to the Proposed TR Rule, depending on the counterparty, data must be publicly disseminated by either (i) the end of the day following the day on which a recognized trade repository receives the data, or (ii) by the end of the second day following the day on which a recognized trade repository receives the data.[6] The stated purpose of the public reporting delays is to "ensure that counterparties have adequate time to enter into any offsetting transaction that may be necessary to hedge their positions."[7]

The Proposed TR Rule, however, only provides the time frame by which the data must be publicly disseminated and does not provide a minimum time that the data must be held prior to public dissemination. As currently drafted, the Proposed TR Rule would allow a recognized trade repository to publicly disseminate the data as soon as it is received, which would defeat the purpose of the delay and, as discussed further below, would pose risks to market integrity similar to those seen in the United States.

As the Participating Jurisdictions are likely aware, a similar framework for real-time public dissemination was implemented in the United States under the Commodity Futures Trading Commission's ("**CFTC**") regulations.[8] That framework has raised a number of issues for market participants. U.S. market participants' primary concerns are related to the potential disclosure of the identity of counterparties and, in less liquid markets, exposure of counterparties to "front-running" of hedging activity by market participants and the possibility that the public transaction-level data will make it more difficult for counterparties to execute a desired trading strategy.

Specifically, the time delays provided in the CFTC's Real-Time Reporting Rules "are not sufficient for illiquid markets."[9] For example, the Treasurer of Southwest Airlines Co.

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[5] Proposed TR Rule at Section 39.

[6] *See* Proposed TR Rule at Section 39(3).

[7] Proposed TR Companion Policy at Section 39(3).

[8] The CFTC's regulations on real-time reporting are found in Part 43 of the CFTC Regulations, 17 C.F.R. Part 43 ("**CFTC's Real-Time Reporting Rules**").

[9] *See* Testimony of Chris Monroe, Treasurer of Southwest Airlines Co., Before the U.S. House of

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("**Southwest**") testified in a Congressional hearing that the inadequate reporting delays could cost Southwest $60 million in annual costs and stated that non-counterparty dealers "plainly were aware of trades [Southwest] had entered into…."[10]

The CFTC responded to these concerns by issuing a no-action letter, which provided a 15-day time delay for the public dissemination of certain swaps the CFTC deemed susceptible to the risk of "front-running."[11]

Finally, the Proposed TR Rule requires recognized trade repositories to ensure that their publicly disclosed data is anonymized.[12] Recognized trade repositories, however, are not required to determine whether anonymized published data could reveal the identity of a counterparty based on the terms of the transaction.[13] For example, disclosure of the value of trades with large notional values in certain commodities can provide enough information to the market so that hedging such transactions can become uneconomical.

As such, the Working Group respectfully requests that the Participating Jurisdictions provide a time before which transaction-level data may not be publicly disseminated. That time should be established based on the liquidity of the relevant commodity. The 15-day time delay provided to Southwest by the CFTC was for transactions in the WTI and Brent derivatives, both of which are considered relatively liquid markets, even at the two-year tenor covered by the CFTC's no-action relief. Accordingly, less liquid markets such as WCS may need longer delays, while more liquid markets like CAD Libor-based interest rate swaps may require shorter delays.

In addition, the Working Group respectfully requests that the Participating Jurisdictions provide trade repositories with additional parameters and guidance on how they must treat transaction-level data released to the public to ensure that "anonymized" data published by a trade repository does not reveal the identity of a counterparty to a large notional trade based on the terms of a transaction.

C. Differences Between the Proposed TR Rule's Reporting Hierarchy and Ontario's Reporting Hierarchy Must Be Resolved.

The Proposed TR Rule establishes a hierarchy to determine which counterparty to a derivatives transaction must report the data with respect to that transaction. That hierarchy is

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Representatives Committee on Agriculture, Subcommittee on General Farm Commodities and Risk Management at 2 (July 24, 2013), *available at* http://agriculture.house.gov/sites/republicans.agriculture.house.gov/files/pdf/hearings/Monroe130724.pdf.

[10] *Id.*

[11] CFTC No-Action Letter 14-134, Division of Market Oversight, *Time Limited No-Action Relief: Further Time Delay for Public Dissemination of Long-dated Brent and WTI Crude Oil Swap and Swaption Contracts Executed by or with Southwest Airlines* (Nov 6, 2014), *available at* http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-134.pdf.

[12] Proposed TR Rule at Section 39(4).

[13] Proposed TR Companion Policy at Section 39(4).

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workable for commercial energy firms and is consistent with the reporting rules in Manitoba and Quebec. However, portions of the proposed hierarchy are inconsistent with the Ontario Securities Commission's ("**OSC**") reporting rules.[14] Specifically, there are material differences with the OSC TR Rule and the Proposed TR Rule regarding the manner in which counterparties that are at the same level of the reporting hierarchy may assign reporting responsibility and allow the non-reporting counterparty to avoid regulatory liability.

Under the OSC TR Rule, reporting liability can only be avoided if the counterparties sign on to an International Swaps and Derivatives Association ("**ISDA**") multilateral agreement and adhere to the ISDA methodology.[15] Requiring the use of the ISDA methodology and execution of the ISDA multilateral agreement is an unworkable solution for many derivatives market participants.

In particular, to determine the reporting counterparty under the ISDA methodology, the counterparties must first look to their regulatory status under the CFTC's regulations to determine the reporting counterparty. If the counterparties have the same regulatory status in both Canada and the United States, then the counterparties would look to the ISDA methodology's "tie-breaker logic." For commodities-based derivatives, the "tie-breaker logic" would generally require the "seller" in a transaction to serve as the reporting counterparty.

ISDA's tie-breaker logic is likely not helpful for end-user counterparties that have the same regulatory status in Canada and the United States. Specifically, the tie-breaker language presupposes that both counterparties to a derivatives trading relationship are able to report derivatives to a trade repository, as the role of "seller" can switch back and forth between the counterparties from transaction to transaction. In trading relationships between two end-users, it is possible that one of the counterparties will not have the ability to report derivatives. As such, one counterparty may have to serve as the permanent reporting counterparty, eliminating the ISDA methodology as a viable choice and requiring the non-reporting counterparty to retain its reporting requirement liability under the OSC's TR Rule.

Under the Proposed TR Rule, however, counterparties with the same reporting hierarchy status have more flexibility because they may simply agree to assign the reporting liability to one of the counterparties by written contract. The Working Group respectfully requests that the Participating Jurisdictions provide further clarity on how a local counterparty's transactions would be impacted if the other party is a local counterparty in Ontario and subject to the ISDA methodology.

Given the differences between the OSC's TR Rule and the Proposed TR Rule, end-users without the ability to report derivatives transactions that involve local counterparties in Ontario are at a disadvantage when compared to how end-users in the Participating Jurisdictions would be treated under the Proposed TR Rule. As such, the Working Group requests that the regulators

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[14] The OSC's reporting rules are Rule 91-506 ("**OSC Scope Rule**") and Rule 91-507 ("**OSC TR Rule**") (collectively, the "**OSC Reporting Rules**").

[15] *Compare* Section 25 of the OSC TR Rule *with* Section 25 of the Proposed TR Rule.

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in the Participating Jurisdictions work with the OSC to amend the OSC's TR Rule to reflect the more flexible reporting hierarchy paradigm set forth in the Proposed TR Rule.

D. The Proposed TR Rule's Exclusion for End-Users from Reporting Trades of Commodity Derivatives Needs Clarification with Respect to the Threshold.

i. Overview.

The Proposed TR Rule provides end-users with two options to qualify for an exclusion from the reporting of commodity derivatives, if certain conditions are met. The Working Group welcomes the Participating Jurisdictions' proposed end-user exclusion from the reporting requirements and, with certain changes, Option 1 in Section 40 of the Proposed TR Rule could provide meaningful relief to commodity derivatives end-users.

The exclusion from reporting requirements under Option 1 applies between two end-users (*e.g.,* entities that are not derivatives dealers or Canadian financial institutions) if each counterparty to the transaction has, at the time of the transaction, outstanding commodity derivatives transactions with less than $250 million aggregate gross notional value, including the notional value related to the new transaction.[16]

Option 2 would apply between two end-users when the local counterparty has, at the time of the transaction, less than $500,000 aggregate gross notional value under all outstanding derivatives transactions, including the additional notional value related to that transaction. As previously noted by derivatives end-users, the threshold in Option 2 is too low to provide meaningful relief.[17] [18]

ii. The Notional Value Threshold.

The use of a notional value-based threshold in Option 1 raises two issues. *First,* the Proposed TR Rule does not provide guidance on how to calculate the notional value of commodity derivatives. The calculation of notional value for commodity derivatives is not as straightforward as it is for other derivatives. The notional value of commodity derivatives is a function of the notional volume of the underlying commodity and not a notional dollar amount, as used for other products.

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16 *See* Proposed TR Rule at Section 40; *see also* Proposed TR Companion Policy at Section 40.

17 Shell Energy North America (Canada) Inc., Shell Trading Company comment letter, *Canadian Securities Administrators ("CSA") Consultation Paper 91-301 Model Provincial Rules – Derivatives: Product Determination, and Trade Repositories and Derivatives Data Reporting* (February 4, 2013) *available at*: http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20130204_91-301_kerrp.pdf.

18 Suncor Energy Inc. comment letter, *Comment Letter to CSA Staff Consultation Paper 91-301 – Model Provincial Rules – Derivatives; Product Determination and Trade Repositories and Derivatives Data Reporting* (February 4, 2013) *available at*: https://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20130204_91-301_serrac.pdf.

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For example, the notional value of a $100 million interest rate swap is $100 million. However, the notional value of a swap based on 100,000 barrels of crude oil is a function of the price of that crude oil. With that in mind, the Working Group respectfully recommends the Participating Jurisdictions adopt the following approach for calculating the notional value of a derivative:

- For a fixed price for floating price commodity swap, the notional value would be the difference between the two prices at calculation * total volume of the contract.
- For a floating price commodity swap, the notional value would be the difference between the two prices at calculation * total volume of the contract.
- For an option, the notional value would be the premium * the total volume of the option.

Second, the use of a counterparty's gross notional value of outstanding commodity derivatives, at the time of execution of a transaction, as the relevant threshold for the reporting exclusion will be difficult to implement given the volatility in commodity prices. For example, a refiner that has the capacity to refine 2 million barrels of Canadian crude oil a month, or 24 million barrels a year, in its U.S. refineries could enter into WCS/WTI basis swaps[19] to hedge its crude oil needs for the next year throughout the current year. If the current price differential between WCS and WTI was $10, that entity would qualify for the proposed exclusion from reporting in the Proposed TR Rule since its notional value would be $240 million. However, if the differential between WCS and WTI reached $15 or even $11, that entity's notional value may no longer qualify for the proposed exclusion based solely on factors outside of its control. As such, if the refiner would like to access the full universe of available counterparties, it must build out its derivatives reporting infrastructure in anticipation of potentially losing the exclusion overnight.

To provide more effective relief for end-users, the Working Group recommends that the Participating Jurisdictions amend Option 1 to provide a reporting exclusion for transactions where each counterparty is a derivatives end-user that had commodity derivatives on its books at the end of each of the previous four calendar quarters with a total average of less than $250 million gross notional value. Once an end-user exceeds that threshold, it should be permitted one calendar quarter to prepare to operate without the exclusion or to get under the $250 million threshold. Such an approach will provide end-users with enough time and flexibility to make the relief provided by the proposed end-user exclusion from derivatives reporting meaningful.

To illustrate the concept, here is an example. Take an end-user with the following quarter-end gross notional values for the commodity derivatives on its books: Q1 2015-$250 million; Q2 2015-$230 million; Q3 2015-$260 million; Q4 2015-$250 million. This end-user would qualify for the exclusion since its total average is less than $250 million. If at the end of Q1 2016 the end-user has $290 million gross notional value of commodity derivatives on its

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[19] This could be done in connection with a NYMEX CL futures position to hedge both directional price risk and the basis risk between the two prices.

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books, the entity should be able to continue to qualify for the exclusion from reporting if it has less than $220 million gross notional value of commodity derivatives on its books at the end of Q2 2016. If it does not, it would lose the exclusion until its average gross notional value outstanding of commodity derivatives falls under $250 million.

E. The Compliance Timeline to Begin Reporting Derivatives Data Should Be Three Months After Derivatives Dealers Begin Reporting.

The Proposed TR Rule considers staggering compliance with reporting obligations such that derivatives dealers would begin reporting on a certain date followed by end-users beginning to report on a later date. The Working Group applauds the proposed staggered approach because it will allow recognized trade repositories to focus on onboarding a small set of market participants that will be obligated to report a vast majority of derivatives before focusing on end-users that will likely require more customer service resources to properly "on board" with trade repositories. This recommendation is a product of the Working Group's "lessons learned" from the implementation of reporting requirements in the United States where a short period of time between swap dealer and end-user compliance with regard to the reporting of commodity swaps resulted in the CFTC having to delay end-user compliance.

Given that trade reporting will likely be in effect for end-users in Manitoba, Ontario, and Quebec by the time the Proposed TR Rule becomes effective, the Working Group respectfully requests that the Participating Jurisdictions require end-users to begin reporting derivatives three months after derivatives dealers begin reporting.

III. Comments of the Working Group on Other Technical Issues.

A. Scope of Recordkeeping Requirements.

The text of the Proposed TR Rule requires the reporting counterparty to keep "transaction records," but the header of Section 36 of the Proposed TR Rule is "Records of data reported." As such, it is unclear whether the recordkeeping requirement in Section 36 of the Proposed TR Rule covers all data reported to a recognized trade repository or a subset of that data referred to in the rule as "transaction records."

The Working Group requests additional clarification on the scope of Section 36 of the Proposed TR Rule's recordkeeping requirement.

B. The Proposed TR Rule Should Provide Additional Guidance on How Data Will Be Made Available to Counterparties.

Under the Proposed TR Rule, recognized trade repositories must, among other things, provide each counterparty to a derivatives transaction access to all data relating to that transaction in a timely manner, regardless of whether the counterparties are participants of the recognized trade repository.[20] The Proposed TR Rule does not, however, discuss how a

[20] *See* Proposed TR Rule at Section 38(1).

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recognized trade repository should go about providing access to non-participants whose trades are reported to such recognized trade repository.

The Working Group respectfully requests additional guidance on how trade repositories should be required to provide access to data to all counterparties.

C. The Exclusion of Derivatives Contracts Traded on an "Exchange" Should Recognize and Include a Broader Universe of Regulated Trading Facilities.

The Proposed Scope Rule provides that derivatives traded on certain exchanges that are recognized by a securities regulatory authority or a recognized foreign exchange are excluded and thus, not subject to the requirements under the Proposed TR Rule. Notably, an "exchange" in this context of the Proposed Scope Rule would not include any of the following:

- a "swap execution facility," as defined in the Commodity Exchange Act (United States);
- a "multilateral trading facility," as defined by the European Parliament in the Markets in Financial Instruments Directive (MiFID);
- an "organized trading facility," as defined in Directive 2014/65/EU Article 4(1)(23) of the European Parliament; or
- any entity organized in a foreign jurisdiction that is similar to an entity described above.

As such, derivative transactions on the above facilities would be subject to the Proposed TR Rule. Reporting of such derivatives transactions may be difficult, unless the trading facility can be used to satisfy the required reporting obligations in each relevant Canadian jurisdiction.[21]

The Working Group respectfully requests that the Participating Jurisdictions recognize additional trading facilities as an "exchange" or provide other necessary compliance relief, in order to avoid imposing unnecessary reporting obligations on Canadian entities, which may limit their access to financial markets abroad.

IV. CONCLUSION.

The Working Group appreciates this opportunity to provide comments on the Proposed Reporting Rules and respectfully requests that the comments set forth herein are considered as any final legislation or regulations are drafted.

If you have any questions, please contact the undersigned.

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[21] Proposed Scope Rule at Sections 2(1)(g) and 2(2).

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Respectfully submitted,
/s/ R. Michael Sweeney, Jr.
R. Michael Sweeney, Jr.
Alexander S. Holtan
Lillian A. Forero

INCLUDES COMMENT LETTERS

March 24, 2015

BY EMAIL

Dear Sirs/Mesdames:

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

Michael Brady
Senior Legal Counsel, Capital Markets
British Columbia Securities Commission
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Re: CSA Multilateral Notice and Request for Comment Proposed Multilateral Instrument 91-101 *Derivative Product Determination* and Proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* (the "Proposed Amendments")

The Canadian Advocacy Council[1] for Canadian CFA Institute[2] Societies (the CAC) appreciates the opportunity to comment on and wishes to provide the following general comments on the Proposed Amendments.

We fully support the goals of increased transparency and the ability to manage potential systemic risk in the over-the-counter derivatives market.

The five participating Authorities have indicated in the Notice accompanying the Proposed Amendments that they intend to harmonize the Proposed Amendments, to the extent possible, with the existing rules relating to derivatives product determination and trade repositories in Manitoba, Ontario and Quebec. We understand that the Authorities are somewhat constrained in their ability to harmonize the definitions of "derivative" and

[1]The CAC represents the 14,000 Canadian members of CFA Institute and its 12 Member Societies across Canada. The CAC membership includes portfolio managers, analysts and other investment professionals in Canada who review regulatory, legislative, and standard setting developments affecting investors, investment professionals, and the capital markets in Canada. See the CAC's website at http://www.cfasociety.org/cac. Our Code of Ethics and Standards of Professional Conduct can be found at http://www.cfainstitute.org/ethics/codes/ethics/Pages/index.aspx.

[2] CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion for ethical behavior in investment markets and a respected source of knowledge in the global financial community. The end goal: to create an environment where investors' interests come first, markets function at their best, and economies grow. CFA Institute has more than 119,000 members in 147 countries and territories, including 112,000 CFA charterholders, and 143 member societies. For more information, visit www.cfainstitute.org.

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"security" in the Proposed Amendments as a result of existing differences in the securities legislation of each jurisdiction. However, participants in the over-the-counter markets operate on a national basis, where transactions cross provincial borders on a regular basis, and different definitions impose additional costs and administrative burdens on reporting counterparties. It is important for the efficiency of our capital markets, and in order to avoid regulatory arbitrage, that the financial instruments subject to the over-the-counter derivatives reporting regime be the same in each Canadian jurisdiction. Harmonization is particularly important for counterparties located in a jurisdiction outside of Canada in order to ensure compliance.

In addition to the legislative differences (changes to which we acknowledge involve a lengthy process), the Proposed Amendments also contain specific proposals which differ considerably from the existing rules in the three provinces noted above. These differences are particularly noticeable with respect to the proposed reporting waterfall provisions and the trade reporting exemption for derivatives based on commodities.

It is our understanding that the draft rules in Manitoba, Ontario and Quebec were amended numerous times in order to address comments from market participants who were concerned, among other things, about potential double reporting of over-the-counter derivative trades in two Canadian jurisdictions. While improvements might still be made to the rules already in force, the Proposed Amendments raise similar issues to the original draft rules in the other provinces and could result in inconsistent reporting requirements. It is important that in the event the two counterparties are in different Canadian jurisdictions that one party is able to report on the other's behalf. In particular, we are concerned about potentially inconsistent reporting requirements for two local counterparties who are neither derivatives dealers nor Canadian financial institutions. The Proposed Amendments would provide that if the counterparties do not agree in writing who will report, then each local counterparty will be a reporting counterparty, resulting in double reporting. As set out in the Notice, the corresponding provision in Ontario requires the reporting counterparty to be determined pursuant to ISDA methodology, which we believe provides certainty and is well understood by market participants. A different rule requiring two reports will lead to added expense for reporting counterparties, as well as an inaccurate data base on the size of the over-the-counter derivatives market in Canada.

The Proposed Amendments provide an exemption from reporting trades of commodities derivatives if, at the time of execution, the counterparty's aggregate notional exposure under all contracts based on commodities, other than cash or currency, is less than $250 million. We believe that a number of companies who trade in over-the-counter derivatives where the underlying asset is a commodity may still do for financial purposes (and not hedging purposes) at amounts far lower than $250 million, and thus such financial transactions should be reportable as they currently are in Manitoba, Ontario and Quebec.

With respect to the data that will be collected or made available to the marketplace, we are of the view that robust data collection should allow for more assessment of the level of speculation in the market and, ultimately, risk.

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Finally, with respect to the trade repository rules, we agree that the draft rules relating to regulation and oversight are robust and will help ensure that recognized trade repositories operate in a transparent manner and in a way that will promote the public interest. The proposed three month period for trade repositories to seek and obtain recognition should be sufficient, since any entity that is either already operating as a trade repository or sophisticated enough to qualify would likely be preparing its application well in advance of the publication of the final rules. Ideally, the Proposed Amendments would impose the same recognition requirements on trade repositories already recognized in another Canadian jurisdiction, to minimize the administrative burden that would result in having to deal with a different trade repository by those market participants already reporting their trades.

Concluding Remarks

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

(Signed) *Cecilia Wong*

Cecilia Wong, CFA
Chair, Canadian Advocacy Council

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The Exchange Tower
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March 24, 2015

VIA EMAIL: mbrady@bcsc.bc.ca

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

c/o: Michael Brady
Senior Legal Counsel, Capital Markets
British Columbia Securities Commission
P.O. Box 10142 Pacific Centre
701 West Georgia Street
Vancouver, British Columbia V7Y 1L2

RE: Proposed Multilateral Instrument 91-101 *Derivatives: Product Determination* and Related Companion Policy 91-101 *Derivatives: Product Determination.*

Dear Mr. Brady:

TMX Group Limited ("**TMX Group**") welcomes the opportunity to comment on the proposed Multilateral Instrument 91-101 *Derivatives: Product Determination* and Related Companion Policy 91-101: *Derivatives: Product Determination* ("**MI 91-101**" or the "**Instrument**") published by the Alberta Securities Commission (the "**ASC**"), the British Columbia Securities Commission, the Financial and Consumer Affairs Authority of Saskatchewan, the New Brunswick Financial and Consumer Services Commission and the Nova Scotia Securities Commission (the "**Authorities**") on January 21, 2015 (the "**Notice**"). TMX Group is supportive of the proposed Instrument; particularly of the fact that the proposed Instrument will help create alignment across provinces, as the Instrument is substantially similar to the existing local rules in Manitoba, Ontario and Québec[1]. Additionally, TMX Group is

[1] The securities regulatory authorities in Manitoba, Ontario and Québec published local rules in each respective province, namely (collectively, the "**Existing Scope and TR Rules**"): (i) Ontario Securities Commission ("**OSC**") Rule 91-506 *Derivatives: Product Determination* and the corresponding OSC Rule 91-507 *Trade Repositories and Derivatives Data Reporting*; (ii) Manitoba Securities Commission ("**MSC**") Rule 91-506 *Derivatives: Product Determination* and the corresponding MSC Rule 91-507 *Trade Repositories and Derivatives Data Reporting*; and (iii) Authorité des marchés financiers ("**AMF**") Regulation 91-506 Respecting Derivatives Determination and the corresponding AMF Regulation 91-507 respecting trade repositories and derivatives data reporting.

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supportive that the Authorities are proposing to implement a national instrument to harmonize all local rules across provinces[2].

The Notice has asked for comments regarding the Instrument, specifically whether it provides sufficient clarity regarding the contracts and instruments that are subject to trade reporting, pursuant to the proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* ("**MI 96-101**"). TMX welcomes the opportunity to comment on this matter as we believe more clarity could be provided, in particular, to the language in relation to the exclusion of certain contracts that fall within the definition of "derivative", for the purposes of the Instrument. As a result, we are proposing a slight change to the language in section 2(1)(g) of the Instrument in order to bring more clarity to the Instrument.

1. Proposed Amendment to MI 91-101

TMX Group submits a proposed technical amendment be made to section 2(1)(g) of MI 91-101. We are proposing this amendment to better clarify the intent behind this proposed exclusion. We propose the following language would more accurately align with the intent and purpose of the proposed Instrument:

Excluded derivatives

2(1) The specified instrument does not apply to a contract or instrument that is a derivative, if the contract or instrument is one or more of the following:

...

(g) traded on or subject to the rules of an exchange that is:

(i) recognized by a securities regulatory authority,
(ii) exempt from recognition by a securities regulatory authority, or
(iii) regulated in a foreign jurisdiction by a signatory to the International Organization of Securities Commissions' Multilateral Memorandum of Understanding.

2. Reasoning for the Proposed Amendment

TMX Group is submitting this amendment to section 2(1)(g) of MI 91-101 for two reasons, as follows:

A. it preserves the intent of the proposed Instrument; and
B. it is consistent with international regulations.

Each of the two reasons is further described below.

[2] At the Canadian Securities Regulators "Proposed New Derivatives Rules" webinar, held on February 26, 2015, regulators stated that their intent is to harmonize all the local laws (once MI 91-101 and MI 96-101 are finalized) into a national instrument.

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A. Preserves the Intent of the Proposed Instrument

MI 91-101 and MI 96-101 is an opportunity for the Authorities to appropriately enhance the oversight of the derivatives marketplace, and particularly the over-the-counter ("**OTC**") derivatives marketplace. This oversight will ultimately create better protection for investors.

TMX is supportive of the effect that MI 91-101 and MI 96-101 will have, and welcomes the addition of these rules to the OTC derivatives market. The derivatives that are traded OTC and are not subject to rules of an exchange do not allow the Authorities the requisite transparency, surveillance and oversight of the Canadian marketplace.

TMX Group also recognizes the purpose of the exclusions found in MI 91-101: if a derivative is traded on a recognized exchange, the requirement for timely market data is already met, thus making the requirement to report such trades under MI 96-101 redundant. From a policy perspective, the carve-out in MI 91-101 also includes any OTC transactions that: meet or exceed specified volumes, are entered into the exchange, and are subject to the rules of a recognized exchange ("**Block Transactions**"). Block Transactions are subject to the rules of the applicable recognized exchange, including market surveillance and oversight, and are disclosed to Canadian regulators in the same manner as screen-traded transactions. Block Transactions are exempt from the reporting requirements under the Existing Scope and TR Rules. TMX Group understands that the application of MI 91-101 and MI 96-101 is intended to be as harmonious as possible with the application of the Existing Scope and TR Rules.

B. Consistent with International Regulations

The proposed amendment will not only provide more clarity to MI 91-101 and better reflect the policy considerations underlying the Instrument, but it will also harmonize with the approach implemented by other predominant foreign commodities regulators. By way of example, pursuant to the *Commodity Exchange Act* (the "**CEA**"), Block Transactions are considered to be "exchange" transactions. Section 4(a) of the CEA provides that it is illegal to offer to execute, to confirm or conduct any business in the United States for the purpose of soliciting or accepting any order for, or otherwise dealing in, any transaction in, or in connection with, a contract for the purchase or sale of a commodity for future delivery unless:

> "such transaction is conducted on or subject to the rules of a board of trade which has been designated by or registered by the Commission as a contract market or derivatives transaction execution facility for such commodity"[3]

Thus, so long as a Block Transaction is subject to the rules of a board of trade which is designated by or registered by the Commodity Futures Trading Commission, such transaction is considered an "exchange" transaction, that is, a transaction conducted subject to the rules of a contract market.

As Block Transactions are considered "exchange" transactions in other predominant foreign commodity marketplaces, we propose the above-noted amendment to the Instrument to provide comfort that this

[3] For the full section, please see section 4(a)(1) of the CEA.

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treatment of Block Transactions may continue across markets and this will minimize the potential for confusion, particularly in the context of energy and other markets that operate on a North American and global basis. TMX Group views the proposed amendment as an important one, as the derivatives energy market effectively functions as "one market" and different rules would lead to market confusion and potentially regulatory arbitrage.

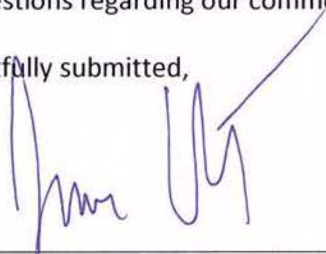
TMX Group urges the Authorities to make a slight amendment to the proposed language found at section 2(1)(g) of MI 91-101 as this would appropriately support the intent and purpose of the proposed Instrument, as well as be consistent with regulations in other major markets.

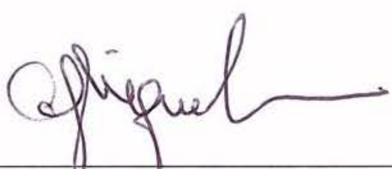
3. Harmonized Approach

Finally, as noted above, TMX Group is pleased that the Authorities are proposing to implement MI 91-101 and MI 96-101 as a national instrument which will provide uniformity across provinces.

TMX Group appreciates the opportunity to provide comments with respect to MI 91-101. We hope that you will consider our suggestion and we would be happy to discuss this matter at greater length. Please feel free to contact Danielle Grover, Legal Counsel, TMX Group at danielle.grover@ngx.com if you have any questions regarding our comments.

Respectfully submitted,





James Oosterbaan President Natural Gas Exchange Inc. Group Head of Energy	Alain Miquelon President and Chief Executive Officer Montréal Exchange Group Head of Derivatives

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TransCanada
450 – 1st Street SW, Calgary, Alberta, Canada T2P 5H1

TransCanada
In business to deliver

March 25, 2015

DELIVERED VIA ELECTRONIC MAIL

Alberta Securities Commission
British Columbia Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

c/o:
Michael Brady
Senior Legal Counsel, Capital Markets
British Columbia Securities Commission
mbrady@bcsc.bc.ca
P.O. Box 10142 Pacific Centre
701 West Georgia Street
Vancouver, British Columbia V7Y 1L2

Dear Sirs/Mesdames:

RE: CSA Multilateral Notice and Request for Comment dated January 21, 2015 with respect to Proposed Multilateral Instruments 91-101 *Derivatives Product Determination* and 96-101 *Trade Repositories and Derivatives Data Reporting*

TransCanada Corporation (**TransCanada**) is pleased to submit its comments in response to:

- Proposed Multilateral Instrument 91-101 *Derivatives Product Determination* (the **Proposed Scope Rule**);
- Proposed Companion Policy 91-101 *Derivatives: Product Determination* (the **Proposed Scope CP**);
- Proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* (the **Proposed TR Rule**); and
- Proposed Companion Policy 96-101 *Trade Repositories and Derivatives Data Reporting* (the **Proposed TR CP**),

(collectively, the "**Proposed Rules**") as published and solicited for comments by staff of the Alberta Securities Commission, the British Columbia Securities Commission, the Financial and Consumer Affairs Authority of Saskatchewan, the New Brunswick Financial and Consumer Services Commission and the Nova Scotia Securities Commission (each, an **Authority** and collectively, the **Authorities**).

TransCanada appreciates the opportunity to provide its comments on the Proposed Rules. The comments below are provided with the goals of achieving effective regulatory oversight of the OTC market while not unduly burdening market participants and ensuring that the Proposed Rules contain the necessary clarity to be effectively applied. TransCanada's comments include:

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- Clarification that transactions that use Net Settlement Instructions are commodity contracts with the intention to physically deliver and are exempt under the Proposed Scope Rule section 2(1)(d)(i);
- Clarification that retail electricity contracts that provide for a true-up mechanism (as described below) are commodity contracts with the intention to physically deliver and are exempt under the Proposed Scope Rule section 2(1)(d)(i);
- Clarification that natural gas storage service contracts are not considered to be derivatives contracts and therefore not subject to trade reporting;
- Clarification with respect to the definition of a “derivatives dealer”;
- A suggested transitional period of 1 year between the date on which the Proposed TR Rule becomes effective and the date that the first reporting obligations will apply; and
- Transactions between a parent company and its wholly owned subsidiaries or between entities that are wholly owned by a common parent should not be subject to trade reporting,

all as more fully described below.

I. TransCanada

With more than 60 years’ experience, TransCanada is a leader in the responsible development and reliable operation of North American energy infrastructure including natural gas and liquids pipelines, power generation and gas storage facilities. TransCanada operates a network of natural gas pipelines that extends more than 68,000 kilometres, tapping into virtually all major gas supply basins in North America. TransCanada is one of the continent's largest providers of gas storage and related services with 368 billion cubic feet of storage capacity. A growing independent power producer, TransCanada owns or has interests in over 11,800 megawatts of power generation in Canada and the United States. TransCanada is developing one of North America's largest liquids delivery systems.

TransCanada constructs and invests in large infrastructure projects, purchases and sells energy commodities, issues short-term and long-term debt, including amounts in foreign currencies, and invests in foreign operations. These activities expose the company to market risk from changes in commodity prices, foreign exchange rates and interest rates. TransCanada uses derivatives as part of its overall risk management strategy to assist in mitigating the impact of these market risk exposures.

TransCanada would like to take this opportunity to provide the Authorities with some information related to Alberta’s electricity and natural gas markets and our operations within those markets. These commodities and market structures create unique challenges with respect to derivatives regulation, and these comments are provided in an effort to develop a mutual understanding of these challenges.

II. Alberta Electricity Market Overview

Central to Alberta’s electricity market is the Alberta Electric System Operator (**AESO**) who operates a “Power Pool” into which all electricity generated within or imported into Alberta is sold, and from which all electricity consumed in or exported from Alberta is purchased (with the exceptions of behind-the-fence generation and facilities not connected to the Alberta Interconnected Electric System, or AIES). The Power Pool therefore operates as a real-time spot market for the physical exchange of bulk wholesale electricity, matching demand with the lowest priced supply to establish an hourly pool price for all electricity exchanged through the pool during that hour. Due to the restrictions imposed by the Power Pool structure, most market participants cannot actually ‘deliver’ physical electricity – this can only be done by owners of Alberta’s electric transmission and distribution systems.

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Net Settlement Instructions

Since Alberta's electricity market uses the Power Pool structure, it does not permit bilateral point-to-point transactions of wholesale electricity as found in some other markets. However, in order to replicate this type of transaction, electricity market participants are permitted to use "Net Settlement Instructions" (**NSIs**) (under the AESO Rules) or "direct sales agreements" (under the *Electric Utilities Act* of Alberta (**EUA**)). NSIs allow electricity market participants to enter into forward physical contracts for the purchase and sale of electricity directly with other pool participants for an agreed quantity of power at a negotiated price over a specified period of time in the future. Due to the Power Pool structure, the "delivery" of the physical electricity subject to an NSI still occurs by the real-time exchange of electricity through the Power Pool.

Even though direct delivery of electricity from one counterparty to another counterparty in a transaction that uses NSIs is not possible due to the Power Pool's market structure, TransCanada believes that these transactions fit the nature of the exemption provided for in the Proposed Scope Rule under section 2(1)(d)(i). TransCanada kindly requests that the Authorities clarify in the Proposed Scope Rule or the Proposed Scope CP that NSIs and "direct sales agreements" as defined under the EUA are exempt from trade reporting.

Retail Electricity Contracts

Another aspect to Alberta's electricity market structure is that only transmission and distribution line owners can actually 'deliver' physical electricity to consumers, therefore all consumers must select a retailer to arrange for delivery of electricity from the Power Pool to the customer's meter through the transmission and distribution systems. Consumers may contract for their supply of electricity with such retailers at prices other than the hourly spot price, including at a fixed price.

Electricity is a unique commodity due to its physical nature. Electricity cannot be stored – at least not in a commercially practicable manner for consumers in Alberta. In addition, it is extremely difficult for any large electricity consumer to accurately forecast hourly electricity consumption over the term of a fixed price contract. These nuances create a need for fixed price retail electricity contracts to accommodate variations between contracted volumes and a consumer's actual consumption.

In order to manage the variations between contracted volumes and a consumer's actual consumption, retailers who offer fixed price contracts typically include financial true-up mechanisms in those contracts. These true-up mechanisms allow the retailer to provide the consumer with physical electricity volumes in excess of the fixed volume set by the contract; the retailer generally charges for excess electricity consumption at the prevailing Pool Price. When actual electricity consumption for the consumer falls short of the fixed volume contracted, the retailer will sell the excess volume back to the Power Pool (at Pool Price) on behalf of the consumer.

While these true-up mechanisms may be considered financial in nature, such mechanisms only serve the purpose of facilitating delivery of a physical commodity whose consumption cannot be accurately estimated and cannot be stored for future use. The mechanism is intended to account for (potentially frequent) minor variations from the contracted / permitted volume, or (very infrequent) unexpected and temporary large deviations from contracted / permitted volume. Although such true-up mechanisms permit some form of cash settlement, such provisions are industry standard and included in such contracts for practical and efficiency reasons due to the particular nature of the commodity (electricity). TransCanada believes that contracts of this nature fit within the description of commodities contracts, and are not subject to trade reporting pursuant to the exemption provided in the Proposed Scope Rule section 2(1)(d)(i). TransCanada kindly requests that the Authorities clarify in the Proposed Scope Rule or the Proposed Scope CP that these transactions are exempt from trade reporting.

III. Natural Gas Storage Services

TransCanada owns and operates two natural gas storage facilities in Alberta. These facilities accept physical natural gas from customers and store it in accordance with negotiated terms. Upon the expiration of the term, TransCanada delivers the physical gas back to the customer at the connecting pipeline. TransCanada's natural gas storage customers include utilities, aggregators, marketers, and producers who typically use gas storage services to provide

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supply security and operational balancing, as well as risk management and price arbitrage. TransCanada provides a service to these customers but does not take a commodity position, and these gas storage contracts do not involve investment, hedging or speculation by TransCanada.

There is no 'market' for TransCanada's gas storage services – in other words, contracts for TransCanada's gas storage services are not transacted on any exchange, and they do not involve brokers or swap dealers. Prices for gas storage services are negotiated by TransCanada and the counterparty on a deal-by-deal basis. While underlying commodity prices are a material input, the price of the gas storage service is not explicitly or solely based on any one underlying interest. Other factors such as delivery point, type of service, interruptions in adjacent / neighbouring transport service, and company-specific commercial factors all affect the negotiated price for natural gas storage. Natural gas storage contracts are non-standard contracts, and each contract is unique.

In accordance with the guidance regarding "Additional contracts not considered to be derivatives" in the Proposed Scope CP, TransCanada believes natural gas storage contracts fit the description of provision of a service, and therefore does not consider such contracts to be "derivatives" as defined in the *Securities Act* (Alberta). On this basis TransCanada does not consider such transactions to be subject to trade reporting and kindly requests the Authorities confirm the accuracy of this conclusion.

IV. Comments to Specific Questions Posed by the Authorities

Below are TransCanada's comments relating to certain specific questions posed by the Authorities with respect to the Proposed Rules.

<u>Contracts and Instruments Subject to Trade Reporting (question 1)</u>

TransCanada appreciates the inclusion of the Proposed Scope CP to aid in the understanding of the Proposed Scope Rule. We are, however, of the view that transferring some critical wording from the Proposed Scope CP into the Proposed Scope Rule itself would provide additional clarity and commercial certainty with respect to the contracts and instruments that are (or are not) subject to trade reporting. TransCanada suggests adding the following words to section 2(1)(d) of the Proposed Scope Rule:

> "or where cash settlement of a physical commodity contract is triggered by a termination right arising as a result of the breach of the terms of the contract or an event of default thereunder."

TransCanada also encourages the Authorities to move the list of "Additional contracts not considered to be derivatives" from the Proposed Scope CP to the Proposed Scope Rule to provide more clarity and commercial certainty on these particular exclusions.

<u>Embedded Optionality (question 2)</u>

TransCanada supports the notion that optionality embedded in an agreement to purchase a commodity for future delivery should not, in itself, result in the agreement being deemed to be a derivative. TransCanada suggests that in this section of the Proposed Scope CP, it would be appropriate to clarify that contracts such as retail electricity contracts that provide for a true-up mechanism do not negate the intention to deliver a physical commodity as discussed above.

We would also welcome clarification in the Proposed Scope CP that physical commodity contracts that allow for a zero delivery obligation fall within the exemption provided if the other factors relating to intent to physically delivery or receive the commodity are present. Certain operational considerations for end-users of electricity and natural gas may lead to situations where it is reasonable in the circumstances for a party to deliver or receive a zero quantity of the commodity on a given day or month (plant outages for significant maintenance for example). Allowing for a zero delivery obligation to fall within the provisions of the exemption for commodity contracts intended to be physically delivered meets the needs of end-users of such commodities who do not know their exact consumption requirements on a daily or hourly basis, but who wish to fix their commodity costs for periods when they do require the delivered commodity.

INCLUDES COMMENT LETTERS

Exclusion of Derivatives Dealers (question 4)

TransCanada respectfully submits that a fundamental issue affecting the question of whether a "derivatives dealer" should be excluded from the definition of a local counterparty is the lack of clarity surrounding the definition of a "derivatives dealer". Although beyond the scope of this letter, the current definition of derivatives dealer is vague and difficult to apply with certainty. In particular, it is not clear how the Authorities will define the concept of "engaging in the business of trading in derivatives", nor whether that concept will be applied on a transaction-specific basis or more generally based on the entity's collective business activities. The concept of being "in the business of trading in derivatives", that was borrowed from securities markets and lies at the heart of the derivatives dealer definition in the Proposed TR Rule, requires significant modification and clarification in the context of the derivatives markets. Derivatives markets are fundamentally different from securities markets in many key respects. Therefore, concepts applicable to securities markets, such as elements determinative of securities dealing activity, when applied with only nominal changes to elements intended to be determinative of derivatives dealing activity, are poorly suited to derivatives markets.

Additionally, TransCanada notes that this current definition also does not clearly state the jurisdiction in which an entity must be "…engaging in the business of trading in derivatives…". Adding this clarification would eliminate potential confusion in the future, and would be consistent with the multilateral instrument in effect in Manitoba, Ontario and Quebec.

End-user Commodity Transactions Exemption (question 9)

TransCanada appreciates the Authorities' efforts with respect to the proposed commodity reporting exemption in section 40 of the Proposed TR Rule. This threshold is significantly greater than the $500,000 amount in effect in Manitoba, Ontario, and Quebec, and the recognition of the need to increase the threshold is commendable. From a practical perspective however, it may be unlikely that many end-users could benefit from this exemption as it is unlikely that both counterparties to a transaction would fall below the $250 million threshold. It may be more common for end-users to be transacting with larger entities that do not qualify for the reporting exemption. TransCanada respectfully suggests that the Authorities consider making the reporting exemption available for transactions where only one counterparty to the transaction is below the $250 million threshold and neither party is a derivatives dealer given that the Authorities acknowledge that these small end-user transactions do not give rise to significant systemic risk.

TransCanada also notes certain practical considerations with respect to applying the proposed commodity reporting exemption which arise when trying to calculate a fluctuating aggregate notional value:

- If an entity temporarily exceeds the commodity reporting exemption threshold, at what point in time do the reporting requirements apply to that entity? Can the entity qualify for the exemption again at a later date if the aggregate notional value of outstanding commodity derivatives falls below $250 million?
- Is this exemption meant to be a 'snapshot in time" observation, or rather an average notional quantity calculated over a certain period of time?
- Does the $250 million aggregate notional value calculation include transactions entered into on an exchange, transactions with Canadian financial institutions, and transactions with affiliated entities?

With respect to whether the $250 million threshold is appropriate, TransCanada is concerned that the threshold amount remains too low and such a low threshold may result in reporting for derivatives users who pose little or no systemic risk. TransCanada respectfully requests that the Authorities provide details of the underlying analysis conducted to determine the $250 million threshold so that the methodology can be reviewed.

Finally, TransCanada respectfully requests that the Authorities consider allowing the aggregate notional value be calculated on a net basis of exposure for transactions executed with the same counterparty under the same master agreement. Incorporating this principle would more accurately reflect the true aggregate systemic risk created by individual users' derivatives transactions.

INCLUDES COMMENT LETTERS

Implementation and Transition Period (questions 10 & 11)

Significant time and resources will be required to perform analysis, develop processes and procedures and implement system changes to comply with the reporting requirements under the Proposed Rules. Counterparties must enter into agreements to designate who will be the reporting counterparty in accordance with the Proposed TR Rule under section 25(1)(d). In addition, trade repositories will have to seek and obtain recognition and implement a process to on-board entities in the affected provinces. Many of these changes cannot be initiated until the rules have been finalized. It is therefore important for the transitional provisions of each of the Proposed Rules to allow adequate time for companies to prepare. TransCanada suggests 1 year from the date final rules are released until trade reporting requirements commence. Any transition period of less than 1 year may have significant detrimental effects on the entities that will be affected by the obligations set out in the TR Rule. Staged implementation for reporting by derivatives dealers and others is not considered necessary if sufficient time is given between finalization of the Proposed Rules and the start of trade reporting.

V. Additional Comments

Inter-affiliate Trade Reporting Exemption

Since transactions between a parent company and its wholly owned subsidiaries or between entities that are wholly owned by a common parent company do not create systemic risk, TransCanada suggests that such transactions should not be subject to the reporting requirements set out in the Proposed Rules. This inter-affiliate reporting exemption would be consistent with both the requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act in the US and the clearing exemption available for transactions between affiliated entities under Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives*. TransCanada also notes that section 41 of the Proposed TR Rule provides an exemption for reporting trades between a government and a crown corporation that forms part of a consolidated entity within that government. The same exemption should be afforded to other non-government affiliated entities that are a parent company and a wholly owned subsidiary or between affiliated entities which share a common parent since no systemic risk is created within such an arrangement. The webcast hosted by the Authorities on February 26, 2015 suggested an exemption could apply where the two entities are included within the same consolidated financial statements; however, TransCanada suggests that the test should be with respect to ownership (i.e., a parent company and a wholly owned subsidiary or two entities wholly owned by the same parent) as standalone entity financial reporting requirements may exist that would complicate a test based on financial reporting practices.

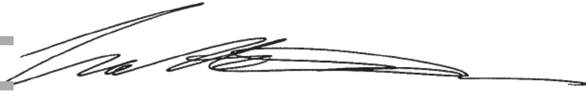
Reporting Timelines

TransCanada respectfully requests that the Authorities consider changing instances of the term "as soon as technologically practicable" appearing in the Proposed Rules. While technological limitations are an important factor in the process of reporting information to a trade repository, such limitations are neither the only factor nor, arguably, the most important / limiting factor. Despite clarifications in the Proposed TR CP (notably sections 26(8) and 31(2)), by definition the phrase "as soon as technologically practicable" suggests that reporting be done as soon as the fastest available technology allows – it does not permit consideration of intermediary administrative steps on behalf of the derivatives user or consideration of costs. By definition, it is also inconsistent with the guidance offered in the Proposed TR CP. TransCanada submits that use of terms such as "as soon as commercially reasonable" or "as soon as reasonably practicable" would allow for a suitably realistic timeframe, and would better describe the expectations as elicited in the Proposed TR CP.

TransCanada hopes these comments will be useful to the Authorities in their deliberations. If you have any questions or would like to discuss any of these matters, please do not hesitate to contact the undersigned.

INCLUDES COMMENT LETTERS

Sincerely,



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