EVERSHEDS
SUTHERLAND

March 1, 2019

<u>**VIA ELECTRONIC MAIL**</u>

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor, Box 55
Toronto, Ontario
M5H 3S8
comments@osc.gov.on.ca

Re: Comments in Response to OSC Staff Notice 11-784 *Burden Reduction*

Dear Sir or Madam:

I.   INTRODUCTION

On behalf of The Canadian Commercial Energy Working Group (the "**Working Group**"), Eversheds Sutherland (US) LLP submits this letter in response to the request for public comment from the Ontario Securities Commission ("**OSC**") in OSC Staff Notice 11-784 *Burden Reduction* ("**OSC Staff Notice 11-784**").[1] Specifically, the Working Group's comments herein focus on burden reduction under OSC Rule 91-507 *Trade Repositories and Derivatives Data Reporting* ("**OSC TR Rule**").

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

II.   COMMENTS OF THE WORKING GROUP

The Working Group appreciates that the OSC has continued to reexamine its rules and commends the OSC for its efforts. However, the OSC TR Rule still raises a few issues for commercial energy companies doing business in Canada, which results in unnecessary burdens. Those issues include: (i) harmonization of reporting counterparty liability; and (ii) the threshold to qualify for the exclusion from reporting commodity derivatives.

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[1]   *See* OSC Staff Notice 11-784 *Burden Reduction* (Jan. 14, 2019), http://www.osc.gov.on.ca/documents/en/Securities-Category1/sn_20190114_11-784_burden-reduction.pdf.

A. **The OSC Should Harmonize Its Reporting Counterparty Liability Structure with That of the MI TR Rule, the MSC TR Rule, and the AMF TR Rule.**

The Working Group respectfully requests that the OSC harmonize the reporting counterparty liability structure in the OSC TR Rule with that of the MI TR Rule,[2,3] the MSC TR Rule,[4] and the AMF TR Rule.[5]

Under the OSC TR Rule, if both counterparties to a derivatives transaction have the same regulatory status (*e.g.*, non-dealer), the only way for the non-reporting counterparty to avoid regulatory liability in the event the reporting counterparty fails to report the transaction is for both counterparties to execute the ISDA Agreement and adhere to the ISDA Methodology.[6]

In contrast, under the MI TR Rule, the MSC TR Rule, and the AMF TR Rule, if both counterparties to a derivatives transaction have the same regulatory status (*e.g.*, non-dealer) the non-reporting counterparty would not retain any regulatory liability if reporting responsibility is assigned by written agreement. Execution of the ISDA Agreement and adherence to the ISDA Methodology is not required (i) to assign reporting responsibility to one counterparty or (ii) for the non-reporting counterparty to avoid regulatory liability if the reporting counterparty fails to report the transaction.[7]

In comparison to the OSC TR Rule, the MI TR Rule, the MSC TR Rule, and the AMF TR Rule provide necessary flexibility that allows delegation of reporting responsibility in manner that is more workable than under the ISDA Agreement and ISDA Methodology. For example, reliance on the ISDA Methodology's tie-breaker logic may not be helpful for non-dealer 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 transaction 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. However, in trading relationships between two non-dealers, 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 liability. This would generally be an unfavorable outcome for both counterparties.

For these reasons, the Working Group respectfully requests that the OSC harmonize its reporting counterparty liability structure with the MI TR Rule, the MSC TR Rule, and the AMF TR Rule. Doing so would harmonize the reporting counterparty liability structure across provinces and reduce the associated reporting burdens.

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[2]   MI 96-101 *Trade Repositories and Derivatives Data Reporting* ("**MI TR Rule**").

[3]   Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan, and Yukon are collectively, the "**MI Jurisdictions**".

[4]   MSC Rule 91-507 *Trade Repositories and Derivatives Data Reporting* ("**MSC TR Rule**").

[5]   AMF Regulation 91-507 *Respecting Trade Repositories and Derivatives Data Reporting* ("**AMF TR Rule**").

[6]   *See* OSC TR Rule at Section 25.

[7]   *See* MI TR Rule at Section 25; MSC TR Rule at Section 25; AMF TR Rule at Section 25.

B. **The Exclusion from Reporting Derivatives Data of Commodity Derivatives Should Be Increased.**

The OSC TR Rule provides end-users with an exclusion from the reporting of commodity derivatives, if certain conditions are met.[8] Specifically, the exclusion applies 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.[9,10] However, as previously noted by derivatives end-users, the threshold in this exclusion is too low to provide meaningful relief from the reporting burdens.[11,12] As such, the Working Group respectfully requests for the OSC to increase the threshold to at least $250 million, which would be consistent with the exclusion from reporting derivatives data of commodity derivatives in the MI TR Rule.[13]

III. **CONCLUSION**

The Working Group appreciates this opportunity to provide input to the OSC and respectfully requests that the comments set forth herein are considered.

If you have any questions, please contact the undersigned.

Respectfully submitted,
/s/ Alexander S. Holtan
Alexander S. Holtan
Blair Paige Scott

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[8]   *See* OSC TR Rule at Section 40.

[9]   *See* OSC TR Rule at Section 40.

[10]   Regarding the calculation of notional amount, Working Group has previously submitted comments to provide suggested approaches. *See, e.g.*, The Canadian Commercial Energy Working Group Comments on CPMI-IOSCO Batch Three Report (Sept. 2017), https://www.bis.org/cpmi/publ/comments/d160/tccewg.pdf; The Canadian Commercial Energy Working Group Comment Letter on Proposed Multilateral Instrument 91-101 *Derivatives: Product Determination* and Proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* (Mar. 24, 2015), http://www.albertasecurities.com/Regulatory%20Instruments/5042659-v1-CSA_Notice_and_RFC_on_Proposed_MI_91-101_and_96-101_96.101.pdf.

[11]   Shell Energy North America (Canada) Inc., Shell Trading Company Comment Letter, *CSA Paper 91-301 Model Provincial Rules – Derivatives: Product Determination, and Trade Repositories and Derivatives Data Reporting* (Feb. 4, 2013), http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20130204_91-301_kerrp.pdf.

[12]   Suncor Energy Inc. Comment Letter, *CSA Staff Consultation Paper 91-301 – Model Provincial Rules – Derivatives; Product Determination and Trade Repositories and Derivatives Data Reporting* (Feb. 4, 2013), https://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20130204_91-301_serrac.pdf.

[13]   *See* MI TR Rule at Section 40.