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Canadian Market
Infrastructure Committee

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

November 30, 2020

Dear Sirs/Mesdames:

Re: Proposed Amendments[1] (the "Proposed Amendments") to National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* ("NI 94-101") and Related Companion Policy (the "Companion Policy")

INTRODUCTION

CMIC is pleased to provide this comment letter on the Proposed Amendments.

CMIC was established in response to a request from Canadian public authorities,[2] to represent the consolidated views of certain Canadian market participants on proposed regulatory and legislative changes in relation to over-the-counter ("**OTC**") derivatives. 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, but not limited to, both domestic and foreign owned banks operating in Canada as well as major Canadian institutional market participants, including a number of major pension funds, in the Canadian derivatives market.

[1] Published September 3, 2020.

[2] "Canadian public authorities" means representatives from Bank of Canada, Canadian Securities Administrators, Department of Finance and The Office of the Superintendent of Financial Institutions.

GENERAL COMMENTS

CMIC is supportive of the main policy objective of the Proposed Amendments to ensure that certain entities are not unintentionally subject to the rules, while ensuring that entities that might present systemic risk when viewed with affiliated entities, are in scope for mandatory clearing. Specifically, we commend the approach taken by the Canadian Securities Administrators (the "**CSA**") to ensure that certain special purpose vehicles and investment funds would be subject to the mandatory clearing requirement only if, on their own, they exceed the $500 billion threshold under paragraph 3(1)(c). In addition, we strongly support the burden reduction measures taken by the CSA in removing the requirement to file a form in order to rely upon an intragroup exemption and by reducing the monitoring frequency of the thresholds under paragraphs 3(1)(b) and (c) of NI 94-101.

EFFECTIVE DATE OF PROPOSED AMENDMENTS

Once the Proposed Amendments have been finalized and adopted by regulators in each province and territory, market participants will need time to conduct a client outreach in order to determine which counterparties are in scope for mandatory clearing based on the new methodology for determining whether a party is above the applicable thresholds under paragraphs 3(1)(b) and (c). The vast majority of market participants will be using ISDA's Canadian Clearing Classification Letter (the "**ISDA Classification Letter**") to conduct their client outreach. Once the Proposed Amendments come into force, the ISDA Classification Letter needs to be updated to take into account the changes set out in the Proposed Amendments. After that, market participants will need at least six months to complete their client outreach. Accordingly, CMIC recommends that the current exemption for counterparties specified in paragraphs 3(1)(b) and (c) be extended for a nine month transition period after the date the Proposed Amendments come into force.

INTRAGROUP EXEMPTION

As noted above, CMIC fully supports the removal of the requirement to deliver a completed Form 94-101F1 where parties wish to rely on the intragroup exemption. We also believe that two other conditions to the intragroup exemption under paragraph 7(1) of NI 94-101 should also be removed.

The first is the requirement under paragraph 7(1)(b) that both counterparties to the mandatory clearable derivative agree to rely on this exemption. It is unclear whether this agreement needs to be in writing but in CMIC's view, this condition should not be required since the mandatory clearable derivative is already required to be subject to a centralized risk management program reasonably designed to assist in the managing of risks associated with the derivatives between the counterparties. If the derivative is not cleared, by implication there is already an agreement between the counterparties that they are relying on this intragroup exemption. We do not believe that any kind of formal or specific agreement between the parties to rely on the intragroup exemption is necessary and only adds an additional burden in ensuring that satisfaction of this condition is documented internally.

The second is the requirement that there be a written agreement between the counterparties setting out the terms of the mandatory clearable derivative. It is unclear why a written agreement of the terms of the trade is a necessary condition for the parties to rely on this intragroup exemption. In our view, this requirement is already addressed under derivatives business conduct or other applicable rules[3] and it would be duplicative to include this requirement under NI 94-101. Further, we note that

[3] For example, see section 33 of the second draft of National Instrument 93-101 *Derivatives: Business Conduct* found here (the "draft Business Conduct Rules") and similar requirements under OSFI Guideline B-7 Derivatives Sound Practices found here.

under section 4 of the draft Business Conduct Rules, the CSA has already decided from a policy perspective that market participants should be exempt from the written agreement requirement with respect to inter-affiliate transactions. Accordingly, deleting this written agreement requirement under NI 94-101 would be consistent with the approach taken under the draft Business Conduct Rules and would also be consistent with other burden reduction measures being undertaken by regulators. If this condition is not removed, at the very least, it is CMIC's view that the Companion Policy should clarify that trade confirmations or other internal approvals of the terms of the trade would also be an acceptable form of "written agreement".

DRAFTING COMMENTS

We have two drafting suggestions for the Companion Policy.

For clarity, we suggest the following change be made to the 9th paragraph under "Section 3(1) – Duty to submit for clearing":

> For example, local counterparty XYZ has had an average month-end gross notional amount under all outstanding derivatives of $75 000 000 000 for the months of March, April and May of 2021. Counterparty XYZ has also had, combined with each of its affiliated entities that are local counterparties, a month-end gross notional amount for all derivatives of $525 000 000 000 at the end of November 2020. Considering that the aggregated month-end gross notional amount outstanding of $525 000 000 000 exceeds the $500 000 000 000 threshold and that it occurred during the previous 12 months, and that the average month-end gross notional amount of the $75 000 000 000 for March, April and May of 2021 exceeds the $1 000 000 000 threshold, counterparty XYZ will need to comply with the Instrument in respect of mandatory clearable derivatives entered into during the reference period September 1, 2021 to August 31, 2022. As such, a local counterparty that does not exceed, on its own, the $1 000 000 000 threshold is not required to clear even if the aggregated month-end gross notional amount outstanding with all of its affiliated entities exceeds the $500 000 000 000 threshold.

Under "Section 3(2) – 90 day transition", we suggest that the references to "subsection 3(1)" be changed to "subsection 3(1)(c)(ii)" to track the wording of the amended Section 3(2) of NI 94-101.

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:

Alberta Investment Management Corporation
Bank of America
Bank of Montreal
Bank of Tokyo-Mitsubishi UFJ, Ltd., Canada Branch
Canada Pension Plan Investment Board
Canadian Imperial Bank of Commerce
Citigroup Global Markets Inc.
Deutsche Bank A.G., Canada Branch
Fédération des Caisses Desjardins du Québec
Healthcare of Ontario Pension Plan Trust Fund
HSBC Bank Canada
Intact Financial Corporation
Invesco Canada Ltd.

JPMorgan Chase Bank, N.A., Toronto Branch
Manulife Financial Corporation
Morgan Stanley
National Bank of Canada
OMERS Administration Corporation
Ontario Teachers' Pension Plan Board
OPSEU Pension Plan Fund
Royal Bank of Canada
Sun Life Financial
The Bank of Nova Scotia
The Toronto-Dominion Bank