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March 21, 2022

VIA EMAIL

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

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1

Grace Knakowski
Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8

RE: CSA Notice and Third Request for Comment ("CSA Notice") in respect of Proposed National Instrument 93-101 *Derivatives: Business Conduct* (the "Business Conduct Rule") and Proposed Companion Policy 93-101CP *Derivatives Business Conduct* (the "Companion Policy")

Convera Canada ULC ("**Convera**", "**we**" or "**us**") appreciates the opportunity to comment on the Business Conduct Rule and the related Companion Policy. Capitalized terms used in this letter but not defined herein shall have the meanings ascribed to them in the CSA Notice, the Business Conduct Rule or the Companion Policy, as applicable.

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About Convera

Convera is a money services business registered with the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) and operating a foreign exchange and cross-border payment service in Canada. As part of that business, Convera currently offers OTC foreign exchange derivatives contracts which would be subject to the requirements of the Business Conduct Rule and the Companion Policy.

Convera's business consists of the former operations of Custom House ULC, which operated in Canada under the name Western Union Business Solutions. Convera acquired Custom House ULC's assets and operations on February 16, 2022, in connection with the sale by The Western Union Company of its Western Union Business Solutions division.

Comments

Convera is supportive of the CSA's attempts to ensure that a uniform approach to derivatives market conduct regulation is established in Canada.

With respect to the Business Conduct Rule and the Companion Policy, our comments are as follows:

1. **Commercial Hedger Category of "Eligible Derivatives Party" (EDP) Definition**

We are strongly supportive of the decision to eliminate the $10 million financial threshold for qualifying as a commercial hedger. This decision is consistent with the long-standing treatment of commercial hedgers of all sizes as either "accredited counterparties" in the Quebec Derivatives Act or as "qualified parties" in most of the provincial OTC derivatives blanket orders that are currently in effect.

In our experience, when commercial enterprises enter into derivatives contracts to hedge foreign exchange risk, they do so based on a detailed knowledge of their business needs and expectations. As such, these commercial enterprises are using OTC foreign exchange derivatives as a risk management tool and not for purposes of investment or speculation.

Because of the nature of our economy, Canadian businesses of all sizes have exposures to foreign currency risk. In our view, the $10 million financial threshold would have significantly reduced the ability of smaller companies to access vital foreign exchange hedging tools, as many derivatives dealers may not be willing or able to provide services to clients who will not qualify as Eligible Derivatives Parties.

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2. **Definition of "Derivatives Party Assets"**

In the Business Conduct Rule, the definition of "derivatives party assets" is provided as follows:

> "derivatives party assets" means any asset, including collateral, received or held by a derivatives firm from, for or on behalf of a derivatives party;

The Business Conduct Rule imposes certain obligations in respect of "derivatives party assets" including disclosures (Section 18), segregation (Section 24), reporting (Section 28), and recordkeeping (Section 34), and differentiates between "derivatives party assets" generally and "derivatives party assets" which are held as collateral or considered to be "initial margin."

We wish to reiterate prior comments made on the second draft of the Business Conduct Rule that the definition of "derivatives party assets" should be more precisely defined.

Many providers of OTC foreign exchange derivatives are also providers of payment services to their clients, and these clients may make use of their services in a complementary fashion. A broad definition of "derivatives party assets" increases the possibility of confusion and the potential for conflict with the proposed safeguarding requirements under the federal *Retail Payments Activities Act* to be administered by the Bank of Canada.

For example, a client may need to make a scheduled payment to a supplier in a foreign currency and might enter into an OTC derivative to hedge the foreign exchange risk associated with that payable. On the maturity date, the foreign currency would be credited to the client's payment account, available to fund the outgoing payment. Under the language in the Business Conduct Rule and the Companion Policy, these funds would be considered "derivatives party assets" because they are related to (proceeds of) an OTC derivative. However, those funds are no longer intended to be used for derivatives-related activity, and may also be subject to applicable safeguarding requirements applicable to client funds under the *Retail Payments Activities Act*.

We would suggest that the definition of "derivatives party assets" be revised to reflect only client assets held by a derivatives firm *as collateral* in respect of derivatives transactions or, if applicable, held by a derivatives firm *for investment purposes* on the part of the derivatives party. We believe that these are the circumstances where the CSA is focused on risks related to trading in OTC

derivatives and are areas which will not raise the potential for conflict with other regulatory regimes to which derivatives dealers may be subject.

At the very least, the definition of "derivatives party assets" in the Business Conduct Rule should be explicitly limited, consistent with the explanation provided in the Companion Policy, to assets which are held or received by a derivatives firm *in relation to derivatives transactions* to make it clear that funds held or received for unrelated purposes are not in scope.

3. Waivers and Fair Dealing

In the Companion Policy commentary on section 7 [Exemptions from certain requirements of this Instrument when dealing with or advising an eligible derivatives party] of the Business Conduct Rule, the CSA states that:

> We would consider it to be a breach of section 8 [Fair dealing] to put unreasonable pressure on any derivatives party to waive any requirements.

We would ask the CSA to provide greater clarity around what constitutes "unreasonable pressure" in this context and, in particular, to confirm that derivatives firms have the right to refuse to provide services to derivatives parties that are eligible commercial hedgers and that are unwilling to provide waivers required by the derivatives firm's operating model.

In its responses to the industry comments on the second draft of the proposed Business Conduct Rule, the CSA has emphasized repeatedly that the elimination of the $10 million financial threshold for commercial hedgers necessitates retaining various protections for commercial hedgers to the extent that commercial hedgers have not waived those protections.

With respect to documentation and systems development, derivatives dealers need certainty regarding the obligations which will be applicable based on their chosen operating models. Managing exceptions to standard processes is expensive, time-consuming, and presents the possibility of administrative or systemic errors. It would be reasonable for a derivatives firm to decide to limit its client base to EDPs and/or to eligible commercial hedgers who are willing to waive certain protections.

For example, in respect of section 20 [Daily reporting] prior commentators emphasized that daily marked-to-market valuations are not relevant for commercial hedgers and would be difficult to operationalize or explain, based on the availability of intra-day pricing. In the Companion Policy commentary on section 20, the CSA has indicated that it expects this information to be available in an electronic form such as through an online platform.

Is a derivatives dealer whose business model is to sell OTC derivatives *only* to eligible commercial hedgers obligated to build and provide such a platform to provide daily valuations in case a single client refuses to sign a waiver? Or may they require *all* clients to sign waivers with respect to daily reporting as a condition of doing business?

We believe it should be the second option, and that such a requirement should not be considered "unreasonable pressure" placed on the derivatives party. Derivatives firms should be free to choose with whom they wish to transact, and a derivatives firm can choose not to transact with any prospective derivatives party that does not wish to enter into a waiver in respect of future transactions.

So long as the relevant waiver(s) are presented at the time the account is opened or before a derivatives transaction is booked, the derivatives party will have the ability to evaluate the totality of the commercial relationship and to determine whether it wishes to sign the waiver(s), or to find another counterparty if it decides that it values certain protections (such as daily marked-to-market valuations).

4. **Permitted Referral Arrangements**

In the Companion Policy commentary on section 15 [Permitted referral arrangements], the CSA states that:

> Subsection 1(1) defines a "referral arrangement" in broad terms. Referral arrangement means an arrangement in which a derivatives firm agrees to pay or receive a referral fee. The definition is not limited to referrals for providing derivatives, financial services or services requiring registration. It also includes receiving a referral fee for providing a derivatives party's name and contact information to an individual or a firm. "Referral fee" is also broadly defined. It includes any benefits received from referring a derivatives party, including sharing or splitting any commission resulting from a transaction.

We believe that this approach is overly broad. Derivatives dealers may be engaged in many different commercial activities, and referrals which are specifically related to business lines which are not subject to the Business Conduct Rule should not be captured.

The broad language above is also seemingly inconsistent with later commentary in the Companion Policy, which suggests that the obligations should only apply to *derivatives-related* activities:

> If the person or company receiving the referral is a derivatives firm or an individual acting on behalf of that derivatives firm, they would be responsible for carrying out all obligations of a derivatives firm towards the referred derivatives party *in respect of the derivatives-related activities for which the derivatives party is referred* and communicating with the referred derivatives party.

We believe this second excerpt is a more reasonable interpretation of the scope of a derivative firm's obligation. The definition of "referral arrangement" should be limited to intentional referrals for derivatives-related activity.

5. Relationship Disclosure Information

In the Companion Policy commentary on section 18 [Relationship disclosure information], the CSA states that:

> To satisfy their obligations under subsection 18(1), an individual acting on behalf of a derivatives firm must spend sufficient time with a derivatives party in a manner consistent with their operations to adequately explain the relationship disclosure information that is delivered to the derivatives party.

The Companion Policy commentary seems to greatly expand the obligation set out in section 18(1) of the Business Conduct Rule, which is to "deliver" certain relationship disclosure information to the client. A requirement to walk each client through the relationship disclosure information is potentially-burdensome and will create delays in the onboarding process.

Given that the CSA has recognized the use of online platforms and questionnaires to determine derivatives party needs and objectives and suitability, it seems counterintuitive that basic relationship disclosures would require extensive in-person interaction. Provided that individuals acting on behalf of the derivatives firm are available to answer questions and otherwise to support derivatives parties in reviewing and understanding the relevant disclosures, if necessary, detailed walk-throughs should not be required.

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Thank you again for the opportunity to provide these comments. We would be happy to address any questions or points of clarification which arise in the context of your review.

Convera Canada ULC