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VIA ELECTRONIC MAIL

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 Office
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

c/o:
Me Philippe Lebel
Corporate Secretary
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c/o:
Grace Knakowski
Secretary
Ontario Securities Commission
20 Queen Street West
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Re: Comments on Proposed National Instrument 93-101 *Derivatives: Business Conduct* and Proposed Companion Policy

Dear Sir or Madam:

I. INTRODUCTION

On behalf of The Canadian Commercial Energy Working Group (the "**Working Group**"), Eversheds Sutherland (US) LLP hereby submits this letter in response to the request for public comment from the Canadian Securities Administrators ("**CSA**") on Proposed National Instrument 93-101 *Derivatives: Business Conduct* ("**Proposed NI 93-101**") and the related Proposed Companion Policy ("**Proposed Companion Policy**") (collectively, the "**Proposed Instrument**").[1] The Working Group's comments are from the perspective of derivatives end-users who (i) would like clarity on the regulatory status of market participants and (ii) are concerned that undue burdens placed on derivatives dealers

[1] *See* CSA Notice and Third Request for Comment on Proposed National Instrument 93-101 *Derivatives: Business Conduct* and Proposed Companion Policy (Jan. 20, 2022) ("**Third Proposal**").

may result in higher costs for end-users and fewer available counterparties with whom they can hedge their commercial risk.

The Working Group appreciates the CSA's ongoing hard work throughout the derivatives regulatory reform process and offers these comments to further advance that process. In particular, the amended definition of "Eligible Derivatives Party" ("**EDP**") included in the third proposal goes a long way to addressing a number of the concerns raised by the Working Group in prior comment letters.[2]

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

A. Market Participants Relying on the Proposed Registration De Minimis Exemptions Should Not Be Treated as Derivatives Dealers Under the Proposed Instrument

The Proposed Instrument would impose business conduct obligations on "derivatives dealers." However, the scope of the proposed derivatives dealer definition extends beyond those required to register as derivatives dealers. Specifically, Proposed NI 93-101 defines a "derivatives dealer" as:

- "a…company engaging in or holding…itself out as engaging in the business of trading in derivatives as principal or agent"; or
- "any other…company required to be registered as a derivatives dealer under securities legislation."[3]

It is the Working Group's understanding that this construct (*e.g.*, subjecting un-registered derivatives dealers to obligations under the Proposed Rule) is intended to ensure that the requirements imposed by the Proposed Rule apply to Canadian financial institutions which, for unrelated reasons, may not be obligated or permitted to register with the relevant provincial securities regulator when acting as a derivatives dealer.[4]

While the Working Group believes it is appropriate for the relevant Canadian financial institutions to be subject to some form of business conduct requirements, the mechanism used to accomplish this, the overly broad definition of "derivatives dealer", may have adverse consequences for commodities derivatives markets. Specifically, the current definition, even with the improved guidance regarding the definition in the Proposed Companion Policy, creates regulatory uncertainty.

In short, given the absence of an objective standard like a *de minimis* exception or exemption, an entity that engages in a limited amount of dealing activity will not have a clear

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2 *See* the first and second Working Group comment letters in relation to 93-101.

3 Proposed NI 93-101 at Section 1(1).

4 Third Proposal at 3.

understanding of when it may become subject to the requirements of the Proposed Rule. This may cause a number of non-dealer commodity market participants to stop engaging in *de minimis* amounts of dealing activity, leaving only large dealers as available counterparties for hedging end-users, potentially decreasing liquidity and increasing prices.

To avoid this outcome, the Working Group respectfully suggests that the CSA either (i) only apply the Proposed Rule non-financial entities when such entities are registered as a derivatives dealer, or (ii) expand the scope of the new *de minimis* exemption[5] from the senior derivatives manager requirement to cover all obligations under the Proposed Rule applicable to transactions with EDPs.

B. The Senior Derivatives Manager De Minimis Exemption Should be Refined

The Working Group appreciates the inclusion of the new *de minimis* exemption from the senior derivatives manager requirements of the Proposed Rule, and, as noted above, suggests its expansion to cover all obligations with respect to transactions with EDPs. However, to function effectively the *de minimis* exemption must be amended in two ways.

First, as currently constructed, the exemption is over-inclusive because its threshold is based on the notional amount of all outstanding derivatives. The total amount of derivatives activity, including hedging, an entity or enterprise engages in should not be used as a metric to determine whether an entity receives dealer-related relief. Canada should follow the approaches taken by the United States and EU and base this exemption on the level of the activity at issue - derivatives dealing activity.[6] As such, eligibility for this *de minimis* exemption should be a function of an entity's level of dealing activity.[7]

Second, the proposed *de minimis* exemption applies disproportionately to Canadian entities when compared to non-Canadian entities. Currently, a Canadian domiciled entity must include all of its affiliates' derivatives in the determination of whether it qualifies for the exemption. In contrast, a non-Canadian entity need only look to its derivatives with Canadian entities and its affiliates' derivatives with Canadian entities when making the same determination. This provides a material advantage to non-Canadian entities. The exemption should be amended to require the inclusion of all relevant derivatives entered into by (i) Canadian entities within the corporate family, and (ii) non-Canadian entities within the corporate family with Canadian counterparties.

C. The Proposed Instrument's Recordkeeping Requirements Are too Broad

The recordkeeping requirements in the Proposed Rule are broad, nebulous, and likely very burdensome. The proposed requirements appear to require derivatives dealers to capture e-mails, instant messages, and phone recordings, among other records. The Proposed Rule seems to place an affirmative obligation on derivatives dealers to record phone lines as well. The Proposed Companion Policy attempts to soften the recordkeeping requirements by stating: "a derivatives [dealer] may not need to save every voicemail or e-

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5 Proposed NI 93-101 at Section 31.1.

6 *See* 17 CFR 1.3.

7 The Working Group understands that this might require an adjustment of the thresholds in the proposed exemptions, but believes a more appropriately targeted exemption will better serve the intent underlying the exemption.

mail, or to record all telephone conversations with every [counterparty]."[8] However, the Proposed Companion Policy goes on to state that the CSA does "expect a derivatives [dealer] to maintain records of all communications with a [counterparty] relating to derivatives transacted with…the [counterparty]."[9] In most circumstances, it may actually be more burdensome to distinguish between communications covered by the Proposed Rule's recordkeeping requirements and those that are not than just capturing all phone calls, instant messages, and e-mails attributed to particular trader.

The Working Group respectfully suggests that the CSA clarify that derivatives dealers are only obligated to retain records of communications related to the negotiation of derivatives, the execution of derivatives, and any amendment or termination of derivatives. Further, the Working Group respectfully requests for the CSA to clarify that in the event such communication is made over the phone, that the derivatives dealer would not be obligated to record the phone line if a record of the execution of the derivative (e.g., a confirmation or instant message) otherwise exists.

III. CONCLUSION

The Working Group appreciates this opportunity to provide input on the Proposed Instrument 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
Olivia Pribich

8 Proposed Companion Policy at Section 36.

9 *Id*.