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Superintendent of Securities, Department of Justice and Public Safety, Prince
Edward Island

March 21, 2022

Attention:

Me Phillippe Lebel	Grace Knakowski
Corporate Secretary and	Secretary
Executive Director, Legal Affairs	Ontario Securities Commission
Autorité des marchés financiers	

consultation-en-cours@lautorite.qc.ca comments@osc.gov.on.ca

Re: Canadian Securities Administrators Notice and Third Request for Comment – Proposed National Instrument 93-101 – Derivatives: Business Conduct and Proposed Companion Policy 93-101CP - Derivatives: Business Conduct

OVERVIEW

The Portfolio Management Association of Canada (**PMAC**), through our Industry Regulation & Taxation Committee, is pleased to have the opportunity to submit the following comments regarding the CSA's Notice and Third Request for Comment – Proposed National Instrument 93-101 – Derivatives

Business Conduct (**Proposed NI 93-101**) and Proposed Companion Policy 93-101 – Derivatives Business Conduct (**CP** and collectively, the **Consultation**).

PMAC represents over [300 investment management firms](#) registered to do business in Canada as portfolio managers (**PMs**) with the members of the Canadian Securities Administrators (**CSA**). In addition to this primary registration, 70% of our members are also registered as investment fund managers and/or exempt market dealers. Some member firms manage large mutual funds or pooled products, and others manage separately managed accounts on behalf of private clients or institutions such as pension plans and foundations. PMAC's members encompass both large and small firms and manage total assets in excess of \$2.9 trillion.

GENERAL COMMENTS

PMAC supports the work of the CSA to establish a robust regime that is tailored for over-the-counter (**OTC**) derivatives markets, meets the International Organization of Securities Commissions' (**IOSCO**) standards and creates a market conduct regime that is consistent with the regulatory approach taken by most IOSCO jurisdictions with active derivatives markets. We also applaud the CSA for their receptivity to stakeholder feedback on the 2017 and 2018 requests for comment on Proposed NI 93-101. We believe the Consultation has balanced the need to establish a robust investor protection framework that leverages National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**) for registered advisers.

Our submission is focused on Proposed NI 93-101 as it pertains to registered advisers and covers the following: 1) a summary of PMAC's key recommendations relating to Proposed NI 93-101; and 2) responses to certain Consultation questions. The questions are identified by the number assigned to them in the Consultation and, as such, the numbering is not consecutive in this letter.

SUMMARY OF PMAC'S KEY RECOMMENDATIONS

1. **Subject to PMAC's comments herein, enact Proposed NI 93-101 as currently presented.** We believe that the Consultation strikes the correct balance between meeting IOSCO's standards for OTC derivatives regulation, protecting the Canadian markets and imposing a proportionate regulatory burden, and that Proposed NI 93-101 should be enacted as currently proposed.
2. **Set out a clear roadmap at the start of Proposed NI 93-103 illustrating its application to advisers regulated by NI 31-103.** The CSA can increase clarity regarding the application of the business conduct

- rule to advisers by setting out the divisions and sections of Proposed NI 93-101 that advisers that are already complying with NI 31-103 are subject to. This will improve compliance and reduce regulatory burden. As currently drafted, readers must cross-reference the various sections of Proposed NI 93-101 from which such advisers are exempt, in order to determine which remaining sections apply to them.
3. **Provide clarity where there is ambiguity.** Provide clarity regarding the transition period for obtaining an EDP representation from a derivatives party that is a permitted client as well as regarding whether Section 4 of Proposed NI 93-101 applies to foreign sub-advisers, foreign sub-sub-advisers and foreign dealers that are affiliated with a PM where that PM is responsible for advising an affiliated entity that is an investment fund and complies with Proposed NI 93-101.
 4. **Do not impose a separate derivatives registration requirement on advisers.** Due to the already robust existing framework to register and regulate advisers under NI 31-103, we ask that the CSA import the same sound logic in Proposed NI 93-101 and not impose a separate derivatives registration requirement on advisers.

POSITIVE CONSULTATION FEEDBACK

We would like to start by thanking the CSA for their responsiveness to the comments received through the 2017 and 2018 consultations that are reflected in the Consultation.

We view the revised Consultation as improving Proposed 93-101 for the benefit of investors, whilst appropriately leveraging existing robust regulations with which registered advisers already comply. As a result of these changes, we believe that Canada's derivatives business conduct regime will meet IOSCO OTC Standards and avoid pitfalls that could have imposed duplicative regulations, restricted liquidity in the Canadian derivatives market and hindered Canadian competitiveness.

Amongst the changes we would like to commend the CSA for making to the Consultation are the following:

- ✓ Exemption for registered advisers from certain requirements in Proposed NI 93-101 if they comply with corresponding requirements in NI 31-103 with respect to their derivatives activity;
- ✓ Senior Derivatives Manager requirements no longer applying to registered advisers;

- ✓ Foreign adviser and sub-adviser exemptions that are similar to the exemptions under NI 31-103 for international advisers and sub-advisers;
- ✓ Transition period to allow derivatives firms to treat existing permitted clients, accredited counterparties, qualified persons and U.S. eligible contract participants as Eligible Derivatives Parties (**EDPs**) for up to five years; and
- ✓ Foreign liquidity provider exemption for foreign dealers when they transact with derivatives dealers in Canada.

Subject to the following questions and comments, PMAC is very supportive of the Consultation as well of the thoughtful and consultative policy development process undertaken by the CSA to create a derivatives business conduct regime for advisers that is appropriate for Canadian investors and the Canadian regulatory system.

RESPONSES TO SPECIFIC CONSULTATION QUESTIONS

2. Foreign Derivatives Dealer and Foreign Derivatives Adviser Exemptions—Comparability Determinations

A foreign dealer or adviser from a foreign jurisdiction that, on an outcomes-basis, has comparable requirements to those in the Instrument will receive a complete exemption from the Instrument where that foreign dealer or adviser complies with the conditions of the exemption in section 38 or the exemption in section 43. Outcomes-based assessments have been conducted for the jurisdictions listed in Appendices A and D. Please provide any comments you may have on the inclusion of any of the foreign jurisdictions listed in these Appendices.

Should any other foreign jurisdiction(s) with comparable requirements be added to these Appendices? Please explain your response with reference to the applicable legislation and related requirements.

PMAC generally agrees that the proposed jurisdictions set out in Appendix D are reflective of the major markets with which PMs conduct business. However, while the jurisdictions in Appendix D cover the majority of what are considered to be “developed markets”,¹ we note that neither Norway nor Israel are included, while Brazil, which we understand to have a less developed derivatives market, is included. We suggest that Norway and Israel be included in the list as they too are “developed markets”. Members also suggested that Bermuda and Cayman Islands should be considered for inclusion in Appendix D as these are jurisdictions members commonly engage with. We note that the lists of specified foreign jurisdictions for dealers

¹ <https://www.msci.com/our-solutions/indexes/market-classification44>

(Appendix A) and for advisers (Appendix D) may differ depending on the requirements of different registrants.

Additionally, it may be helpful for the CSA to expressly set out in the CP the criteria by which it will evaluate the sufficiency of a jurisdiction's derivatives regime to be added to the lists in Appendices A and D. For instance, including information about whether the CSA will accept a request to include an additional jurisdiction from industry participants or private entities, and what information should be provided, would assist in understanding the process to add additional jurisdictions as markets continue to develop and grow.

We note that the drafting of section 44(2)(b) (exemption for foreign derivatives sub-advisers) is not aligned with the drafting of sections 38(1)(b) (exemption for foreign derivatives dealers) and 43(1)(b) (foreign derivatives advisers). The latter sections are drafted broadly and include a derivatives dealer / adviser that is "registered, licensed or authorized...", whereas section 44(2)(b) includes only a sub-adviser that "is registered...". We assume that this was unintentional. We see no reason why the approach should be different in these sections and request that the language in section 44(2)(b) be broadened to include a sub-adviser that is "registered, licensed or authorized, or operates under an exemption from registration" in the relevant jurisdiction.

5. Exemptions from the Designations and Responsibilities of a Senior Derivatives Manager

We have added exemptions in section 31.1 of the Instrument from the senior derivatives manager requirements for persons and companies to rely on (i) a general de minimis exemption available to all derivatives dealers whose aggregate gross notional amount of outstanding derivatives does not exceed \$250 million or (ii) a de minimis exemption available to derivatives dealers that exclusively deal in commodities derivatives and whose aggregate gross notional amount of outstanding commodity derivatives does not exceed \$3 billion.

Do you support the additional exemptions in section 31.1 from the senior derivatives manager requirements?

PMAC welcomes the exemption from the designation and responsibility of a Senior Derivatives Manager with respect to advisers.

7. Treatment of Registered Advisers under Securities or Commodity Futures Legislation

We have added an exemption in section 45 for registered advisers under securities or commodity futures legislation from certain requirements of the Proposed Instrument listed in Appendix E if the registered adviser complies with

corresponding requirements in NI 31-103 relating to a transaction with a derivatives party. In such cases, we anticipate that the existing compliance systems of the registered adviser can easily be extended to address any of the residual obligations of the Instrument, which residual obligations ensure that NI 31-103 requirements are extended to the registered adviser's derivatives activities.

Please provide any comments you may have on this approach and the requirements listed in Appendix E.²

We understand that some derivatives parties rely on the expertise of a derivatives adviser to develop or implement derivatives trading strategies to help them achieve their organizational objectives.

Section 7 of the Instrument exempts derivatives advisers from many of the requirements of the Instrument when they are advising an EDP. Are there any scenarios where derivatives advisers that are advising EDPs should be required to comply with any of the requirements that section 7 provides an exemption from?

PMAC applauds the CSA's recognition that registered advisers complying with corresponding requirements in NI 31-103 should be exempt from certain requirements in Proposed NI 93-101. We believe the Consultation now strikes the correct balance of market and investor protection and imposition of regulatory burden, given that registered advisers can extend their existing compliance systems to address any of the residual obligations under Proposed NI 93-101.

We believe that the exemption is appropriate in scope and application. We do, however, have the following questions and comments:

- Instead of listing only the exemptions for registered advisers under section 45 in Appendix F – *Registered Advisers Under Securities and Commodity Futures Legislation*, it would be preferable to also provide a statement setting out a list of the divisions and sections of Proposed NI 93-103 that *do* apply to registered portfolio managers. We believe that framing the adviser obligations by reference to which aspects of Proposed NI 93-103 apply to registered advisers will improve clarity and compliance and will reduce the need and cost for firms to retain legal counsel to assist with implementation.
- The transition period for obtaining an EDP representation from a derivatives party that is a permitted client is confusing. The Consultation states:

² We note that the adviser exemptions are in Appendix F, not E.

Transition Period - We have included a delayed effective date of one year from the date of the final publication of the Proposed Instrument, together with new transition provisions that allow derivatives firms to treat existing permitted clients, qualified parties, accredited counterparties and eligible contract participants as EDPs *for up to five years*. [Emphasis added]

The CP provides:

As long the derivatives firm obtained the status representation and could rely on that representation before the Instrument came into force, then the derivatives firm may rely on that representation *until the transition period expires...*

We would generally expect that derivatives firms that are updating information relating to derivatives parties after the effective date of the Instrument and *prior to the expiry of the transition period* would begin to collect information about the status of the derivatives party as an eligible derivatives party. [Emphasis added]

It is our understanding from the CP that the firm is required to seek an EDP status representation from a derivatives party ahead of the expiry of the transition period (i.e., before 6 years after the publication of the instrument). Additional clarity on the timeline for obtaining the EDP status representation would be welcome.

- Members also queried how the CSA would view the following scenario: Where a local investment fund (the **Fund**) that has a derivatives adviser (the **PM**) that is affiliated with and advising the Fund directly, Section 4 makes it clear that the PM is not exempt from and must comply with Proposed NI 93-101. However, could Section 4 be interpreted as being available to a foreign derivatives sub-adviser, foreign derivatives sub-sub-adviser or foreign derivatives dealer that is affiliated with the PM.

We ask the CSA to clarify within the CP what the intent is (using examples) in reference to Section 4 and the application of Proposed NI 93-101 to foreign sub-advisors, foreign sub-sub-advisers and foreign dealers that are affiliated with a portfolio manager, where that portfolio manager is responsible for advising an affiliated entity that is an investment fund and complies with Proposed NI 93-101.

8. Conflicts of Interest

Section 9 of the Instrument was developed with the intention that it would be generally consistent with the conflicts of interest provisions of NI 31-103. The Client Focused Reforms amended the conflicts of interest provisions of NI 31-103 (through amendments to section 13.4 and the addition of section 13.4.1) and adopted related companion policy changes. We are considering further changes to conform the conflicts of interest requirements so that they are consistent with those in NI 31-103, along with other changes to conform the requirements to be consistent with the requirements found in Client Focused Reforms.

Please provide any comments relating to the inclusion of such corresponding changes to the Proposed Instrument.

PMAC believes that Proposed NI 93-101 should be amended prior to implementation to conform with the conflicts of interest requirements in NI 31-103, namely the requirement to address material conflicts of interest in the best interest of the client. We believe that the CSA has placed the correct focus on client interests coming first under NI 31-103 and believe that the derivatives business conduct regime should mirror that policy intent.

CONCLUSION

Subject to our comments above, we agree that Proposed NI 93-101 best serves investors and the market by leveraging the already robust regulatory requirements that portfolio managers are accustomed and subject to. We continue to urge the CSA not to impose a separate derivatives registration requirement on registered advisers.

We would like to thank the CSA for the work, thought and outreach that has gone into developing and publishing this third request for comment and the Consultation. We view the Consultation as an exemplary balancing of regulatory burden against investor and market protection issues. We would be happy to speak with you further about any of the remarks in our letter and/or in [our submission](#) on the 2018 Derivatives Registration Consultation.

Sincerely,

PORTFOLIO MANAGEMENT ASSOCIATION OF CANADA

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