

October 7, 2022

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

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Re: Comments on Proposed Amendments to Derivatives Reporting Rules in Canada

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 Canadian Securities Administrators ("**CSA**"), Ontario Securities Commission ("**OSC**"), the Manitoba Securities Commission ("**MSC**"), and the Quebec Autorité des marchés financiers ("**AMF**") (collectively, the "**Canadian Regulators**") on proposed amendments to certain of their respective instruments that establish OTC derivatives

reporting rules (the “**Proposed Amendments**”).¹ The Working Group appreciates the Canadian Regulators’ ongoing hard work through the derivatives regulatory reform process and offers these comments to further advance those efforts.

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. The Working Group Generally Supports the Proposed Amendments

The Working Group appreciates and commends the Canadian Regulators for harmonizing several aspects of the Canadian reporting rules with those implemented in other jurisdictions. Similar to efforts carried out by the Commodity Futures Trading Commission (“**CFTC**”) and the CPMI-IOSCO Working Group, the Proposed Amendments would improve the quality of reported data, adopt the same identifiers as other global requirements, and reflect standards and guidance published by the CFTC and the CPMI-IOSCO Working Group. This similarity will ease the implementation process for the Proposed Amendments, as market participants will have the CFTC and CPMI-IOSCO standards available for use as a reference point and may have already begun making the baseline system changes needed to implement the Proposed Amendments.

In particular, as discussed further below, the Working Group would like to express support for the following under the Proposed Amendments: (i) the proposal to not require verification of reported data by End-User² reporting counterparties; (ii) the OSC’s proposed alternative reporting hierarchy in Annex E of the OSC Proposed Amendments; and (iii) the MSC, OSC, and AMF’s Proposed Amendments regarding the Commodity Exclusion (Section 40).

i. Support for Not Subjecting End-Users to Verification Obligations

With respect to data verification requirements, the Working Group appreciates the Canadian Regulators’ recognition of the burden associated with frequent and continued verification as compared to the limited benefits associated with subjecting End-User reporting

¹ See CSA Multilateral Notice and Request for Comment on Proposed Amendments to the MI TR Rule and the MI TR Companion Policy (June 9, 2022) (“**MI TR Notice**”), <https://www.asc.ca/-/media/ASC-Documents-part-1/Regulatory-Instruments/2022/06/6022513-CSA-Notice-of-Amendments-to-MI-96-101.ashx>; OSC Notice on Proposed Amendments to OSC TR Rule, OSC TR Companion Policy, and OSC Scope Companion Policy (June 9, 2022) (“**OSC TR Notice**”), <https://www.osc.ca/en/securities-law/instruments-rules-policies/9/91-507/proposed-amendments-osc-rule-91-507-trade-repositories-and-derivatives-data-reporting-and-proposed>; MSC Staff Notice 91-701 Proposed Amendments to MSC TR Rule, MSC TR Companion Policy, and MSC Scope Companion Policy (June 9, 2022) (“**MSC TR Notice**”), <https://docs.mbsecurities.ca/msc/derivatives/en/item/520956/index.do>; Quebec AMF Notice on Proposed Amendments to AMF TR Rule, AMF TR Companion Policy, and AMF Scope Companion Policy (June 9, 2022) (“**AMF TR Notice**”), <https://lautorite.qc.ca/fileadmin/lautorite/reglementation/instruments-derives/reglements/91-507/2022-06-09/2022juin-91-507-avis-cons-en.pdf>.

² As used herein, “**End-Users**” refers to entities that are not a derivatives dealer and not a clearing agency.

counterparties to a verification obligation. Specifically, the absence of a verification obligation for End-User reporting counterparties is appreciated and is a welcome improvement over the CFTC's rules, which impose a quarterly verification requirement on End-User reporting counterparties.³

The absence of the verification requirement would likely make the prospect of acting as a reporting counterparty more viable for End-Users. As a result, this may provide End-Users with additional potential counterparties, thereby improving liquidity, and ultimately may result in incrementally better pricing of commodities swaps.

ii. Support for OSC's Proposed Alternative Reporting Hierarchy in Annex E of the OSC Proposed Amendments

The Working Group supports the OSC's proposed alternative reporting hierarchy in Annex E of the OSC's Proposed Amendments, which would allow counterparties that are both End-Users to agree through a written agreement which counterparty is required to report under the OSC reporting rules.⁴ The Working Group supports this proposed change to the OSC reporting counterparty hierarchy because it would: (i) provide market participants with greater flexibility and appropriately allow End-Users to determine which counterparty is better suited to be the reporting counterparty; and (ii) simplify compliance with multi-jurisdictional reporting requirements by making Ontario's reporting counterparty hierarchy more consistent with the reporting counterparty hierarchy of the other Canadian jurisdictions as well as under the CFTC's reporting rules.⁵

iii. Support for MSC, OSC, and AMF's Proposed Amendments Regarding the Commodity Exclusion (Section 40)

The Working Group supports that under the Proposed Amendments, the conditional exclusion from reporting derivatives data of commodity derivatives (*i.e.*, the Commodity Exclusion)⁶ would be more harmonized in the respective Canadian jurisdiction reporting rules. Specifically, the Working Group supports that the OSC, MSC, and AMF proposed changes that would bring the conditions to qualify for the Commodity Exclusion more in line with the MI TR Rule by proposing to increase the qualifying notional amount from \$500,000 to \$250 million.

The proposed changes to the Commodity Exclusion (Section 40) in the MSC, OSC, and AMF's Proposed Amendments are necessary as the exclusion in those jurisdictions is currently so limited that it is effectively not available to commodity End-Users.

B. The Proposed Derivatives Dealer Definition Would Create Confusion and Should Be Simplified to Refer to Registered Derivatives Dealers

The Working Group is concerned that the proposed derivatives dealer definition in the Proposed Amendments would create confusion. As the Canadian Regulators are aware, the Proposed Amendments would expand the scope of the definition of "derivatives dealer" to

³ The Proposed Amendments' verification process is intended broadly to align with the revised CFTC requirements regarding verification under CFTC Regulations 45.14 and 49.11. However, different from the comparable CFTC Regulations, the Proposed Amendments would not require end-users to verify data once every calendar quarter "due to the resulting burden." MI TR Notice at 4 n.5

⁴ See 45 OSCB 5837.

⁵ See 45 OSCB 5837.

⁶ As used herein, the "Commodity Exclusion" refers to the conditional exclusion in the following: MI TR Rule at Section 40; OSC TR Rule at Section 40; MSC TR Rule at Section 40; and AMF TR Rule at Section 40.

include entities that are “required to be registered as a derivatives dealer.” The stated goal of this revision is to align the definition of “derivatives dealer” with Proposed National Instruments 93-101 and 93-102, which would govern business conduct and registration, respectively (the “**Proposed National Instruments**”).⁷ While consistency among Canada’s derivatives rules is important, this proposed change would import a shortcoming of the Proposed National Instruments into the respective Canadian jurisdiction’s derivatives reporting rules (collectively, “**Canadian Reporting Rules**”).

Notably, the proposed expanded definition of “derivatives dealer” would create uncertainty as to the application of the derivatives dealer specific requirements in the Canadian Reporting Rules as it still retains the prong that captures any entity “engaging in the business of trading in derivatives as principal or agent.”⁸ If the Proposed National Instruments are finalized as proposed, the use of this language would likely create a universe of entities subject to derivatives dealer reporting obligations that are not registered as a derivatives dealer or subject to derivatives dealer business conduct requirements. Specifically, the Proposed National Instruments would exempt certain entities that otherwise meet the definition of “derivatives dealer” from registration and business conduct requirements under exemptions not found in the Proposed Amendments. Said another way, including the proposed change to the definition of “derivatives dealer” without removing the first prong of the definition would lead to material inconsistencies in the application of the derivatives dealer definition across the Canadian Reporting Rules and the Proposed National Instruments.

To ensure the desired consistency, the definition of derivatives dealer in the Canadian Reporting Rules and Proposed NI 93-102 should be limited to entities registered as a derivatives dealer. To the extent that Canadian Regulators believe certain entities that are not captured by this more limited definition – such as exempt foreign dealers or financial institutions otherwise exempt from registration with provincial securities regulators – should be required to report as derivatives dealers, those entities should be brought within the derivatives dealer definition with precision rather than with a broad catch-all like the current first prong of the Canadian Reporting Rules’ derivatives dealer definition.

C. The Application of the Approach to Notional Amount Under the Proposed Amendments Should Be Limited to the Canadian Reporting Rules

For the reasons discussed below, the Working Group respectfully requests for the application of the approach to notional amount under the Proposed Amendments to be limited to the Canadian Reporting Rules. Although the Working Group commends Canadian Regulators’ desire to adopt international standards with respect to derivatives reporting data requirements, the methodology for calculating notional amounts of commodity derivatives set out in the CPMI-IOSCO technical standards and included in the Proposed Amendments is not representative of the method commercial energy firms use to calculate the notional amount

⁷ MI TR Notice at 3.

⁸ For example, under the Proposed Amendments to the MI TR Rule, “derivatives dealer” would be defined to mean either of the following:

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

of their derivatives and vastly overstates the notional amount of commodity derivatives – this issue has been noted in a number of industry comments to regulatory bodies.⁹

Given the importance of the notional amount concept in various rules, including the Canadian Reporting Rules, Canadian Regulators should ensure that the notional amount calculation methodology used for those rules is appropriate for those purposes and consistent with the methodology used by market participants when they commented on prior final and proposed rules. As such, the Working Group requests that Canadian Regulators limit the application of the approach to notional amount calculations for commodity derivatives in the Proposed Amendments to the Canadian Reporting Rules for data reporting purposes. Further, the Working Group requests that Canadian Regulators allow market participants to use the more appropriate methodology set out in the Working Group's prior comments¹⁰ in other contexts, including determining eligibility for the \$250 million notional threshold in the Commodity Exclusion.

III. RESPONSES TO SPECIFIC QUESTIONS FROM CANADIAN REGULATORS

A. Reporting Deadline for End-Users Should Be Consistent with the CFTC's T+2 Timeline

As the Canadian Regulators are aware, the Proposed Amendments would give reporting counterparties until the next business day to report derivatives data to a trade repository. The Proposed Amendments ask whether the reporting deadline for End-User reporting counterparties should be amended to be consistent with the CFTC's longer T+2 (*i.e.*, 48-hour) deadline.^{11,12}

The Working Group strongly supports adopting the CFTC's T+2 reporting deadline. Specifically, for Canadian entities that report or have affiliates that report OTC derivatives in the US using the same or related systems, a variation in the reporting deadline is an unneeded complexity. The absence of this complexity and the longer reporting deadline (i) would benefit market participants as reporting would be less resource intensive and (ii) could improve the quality of reported data as End-Users would have more time to confirm its accuracy.

B. Timeline for the Implementation of the Proposed Amendments

The Proposed Amendments also request feedback on the proposed implementation timeline for the changes set out in the Proposed Amendments. Based on experience with implementing the CFTC's recent reporting rule amendments, the Working Group's members

⁹ See, *e.g.*, The Canadian Commercial Energy Working Group Comment Submission to CPMI IOSCO on the Batch Three Report (Sept. 2017), <https://www.iosco.org/library/pubdocs/565/pdf/The%20Canadian%20Commercial%20Energy%20Working%20Group.pdf>; Coalition Comment Letter to the CFTC, "Notional Amount" Calculation Methodology Under Swap Dealer De Minimis Determination (RIN 3235-AK65) and Other CFTC Swap Regulations (Sept. 20, 2012); Futures Industry Association Principal Traders Group Comment Letter to the CFTC, *Request for Confirmation on Notional Amount Calculation Methodology for Swaptions* (Dec. 20, 2012).

¹⁰ See, *e.g.*, The Canadian Commercial Energy Working Group Comments on Proposed National Instrument 93-102 Derivatives: Registration and Proposed Companion Policy 93-102 (Aug. 2, 2018), <https://lautorite.qc.ca/fileadmin/lautorite/consultations/commentaires/derives/2018-09-17/eversheds.pdf>.

¹¹ Under the Proposed Amendments, reporting counterparties would be given until the next business day to report derivatives data to a trade repository, regardless of whether they are a derivatives dealer or End-User. In comparison, CFTC Regulations Part 45 gives end-users by T+2 following the execution date.

¹² See, *e.g.*, CFTC Regulation 45.3(b)(2).

believe 18 months from finalization of the Proposed Amendments is the minimum amount of time necessary to come into compliance. That would allow both trade repositories and market participants enough time to make the necessary changes to their systems, especially those that are not required to report under the CFTC's rules.

In addition, Canadian Regulators should account for two additional issues in determining the implementation deadline for the Proposed Amendments, as discussed below.

First, as the CSA notes, the CFTC will be requiring the implementation of further changes to their reporting requirements by December 2023.¹³ The same resources needed to implement the changes required under the Proposed Amendments will likely be required to support the CFTC changes as well. As such, adequate time, such as at least 8 months, should be provided after the deadline for the CFTC's 2023 changes.

Second, Canadian Regulators should avoid, to the extent possible, making changes to the technical standards underlying the Canadian Reporting Rules, once the Proposed Amendments are finalized. Making any such changes may require adjustments to systems changes already completed in anticipation of complying with the Proposed Amendments, which is both inefficient and time consuming.

IV. CONCLUSION

The Working Group appreciates this opportunity to provide input on the Proposed Amendments 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

¹³ MI TR Notice at 9.
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