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February 8, 2013

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission

c/o
John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario M5H 3S8
jstevenson@osc.gov.on.ca

-and-

Me Anne-Marie Beaudoin
Secrétaire de l'Autorité des marchés financiers
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C.P. 246, Tour de la Bourse
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Dear Sirs / Mesdames,

**Re: Comments on Canadian Securities Administrators Consultation Paper 91-301 Model Provincial Rules - Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting (the "Consultation Paper").**

We submit the following comments in response to the Notice and Request for Comments published by the Canadian Securities Administrators (the "**CSA**") on December 6, 2012 ((2012) 35 OSCB 10967) with respect to the Consultation Paper. Thank you for the opportunity to comment on the Consultation Paper. We commend the CSA in its efforts towards developing a regulatory framework for derivatives in Canada that responds to G20 commitments through this and other consultation papers published to date.

This letter represents the general comments of certain individual members of our securities practice group (and not those of the firm generally or any client of the

firm) and are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client.

By way of general comments, we strongly urge all CSA members to take this opportunity to streamline and harmonize derivatives regulation across Canada. While derivatives have been subject to disparate regulation throughout Canada for various historical and political reasons, given the magnitude and significance of the changes represented by the impending new regulatory framework, we strongly advocate in favour of harmonization of the local legislation and rules that are to serve as the foundation of this framework. In our view, superimposing an already complex framework on complicated non-harmonized rules will exacerbate the complexities associated with the current fragmented regulatory regime and impose an unnecessary regulatory compliance burden on market participants. It may also impede the ability of regulators to fully achieve the regulatory goals behind standardized derivatives data reporting.

For similar reasons, we also urge the CSA to ensure that any Canadian framework that is adopted is globally harmonized with its counterpart requirements in other major financial centres, such as the United States and the United Kingdom. Canadian regulators are actively involved with regulatory and policy development at the global level through IOSCO and other avenues and the focus should be on the development of globally harmonized regulation. Given the nature and the size of the derivatives market in Canada, we do not see any substantive reason to implement unique Canadian requirements which impose duplicative or additional compliance obligations on market participants that: (a) are already subject to substantially equivalent requirements in the leading derivatives markets, and (b) may give rise to different interpretations from one Canadian jurisdiction to the next. In this respect, we further recommend an efficient and streamlined process for recognizing or designating trade repositories which are recognized or designated and appropriately regulated in their home jurisdiction. Such trade repositories should also be able to rely on compliance with their home jurisdiction's regulation to satisfy Canadian obligations. This will encourage global trade repositories to seek recognition or designation in Canada, thereby ensuring that transaction data relevant to the Canadian derivatives market is collected and made accessible to Canadian regulators in a globally consistent and harmonized manner, rather than on a regionally fragmented basis.

We also recommend the implementation of a principal regulator model, similar to that used to determine a principal regulator for registrants and for reporting issuers, to seek to ensure efficient, streamlined and effective reporting and regulation. Requiring a regulated entity or market participant to deal with multiple regulators for the same purpose increases costs while decreasing efficiency, both from the perspective of the regulated entity/participant as well as the regulator. In our view, the quality and efficiency of derivatives data reporting would be greatly improved where those subject to the rules are able to deal with a single principal regulator. It would also allow the regulators to better focus on consolidation of data and analysis for policy-making purposes. We do not believe that such a system

would give rise to any gaps in Canada, given that the non-principal jurisdictions could retain regulatory/supervisory jurisdiction over a regulated entity/participant but would rely on the principal regulator's review process, and the regulators can implement a process for sharing and consolidating information amongst themselves.

*Specific comments on Model Provincial Rule Derivatives: Product Determination ("**Scope Rule**")*

For the purposes of section 2 of the Scope Rule, "excluded derivatives," we submit that the exclusions should not be limited to derivatives regulated by gaming control legislation in Canada or a province, but should also extend to derivatives regulated by appropriate gaming control legislation of certain designated foreign jurisdictions. Similarly, excluded insurance and annuity contracts should be expanded to include those issued by an insurer that is appropriately licenced/regulated in certain designated foreign jurisdictions and evidences of a deposit should be expanded to include those issued by foreign banks regulated and supervised in certain designated foreign jurisdictions. As discussed in detail below, by reason of the broad definition of "transaction" and "local counterparty," reporting may be triggered in respect of a broad range of transactions, including those that have only a remote or even tenuous connection to Canada. Unless the reporting obligation is substantially narrowed to capture only those transactions that have a real and substantial connection to a Canadian jurisdiction, failure to expand these exclusions will result in uncertainty where the contract or instrument is appropriately regulated outside of Canada.

*Specific comments on Model Provincial Rule Derivatives: Trade Repositories and Derivatives Data Reporting ("**TR Rule**")*

Trade Repository Designation and Ongoing Requirements

With respect to the TR Rule, as an overall comment, we submit that requirements applicable to trade repositories should be harmonized to the greatest extent possible with requirements imposed in the leading derivatives markets. This includes initial and ongoing filing and disclosure obligations, as well as requirements relating to structure, governance and management. Further, we recommend a streamlined process for the recognition or designation of trade repositories which are appropriately regulated in certain designated jurisdictions. To the extent that there are any differences in regulation under Canadian requirements, we submit that such trade repositories should be granted relief from compliance on the basis that they are appropriately regulated by a counterpart regulator. In this respect, we further submit that Canadian regulators should provide a list of acceptable jurisdictions or regulatory regimes recognized for these purposes, and not impose upon the trade repository the burden on demonstrating substantial equivalency or seeking specific exemptive relief. In our view, this would increase regulatory certainty and encourage greater participation by global trade repositories in the Canadian market. We understand that the Consultation Paper contemplates that global trade repositories would be able to apply for exemptive relief where they are regulated outside of Canada. However, we do not see the purpose of imposing

upon them the burden of applying for exemptive relief where a much more streamlined and efficient recognition process can be implemented without compromising Canadian regulatory goals.

To the extent that specific Canadian requirements are necessary, we submit that ongoing obligations should be streamlined to allow global trade repositories to satisfy their obligations by filing or providing information required to be provided to their home regulator. In this respect, we advocate a system similar to that made available to "designated foreign issuers" under National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers,* which, while being market participants and subject to the jurisdiction of Canadian regulators, are substantially exempt from most Canadian requirements in reliance upon equivalent home jurisdiction requirements.

By way of specific comments, we believe that the requirement to provide 45 days' advance notice of a significant change to F1 information in section 3(1) is too onerous and in practice will be difficult to comply with, especially where it is not harmonized with similar notice requirements in the trade repository's home jurisdiction. We also submit that the TR Rule should accommodate filing of interim financial statements by global repositories which are required to provide only six-month interim statements in their home jurisdiction (s. 6), and that the requirement under s. 7 relating to a legal framework should apply only in respect of activities in the relevant Canadian jurisdiction.

Data Reporting

With respect to data reporting, we believe that, due to the definition of "local counterparty" and "transaction," the proposed TR Rule covers an overly broad range of reporting parties and transactions that should not be captured by Canadian derivatives data reporting requirements. We believe that the breadth of these provisions is excessive, that it would create uncertainty and duplication, and will discourage participation in the Canadian market, ultimately undermining access to transaction data for Canadian regulatory purposes.

The Consultation Paper states that the proposals are aimed at improving the transparency of the derivatives market, with trade repository data allowing for both oversight and policy-making, by providing regulators with information on the *nature and characteristics of the Canadian derivatives market.* We believe that the reporting requirement should therefore be carefully tailored to capture data relating to the Canadian derivatives market. As currently drafted, the TR Rule would require reporting by a wide range of entities and in respect of a wide range of transactions that do not have any substantial connection to the Canadian market. We question whether an expansive and potentially duplicative approach to trade data reporting may in fact undermine the collection of meaningful data on real derivatives market risks specific to the Canadian market.

The Consultation Paper also states that reporting by market participants located in a foreign jurisdiction whose derivatives activities trigger reporting

requirements under the TR Rule is appropriate and not an unnecessary burden. However, as currently drafted, the TR Rule would impose a reporting requirement on a wide range of persons who may have little or no connection to Canada (such as every foreign subsidiary of a provincially incorporated company or an entity that is a reporting issuer or registrant in the province), in respect of derivatives activity that also has little or no connection to Canada. There is no express jurisdictional scope to the definition of "transaction" or the reporting requirement in subsection 25(1), which requires a local counterparty to report derivatives data for each transaction to which it is a counterparty, irrespective of that transaction's connection to the Canadian derivatives market. This is further exacerbated where the entity is subject to an equivalent reporting obligation in a foreign jurisdiction (where there is likely to be a more substantial connection). While the Consultation Paper acknowledges that it would be possible to apply for an exemption on the grounds of equivalency where there are "minor differences" between a foreign regime and the TR Rule, in our view, it is neither efficient nor appropriate to impose upon such entities the further regulatory burden of having to report potentially duplicative trade data or apply for exemptive relief when such entities have only a tenuous connection, if any, to Canada.

With respect to the definition of "local counterparty", we believe that the most relevant connection is that an individual is resident in the province or a person or company has its head office or principal place of business in the province. Subsection (b) of the definition includes a person or company that is organized under the laws of a province. This part of the definition is problematic in that, in our view, solely being organized under the laws of a province does not provide a sufficient connection to the province. A wide range of persons or companies may be organized under the corporate, partnership or other laws for tax or other purposes and have no other connection to the province. We submit that such persons or companies should be required to report in the jurisdiction where their head office or principal place of business is located, being a more relevant basis for imposing a reporting requirement. In this respect, we also note a discrepancy in that if organization under the laws of the jurisdiction is a sufficient connection (without having a head office or principal place of business in the province), the definition only captures those organized under the laws of a province of Canada and does not capture persons or companies organized under the federal laws of Canada.

In our view the appropriate definition would be to include only individuals resident in Canada and persons or companies having a head office or principal place of business in Canada, and their major subsidiaries, to the extent that such subsidiaries are not subject to an equivalent reporting obligation in a recognized foreign jurisdiction.

We have similar concerns with subsection (c) and (d) of the definition. We see no basis for imposing a derivatives data reporting obligation solely because a party is a reporting issuer or a registrant in the jurisdiction, particularly where the entity's presence or activity in Canada is limited. A person or company will be a reporting issuer solely by reason of account of having distributed securities under a

prospectus in the local jurisdiction. We do not see how this provides a sufficient connection to require derivatives data reporting, or gives rise to the need for the regulator in that province to require such information, in particular when considering that, as noted above, the "transaction" reporting requirement is triggered with no particular connection to Canada. We have similar concerns with respect to registrants which may be registered under the laws of a Canadian province but do not have a head office or principal place of business in Canada as the reporting obligation is not limited to derivatives transactions with Canadian clients. To the extent the transaction does not involve a Canadian client/counterparty, such registrant should not be subject to Canadian reporting obligation, particularly where it is subject to an equivalent obligation in a foreign jurisdiction. With respect to registrants, if expressly retained, the guidance should also clarify that this refers to persons or companies that are registered under the laws of the province only, and not those relying on a registration exemption. In the event that these criterion are retained for

With respect to subsection (e), we submit that any one of the acts of "negotiating, executing or settling" any part of a transaction is not a sufficient basis to impose a reporting requirement. The term "negotiates" in particular, in our view, is ambiguous, open to interpretation and will lead to uncertainty in determining who has an obligation to report.

Subsection (f) also similarly casts an overly broad net in that it captures any subsidiary of every entity in the definition. This would include any and all subsidiaries of provincially incorporated companies, reporting issuers or registrants, regardless of where the subsidiary is located or operates from and regardless of its significance. We do not believe that this basis alone is sufficient to justify imposing a Canadian reporting requirement.

By way of specific comments, we submit that the requirement under ss. 25(3) to report errors and omissions should refer to "material" errors and omissions only, to accord with the "misrepresentation" standard that is used in ss. 25(5). We also have concerns with respect to the disclosure exemption for block trade data under s. 39, in that disclosure of such date could lead to disclosure of the identity of the parties, especially given the characteristics of the Canadian market. With respect to ss. 40(2), and the specific request for comments on the exemption for small derivatives exposures, in our view, the proposed $500,000 threshold is too low but would defer to the comments of industry stakeholders which rely on physical commodity transaction exemptions as to the appropriate threshold amount.

With respect to Form 91-301F2, in our view, sections 6 and 8 of the form are confusing. We recommend omitting section 8 and revising section 6 to clarify that the appointment of the agent for service in section 6 is for the period while the trade repository is designated or exempted from designation, and for six years after the date it ceases to be so designated or exempted.

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Thank you for the opportunity to comment on these proposals.

Regards,

per:

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Simon A. Romano
Kathleen G. Ward