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BY E-MAIL

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Manitoba Securities Commission
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Nova Scotia Securities Commission

RE: CSA Staff Notice 91-303 *Proposed Model Provincial Rule on Mandatory Central Counterparty Clearing of Derivatives* - Comments

Dear Sirs/Mesdames:

TMX Group Limited ("TMX Group") welcomes the opportunity to comment on CSA Staff Notice 91-303 *Proposed Model Provincial Rule on Mandatory Central Counterparty Clearing of Derivatives* (the "Proposed Rule"). TMX Group is supportive of the overall approach taken by the Canadian Securities Administrators ("CSA") OTC Derivatives Committee (the "Committee") and has set out a number of comments below. TMX Group believes that the CSA should apply an approach to the Proposed Rule which is both consistent with foreign jurisdictions and which will be applied consistently across provincial jurisdictions. This approach is necessary to (i) ensure an international and inter-provincial level playing field for entities based in different jurisdictions; and (ii) reduce the potential for regulatory arbitrage which could drive business out of Canada if the regulatory burden becomes significantly higher in this country than in others.

TMX Group

TMX Group's key subsidiaries operate cash and derivative markets for multiple asset classes, including equities, fixed income and energy. Toronto Stock Exchange, TSX Venture Exchange, TMX Select, Alpha Exchange, The Canadian Depository for Securities Limited, Montréal Exchange, Canadian Derivatives Clearing Corporation ("CDCC"), Natural Gas Exchange, Boston Options Exchange, Shorcan, Shorcan Energy Brokers, Equicom and other TMX Group companies provide listing markets, trading markets, clearing facilities, data products, and other services to the global financial community. TMX Group is headquartered in Toronto and operates offices across Canada (Montréal, Calgary and Vancouver), in key U.S. markets (New York, Houston, Boston and Chicago) as well as in London, Beijing and Sydney.

I. General Comments

(a) Provincial Implementation Concerns

TMX Group notes that while we understand the CSA's intention is to harmonize the Proposed Rule across provinces, we remain concerned that there will not be total, or even sufficient, harmonization across provinces with respect to this Proposed Rule once implemented. We are particularly concerned about (1) the possibility that the text of the Proposed Rule may differ across provinces; (2) the possibility that the interpretation of the text and approach by the regulators may differ across provinces; and (3) the potential challenges that the regulators may face in trying to implement the Proposed Rule in a sufficiently coordinated manner. For the many entities that operate across Canada, tracking myriad minor jurisdictional differences in addition to the international rules currently in effect, may result in unnecessary regulatory complexity. The lack of regulatory harmonization and resulting complexity may also potentially deter new entities from entering the Canadian markets and drive existing entities away.

TMX Group recommends that provincial regulators approach the determination of whether a product is a "clearable derivative" jointly as many, if not most, of these products are cleared by counterparties in multiple Canadian jurisdictions. If a derivative is a "clearable derivative" in one province, but not another, this creates confusion as to the manner in which counterparties that are subject to conflicting rules are required to conduct a transaction. Part 4 of the Explanatory Guidance states that one of the factors that regulators will consider in making the "clearable derivative" determination is the existence of a clearing obligation in other jurisdictions. Given that in many cases it may be known at the outset of the analysis under the Proposed Rule that a derivative is traded or is intended to be traded by counterparties located in multiple jurisdictions, rather than each regulator making a determination in isolation and having to consider the prior determination of another regulator, likely the outcome that would best serve the broader public interest would be reached if the provincial regulators cooperated in making the determination at the outset. Further, given the interjurisdictional nature of the market for many products, regulators may need to evaluate many of the factors set out in Part 4 – such as standardization, outstanding notional exposures, liquidity, reliable and timely pricing data, third party pricing vendors, competition, etc. - from a national, or even international, perspective in addition to a provincial perspective, depending upon the nature of the market.

(b) Inconsistencies in Definitions

TMX Group favours consistent use of defined terms throughout the Canadian derivatives regulatory regime. As was noted during the Derivatives Roundtable hosted by the British Columbia Securities Commission on

February 25, 2013, the definition of “local counterparty” in the Proposed Rule is different from the definition of “local counterparty” in Multilateral CSA Staff Notice 91-302 Updated Model Rules – *Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting*; the former definition does not include a counterparty “registered under applicable securities legislation as a dealer or subject to regulations providing that a person or company trading in derivatives must be registered in a category of registration prescribed by the regulations”. It is unclear why a registered dealer is included in the definition for mandatory reporting purposes, but not for clearing purposes. This difference may lead to confusion and unnecessary complication, particularly if compounded by further definitional differences in respective provinces’ regulations. TMX Group seeks further clarity as to why the definitions differ and suggests the CSA consider, instead, using a definition that is consistent across all derivatives regulations.

II. Specific Provision Comments

(a) Top-Down Approach

TMX Group would suggest that the Proposed Rule permit regulators to take a top-down approach to determining that certain products are “clearable derivatives” in addition to the bottom-up approach. Pursuant to both the Commodity Futures Trading Commission (“CFTC”) regulations in the United States and the European Market Infrastructure Regulation (“EMIR”), the regulator may itself determine that certain derivatives should be mandatorily cleared. Pursuant to the Proposed Rule, it appears that the regulator will only evaluate derivatives submitted for review by the clearing agency through a Form F2 as there are no provisions empowering the regulator to gather information or make a determination through other means. Limiting the criteria for inclusion as a clearable derivative to only cleared products is contrary to the G-20 commitment requiring that OTC derivatives contracts be exchange traded and cleared. Under such requirements, avoidance of clearing can be achieved by continuing to transact products exclusively on an OTC basis. Creating incentives not to clear new products was likely not the intent of this Proposed Rule. To avoid this outcome and harmonize the Proposed Rule with the international approach, TMX Group recommends that regulators are also empowered under the Proposed Rule to take a top-down approach and determine that certain derivatives may be subject to mandatory clearing without a prior submission from a clearing agency.

TMX Group notes, however, that as the Proposed Rule is currently structured, it appears that regulators will not be empowered to mandate that a clearing agency clear a particular clearable derivative, unless such power could be implied pursuant to section 14 of the Proposed Rule as a condition on the regulator’s determination that a derivative is a clearable derivative. TMX Group supports an approach whereby a regulator cannot mandate that a clearing agency clear a particular clearable derivative. It is in the best interests of the public for clearing agencies to have the ability to reject for clearing a product which the clearing agency may determine is too risky for its business.

(b) Treatment of Currently Cleared Products

TMX Group would propose further guidance respecting the treatment of derivative products that are already being cleared. Pursuant to section 39.5(a) of the CFTC regulations, a clearing agency is presumed to be eligible to accept any swap for clearing that is within a group, category, type or class of swaps that the clearing agency already clears (though such presumption is subject to review). TMX Group respectfully proposes that provincial regulators make the same presumption with respect to a clearing agency’s ability to clear such products. TMX Group further proposes that derivative products that are currently being cleared by clearing agencies are products that would be appropriate for mandatory clearing and should, subject to

evidence of any adverse effect, upon the implementation of the Proposed Rule, automatically become "clearable derivatives". These are products that the market has already found to be sufficiently mature, liquid and standardized for clearing and which have already been reviewed by regulators in their clearing agency oversight. Automatic determination that such products are "clearable derivatives" will permit regulators to effect this Proposed Rule in a commercially reasonable timeframe.

(c) Mandatory Clearing Factors

TMX Group respectfully requests that: (1) further guidance be provided generally with respect to how regulators will analyze each of the factors listed in section 12 of the Explanatory Guidance to the Proposed Rule (which factors regulators consider when determining whether a derivative is subject to mandatory clearing), including any metrics that may be applied; and (2) an opportunity to comment on and contribute to such guidance before it is finalized also be provided.

With respect to these factors, TMX Group notes the following specific issues:

- (i) Factors (c) and (g) are very similar; both relate to whether a derivative would bring undue risk to the clearing agency and whether the clearing agency would be able to manage such risk. Conceptually, if the clearing agency can *manage* the risk, it is unlikely that the derivative would bring undue risk to the clearing agency; for simplicity and greater market certainty regarding criteria application, TMX Group recommends either combining these two factors or redacting one of them.
- (ii) With respect to factor (d), regulators should also consider the concentration of positions across Canadian market participants in a particular clearable derivative as trading volume is not as strong an indicator of systemic risk as large positions.
- (iii) With respect to factor (j), reliance upon mandated clearing determinations in foreign jurisdictions is concerning as the basis for such decisions may not be applicable in the local jurisdiction. Accordingly, TMX Group requests further clarity respecting how the existence of a clearing obligation in other jurisdictions would impact a regulator's decision.
- (iv) CFTC Regulations apply the following additional factors which are not included in the Proposed Rule:
 - (1) The existence of reasonable legal certainty in the event of the insolvency of the relevant derivatives clearing organization or one or more of its clearing members with regard to the treatment of customer and swap counterparty positions, funds, and property;
 - (2) Participant eligibility standards, if different from the derivatives clearing organization's general participant eligibility standards;
 - (3) Risk management procedures, including measurement and monitoring of credit exposures, initial and variation margin methodology, methodologies for stress testing and back testing, settlement procedures, and default management procedures; and
 - (4) Applicable rules, manuals, policies, or procedures.

TMX Group proposes that these same factors be considered under the Proposed Rule to provide greater consistency in regulatory approach across jurisdictions and greater commercial simplicity and certainty that products, many of which are transacted internationally will be treated similarly in different jurisdictions.

(d) Implementation and Review Process Timeframe

TMX Group requests that regulators provide greater clarity regarding (i) the intended timing of implementation and application of the Proposed Rule; and (ii) the review process timeframe following submission of the Form F2 pursuant to the Proposed Rule. With respect to (i), TMX Group respectfully proposes that once regulators have access to derivatives data reporting, regulators should have the data needed to implement and apply the Proposed Rule and that implementation of the Proposed Rule should not be unnecessarily delayed. With respect to (ii), TMX Group requests that regulators set out a review process timeframe in the Proposed Rule that is similar to the timeframe provided in the CFTC regulations – specifically, a 90 day timeframe to make a determination on mandatory clearing. The comment period provided to the public pursuant to the Proposed Rule should also be consistent with the comment period of 30 days pursuant to CFTC Rule 39.5, rather than the minimum period of 60 days provided in the Proposed Rule. These proposed modifications would ensure that mandatory clearing determinations pursuant to the Proposed Rule will be made within a commercially reasonable timeframe and provide greater certainty to the market as to when to expect such determinations.

(e) End User Exemption

TMX Group supports the inclusion of an appropriate *de minimis* or small end user exemption in the Proposed Rule that is consistent with US and European standards. Participants with outstanding derivative positions below the *de minimis* threshold would be subject to neither dealer registration nor the clearable derivative requirements when undertaking transactions that are *bona fide* hedges. Without such an exemption, TMX Group is concerned about potential regulatory arbitrage and loss of market participants. Smaller market participants that are subjected to onerous reporting and clearing requirements may be inclined to discontinue all derivative dealings or conduct such business in another jurisdiction or through a foreign affiliate. The result would be that overall market liquidity and transparency would be diminished without a material reduction in overall market risk.

(f) Treatment of Particular Products

As discussed above, TMX Group supports the commencement of the application of the Proposed Rule by regulators to determine clearable derivatives once regulators begin collecting derivatives data through the final trade repository rule. As also discussed above, we support the determination that derivative products currently cleared by clearing agencies in Canada should be clearable derivatives. If such a determination is not made, however, TMX Group would propose that equity derivatives and non-deliverable foreign exchange forwards should be among the first derivative categories to be reviewed and found to be clearable derivatives due to the potential systemic risks resulting from their large volumes and the characteristics that make them highly suitable for mandatory clearing, including the maturity of the market and standardization of the products.

(III) Global Approach to OTC Derivatives Reform

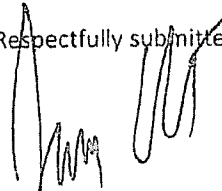
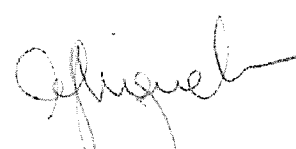

As discussed throughout this comment letter, TMX Group supports a domestic approach to derivatives regulatory reform that is consistent with international regulations. In that context, we note that as stated in the Background to the Proposed Rule, a major component of the G-20 commitments regarding derivatives regulatory reform to which Canada committed includes the requirement that all standardized over-the-counter derivative contracts should be traded on exchanges or electronic trading platforms. We note the strong connection between exchange-trading and clearing and that this component has not yet been

addressed in Canadian derivatives regulations. It is challenging to fully comprehend the Canadian derivatives regulatory framework or intended framework without any communication with respect to this component. We understand that regulations regarding trading platforms may be forthcoming, but we are unfamiliar with the more specific structure of this rule and whether it is intended to fulfill this component of the G-20 commitments. Other jurisdictions have already enacted regulations with respect to this component. Pursuant to the Dodd-Frank Act in the United States, certain swaps must be made available to trade on an exchange in addition to being cleared. The European Union's proposed Revision of the Markets in Financial Instruments Directive (MiFID II) requires exchange trading for derivative contracts declared eligible for clearing by the European Securities Market Authority (ESMA) under EMIR. TMX Group respectfully requests that the CSA provide further clarity with respect to how and when mandatory exchange-trading may be introduced into the Canadian derivatives regulatory reform process.

TMX Group notes further that by not making a distinction between futures and swaps, the basic derivatives regulatory framework in Canada differs from the approach taken in the US. Pursuant to the US approach, all futures products must be exchange-traded and cleared, while certain swaps products are not required to be cleared. This has resulted in a substantial portion of derivatives products in the US being cleared and not being subject to potential exemptions from clearing. As Canada has taken this different approach, to reduce alignment issues with respect to the effects of the regulations, we note that in drafting the exemptions to the Proposed Rule and in making clearable derivatives determinations, regulators should remain mindful of this fundamental difference in approach to derivatives regulation.

TMX Group appreciates the opportunity to provide comments with respect to the Proposed Rule and looks forward to further dialogue on mandatory clearing and Canadian derivatives reform generally. We hope that you will consider our concerns and suggestions and would be happy to discuss these at greater length with the Committee. Please feel free to contact Steve Lappin at steve.lappin@ngx.com, George Kormas at gkormas@cdcc.ca or David Stanton at dstanton@cds.ca if you have any questions regarding our comments.

Respectfully submitted,

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