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Nova Scotia Securities Commission
Nunavut Securities Office
Ontario Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

c/o:
Ms. Josée Turcotte, Secretary
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Me Anne-Marie Beaudoin, Corporate Secretary
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Dear Sirs/Mesdames:

RE: Comment Letter to CSA Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (the "Proposed Clearing Rule") and Proposed Companion Policy 94-101CP *Mandatory Central Counterparty Clearing of Derivatives* (the "Proposed Clearing CP")

This comment letter is in response to the Canadian Securities Administrators' ("**CSA**") OTC Derivatives Committee (the "**Committee**") request for comments regarding the proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives (*the **"Proposed Clearing Rule")** and its proposed Companion Policy94-101 CP (the **"Proposed Clearing CP").**

We appreciate the opportunity to comment on the Proposed Clearing Rule and the Proposed Clearing CP, and we greatly appreciate the opportunity afforded us by the Committee to provide comment. Though we strongly support the importance of harmonization across Canada by the Committee opting to develop a national instrument so that "the substance of the rules be the same across jurisdictions, and that market

participants and derivatives products will receive the same treatment across Canada, both in terms of participants (similar exemptions) and products (same determinations)", we strongly urge the Committee to be cognizant that harmonization is not an end to itself. As the Committee is well aware the nature of OTC derivatives markets is international and this plays an important role in a framework to develop a Canadian approach to central counterparty clearing. As noted in the December 2012 *Financial System Review*[1] published by the Bank of Canada, "transactions in OTC derivatives frequently involve counterparties in different jurisdictions, and market participants regularly trade in several currencies and across various types of OTC derivatives. For example, the majority of trades in Canadian-dollar OTC interest rate derivatives (measured in notional amount outstanding) involve at least one offshore counterparty, and Canadian dealers have large portfolios of derivatives that are not denominated in Canadian dollars". Thus, it is imperative that the Committee interprets the G20 commitments to mean that Canadian market participants of all types can continue to fulfill their risk management obligations by having access to the global liquid derivatives markets.

As counsel to counterparties ranging from energy producers, energy transporters, and energy trading and marketing organizations to global financial institutions; financial market infrastructures such as exchanges and clearing agencies and derivatives market intermediaries, Dentons Canada LLP **("Dentons")** has extensive involvement with all asset classes involved derivatives transactions from a legal and regulatory perspective. Dentons advises a number of market participants' vis-à-vis the current and impending derivatives regulation in Canada. In this letter, we would comment from a legal and regulatory standpoint, as opposed to a business and implementation standpoint on certain of the provisions in the Proposed Clearing Rule as our clients are commenting on those provisions

This letter reflects the general comments of certain members of Dentons energy transactions and derivatives practice groups and does not necessarily reflect the overall views of our firm or our clients.

1. Definitions; Terminology used and the lack of meaning thereof

One of the complexities of constructing and interpreting statutes is that more and more activity such as derivatives trading (a technical subject) is made subject to government regulation. As a result, technical language would feature prominently in legislative texts and rules. This creates a problem of interpretation for market participants to decipher between the ordinary and technical meanings of a term. This ambiguity is intensified when a term is not defined in a rule such as some of the terms used in the Proposed Clearing Rule. The Committee has used terms such as "Clearing member"; "Head Office"; "Principal Place of Business"; and "Affiliate" to name a few without defining these terms.

The Committee has stated in Annex A of the Proposed Clearing Rule– *Comment Summary and CSA Responses*, that it had made no change to the request by commenters to the draft model rule it published on December 19, 2013 CSA Notice 91-303 *Proposed Model Rule Provincial Rule on Mandatory Central Counterparty Clearing of Derivatives* (the "**Draft Model Rule**") , seeking additional guidance on concepts such as "head office"; "principal place of business" and "affiliate" or more specifically what is meant by "responsible for the liabilities of that affiliated party",, as these are "longstanding legal concepts". It is well settled by the Supreme Court of Canada that words contained in a statute are to be given their ordinary

[1] http://www.bankofcanada.ca/wp-content/uploads/2012/12/fsr-1212-chande.pdf

meaning. Other principles of statutory interpretation only come into play where the words sought to be defined are ambiguous.

The Courts have long used the governing principles in interpreting legal terms that (1) "legal terms that have no ordinary, non-technical meaning must be given their technical meaning; and (2) if a word or expression has both a legal and a non-technical meaning, the technical meaning is presumed". Though it is plausible that the use of legal concepts in legislation such as the Proposed Clearing Rule means they are meant to be used in a legal context, we urge the Committee to define these terms or provide guidance when it finalizes the companion policy to prevent a blurring of the distinction between the ordinary and legal meaning as it adds to the terminological confusion that has occurred in the interplay of considering the ordinary meaning versus the legal; meaning in various decisions of the Supreme Court of Canada.

On the other hand, the term clearing member would not be found in an ordinary dictionary and as a technical term, unless defined by the Committee, market participants would interpret this term by the specialized use by a distinct portion of the community.

2. Definition of Local Counterparty

As noted by the Committee, a commenter to the Draft Model Rule already noted that the local counterparty definition in the TR Rules differs from the local counterparty definition in the Draft Model Rule. The Committee also stated that it made no change as "the inclusion of registrants in the local counterparty definition of the Clearing Rule would result in requiring foreign registrants to clear even where there is no local counterparties involved in the transaction". We understand that the Committee wants to ensure that the clearing obligation applies to foreign entities similar to what the EU has done; ensuring that the "clearing obligation will apply directly to certain third country entities when they enter into derivatives subject to the clearing obligation with certain EU derivatives market participants".

However, the European Union and the U.S. legislation have uniform definitions in all their rules implementing the G20 commitments. As the Committee has stated in the rules it has published and the consultation papers, Canada has a very small derivatives market and putting in different definitions for the same term in different rules causes uncertainty among market participants especially foreign participants seeking to enter into derivatives transactions with Canadian counterparties.

We urge the Committee to harmonize its definitions in all its rules and find a way to adapt a similar approach as the European Union and the US that extended their clearing obligations to third country entities whose contracts have a direct, substantial and foreseeable effect in the EU or the US respectively and in the EU are aimed at evading EMIR's clearing and risk mitigation obligations (i.e. derivatives contracts or arrangements concluded without any business substance or economic justification).

3. Legal Uncertainty regarding Determining the Applicability of the Phase-In Period

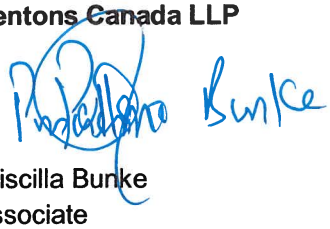
Without wanting to be repetitive, we urge the Committee to finalize the Registration Rule before it determines that certain derivatives be subject to mandatory central counterparty clearing. The committee has stated that it intends to follow a phase-in-approach and despite its assertion that counterparties that are not financial entities would benefit from an 18-month grace period, this grace period cannot be relied

upon unless counterparties know definitely what entities would fall into definite categories. A non-financial counterparty might fall in the fourth and final; phase in and its privately administered employee pension plan might fall somewhere else if the financial entity definition is left as is.

4. Conclusion

We thank you for the opportunity to comment on the Proposed Clearing Rule and Proposed Clearing CP and would be pleased to discuss our thoughts with the Committee further. If you have any questions or comments, please contact the undersigned

Yours truly,
Dentons Canada LLP



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