TMX Group Limited
The Exchange Tower
130 King Street West
Toronto, Ontario
M5X 1J2

May 13, 2015

VIA EMAIL

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal (Québec)
H4Z 1G3
consultation-en-cours@lautorite.gc.ca

Ms. Josée Turcotte,
Secretary
Ontario Securities Commission
20 Queen Street West 19th Floor, Box 55
Toronto, Ontario
M5H 3S8
comments@osc.gov.on.ca

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

Dear Sirs/Mesdames:

Re: CSA Notice on Proposed National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives - Comments

TMX Group Limited ("TMX Group") welcomes the opportunity to comment on proposed National Instrument 94-101 - Mandatory Central Counterparty Clearing of Derivatives (the "Clearing Rule") and related Companion Policy (the "Clearing CP", and together "NI 94-101"). TMX Group is supportive of all efforts to make Canada's derivatives-related regulatory framework more efficient and transparent. Subsequent to the TMX Group's March, 2014, comment letter on CSA Notice 91-303 - Proposed Model Provincial Rule on Mandatory Central Counterparty Clearing of Derivatives ("Draft Model Rule"), we are especially pleased to learn that the regulators have proposed a National Instrument that harmonizes regulations across all jurisdictions. We would, however, like to address some key elements of the Draft Model Rule in respect of which TMX Group commented and which do not appear to have been reflected in NI 94-101 as well as some additional issues. Most specifically to that end, TMX Group would like to reiterate the importance of developing a cohesive OTC framework which satisfies the primary objective of mitigating systemic risk and ensures that Canadian markets remain attractive and competitive for global participants.

1. **Harmonization & Mandatory Clearable Derivative Determination**

The two-pronged definition of "mandatory clearable derivative" in the proposed Clearing Rule indicates that the process of determining whether a product must be cleared will differ between Quebec and the other CSA jurisdictions. Furthermore, the notice accompanying proposed NI 94-101 (the "Clearing Notice") specifies that, in the CSA jurisdictions (other than Quebec), the process is expected to follow the typical rule-making or regulation making processes, whereas in Quebec the decision will be made by the Autorité des marchés financiers ("AMF").

TMX Group would like to stress the critical importance of a uniform process: the mere possibility of different provincial interpretations creates legal uncertainty which adversely affects markets. We are concerned that the filing and determination processes will be duplicated across jurisdictions and we request that the CSA further clarify this point. If the determination of mandatory clearing of a derivative varies between jurisdictions, for instance, it may create conflicting obligations for some participants, may add unnecessary complexity and costs for

stakeholders, and may, ultimately, both deter new entities from entering the Canadian markets and drive existing entities away. We urge the regulators to balance any benefits of this approach against the costs. For many entities operating across Canada, or those entering the market, tracking, interpreting and navigating multiple regulatory frameworks may be extremely burdensome.

We understand that part of the reason why the AMF may be taking a different approach to the determination process is because deeming derivatives to be mandatory clearable derivatives requires regulators to undergo a full rule-making or regulation making process in order to amend the National Instrument to add a new mandatory clearable derivative to the list in the appendix while the AMF's regulation making process may be different. The AMF, for example, may not require Quebec ministerial approvals, while at least some other provincial regulators will require such approvals, making the determination process much longer in those jurisdictions.

We question whether there might be a way to structure this rule such that determinations are not subject to the full rule-making or regulation making process so that all regulators may make the determination jointly at the same time.[1] A full rule-making or regulation making process should not be required as this determination will flow from rules that will be set out in the National Instrument that will have received the relevant approvals.

A simplified approach that does not require each determination to go through a full rule-making or regulation making process and which could be standardized across all provinces, including Quebec, would:

i. Address the concerns we have raised with respect to the divergence in approach between Quebec and the other provinces and related unpredictability of the determination outcome;
ii. Be more consistent with how provincial securities regulators make certain other comparable determinations (i.e. recognition/exemption of exchanges and associated terms and conditions);
iii. Allow regulators to provide more concrete guidance regarding the timeframe for the determination process (and address concerns related to this issue which we have set out in subsection 2.c as it removes the uncertainty of when ministerial approvals/other regulatory amendment approvals will be made); and
iv. Free up government and regulator resources for matters that are more appropriately in need of ministerial approval or a full regulatory amendment process.

[1] In the US, for instance, under regulation §50.6 of 17 CFR Part 50 on Clearing Requirement determination pursuant to Section 2(h)(3) of the CEA, a delegation of authority has been adopted. CFTC itself has delegated the authority to the Director of the Division of Clearing and Risk to make the determination under the rule under certain cases. Such approach ensures a timely and efficient determination.

2. Determination

a. Bottom-Up Approach

NI 94-10 appears to have maintained only the bottom-up approach with respect to determining the mandatory clearing of derivatives. Section 12 of the Clearing Rule indicates that no later than the 10th day after a regulated clearing agency first provides or offers clearing service for a derivatives, it must submit to the regulator a completed Form F2 identifying the derivatives. Thus, this indicates that the only method for determining mandatory clearing is for a clearing agency to submit a notice making such a request to the regulators.

This approach diverges from most foreign jurisdictions, where regulators have adopted a combination of bottom-up and top-down approaches. CFTC regulations, for example, state that "the Commission on an ongoing basis shall review each swap, or any group, category, type, or class of swaps to make a determination as to whether the swap or group, category, type, or class of swaps should be required to be cleared." Any determination would still be subject to a public comment period.[2] EMIR states that "ESMA shall, on its own initiative, after conducting a public consultation (…) notify to the Commission the classes of derivatives that should be subject to the clearing obligation...Following the notification, ESMA shall publish a call for a development of proposals for the clearing of those classes of derivatives."[3]

While a newly offered derivative might not warrant from the outset a determination of mandatory clearing, this situation could evolve over time. The Clearing Rule does not provide grounds for the regulators to take into account such market developments.

TMX Group respectfully requests further clarification with respect to how systemic risk mitigation objectives would be met if a specific derivative, or class of derivatives, was to pose a systemic risk but had not otherwise been submitted for a determination of mandatory clearing. We understand that securities regulators may have the authority to initiate their own determination processes, should it be necessary, pursuant to their general authority under securities legislation. We would submit, however, that it would be in the best interest of market stability and predictability, and provide greater regulator process transparency, if the existence of such authority with respect to the determination process was clearly provided for in the national instrument.

Provisions with respect to this matter should make clear that such authority exists and, should regulators choose to exercise it, describe the applicable process. We note, for clarity, that this should not have the consequence of mandating that clearing agencies clear certain products they do not wish to or cannot clear.

---

[2] CFTC Regulation § 39.5(a)(2) under 17 CFR Part 39 on the Review of swaps for Commission determination on clearing requirement. ("CFTC Regulation 39.5").

[3] Article 5(3) of Regulation (EU) No 648/2012 ("EMIR").

b. Facilitated Determination for Products Offered for Clearing

In the transition period, regulated clearing agencies would have 30 days to submit a completed Form F2 for all products that are already offered for clearing. The Clearing Rule does not appear to grandfather existing products which are already centrally cleared whereas several foreign jurisdictions have incorporated this mechanism. Furthermore, TMX Group questions whether, for products already offered for clearing, part of the information covered under Form F2 might not directly be available from international organizations, trade repositories and/or already reported to the regulators.

The OICV-IOSCO recommends that "the bottom-up approach uses the offering of products for clearing at a CCP [Central counterparty] as the starting point" [4] and although the regulatory authorities may determine that mandatory clearing should not be applicable, many foreign jurisdictions have adopted a presumption of clearing eligibility for products already offered for clearing by a clearing agency.[5]

Considering the significant burden that this process will entail, TMX Group strongly urges the regulators to adopt an approach by which derivatives already offered for clearing be deemed submitted for determination so as to simplify the process during transition.

c. Rule-Making Process Timeframe

In contrast to other jurisdictions, such as the United States (through the CFTC), no timeframe is prescribed for the rule-making process pursuant to NI 94-101. TMX Group would like to reiterate the substantial impact that such legal uncertainty and indeterminate timing has on our ability to be reactive and competitive in a global market. We believe that our participants will also need certainty with respect to the determination and be able to predict when they can expect such determination so they can make appropriate business decisions accordingly. The OICV-IOSCO recommends that the "determining authority should verify the appropriate timeframe for reaching its determination and communicate this clearly to the CCPs in question."[6] The CFTC, for example, has adopted a maximum 90 day timeframe[7]. TMX Group specifically and strongly requests that the regulators specify a maximum timeframe for the product determination process.

d. Form F2 and Factors of Determination

Although the regulators may have different considerations when assessing whether a derivative or class of derivatives should be subject to mandatory clearing as opposed to permitting new

[4] « Requirements for Mandatory Clearing », OR05/12, OICV-IOSCO, Technical Committee of the IOSCO, February 2012 ("IOSCO Requirement") at p. 13.
[5] CFTC Regulation 39.5(a) and EMIR Article 5(2).
[6] IOSCO Requirement, p. 16.
[7] CFTC Regulation 39.5 (b) (6).

derivatives to clear, TMX Group questions whether some of the information requested under Form F2 may be directly available from international organizations, trade repositories and/or already disclosed to the regulators. In view of the above consideration and the timing required under section 12 of the Clearing Rule when a regulated clearing agency first provides or offers a clearing services for a derivative, TMX Group calls on the regulators to adopt a streamlined process which would avoid any duplicative or additional regulatory burden on clearing agencies.

3. Substituted Compliance and Efficiency of the Canadian Markets

Under Section 5(5) of the Clearing Rule, the clearing obligation can be satisfied by certain local counterparties by submitting for clearing in another Canadian jurisdiction or in a foreign jurisdiction. Notwithstanding that such substituted compliance may align with the regulators' territorial oversight objectives, TMX Group would like to reiterate its concern with the potential impact of such exemptions. Most particularly, to the extent that a foreign regulatory framework is more flexible, and allows foreign CCPs to launch new clearable products more rapidly,[8] it may create an unlevel playing field and impede Canadian clearing agencies' ability to compete with foreign CCPs. The indeterminate timeframe with respect to both approving new products and associated rules (pursuant to NI 24-102) and the determination process for mandatory clearing derivatives, may make it exceedingly difficult for market participants to predict when a clearing agency will be entitled to clear new products and when such clearing will become mandatory. Once a clearing service becomes available, considering the capital requirement advantage to clear such product, a local participant may be incentivized to clear it abroad and avail itself to substituted compliance. The foregoing are, in TMX Group's view, clear and unacceptable obstacles for Canadian clearing agencies' competitive participation in global markets. TMX Group strongly recommends that the regulators adopt a more flexible and efficient approach to this process.

4. Derivative Definition

We believe that under "Specific Comments" in the Clearing CP, reference should be made to the definitions in Proposed Multilateral Instrument 91-101 *Derivatives: Product Determination* to ensure that the definition of derivative is consistent across provinces. Further, we note that under existing Canadian legislation, unlike legislation in other jurisdictions such as the United States, there is no concept of futures contracts which are required to be exchange-traded and cleared. We believe that there should be legislation requiring certain exchange-traded contracts to be cleared in addition to legislation relating to OTC derivatives as similar policy reasons for clearing of OTC derivatives would apply to clearing of exchange-traded derivatives.

[8] TMX Group has raised concerns with respect to the material change approvals required pursuant to National Instrument 24-102 *Clearing Agency Requirements* ("NI 24-102") as, as currently drafted, it may take longer to receive regulatory approvals to launch new products.

5. Derivatives Trading Facilities

TMX Group would appreciate further clarity with respect to how the Clearing Rule will work with rules regarding derivatives trading facilities. For example, would a mandatory determination under one set of regulations result in an automatic determination or automatic consideration under the determination process under the other? Consideration should be given as to how these two set of regulations will compare and work together before finalization and greater clarity regarding this matter should be provided to the market.

We thank you for the opportunity to provide our comments on the Proposed NI 94-101. We hope that you will consider our suggestions and we would be happy to discuss our comments further at your convenience. Please feel free to contact Marlène Charron-Geadah, Legal Counsel, TMX Group at mcharron-geadah@m-x.ca if you have any questions regarding our comments.

Respectfully submitted,

Alain Miquelon
President and Chief Executive Officer
Montréal Exchange
Group Head of Derivatives

Jim Oosterbaan
President
Natural Gas Exchange Inc.
Group Head of Energy