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VIA ELECTRONIC MAIL

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

Dear Sir or Madam:

I. INTRODUCTION.

On behalf of The Canadian Commercial Energy Working Group ("**Working Group**"), Sutherland Asbill & Brennan LLP hereby submits this letter in response to the request for public comment on Proposed National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives ("**Proposed Clearing Rule**") and Proposed Companion Policy

94-101CP ("**Proposed Clearing Companion Policy**").[1] The Working Group welcomes the opportunity to provide comments on the Proposed Clearing Rule and the Proposed Clearing Companion Policy and looks forward to working with Canadian regulators throughout the derivatives reform process.

The Working Group appreciates that the Canadian Securities Administrators ("**CSA**") incorporated suggestions into the Proposed Clearing Rule and the Proposed Clearing Companion Policy that it received from public comments submitted on CSA Staff Notice 91-303 Proposed Model Provincial Rule on Mandatory Central Counterparty Clearing of Derivatives ("**Draft Model Clearing Rule**").[2] The Proposed Clearing Rule and the Proposed Clearing Companion Policy are an improvement from the Draft Model Clearing Rule, and with targeted amendments and clarification, could provide a workable regulatory regime for mandatory central clearing.

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.

The Working Group has identified the following issues which should be addressed, for the reasons discussed herein, as the final rule on mandatory central clearing is drafted: (i) the End-User Exemption; (ii) the interpretation of "hedging or mitigating commercial risk;" (iii) the Intragroup Exemption; (iv) the interpretation of "affiliated entity;" (v) non application to certain entities, including federal and provincial governments and governmental entities of Canada; and (vi) harmonization. Each of these issues is discussed in detail below.

A. END-USER EXEMPTION (SECTION 9 OF THE PROPOSED CLEARING RULE)

1. The Proposed Affiliate End-User Exemption Should Be Revised.

The Working Group appreciates that the CSA provided end-users with an exemption from mandatory central clearing (the "**End-User Exemption**"). The inclusion of the End-User Exemption is an appropriate step to achieving a framework that balances the CSA's regulatory objectives of improving transparency and the overall mitigation of systemic risk with the

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[1] *See* CSA Notice and Request for Comment, Proposed National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives and Proposed Companion Policy 94-101CP (Feb. 12, 2015) ("**CSA Notice**"), *available at* http://www.albertasecurities.com/Regulatory%20Instruments/5022685-v5-Proposed_NI_94-101_package.pdf.

[2] *See generally* CSA Staff Notice 91-303 Proposed Model Provincial Rule on Mandatory Central Counterparty Clearing of Derivatives (Dec. 19, 2013), *available at* http://osc.gov.on.ca/documents/en/Securities-Category9/csa_20131219_91-303_mandatory-counterparty-clearing- derivatives.pdf.

corresponding burdens imposed on market participants. However, as discussed further below, the Working Group is concerned that the proposed End-User Exemption, as drafted, does not accurately reflect CSA's intent.

Section 9(2) of the Proposed Clearing Rule (the "**Affiliate End-User Exemption**") provides an exemption from mandatory central clearing for an affiliated entity "acting on behalf of a counterparty" that is not a financial entity if certain conditions are met. While the Working Group appreciates that the CSA removed reference to an "agent" in the Proposed Clearing Rule's Affiliate End-User Exemption,[3] the revised language should be amended to address two issues.

First, the proposed language for the Affiliate End-User Exemption does not accurately reflect how it is intended to work. The Affiliate End-User Exemption is intended to allow an entity to hedge the risk of its non-financial affiliates and still qualify for the End-User Exemption. To do so, that entity would have to act as a counterparty to a derivatives transaction with a third party – the affiliates' whose risk is being hedged would not be a counterparty to that transaction. However, the proposed Affiliate End-User Exemption states that the mandatory central clearing requirement "does not apply to a transaction entered into by an affiliated entity of a ***counterparty*** that is not a financial entity…." (emphasis added).[4] That language should be amended so that, among other things, the Affiliate End-User Exemption functions as intended. This issue is resolved by the Working Group's proposed revised language for the Affiliate End-User Exemption provided below.

Second, the proposed Affiliate End-User Exemption places an unnecessary limitation on its use. Specifically, the Affiliate End-User Exemption is not available to an entity hedging the risk of its affiliates if that entity is subject to, or exempt from, a registration requirement. Effectively, this limitation would prevent a derivatives dealer, or even a large derivative participant, from utilizing the Affiliate End-User Exemption.[5] Such a limitation is unnecessary and needlessly restrictive.

The purpose of the Affiliate End-User Exemption is to allow a common market practice whereby an enterprise uses one or a few market facing entities to consolidate and hedge the commercial risk of the larger corporate group. This structure allows market participants to minimize the number of trading agreements they must put in place, and, by allowing the company to hedge its net risk rather than its gross risk, reduces margin requirements and credit risk. Given its purpose, the focus of the Affiliate End-User Exemption should be on the risk being hedged and not the entity doing the hedging. To this point, the CSA even recognizes in its discussion on the interpretation of "hedging or mitigating commercial risk" that: (i) the appropriate focus is on "…the underlying activity to which the risk relates, not the type of

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[3] *See* CSA Notice at 14.

[4] Proposed Clearing Rule at Section 9(2).

[5] *See, e.g.*, CSA Consultation Paper 91-407 Derivatives: Registration (Apr. 18, 2013) ("**Registration Consultation Paper**"), *available at* http://www.osc.gov.on.ca/documents/en/Securities-Category9/csa_20130418_91-407_derivatives-registration.pdf.

entity…;"[6] and (ii) the "…ability to rely on the [End-User Exemption] for a particular transaction depends on the purpose of the transaction."[7] As such, the Affiliate End-User Exemption should be amended, as shown below,[8] to allow an entity to hedge the risk of non-financial affiliates, regardless of whether that entity is subject to, or exempt from, a registration requirement.

The Working Group's Proposed Revised Language for the Affiliate End-User Exemption in Section 9(2) of the Proposed Clearing Rule

Section 9. (2) Section 5 does not apply to a transaction **if all of the following apply**:

(a) **the transaction is entered into by an ~~affiliated entity~~ affiliate of ~~a counterparty that~~ (i) an entity that is not a financial entity or (ii) entities that are not financial entities~~ if all of the following apply:~~; and**

~~(a) the affiliated entity is acting on behalf of the counterparty that is not a financial entity;~~

(b) **the transaction is entered into for the purpose of hedging or mitigating the commercial risk of the entity that is not a financial entity or entities that are not financial entities.**

~~(c) the affiliated entity is not subject to, registered under or exempted from the registration requirement under the securities legislation of a jurisdiction of Canada.~~

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6 *See* Proposed Clearing Companion Policy at Section 4 (discussing the appropriate focus for determining whether a risk being hedged or mitigated is commercial).

7 *See* Proposed Clearing Companion Policy at Section 4.

8 A clean (*i.e.*, non-redline) version of the Working Group's proposed revised language for the Affiliate End-User Exemption in Section 9(2) of the Proposed Clearing Rule is provided below.

Section 9. (2) Section 5 does not apply to a transaction if all of the following apply:

(a) the transaction is entered into by an affiliate of (i) an entity that is not a financial entity or (ii) entities that are not financial entities; and

(b) the transaction is entered into for the purpose of hedging or mitigating the commercial risk of the entity that is not a financial entity or entities that are not financial entities.

2. A Market Participant Should Be Permitted to Use the End-User Exemption for Types, Classes, or Categories of Derivatives for Which It Is Not A Derivatives Dealer or a Large Derivative Participant.

Although the derivatives registration regime in Canada has not been finalized at this time, the Working Group notes that it will impact many aspects of derivatives regulations, including whether a market participant would be eligible to use the End-User Exemption from mandatory central clearing. However, neither the Registration Consultation Paper nor the Proposed Clearing Rule address whether the registration requirement would apply to an entity's derivatives activity generally or if regulators contemplate limited purpose designation such that an entity would only need to register as a derivatives dealer or a large derivative participant for specific types, classes, or categories of derivatives. This would allow an entity to remain eligible to use the End-User Exemption to hedge commercial risks for other derivatives products. Notably, the U.S. Commodity Futures Trading Commission implemented a limited purpose designation regime.[9]

If a limited purpose designation regime is adopted – which the Working Group strongly urges the CSA to do – an entity could, for example, be registered as a derivatives dealer only for its OTC natural gas commodity derivatives activity and still have available to it the End-User Exemption for other derivatives transactions, such as foreign exchange or interest rate swaps, used to hedge or mitigate its commercial risk.

While the Working Group recognizes that the registration regime is outside of the scope of this particular request for comment, the Working Group respectfully notes that a limited purpose designation regime should be adopted and that the End-User Exemption in the final rule on mandatory central clearing should be available to a market participant for the types, classes, or categories of derivatives for which it is not registered as a derivatives dealer or large derivative participant.

B. INTERPRETATION OF "HEDGING OR MITIGATING COMMERCIAL RISK" (SECTION 4 OF THE PROPOSED CLEARING RULE)

The Working Group would like to thank the CSA for its efforts in drafting a largely workable regulatory framework for mandatory central clearing and appreciates that the Proposed Clearing Rule reflects the meaningful progress made throughout the drafting process. Notably, the provisions in the Proposed Clearing Rule regarding the interpretation of "hedging or mitigating commercial risk" are an important improvement from the proposed language in the

[9] Under the derivatives regulatory regime in the United States, there is limited purpose designation available for swap dealers and major swap participants. With respect to swap dealers, Section 1a(49)(B) of the Commodity Exchange Act provides that an entity "may be designated as a swap dealer for a single type or single class or category of swap or activities and considered not to be a swap dealer for other types, classes, or categories of swaps or swap activities." Regarding major swap participants, Section 1a(33)(C) of the Commodity Exchange Act similarly provides that an entity "may be designated as a major swap participant for 1 or more categories of swaps without being classified as a major swap participant for all classes of swaps."

Draft Model Clearing Rule because the phrase "closely correlated" was removed.[10] The inclusion of that phrase would have limited the efficacy of the End-User Exemption and the flexibility of hedging practices of end-users.

However, there is still room to further refine the language to clearly ensure that market participants seeking to rely on the End-User Exemption are able to continue engaging in common hedging practices. To this end, the Working Group has identified the issues listed below regarding the interpretation of "hedging or mitigating commercial risk."

1. The Phrase "in the Normal Course of Its Business" Should Be Removed from the Proposed Interpretation of "Hedging or Mitigating Commercial Risk."

The inclusion of the phrase "in the normal course of its business" in the interpretation of "hedging or mitigating commercial risk" under Section 4(1)(a) of the Proposed Clearing Rule could potentially be problematic. In order to utilize the End-User Exemption, it should be sufficient that there is a legitimate commercial risk the company seeks to reduce. Energy companies are continually evolving and improving the manner in which they hedge their risk. As such, it may be difficult in certain circumstances for energy companies to determine what constitutes "in the normal course of its business." For this reason, certain new and legitimate hedging approaches utilized to prudently manage risk may not qualify for the proposed End-User Exemption. As such, the phrase "in the normal course of its business" should be removed from Section 4(1)(a) of the Proposed Clearing Rule.

2. Guidance Is Required to Clarify Section 4(2)(a) of the Proposed Clearing Rule.

Section 4(2)(a) of the Proposed Clearing Rule seems to suggest that a derivatives transaction will not be considered to be held for the purpose of "hedging or mitigating commercial risk" even if it qualifies under Section 4(1) if the position is held "to speculate." Since Section 4(1) of the Proposed Clearing Rule appears to define activity that is not speculative in nature, it is unclear what is intended to be captured by the language of Section 4(2)(a) noting that positions held "to speculate" will not be considered to be held for the purpose of "hedging or mitigating commercial risk." To address this, the Working Group suggests that the CSA should provide guidance clarifying Section 4(2)(a) of the Proposed Clearing Rule in this respect.

C. INTRAGROUP EXEMPTION FROM MANDATORY CENTRAL CLEARING (SECTION 10 OF THE PROPOSED CLEARING RULE)

The Working Group appreciates the CSA including a largely workable exemption for intragroup transactions in the Proposed Clearing Rule ("**Intragroup Exemption**"). As the Working Group has noted in previous comment letters, intragroup transactions represent a transfer of risk within a corporate group and do not impose risk on the integrity of the markets.[11]

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[10] *See* CSA Notice at 12.

[11] *See* The Canadian Commercial Energy Working Group Comment Letter on CSA Consultation Paper

Thus, the CSA appropriately provided exemptions from mandatory central clearing for intragroup transactions. The Intragroup Exemption in the Proposed Clearing Rule, however, would benefit from the modifications identified below.

1. A Corporate Group Should Be Permitted to File One Form 94-101F1 to Cover the Entire Corporate Group for the Intragroup Exemption.

A completed Form 94-101F1 would need to be submitted for each pair of affiliated entities that seeks to utilize the Intragroup Exemption under the Proposed Clearing Rule.[12] This proposed requirement would impose burdens that could otherwise be eliminated by allowing a corporate enterprise to file one Form 94-101F1 covering an entire corporate group rather than requiring a filing for each pairing of affiliated entities that seeks to rely on the Intragroup Exemption. As such, the Working Group respectfully suggests incorporating amendments that would permit a corporate enterprise to file one Form 94-101F1 which would cover the entire corporate group.

2. Form 94-101F1 Should Be Modified to Remove the Term "Notifying Party," and Section 10(3)-(4) of the Proposed Clearing Rule Should Be Modified to Allow a Local Counterparty to Cause Form 94-101F1 to Be Submitted.

When read together, Form 94-101F1 and Section 10(3)-(4) of the Proposed Clearing Rule do not clearly indicate who is authorized to submit Form 94-101F1. For example, Form 94-101F1 uses the term "notifying party," whereas Section 10(3)-(4) provides that "the local counterparty must submit" Form 94-101F. While the term "notifying party" is not defined, it is reasonable to conclude that the use of this term, when read in conjunction with Section 10 of the Proposed Clearing Rule, would permit a local counterparty to delegate the task of submitting Form 94-101F to another party (*i.e.*, the local counterparty would cause Form 94-101F1 to be submitted by its affiliate). However, Section 10(3)-(4) of the Proposed Clearing Rule does not specifically provide a local counterparty with this option.

To address this issue, the CSA should make the following modifications. *First*, Section 10(3)-(4) of the Proposed Clearing Rule should be modified to allow a local counterparty to cause Form 94-101F1 to be submitted. Specifically, the text of Section 10(3)-(4) should be revised to read as follows: "…a local counterparty must submit**, or cause to be submitted,** to the regulator…." These changes would permit a company that centralizes its compliance and reporting functions in another entity to use those resources to comply with the obligation to file Form 94-101F1. *Second*, Form 94-101F1 should be amended accordingly to make clear that the local counterparty can submit, or cause to be submitted, Form 94-101F1.

92-401 Derivatives Trading Facilities (Mar. 30, 2015), *available at* https://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20150330_92-401_sweeneym.pdf.

[12] Proposed Clearing Rule at Section 10; Proposed Clearing Companion Policy at Section 10.

3. Consistent Guiding Principles That Allow Flexibility Should Be Provided to Indicate What Would Qualify as an Appropriate Risk Management Program.

To exercise the proposed Intragroup Exemption, entities would need to be subject to appropriate centralized risk evaluation, measurement, and control procedures (*i.e.*, an "**appropriate risk management program**").[13] The Working Group appreciates that the Proposed Clearing Rule appears to provide market participants with a degree of flexibility in determining what would qualify as an appropriate risk management program. The Working Group is concerned, however, that the Proposed Clearing Companion Policy conveys potentially conflicting messages about what would constitute an appropriate risk management program.

For example, Section 10 of the Proposed Clearing Companion Policy provides that entities using the Intragroup Exemption should have "…*detailed* operational material outlining the *robust* risk management techniques used…," which may not be appropriate for companies with less complex risk profiles. (emphasis added). Yet, Section 10 of the Proposed Clearing Companion Policy also says that the centralized risk management program needs to "*reasonably* [monitor] and [manage] risks…," which appears to be a more flexible standard. (emphasis added).

A "reasonableness" standard is the appropriate standard in this instance. Reasonableness is inherently contextual. A risk management program that is reasonable for a small market participant hedging a single risk in its only line of business is very different than a risk management program that would be reasonable for a large market participant hedging a multitude of risks across many business lines. As such, adopting a "reasonableness" standard would allow market participants to qualify for the Intragroup Exemption while tailoring their risk management programs to their unique circumstances.

Section 10 of the Proposed Clearing Companion Policy should be revised to provide consistent guiding principles, but not prescriptive requirements, to help inform market participants as to what regulators would consider to be an appropriate risk management program. Any such guiding principles should provide market participants with the flexibility to utilize risk management programs that are specific to their unique needs and corporate structures.

4. The Definition of "Intragroup Transaction" Should Be Clarified.

Section 10(1) of the Proposed Clearing Rule provides two avenues for a transaction to qualify as an "intragroup transaction" – one avenue relates to entities that are prudentially supervised on a consolidated basis (*i.e.*, Section 10(1)(a)) and the other relates to preparation of financial statements on a consolidated basis *(i.e.*, Section 10(1)(b)).[14] As commercial energy companies are generally not prudentially supervised, Section 10(1)(b) of the Proposed Clearing

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[13] Proposed Clearing Rule at Section 10(2); Proposed Clearing Companion Policy at Section 10.

[14] Section 10(1)(b) of the Proposed Clearing Rule provides that the following qualifies as an "intragroup transaction": "a counterparty and its affiliated entity if the financial statements for the counterparty and its affiliated entity are prepared on a consolidated basis in accordance with accounting principles as defined by the National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards*."

Rule is of particular relevance to the Working Group and to commercial energy companies generally.[15] Given the significance of Section 10(1)(b) of the Proposed Clearing Rule, the Working Group is concerned that the proposed language may not be clear.

The Working Group understands Section 10(1)(b) of the Proposed Clearing Rule to represent the concepts provided below.

- If two entities are consolidated under accounting principles consistent with National Instrument 52-107, then a transaction between the two entities would qualify as an intragroup transaction.

- To the extent that two affiliates' financial results are consolidated into the same ultimate parent's financial statements under accounting principles consistent with National Instrument 52-107, a transaction between those two affiliates would qualify as an intragroup transaction.

- A transaction entered into by (i) a non-issuer Canadian entity, the financial results of which are consolidated into the financial statements of an affiliated foreign issuer that files financial statements in its home jurisdiction in accordance with IFRS, with (ii) another affiliate, the financial results of which are consolidated into the same financial statements qualifies as an intragroup transaction.

The Working Group respectfully requests that the CSA confirm that its understanding of Section 10(1)(b) is correct.

In addition, it is the Working Group's understanding that the revisions made to Section 10(1)(b) of the Proposed Clearing Rule from the analogous Section 8(1)(a) in the Draft Model Clearing Rule were intended to simplify the language and were not intended to change the outcome or substance. The Working Group respectfully requests that the CSA confirm that is the case.

If the CSA did intend to change the outcome or substance with the revisions made to Section 10(1)(b) of the Proposed Clearing Rule from the analogous Section 8(1)(a) in the Draft Model Clearing Rule, the Working Group respectfully requests that the CSA readopt the language used in Section 8(1)(a) of the Draft Model Clearing Rule.

Specifically, Section 8(1)(a) of the Draft Model Clearing Rule provided that an "intragroup transaction" would include a transaction between two affiliated entities whose financial statements are prepared on a consolidated basis in accordance with one of the following:

[15] As noted by the CSA, "'entities prudentially supervised on a consolidated basis' refers to two counterparties that are supervised on a consolidated basis either by the Office of the Superintendent of Financial Institutions (Canada), a government department or a regulatory authority of Canada or a jurisdiction of Canada responsible for regulating deposit-taking institutions." CSA Notice at 16.

(i) if the head office of the parent entity is located in Canada, International Financial Reporting Standards, Canadian GAAP applicable to publicly accountable enterprises, Canadian GAAP applicable to private enterprises or U.S. GAAP as defined by the National Instrument 52-107 Acceptable Accounting Principles and Auditing Standards;

(ii) if the head office of the parent entity is located in a foreign jurisdiction, generally accepted accounting principles of the foreign jurisdiction in which the head office is located if those principles are substantially similar to those provided in subparagraph (i).

Section 8(1)(a)(ii) of the Draft Model Clearing Rule was important in that it provided a workable proposed framework for market participants operating in multiple jurisdictions to qualify for the intragroup transaction.

D. THE INTERPRETATION OF THE TERM "AFFILIATED ENTITY" SHOULD BE AMENDED (SECTION 3 OF THE PROPOSED CLEARING RULE)

Both the Affiliate End-User Exemption and the Intragroup Exemption require market participants to be "affiliated entities" in order to use those exemptions. In the Proposed Clearing Rule, the term "affiliated entity" is limited to "companies."[16] While the word "company" is not defined in the Proposed Clearing Rule, securities laws in Canada define the term to include "any corporation, incorporated association, incorporated syndicate or other incorporated organization."[17]

Noticeably absent from that definition are partnerships.[18] As such, the proposed interpretation of the term "affiliated entity," would effectively prevent partnerships and other unincorporated entities from exercising the Affiliate End-User Exemption and the Intragroup Exemption. Many commercial energy companies have partnerships and similar types of legal entities within their corporate families.

The Working Group requests that the Proposed Clearing Rule be amended to permit partnerships and other unincorporated entities to exercise both exemptions. To do so, the CSA should revise the interpretation of the term "affiliated entity" to include "persons" and "companies."

In addition, in the proposed interpretation of the term "affiliated entity," the CSA discusses the circumstances where an entity controls another entity. Specifically, an entity controls another entity if it holds more than 50 percent of voting securities of that entity or if 50 percent of voting securities of that entity are held for its benefit. The Working Group would like to confirm that phrase "held for its benefit" is intended to account for indirect control, such that

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16 Proposed Clearing Rule at Section 3.

17 *See, e.g.,* Section 1 of the Ontario Securities Act and Section 1 of the Alberta Securities Act.

18 Partnerships are captured under the definition of "person." *See, e.g.,* Section 1 of the Ontario Securities Act and Section 1 of the Alberta Securities Act.

entities would be deemed affiliated entities if another entity had direct or indirect ownership of over 50 percent of the voting securities of each of the entities.[19]

E. THE EXEMPTION FOR CANADIAN GOVERNMENTAL ENTITIES SHOULD BE REMOVED (SECTION 6 OF THE PROPOSED CLEARING RULE)

The Working Group opposes the exemption from the mandatory central clearing requirement for federal and provincial governments, governmental entities, and wholly-owned government entities whose obligations are guaranteed by the federal or a provincial government (the "**Governmental Entities**"). It is unclear why such an exemption is provided, as no explanation is offered for this categorical special treatment. The Working Group strongly encourages the CSA to avoid providing an advantage to any type of participant in competitive markets, such as Canadian OTC derivatives markets, when establishing the regulatory obligations for market participation. In addition, providing a complete exemption from mandatory central clearing for Government Entities might encourage them to take additional speculative risk as they might be cost advantaged in doing so.

In energy markets, Governmental Entities actively compete with other market participants that fall outside of the categories listed in Section 6 of the Proposed Clearing Rule. Providing Governmental Entities with an exemption from mandatory central clearing would lower their costs of engaging in derivatives transactions and provide them with an unfair advantage over other market participants. As such, the Working Group respectfully requests for the CSA to remove the special categorical exemption from mandatory central clearing provided in Section 6 of the Proposed Clearing Rule.

F. A UNIFORM LIST OF FACTORS SHOULD BE CONSIDERED BY THE REGULATORS FOR THE MANDATORY CENTRAL CLEARING DETERMINATION

The Working Group supports the CSA issuing a National Instrument in an effort to harmonize the substance of the Proposed Clearing Rule and the Proposed Clearing Companion Policy across Canadian jurisdictions. Issues regarding harmonization remain, however, with respect to the mandatory central clearing determination as it would still be made by provincial regulators. The Proposed Clearing Rule includes only suggested criteria for regulators to use when determining which derivatives or classes of derivatives should be subject to mandatory central clearing. In addition, it is unclear if the proper level of analysis would be at the provincial market level or the Canadian market level – this is particularly relevant with respect to the analysis of liquidity.

The Working Group proposes that a uniform list of factors be considered by the regulators for the mandatory central clearing determination and respectfully suggests that the appropriate level of analysis is the Canadian market level. For example, when determining whether Canadian dollar LIBOR-based interest rate swaps should be subject to mandatory

[19] The Working Group notes that Section 3 of the Alberta Securities Act includes a definition of "control" that is broader than the 50 percent test set forth in the Proposed Clearing Rule. The Working Group respectfully suggests that the CSA consider making the definition of "control" in the Proposed Clearing Rule consistent with definition of "control" in securities law context.

central clearing in Alberta, the Alberta Securities Commission ("**ASC**"): (i) should make that determination concurrently with the other provinces' securities regulators; and (ii) should make that determination based on those swaps' characteristics across Canada – not just in Alberta. So, when determining if adequate liquidity exists to subject those swaps to mandatory central clearing, the ASC should look at liquidity across Canada – not just liquidity in Alberta.

Further, each product should be considered in a uniform manner across provinces. To achieve this, the level of significance and weight of each factor in making a mandatory clearing determination with respect to a certain product should be harmonized across the provinces.

III. CONCLUSION.

The Working Group appreciates this opportunity to provide comments on the Proposed Clearing Rule and the Proposed Clearing Companion Policy and respectfully requests that the comments set forth herein are considered during the drafting process.

If you have any questions, please contact the undersigned.

Respectfully submitted,
/s/ R. Michael Sweeney, Jr.
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Alexander S. Holtan
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