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February 3, 2016

**VIA ELECTRONIC MAIL**

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**Re: Comments on Proposed Amendments to OSC Rule 91-507 *Trade Repositories and Derivatives Data Reporting* and OSC Companion Policy 91-507CP**

Dear Sir or Madam:

**I. INTRODUCTION**

On behalf of The Canadian Commercial Energy Working Group (the “**Working Group**”), Sutherland Asbill & Brennan LLP hereby submits this letter in response to the request for public comment from the Ontario Securities Commission (the “**OSC**”) on the proposed amendments to OSC Rule 91-507 *Trade Repositories and Derivatives Data Reporting*

(the “**OSC TR Rule**”) and OSC Companion Policy 91-507CP (the “**OSC TR Companion Policy**”).<sup>1</sup> The Working Group welcomes the opportunity to provide comments on the proposed amendments to the OSC TR Rule and the OSC TR Companion Policy (collectively, the “**OSC Proposed TR Amendments**”).

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.

The Working Group appreciates the OSC’s coordinated efforts with the Manitoba Securities Commission (the “**MSC**”)<sup>2</sup> and the Autorité des marchés financiers (the “**AMF**”)<sup>3</sup> to establish a workable derivatives reporting regime. The proposed amendments to the OSC TR Rule, MSC TR Rule, AMF TR Rule, and their respective TR Companion Policies (collectively, the “**Proposed TR Amendments**”) reflect the regulators’ willingness to carefully consider the input of market participants. In addition to this comment letter, the Working Group plans to submit separate comment letters to the MSC and AMF on their respective Proposed TR Amendments.

## II. COMMENTS OF THE WORKING GROUP

By issuing the OSC Proposed TR Amendments, the OSC has moved closer to establishing a derivatives reporting regime that is largely workable. However, the OSC Proposed TR Amendments raise a few issues for commercial energy companies doing business in Canada. Those issues include: (i) end-user affiliate reporting, generally; (ii) the proposed exception in Section 41.1 of the OSC TR Rule for end-user local counterparty affiliates; (iii) the proposed substituted compliance paradigm in Section 26(5) of the OSC TR Rule; (iv) proposed public dissemination of derivatives data under Appendix C of the OSC TR Rule; (v) harmonization of counterparty reporting obligations; and (vi) the definition of “end-user.” Each of these issues will be discussed in detail below.

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<sup>1</sup> See OSC Notice on Proposed Amendments to the OSC TR Rule and OSC TR Companion Policy (Nov 5, 2015) (“**OSC TR Notice**”), available at [http://www.osc.gov.on.ca/documents/en/Securities-Category9/rule\\_20151105\\_91-507\\_derivatives-data-reporting.pdf](http://www.osc.gov.on.ca/documents/en/Securities-Category9/rule_20151105_91-507_derivatives-data-reporting.pdf).

<sup>2</sup> See MSC Notice on Proposed Amendments to the MSC TR Rule and MSC TR Companion Policy (Nov. 5, 2015), available at <http://docs.mbsecurities.ca/msc/notices/en/126316/1/document.do>.

<sup>3</sup> See AMF Notice on Proposed Amendments to the AMF TR Rule, AMF TR Companion Policy, AMF Scope Rule, and AMF Scope Companion Policy (Nov. 5, 2015) (“**AMF TR/Scope Notice**”), available at <https://www.lautorite.qc.ca/en/consultations-derivatives-pro.html>.

**A. THE OSC SHOULD EXEMPT FROM THE OBLIGATIONS OF THE OSC TR RULE TRANSACTIONS BETWEEN END-USER AFFILIATES.**

The Working Group respectfully urges the OSC to exempt all transactions between end-user affiliates from the obligations of the OSC TR Rule. The Working Group recognizes that the OSC Proposed TR Amendments would take meaningful steps to reduce reporting burdens for “end-users.”<sup>4</sup> However, in order to have a derivatives reporting regime that appropriately balances the costs and benefits, the OSC should exempt all inter-affiliate derivatives transactions between end-users from the obligations of the OSC TR Rule. As discussed further herein, this is because the relief proposed under Section 41.1 and Section 26(5) is partial, reporting compliance costs are significant, and the utility of end-user affiliate reporting data to regulators is limited at best.

For these reasons, the Working Group’s primary recommendation is that the OSC provide an exemption from the obligations of the OSC TR Rule for transactions between end-user affiliates similar to the relief provided by the U.S. Commodity Futures Trading Commission (“CFTC”). Specifically, the CFTC has provided conditional relief in CFTC No-Action Letter 13-09 so that certain end-user affiliate transactions do not have to be reported.<sup>5</sup> In providing CFTC No-Action Letter 13-09, the CFTC recognized that such end-user affiliate transactions are used for risk management within a corporate group and do not increase the overall systemic risk or warrant the same reporting requirements as external swaps.<sup>6</sup> Any such relief, however, should also be available to end-users affiliates with a derivatives dealer in their corporate group.

If the OSC does not opt to provide relief for end-user affiliate transactions similar to the relief in CFTC No-Action Letter 13-09, the Working Group respectfully offers the specific comments contained herein in Section II.B and Section II.C, respectively, on the proposed exception in Section 41.1 of the OSC TR Rule and the proposed substituted compliance paradigm in Section 26(5) of the OSC TR Rule.

**B. THE PROPOSED EXCEPTION IN SECTION 41.1 OF THE OSC TR RULE SHOULD BE MODIFIED TO PROVIDE CLARITY AND PROPER SCOPE.**

The proposed exception in Section 41.1 would exclude from the derivatives data reporting obligations of the OSC TR Rule derivatives transactions between end-user local counterparty affiliates. However, there are issues with the proposed exception in Section 41.1 of

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<sup>4</sup> As used in this comment letter, the term “end-user” has the same meaning as provided in the OSC TR Notice. Under the OSC TR Notice, “end-users” are counterparties that are none of the following: derivatives dealers; recognized clearing agencies; or exempt clearing agencies. OSC TR Notice at 2.

<sup>5</sup> CFTC No-Action Letter 13-09, *No-Action Relief for Swaps Between Affiliated Counterparties That Are Neither Swap Dealers Nor Major Swap Participants from Certain Swap Data Reporting Requirements under Parts 45, 46, and Regulation 50.50(b) of the Commission’s Regulations* (Apr. 5, 2013), available at <http://www.cftc.gov/ucm/groups/public/@lrlattergeneral/documents/letter/13-09.pdf>.

<sup>6</sup> See CFTC No-Action Letter 13-09 at 3 (explaining the reason market participants submitted requests for relief and noting that the relief is granted “[a]ccordingly”).

the OSC TR Rule with respect to its availability to (i) certain types of legal entities and (ii) corporate groups with a derivatives dealer.

**1. The OSC Should Make Clear That the Proposed Exception in Section 41.1 of the OSC TR Rule Is Available for Partnerships and Other Unincorporated Entities.**

The Working Group respectfully requests for the OSC to make clear that the proposed exception in Section 41.1 of the OSC TR Rule is available for partnerships and other unincorporated entities. Such clarity is needed because there is uncertainty about whether the proposed exception in Section 41.1 of the OSC TR Rule for “affiliated companies” will be available for partnerships or other unincorporated entities.

While “affiliated companies” is not specifically defined in the OSC TR Rule, securities law in Ontario defines the term “company” to include “any corporation, incorporated association, incorporated syndicate or other incorporated organization.”<sup>7</sup> Absent from this definition of “company” are partnerships and other forms of unincorporated entities.

As such, the relief in proposed Section 41.1 of the OSC TR Rule may not be available for partnerships or other unincorporated entities. This raises issues because many commercial energy companies have partnerships and similar types of legal entities within their corporate groups. Under the AMF Proposed TR Amendments, this is less of an issue since the exception would be available for end-user local counterparty “affiliated persons,” which would include partnerships and trusts.<sup>8</sup>

To resolve this issue, the Working Group respectfully recommends that the OSC TR Rule be amended to permit partnerships and other unincorporated entities to use the proposed exception in Section 41.1 of the OSC TR Rule. To do so, the OSC TR Rule should be amended to change the term “affiliated company” to “affiliated persons.” This would be aligned with the approach taken by the AMF.<sup>9</sup>

**2. The Proposed Exception in Section 41.1 of the OSC TR Rule Should Be Available for Corporate Groups with a Derivatives Dealer.**

As currently drafted, the proposed exception in Section 41.1 of the OSC TR Rule for derivatives transactions between end-user local counterparty affiliates may not be available for corporate groups with a derivatives dealer. Specifically, the OSC Proposed TR Amendments could be read to prevent a counterparty from relying on this exception if it is affiliated with a

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<sup>7</sup> Ontario Securities Act at Section 1 (Current as of June 4, 2015), available at <http://www.ontario.ca/laws/statute/90s05#BK0>.

<sup>8</sup> See AMF Proposed TR Amendments at Section 40.1 (proposing for the exception to apply to derivatives transactions between “affiliated persons”); see AMF Proposed TR Amendments at Sections 1(3) and 1(4) (proposing to define the scope of a person to include partnerships and trusts); see also AMF TR/Scope Notice at 2.

<sup>9</sup> See AMF Proposed TR Amendments at Section 1(3).

derivatives dealer.<sup>10</sup> However, the relief should be available for all end-user-to-end-user transactions regardless of with whom they are affiliated. The focus should be on the character of the counterparties.

Not only would this place an unnecessary restriction on the relief, but given that the derivatives dealer regulatory paradigm is not finalized, it could also make planning difficult for market participants. Further, the parallel proposed exception in Section 40.1 of the AMF TR Rule does not place such restriction on the relief.<sup>11</sup> As such, the parallel proposed exception in Section 40.1 of the AMF TR Rule would be available for derivatives transactions between end-user local counterparty affiliates that have a derivatives dealer in their corporate group.

To reduce unnecessary regulatory burden and to harmonize the provincial reporting regimes, the Working Group respectfully suggests that the OSC revise the proposed exception in Section 41.1 of the OSC TR Rule to make the relief available for corporate groups with a derivatives dealer.

**C. A DERIVATIVES TRANSACTION SHOULD BE EXEMPT UNDER SECTION 26(5) WHERE SUCH TRANSACTION IS EXEMPT UNDER THE LAWS, REGULATIONS, OR GUIDANCE OF AN EQUIVALENT FOREIGN JURISDICTION.**

The Working Group appreciates that the OSC Proposed TR Amendments would allow substituted compliance for end-users with respect to reporting derivatives data for transactions with their end-user foreign affiliates.<sup>12</sup> However, the Working Group respectfully notes that there are issues with one of the conditions to qualify for such relief.<sup>13</sup>

The problematic condition is that to be exempt under Section 26(5) of the OSC TR Rule, the derivatives transaction must be reported to a trade repository pursuant to the laws of certain foreign jurisdictions,<sup>14</sup> which includes the CFTC's reporting paradigm in the United States.<sup>15</sup> However, as noted earlier, the CFTC has provided conditional relief in CFTC No-Action Letter 13-09 so that certain end-user inter-affiliate transactions do not have to be reported. Thus,

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<sup>10</sup> Compare OSC Proposed TR Amendments at Section 41.1(b)(iii) with AMF Proposed TR Amendments at Section 40.1(b).

<sup>11</sup> Compare OSC Proposed TR Amendments at Section 41.1(b)(iii) with AMF Proposed TR Amendments at Section 40.1(b).

<sup>12</sup> See OSC Proposed TR Amendments at Section 26(5).

<sup>13</sup> See OSC Proposed TR Amendments at Section 26(5)(b).

<sup>14</sup> OSC Proposed TR Amendments at Section 26(5)(b).

<sup>15</sup> The OSC TR Rule provides that the following CFTC Regulations are equivalent for the purposes of the substituted compliance provision in Section 26(5) of the OSC TR Rule:

- CFTC Real-Time Public Reporting of Swap Transaction Data, 17 C.F.R. Part 43 (2013);
- CFTC Swap Data Recordkeeping and Reporting Requirements, 17 C.F.R. Part 45 (2013); and
- CFTC Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 17 C.F.R. Part 46 (2013).

end-user inter-affiliate derivatives transactions that are exempt from reporting by CFTC No-Action Letter 13-09 would still need to be reported to qualify for the exemption under Section 26(5) of the OSC TR Rule.

To prevent this unnecessary limitation, the Working Group respectfully requests that Section 26(5) of the OSC TR Rule be modified to allow end-user affiliates to continue to rely on the relief provided by the CFTC while still qualifying for the exception under Section 26(5).

Specifically, the Working Group offers the following suggested amendments to Section 26(5) of the OSC TR Rule:

**The Working Group's Proposed Revised Language for Section 26(5) of the OSC TR Rule**

**Section 26(5)**

- (b) the transaction is reported to a designated trade repository or exempt from such reporting pursuant to
  - (i) the securities legislation of a province of Canada other than Ontario, or
  - (ii) the laws, regulations, or guidance of a foreign jurisdiction listed in Appendix B....

**D. APPENDIX C OF THE OSC TR RULE SHOULD BE AMENDED TO REQUIRE DERIVATIVES DATA TO BE HELD BY TRADE REPOSITORIES FOR A MINIMUM TIME PRIOR TO PUBLIC DISSEMINATION.**

The Working Group commends the OSC for its efforts in the OSC Proposed TR Amendments to appropriately balance the benefits of post-trade transparency against the potential harm that may be caused to market participants' ability to hedge risk.<sup>16</sup> However, as currently drafted, the OSC Proposed TR Amendments under Appendix C of the OSC TR Rule do not achieve the proper balance.

This is because the OSC Proposed TR Amendments provide the time frame by which derivatives data must be publicly disseminated by trade repositories, but still do not provide a minimum time that the data must be held prior to public dissemination.<sup>17</sup> As such, the OSC Proposed TR Amendments still allow a trade repository to publicly disseminate the data as soon as it is received, which would defeat the purpose of the delay – “to avoid signaling the market.”<sup>18</sup>

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<sup>16</sup> OSC TR Notice at 2.

<sup>17</sup> See OSC Proposed TR Amendments at Appendix C.

<sup>18</sup> OSC TR Notice at 2.

To provide market participants with necessary protection, the Working Group respectfully requests that the OSC TR Rule be amended to provide a minimum time that the derivatives data be held before such data is permitted to be publicly disseminated by trade repositories. That minimum time should be determined based on the liquidity of the market for the relevant commodity.

**E. THE OSC SHOULD HARMONIZE ITS REPORTING COUNTERPARTY LIABILITY STRUCTURE WITH THAT OF THE MSC AND AMF.**

The Working Group respectfully notes that in the OSC Proposed TR Amendments, the OSC did not seek to harmonize its reporting counterparty liability structure with that of the MSC and AMF.

Under the OSC TR Rule, if both counterparties to a derivatives transaction have the same regulatory status (*e.g.*, non-dealer), the only way for the non-reporting counterparty to avoid regulatory liability in the event the reporting counterparty fails to report the transaction is for both counterparties to execute the ISDA Agreement and adhere to the ISDA Methodology.<sup>19</sup>

In contrast, under the MSC TR Rule and the AMF TR Rule, if both counterparties to a derivatives transaction have the same regulatory status (*e.g.*, non-dealer) the non-reporting counterparty would not retain any regulatory liability if reporting responsibility is assigned by written agreement. Execution of the ISDA Agreement and adherence to the ISDA Methodology is not required (i) to assign reporting responsibility to one counterparty or (ii) for the non-reporting counterparty to avoid regulatory liability if the reporting counterparty fails to report the transaction.<sup>20</sup>

In comparison to the OSC TR Rule, the MSC TR Rule and the AMF TR Rule provide necessary flexibility that allows delegation of reporting responsibility in manner that is more workable than under the ISDA Agreement and ISDA Methodology. For example, reliance on the ISDA Methodology's tie-breaker logic may not be helpful for non-dealer counterparties that have the same regulatory status in Canada and the United States.

Specifically, the tie-breaker language presupposes that both counterparties to a derivatives transaction are able to report derivatives to a trade repository as the role of "seller," can switch back and forth between the counterparties from transaction to transaction. However, in trading relationships between two non-dealers, it is possible that one of the counterparties will not have the ability to report derivatives. As such, one counterparty may have to serve as the permanent reporting counterparty, eliminating the ISDA Methodology as a viable choice and requiring the non-reporting counterparty to retain its reporting liability. This would generally be an unfavorable outcome for both counterparties.

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<sup>19</sup> See Section 25 of the OSC TR Rule.

<sup>20</sup> See Section 25 of the MSC TR Rule; *see also* Section 25 of the AMF TR Rule.

For these reasons, the Working Group respectfully requests for the OSC to harmonize its reporting counterparty liability structure with the MSC and AMF. Doing so would harmonize the reporting counterparty liability structure across provinces.

**F. IF THE OSC USES THE TERM “END-USER” IN A REGULATION, THAT TERM SHOULD BE DEFINED IN THE REGULATION.**

For regulatory clarity purposes, if the OSC uses the term “end-user” in a regulation, the Working Group respectfully requests for the OSC to define that term in the regulation. Because the term “end-user” may have different meanings to different people, providing a specific definition in the relevant regulation would help ensure a consistent interpretation and application of the law.

**III. CONCLUSION**

The Working Group appreciates this opportunity to provide input on the OSC Proposed TR Amendments and respectfully requests that the comments set forth herein are considered as any final legislation or regulations are drafted.

If you have any questions, please contact the undersigned.

Respectfully submitted,  
/s/ R. Michael Sweeney, Jr.  
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