VIA ELECTRONIC MAIL

September 1, 2017

Alberta Securities Commission
Authorité 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 Commission
Ontario Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
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Dear Sirs/Madams:

Re: Comments on Proposed National Instrument 93-101 *Derivatives: Business Conduct* and Proposed Companion Policy

The International Energy Credit Association ("**IECA**") hereby submits the comments contained in this letter on behalf of its members in response to the solicitation for comments made by the Canadian Securities Administrators ("**CSA**") in respect of the following published documents:

- Proposed National Instrument 93-101 *Derivatives: Business Conduct* (the "**Proposed Rule**"); and
- Proposed Companion Policy 93-101 Proposed CP *Derivatives: Business Conduct* (the "**Proposed CP**").

(collectively, the **"Proposed BC Instrument"**)

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I. INTRODUCTION

The IECA is not a lobbying group. Rather, the IECA is an association of several hundred energy company credit management, contract administration and legal professionals grappling with credit-related issues in the energy industry.

The IECA seeks to protect the rights and advance the interests of the commercial energy end-user community that makes up its membership. The IECA membership includes many small to large energy companies, few of whom are likely to be deemed derivatives dealers in Canada, but all of whom have a fundamental mission of providing safe, reliable, and reasonably priced energy commodities that Canadian businesses and consumers require for our economy and our livelihood.

Correspondence with respect to this comment letter and questions should be directed to the following individuals:

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II. COMMENTS OF THE IECA

On April 18, 2013 the CSA published the CSA Consultation Paper 91-407 *Derivatives: Registration* which provided an overview of the CSA's proposal for the regulation of key derivatives market participants through the implementation of a registration regime and a compliance system/internal business conduct regime. The CSA has since decided to split the regulation in this space into two separate regulations: one national instrument for business conduct and one national instrument for registration.

On April 4, 2017, the CSA published the Proposed BC Instrument for comment. In the CSA Notice and Request for Comment publishing the Proposed BC Instrument, the CSA indicated that they were in the process of developing a proposed registration regime for derivatives dealers, derivatives advisers and potentially other derivatives market participants. The CSA expected to publish the Proposed National Instrument 93-102 *Derivatives: Registration* and a related companion policy ("**Proposed Registration Instrument**") for comment during the same consultation period as the Proposed BC Instrument. In fact, the CSA extended the comment period for the Proposed BC Instrument for 150 days in order to allow market participants and other stakeholders an opportunity to consider both proposed instruments before the comment period expired.

On June 15, 2017, the CSA published CSA Staff Notice 93-301 which stated that the comment periods for the Proposed BC Instrument and the Proposed Registration Instrument would not overlap. The IECA believes that this is unfortunate because the concept of "derivatives dealer" is key to whether or not a party is subject to the Proposed Rule. Further, the IECA hopes that the Proposed Registration Instrument will make clear that any exemptions to derivatives dealer registration can be relied upon to avoid being designated a derivatives dealer in the Proposed Rule and that the Proposed Registration Instrument will apply not only to the Proposed BC Instrument but also to any other derivatives instruments/rules that the CSA has already enacted or proposes to enact in the future. The IECA respectfully requests that the CSA further extends the comment period for the Proposed BC Instrument so that there is overlap with the comment period for the Proposed Registration Instrument. The IECA strongly believes that the Proposed BC Instrument and the Proposed Registration Instrument should be moved forward in unison.

Alternatively, the IECA respectfully requests the market participants be given the opportunity to submit supplementary comments on the Proposed BC Instrument (including comments on specific questions not discussed in this letter) during the comment period for the Proposed Registration Instrument.

The IECA would like to express its general support of the Comment Letter from Eversheds Sutherland (US) LLP, on behalf of The Canadian Commercial Energy Working Group, to the Canadian Securities Administrators dated August 15, 2017 (the "**CCE Letter**"). Throughout this letter the IECA will refer to specific sections of the CCE Letter in support of the comments contained herein.

A. DEFINITIONS

Although the CSA did not specifically put forward a question regarding defined terms, generally, the IECA would suggest that certain terms used throughout the derivatives regulations in Canada (for example, "derivatives dealer") could benefit from standardization into a consolidated instrument like National Instrument 14-101 *Definitions*. By way of example, the term "derivatives dealers" is defined in the Proposed Rule, but the definition is different from the reporting rules that have been implemented across Canada in that it adds another class of derivatives dealer. The IECA would propose a more streamlined process whereby commonly used terms (like derivatives dealer) are consolidated across Canada in one instrument for ease of reference and to reduce unnecessary confusion.

B. DEFINITION OF "ELIGIBLE DERIVATIVES PARTY" (CSA QUESTION #1)

Respectfully, the IECA does not believe that the definition of EDP as set out in the Proposed BC Instrument is the appropriate definition for this term. The IECA believes that the CSA should consider amending the definition of EDP, as suggested below.

1. Harmonization and Revision

The IECA believes that the definition of EDP should be aligned with existing derivatives regulation definitions. Specifically, the IECA suggests that the definition of EDP should be consistent with the concepts of "**qualified party**" under various Provincial Exemption Orders (like Alberta Securities Commission Blanket Order 91-507 – *Over-the-Counter Trades in Derivatives* ("**BO 91-507**")); and the British Columbia Securities Commission Blanket Order 91-501 (BC), *Over-The-Counter Derivatives 91-501(BC)*; "**accredited counterparty**" under the *Derivatives Act* (Quebec); and "**eligible contract participant**" ("**ECP**") under various U.S. Commodity Futures Trading Commission ("**CFTC**") Rules.

The term ECP, as used by the CFTC, is defined in Section 1a(18)(a)(v) of the US Commodity Exchange Act (in part) as:

> (v) a corporation, partnership, proprietorship, organization, trust, or other entity – (I) that has total assets exceeding $10,000,000; (II) the obligations of which under an agreement, contract, or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by an entity described in subclause (I) …; or (III) that (aa) has a net worth exceeding $1,000,000; and (bb) enters into an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity's business; (emphasis added.)

The ECP definition is significant because it allows Canadian market participants that satisfy the ECP definition to have access to the U.S. derivatives markets, which are larger and more liquid than Canadian derivatives markets. In order to harmonize the Proposed Rule with ECP definition, the IECA respectfully

requests that the CSA revise the $25 million net asset threshold contemplated in the current definition of EDP to a lesser threshold of $10 million total assets.

The IECA also suggests that lack of harmonization and/or substituted compliance among the EDP definition and the three definitions described above could have the effect of driving foreign swap dealers out of the Canadian market, since their cost of compliance would increase by their having to establish additional, if not separate, compliance measures just to meet the Canadian requirements. An unintended consequence of the flight of derivatives participants from the Canadian market could be increased liquidity risk. Having fewer swap dealer-suppliers concentrates performance and liquidity risk in those fewer derivative dealers, which creates a less liquid market (i.e. less flexibility and less ability to react and absorb market shocks and default events, because there are fewer participants in the market to spread the risk around). Finally, without harmonization and/or substituted compliance with respect to core concepts like the EDP definition, market participants in Canada will not be able to utilize platforms that have already been developed to exchange information with other market participants (e.g. Markit).

The IECA respectfully submits that there is no reason to create another class of entities to which the Proposed Rule would apply. The currently existing definition of "qualified parties" and "accredited counterparties" already capture those counterparties who do not require the full set of protections afforded to retail customers or investors, either because they may reasonably be considered sophisticated or because they have sufficient financial resources to purchase professional advice or otherwise protect themselves through contractual negotiation with the derivatives firm. However, if the CSA is reluctant to take up the suggestion of the IECA in this respect, the IECA proposes that, at a minimum, the EDP definition should include the qualifications described in subsections (p)(q)(s)(t)(u)(v)(w) & (x) of the definition of "qualified party" in BO 91-507, as set forth in Schedule A to this letter.

The proposed revision in Schedule A also contemplates a revision to the $25 million net asset threshold to the lesser threshold of $10 million total assets, thus making the proposed definition of EDP for Canadian markets consistent with the definition of ECP for US markets.

2. Guarantees

The EDP definition should also be amended to allow an entity to qualify as an EDP if its obligations are guaranteed by an entity that otherwise qualifies as an EDP. A guarantor who meets the criteria of an EDP would be sophisticated or otherwise have the financial resources to protect itself in its role as a guarantor. As such, the protective intent of the Proposed Rule is unnecessary for such guaranteed counterparties. As noted in the CCE Letter (page 8):

> In many circumstances, a commercial energy company will have project entities created to house a particular project, like a wind farm or central hedging entities that face the market on behalf of affiliates. These entities may not have the $25 million in net assets needed to qualify as an EDP, but, in many cases, receive credit support from an affiliate that is an EDP.

Existing derivatives regulation in Canada, like BO 91-507, permit a market participant to be considered an EDP if its obligations under the derivatives that are being traded are fully guaranteed by one or more "qualified parties" or "accredited counterparties". Further, both the European Union's Markets in Financial Instruments Directive 2004/39/EC ("**MiFID**") and CFTC Rules allows the guarantee of an ECP in the U.S. or an eligible counterparty or Professional Client ("**EC**" or "**PC**") in the European Union to be deemed an ECP or an EC or PC if it has a guarantee or a payment undertaking obligation from a company that is an ECP or an EC or PC. The IECA respectfully suggests that harmonization with other derivatives

regulations (in Canada and internationally) to allow an entity to qualify as an EDP if its obligations are guaranteed by an entity that otherwise qualifies as an EDP will prevent undue compliance costs incurred by market participants and also prevent the flight of participants from the market.

3. Reliance on Representations and Warranties

The Proposed CP indicates that a derivatives dealer must take certain steps to determine whether a derivatives party is an EDP before transacting with or advising them. The Proposed CP goes on to state that:

> In determining whether the person or company that it transacts with or advises is an eligible derivatives party, the derivatives firm may rely on factual representations made in writing by the derivatives party, unless a reasonable person would have grounds to believe that such statements are false or it is otherwise unreasonable to rely on the representation. The criteria for determining whether a derivatives party is an eligible derivatives party are to be applied at the time a particular derivative is first entered into. A derivatives firm is not required to ensure that the derivatives party continues to be an eligible derivatives party during the life of the particular derivative but must consider the derivative party's eligible derivatives party status before entering into a new transaction with that derivatives party.

As with other representations and warranties given between counterparties to derivatives transactions, the IECA respectfully suggests that representations as to requisite knowledge and experience of a counterparty should be allowed to be given in Master Agreements or protocols amending them. IECA would request specific language to be included in the Proposed CP to that effect.

Further, a counterparty should be able to rely on representations as to requisite knowledge and experience of a counterparty unless a reasonable person would have grounds to believe that such statements are false or it is otherwise unreasonable to rely on the representation. No active investigation should be required on behalf of the counterparty relying on these representations. The IECA wholly concurs with the CCE Letter (pages 8-9) on this issue.

Finally, the IECA respectfully submits that a market participant engaged in commodity hedging should have the ability to represent and warrant their qualifications to assess risks and to "opt-in" to being treated as an EDP even if they don't meet the asset thresholds.

4. Exemptions – Application of Proposed Rule

(a) End-User

Section 39 of the Proposed Rule sets out an exemption for certain derivatives end-users from the Requirements of the Proposed Rule, as follows:

> A person or company is exempt from the requirements of this Instrument if each of the following applies:
>
> (a) the person or company does not solicit, or otherwise transact in a derivative with, for or on behalf of, a person or company that is not an eligible derivatives party;
>
> (b) the person or company does not, in respect of transactions in derivatives, advise other persons or companies that are not eligible derivatives parties, other than general advice that is provided in accordance with the conditions of section 43 [Advising generally];

(c) the person or company does not regularly quote prices at which they would be willing to transact in a derivative or otherwise make or offer to make a market in a derivative with a derivatives party;

(d) the person or company does not regularly facilitate or otherwise intermediate transactions in derivatives for another person or company;

(e) the person or company does not facilitate the clearing of a transaction in a derivative through the facilities of a clearing agency for another person or company, other than for an affiliated entity.

The current exemption prescribes that a person cannot transact with non-EDP's in order to qualify for the end-user exemption. The IECA suggests that it would be overly onerous to require an otherwise exempt market participant to comply with the Proposed Rule simply because they transact with a non-EDP. Given the plethora of business conduct requirements set out in the Proposed Rule, many market participants will seek to utilize the end-user exemption. In fact, market participants may cease transacting with non-EDP's so that they can fit the end-user exemption. This will create market risk in two separate ways: (i) non-EDP's will have fewer counterparties with which to enter into transactions to hedge their business risk; and (ii) if there are fewer counterparties willing to transact, market liquidity will decrease.

Subsection (c) prescribes that a party cannot qualify for the end-user exemption if a person regularly quotes prices at which they would be willing to transact in a derivative. The CSA has further prescribed, in the Proposed CP, that an indicia of being a "derivatives dealer" is quoting prices. As the IECA will discuss in more detail below (see page 10 in response to CSA Question #5), regularly providing quotes is not necessarily an indication that a person or company is a derivatives dealer. The end-user exemption should be available to entities who regularly quote prices, as long as they aren't otherwise market-makers.

(b) De minimis

The IECA strongly believes that there should be a notional value-based de minimis exception to being classified as a derivatives dealer. The IECA notes and supports the commentary contained in the White Paper "The Need for a De Minimis Exception from Registration as Derivatives Dealer in Canadian Provinces and Proposed Approaches for Implementation" (the "**White Paper**") which is attached as Exhibit I to the CCE Letter. The White Paper speaks effectively about market participants exiting the derivatives markets, in the absence of a *de minimis* dealing threshold, and the corresponding negative market impacts, including risk concentration and decreased liquidity.

C. KNOWLEDGE AND EXPERTISE REQUIREMENTS IN CLAUSES (M) AND (N) OF THE DEFINITION OF "ELIGIBLE DERIVATIVES PARTY" (CSA QUESTION #3)

As currently contemplated in the Proposed Rule, clauses (m) and (n) of the definition of EDP read as follows:

(m) a person or company, other than an individual,

(i) that has represented in writing that it has the requisite knowledge and experience to evaluate the information provided to the person or company about derivatives, the suitability of the derivatives for that person or company, and the characteristics of the derivatives to be transacted on the person or company's behalf, and

(ii) that has net assets of at least $25 million as shown on its most recently prepared financial statements

(n) an individual

(i) who has represented in writing that he or she has the requisite knowledge and experience to evaluate the information provided to the individual about derivatives, the suitability of the derivatives for that individual, and the characteristics of the derivatives to be transacted on the individual's behalf, and

(ii) that beneficially owns financial assets, as defined in section 1.1 of National Instrument 45-106 Prospectus Exemptions, that have an aggregate realizable value before tax but net of any related liabilities of at least $5 million

Requiring EDP representations and/or determinations at a product-type level is impractical for both the derivatives dealer and the EDP.

From the perspective of a derivatives dealer, it would require the derivatives dealer to regularly confirm that representations and warranties it received from its EDP counterparties remained up-to-date as far as product-types were concerned. Similarly, from the EDP's perspective, they would have to regularly give new representations and warranties as their knowledge and experience with product-types changed over time. This creates unnecessary administrative burden for little practical protection.

A party that is sophisticated enough to otherwise qualify as an EDP should be sophisticated enough to know what product-types it was comfortable, or competent, to transact. It should also have its own internal policies and procedures regulating its derivatives activities, including allowed product-types, position limits, and requisite market knowledge and experience among its derivatives trading staff. There should remain some responsibility for one's own actions and market conduct on the part of eligible derivatives parties and derivatives dealers shouldn't be burdened with having to police that EDPs have requisite knowledge and experience with specific derivative product-types.

In addition, derivatives dealers should be able to rely on representations and warranties received from their EDP counterparties without further investigation unless the dealer actually has knowledge that would make it question the accuracy/truthfulness of such representation or warranty. The IECA respectfully recommends that the Proposed Rule and the Proposed CP make clear that a derivatives dealer or derivatives adviser be able to treat a derivatives party as an EDP for all purposes.

Finally, although the CSA did not specifically put forward a question regarding the asset threshold test in subsection (m) of the EDP definition, the IECA would respectfully request a revision to such subsection. The IECA recommends that subsection (m) of EDP definition be revised such that (i) the asset threshold test: (a) should apply to gross assets and not net assets, and (b) be reduced from $25 million to $10 million; and (ii) specifically allow for the threshold to be met through guarantees (i.e. an EDP includes a person, other than an individual, whose obligations are guaranteed by a person who is an EDP).

D. TWO-TIERED APPROACH TO REQUIREMENTS: ELIGIBLE DERIVATIVES PARTIES VS. ALL DERIVATIVES PARTIES (CSA QUESTION #4)

The Proposed Rule prescribes a two-tiered approach to investor/customer protection. A derivatives firm[1] has certain obligations that apply in all cases when dealing with or advising a derivatives party[2]

[1] The CSA refers to derivatives dealers and advisors collectively as a "**derivatives firm**".

regardless of the level of sophistication or financial resources of the derivatives party. Other obligations contained in the Proposed Rule do not apply if the derivatives firm is dealing with or advising a derivatives party that is an EDP.

The two-tiered approach to conduct requirements (distinguishing between eligible derivatives parties and derivatives parties) is logical and appropriate given the differing levels of market sophistication between the two categories of market participant. However, in addition to revising the definition of EDP (as discussed above), the IECA respectfully requests that the CSA make reference to the MiFID on the two-tiered approach issue.

MiFID provides for two main categories of "client": (i) retail; and (ii) professional, with a separate and distinct third category for a limited range of businesses: eligible counterparty. MiFID attaches different regulatory protections to each of these categories, with the result that those falling within the retail category – the less experienced, knowledgeable and sophisticated investors – will be afforded a higher level of protection than that afforded to investors in the professional or eligible counterparty category. It would be beneficial to the market if the CSA allows an entity that may not fit the EDP definition to be treated as such upon request (i.e. the derivatives dealer could forward a questionnaire in order to establish whether the entity possesses sufficient experience, knowledge and expertise to enable him/her to make his/her own trading decisions and properly assess the risks that such trade incurs).

E. BUSINESS TRIGGER GUIDANCE (CSA QUESTION #5)

The Proposed Rule applies to "derivatives dealers" (those in the business of trading over-the-counter ("**OTC**") derivatives), and "derivatives advisors" (those in the business of advising in OTC derivatives), regardless of whether they are registered or exempt from the requirement to register as a dealer or advisor in any given jurisdiction. Specifically, in the Proposed Rule "derivatives dealer" means:

> (a) a person or company engaging in or holding himself, herself or itself out as engaging in the business of trading in derivatives as principal or agent, and
>
> (b) any other person or company required to be registered as a derivatives dealer under the securities legislation of a jurisdiction of Canada;

In determining whether a person is in the business of trading or advising in derivatives, the CSA indicates in Part 1 of the Proposed CP that a number of factors should be considered, including if the person is:

- quoting prices or acting as a market maker;
- directly or indirectly carrying on derivatives trading or advising activity with repetition, regularity or continuity;
- facilitating or intermediating transactions;
- transacting with the intention of being compensated;
- directly or indirectly soliciting in relation to derivatives transactions;
- engaging in activities similar to a derivatives dealer or derivatives advisor;
- an "adviser" in Manitoba as defined in the Commodity Futures Act (Manitoba);
- an "adviser" in Ontario as defined by the Commodity Futures Act (Ontario); or

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[2] "**derivatives party**" means: (a) in the case of a derivatives dealer a person for which the derivatives dealer acts or proposed to act as agent in relation to a transaction in a derivative or a person that is or is proposed to be a party to a derivative where the derivatives dealer is the counterparty; and (b) in the case of a derivatives adviser, a person to which the adviser provides or proposes to provide advice in relation to derivatives.

- an “adviser” in Québec as defined by the Securities Act (Québec).

In the Proposed CP, the CSA also points out that it does not consider that all of the factors discussed above are exhaustive, nor do they necessarily carry the same weight. Triggering one factor will not be determinative. A person should consider their activities holistically in determining whether they would be considered a derivatives dealer or derivatives advisor; ad hoc or isolated instances of activities may not necessarily result in a person being a derivatives dealer or derivatives advisor.

The CSA has asked for focused comments from market participants and other stakeholders on the aspect of the business trigger related to quoting prices or acting as a market maker. Part 1 of the Proposed CP (General Comments) states:

> *Quoting prices or acting as a market maker* – The person or company makes a two-way market in a derivative or routinely quotes prices at which they would be willing to transact in a derivative or offers to make a market in a derivative or derivatives.

Section 39(c) of the Proposed Rule reads as follows:

> A person or company is exempt from the requirements of this Instrument if each of the following applies:
> …
> (c) the person or company does not regularly quote prices at which they would be willing to transact in a derivative or otherwise make or offer to make a market in a derivative with a derivatives party;

1. Quoting prices or Acting as a Market Maker

Part 1 of the Proposed CP (quoting prices or acting as a market maker) and Section 39(c) of the Proposed Rule (exemptions for certain derivatives end-users) do not appropriately describe the situation in which a person or company should be considered a derivatives dealer for two reasons: (i) regularly providing quotes is not necessarily an indication that a person or company is a derivatives dealer; and (ii) end-users regularly quote prices in their hedging business activities.

Although the Proposed CP suggests that quoting prices or acting as a market maker may not be determinative of whether or not a market participant would be considered a derivatives dealer for the purpose of the Proposed Rule, the IECA has concerns with the assumptions made in the Proposed CP in respect of regularly quoting prices as indicia of being a derivatives dealer.

Specifically, the IECA respectfully challenges the assumption set out by the CSA in the Proposed CP that it would not be reasonable for a company who regularly quotes prices on derivatives to other derivatives parties to claim that it is an end-user hedging business activities. The IECA notes and supports the comments made in the CCE Letter (pages 3-4) which provides excellent industry-specific examples illustrating why such assumption is false. Further, the CCE Letter (page 4) also provides appropriate suggestions regarding how the CSA should revise its guidance with respect to the provision of quotes and what activities should constitute market making. The IECA supports these recommendations.

If the CSA is reluctant to take up the recommendations set out in the CCE Letter, the IECA would respectfully propose that the CSA consider amending Section 39(c) to read as follows:

the person or company does not regularly quote prices at which they would be willing to transact in a derivative or otherwise make or offer to make a market in a derivative with a derivatives party ***that is not an eligible derivatives party***;

Adopting the suggested revision would better align the derivatives dealer business trigger guidance in the Proposed CP and the end-user exemption in Section 39 of the Proposed Rule with the two-tiered approach to business conduct requirements set out generally in the Proposed Instrument. In other words, routinely quoting prices to or offering to make a market with eligible derivatives parties should not attract the same level of business conduct requirements as engaging in those activities with non-eligible derivatives parties.

2. Self-Analysis – Derivatives Dealer

The IECA understands that its members will need to consider their activities holistically in order to determine whether or not they will be considered a derivatives dealer for the purposes of the Proposed Rule. However, without a clear, unambiguous definition of what a derivatives dealer is, there is concern that a company's analysis regarding their designation as a derivatives dealer may differ from the same analysis conducted by their Securities Regulator. The business trigger commentary does not make the determination any less ambiguous. As discussed above in response to the CSA Question #1, the IECA submits that various, but all reasonable, interpretations could be made upon which a company can conclude that it isn't a derivatives dealer. Therefore, it is critical that the guidance set out in the Proposed CP provides pragmatic business trigger indicia, especially in circumstances where end-users regularly quote prices in their hedging business activities.

Will the CSA establish a dispute resolution process or adjudicative body where such market participant can argue their case to support their self-assessment as a non-derivatives dealer? The consequences of non-compliance can be great if the regulator concludes differently. Market participants should have a due diligence defence to support their assessment to avoid fines or penalties.

F. SENIOR DERIVATIVES MANAGERS (CSA QUESTION #10)

The Proposed Rule requires derivatives firms to have policies and procedures in place that create a system of controls to manage risk and to ensure that the individuals at derivatives firms have the necessary training and expertise to meet the various compliance and record keeping obligations. Pursuant to the Proposed Rule, senior management in a derivatives firm has certain supervisory, management and reporting obligations. The CSA indicates in the Proposed Rule that "[t]hese requirements are intended to create accountability at the senior management level."

A senior derivatives manager is an individual that is responsible for (or head of) the derivatives activities of a particular business unit. The Proposed Rule requires that senior derivatives managers also be responsible for supervising the activities conducted in the organization that are directed towards ensuring compliance with applicable law, promoting compliance and to taking reasonable steps to prevent and address any non-compliance. Imposing these obligations on senior derivatives managers creates dual, and arguably competing, obligations of business and compliance.

The proposed senior management requirements set out in the Proposed Rule do not reflect existing best practice. Best practice prescribes that the compliance function of an organization always remains independent of the business function of an organization in order to mitigate inherent conflict of interest. It would be imprudent for market participants to modify their current compliance regimes in order to comply with the proposed senior management requirements set out in the Proposed Rule.

Many IECA members currently utilize compliance best practice (separation of their compliance and business functions) to effectively manage risk within their respective organizations. The IECA wishes to provide an example of a compliance system that is typical of its membership and represents best practice in the industry. In this sample compliance system:

- accountability for the management of risk and compliance with applicable laws already exists at the Board level which is then delegated down to the corporation's audit, finance and risk committee;

- a separate risk group that is not engaged in derivative activities (part of the organization's corporate function) maintains, monitors and enforces compliance through approved risk policies and procedures including any delegation of authorities to individual transactors;

- reporting on compliance matters occurs consistently and regularly to management, with any material issues escalated to higher level risk committees and ultimately to the corporation's audit, finance and risk committee) on a quarterly basis; and

- material issues are also reported on a quarterly basis to the compliance law group by the risk group.

For these reasons, the IECA respectfully requests that proposed senior management requirements be removed from the Proposed Rule and that in its absence, market participants continue to adhere to their internal compliance best practices. In the alternative, the IECA respectfully requests that the proposed senior management requirements be amended in the Proposed Rule and the Proposed CP to reflect current industry best-practice.

G. RECORDKEEPING

Section 36 of the Proposed Rule contains certain recordkeeping obligations applicable to derivatives dealers. The Proposed CP indicates that:

> Section 36 imposes a general obligation on a derivatives firm to keep full and complete records relating to the derivatives firm's derivatives, transactions in derivatives, and all of its business activities relating to derivatives, trading in derivatives or advising in derivatives.

Although the CSA did not specifically put forward a question regarding the appropriateness of the recordkeeping requirements, the IECA respectfully submits that the recordkeeping obligations on derivatives dealers are too broad and should be limited to:

- records pertaining to the applicable standards of client obligations set out in Sections 10, 11 and 12 (as applicable);

- records required to demonstrate reliance on any exemption or exclusion in the Proposed Rule;

- records related to the negotiation, execution, amendments and termination of derivatives transactions.

Compliance with Section 36 of the Proposed Rule as currently drafted would be extremely expensive for derivatives firms. Those costs would, in turn, be passed on to other market participants.

The CCE Letter (page 12) accurately describes the impact of the current Proposed Rule and Proposed CP, as follows:

> ...[T]he proposed recordkeeping standard goes beyond keeping records related to the execution and negotiation of trades. The standard could be read to cover all back office activities related to derivatives activity, which are largely mechanical in nature and the burden associated with keeping such records would not be offset by the minimal probative value to regulators in providing these records.

In particular, the IECA notes that the requirements to keep recordings of phone calls and records of instant messaging ("**IM**") with respect to commodity transactions are problematic. Phone line recordings record all conversations which occur when the phone is picked up. It would be extremely difficult and time consuming for market participants to effectively search those recordings each day and allocate portions of them to a specific derivatives transaction.

The IECA notes that different commodities trade differently (e.g. IMs are used instead of the telephone) and a phone may never be picked up. With respect to the requirement to keep an itemized record of post-transaction processing and events, the IECA notes that keeping IMs (and guaranteeing they have not been altered) is also difficult. Given that written confirmations are agreed between the counterparties within a few days of the trade, the value of the records related to IMs and phone calls are quite low.

The IECA respectfully requests that the CSA limit the recordkeeping obligations of derivatives dealers to those set out in the bullet points on page 12 of this letter. The IECA also supports the recommendation made in the CCE Letter (page 12) which requests that the CSA "...clarify that in the event such communication is made over the phone, that the recordkeeping requirement would be satisfied if a record of that communication was made...". In other words, a recording would not be required if a record of the phone communication otherwise exists in a different format.

III. CONCLUSION

The IECA appreciates the opportunity to table our members' comments and concerns to the CSA. This letter represents a submission of the IECA, and does not necessarily represent the opinion of any particular member.

Yours truly,

INTERNATIONAL ENERGY CREDIT ASSOCIATION

Courtney Burton
DENTONS CANADA LLP

SCHEDULE A
REVISED DEFINITION OF EDP

"**eligible derivatives party**" means any of the following:

a) a Canadian financial institution;

b) the Business Development Bank of Canada incorporated under the Business Development Bank of Canada Act (Canada);

c) a subsidiary of a person or company referred to in paragraph (a) or (b), if the person or company owns all of the voting securities of the subsidiary, except the voting securities required by law to be owned by directors of the subsidiary;

d) a person or company registered under the securities legislation of a jurisdiction of Canada as at least one of the following:

   i. a derivatives dealer;

   ii. a derivatives adviser;

   iii. an adviser;

   iv. an investment dealer;

e) a pension fund that is regulated by either the federal Office of the Superintendent of Financial Institutions or a pension commission or similar regulatory authority of a jurisdiction of Canada or a wholly-owned subsidiary of such a pension fund;

f) an entity organized in a foreign jurisdiction that is analogous to any of the entities referred to in paragraphs (a) to (e);

g) the Government of Canada or a jurisdiction of Canada, or any Crown corporation, agency or wholly-owned entity of the Government of Canada or a jurisdiction of Canada;

h) any national, federal, state, provincial, territorial or municipal government of or in any foreign jurisdiction, or any agency of that government;

i) a municipality, public board or commission in Canada and a metropolitan community, school board, the Comité de gestion de la taxe scolaire de l'île de Montréal or an intermunicipal management board in Québec;

j) trust company or trust corporation registered or authorized to carry on business under the Trust and Loan Companies Act (Canada) or under comparable legislation in a jurisdiction of Canada or a foreign jurisdiction, acting on behalf of a managed derivatives account managed by the trust company or trust corporation, as the case may be;

k) a person or company acting on behalf of a managed account that is managed by the person or company, if the person or company is registered or authorized to carry on business as an adviser or a derivatives adviser or the equivalent under the securities legislation of a jurisdiction of Canada or a foreign jurisdiction;

l) an investment fund that is advised by an adviser registered or exempted from registration under securities or commodity futures legislation in Canada;

m) a person or company, other than an individual,

i. that has represented in writing that it has the requisite knowledge and experience to evaluate the information provided to the person or company about derivatives, the suitability of the derivatives for that person or company, and the characteristics of the derivatives to be transacted on the person or company's behalf, and

ii. that has total assets of at least $10 million as shown on their most recently prepared annual financial statements or interim report;

n) an individual

i. who has represented in writing that he or she has the requisite knowledge and experience to evaluate the information provided to the individual about derivatives, the suitability of the derivatives for that individual, and the characteristics of the derivatives to be transacted on the individual's behalf, and

ii. that beneficially owns financial assets, as defined in section 1.1 of National Instrument 45-106 Prospectus Exemptions, that have an aggregate realizable value before tax but net of any related liabilities of at least $5 million;

o) a person or company that buys, sells, trades, produces, markets, brokers or otherwise uses a commodity in its business and that executes an over-the-counter trade in a derivative provided that a material component of the underlying interest of the derivative is any of the following:

i. a commodity that the person or company buys, sells, trades, produces, markets, brokers or otherwise uses in the ordinary course of its business;

ii. a commodity, security or variable that directly or indirectly affects the commodity that the person or company buys, sells, trades, produces, markets, brokers or otherwise uses in the ordinary course of its business;

iii. a commodity, security or variable for which there is a high degree of correlation between the movement in its value and the movement in the value of the commodity that the person or company buys, sells, trades, produces, markets, brokers or otherwise uses in the ordinary course of its business;

iv. another derivative which is not listed for trading on an exchange, where a material component of the underlying interest of that other derivative is a commodity, security or variable referred to in any of subparagraphs (i) to (iii);

p) a person or company to which, with its affiliates, either of the following applies:

i. the person or company has executed one or more over-the-counter trades in derivatives with counterparties that are not its affiliates, provided that each of the following applies:

A. the trades had a total gross value of at least $1 billion (or its equivalent in another currency) in notional principal amount;

B. any of the derivatives relating to one of these trades was outstanding on any day within the 15 months prior to the trade;

ii. the person or company had on any day since the date that is 15 months prior to the trade total gross marked-to-market positions of at least $100 million (or its equivalent in another currency) aggregated across counterparties, in one or more over-the-counter trades in derivatives;

q) a person or company that is directly or indirectly wholly owned (not taking into account securities required by law to be held by directors) by one or more qualified parties;

r) a person or company that directly or indirectly wholly owns (not taking into account securities required by law to be held by directors) a eligible derivatives party;

s) a person or company that is directly or indirectly wholly owned (not taking into account securities required by law to be held by directors) by a person or company referred to in paragraph (r);

t) a person or company directly or indirectly controlled by one or more eligible derivatives parties that are not individuals or investment funds; and/or

u) a person or company whose obligations under the derivative that is being traded are fully guaranteed by one or more eligible derivatives parties.