Canadian Credit Union Association
Association canadienne des coopératives financières

151 Yonge St. / rue Yonge
Suite 1000 / bureau 1000
Toronto, ON M5C 2W7
Tel: / Tél. : 416.232.1262
Fax: / Téléc : 416.232.9196

320-100, Queen St. / rue Queen
Ottawa, ON K1P 1J9
Tel: / Tél. : 613.238.6747
Fax: / Téléc : 613.238.7283

ccua.com

September 17, 2018

DELIVERED VIA ELECTRONIC MAIL

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Financial and Consumer Affairs Authority, Saskatchewan
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Superintendent of Securities, Nunavut

Me Anne-Marie Beaudoin Corporate Secretary Autorité des marches financiers, 800, rue du Square-Victoria, 22e étage C.P. 246, tour de la Bourse Montréal (Québec), H4Z 1G3 Consultation-en-cours@lautorite.gc.ca	Grace Knakowski Secretary Ontario Securities Commission 20 Queen Street West 22nd Floor Toronto, Ontario M5H 3S8 comments@osc.gov.on.ca

Dear Sirs and Mesdames:

RE: Canadian Securities Administrators Proposed National Instruments 93-101 and 93-102

Canadian Credit Union Association ("CCUA") is pleased to provide comments on the Canadian Securities Administrators' ("CSA") proposed National Instrument 93-101 Derivatives: Business Conduct (the "proposed Business Conduct Rule") and proposed National Instrument 93-102 Derivatives: Registration (the "proposed Registration Rule").

CCUA is the national trade association for 251 credit unions in Canada outside Quebec that collectively control over $216 billion in assets and serve more than 5.6 million credit union member/owners through 1,800 branch locations.

With one notable exception[1], credit unions are provincially-chartered and regulated co-operative financial institutions that exist to serve their members. While credit unions generate profits for prudential and growth reasons, their primary objective is to meet the needs of their members. For 14 years running, credit unions have earned the top spot in the Ipsos "Best Banking" Awards and have similarly been rated the top service provider in repeated surveys of Canadian Federation of Independent Business (CFIB) members.

Credit unions in turn own and control provincial or regional centrals that provide them with wholesale financial services, liquidity management, payments processing and other services. These central entities include Atlantic Central (for credit unions in the Atlantic provinces), Central 1 Credit Union (for credit unions in Ontario and British Columbia) and Centrals in each of Manitoba, Saskatchewan and Alberta. Credit unions also own a federally-regulated bank called Concentra that provides wholesale financial and trust solutions to credit unions across Canada. This submission has been prepared in consultation with credit unions, Centrals and Concentra.

The vast majority of CCUA's credit union members use derivative products strictly for their own commercial hedging purposes.

Our comments are outlined below in three sections. We begin with some concerns with certain definitions that are applicable to both the proposed Business Conduct Rule and the proposed Registration Rule. We will then comment on specific requirements of each proposed Rule.

1. DEFINITION CONCERNS APPLICABLE TO THE BUSINESS CONDUCT RULE AND REGISTRATION RULE:

The definition of "Canadian financial institution":

The definition of "Canadian financial institution" in the proposed Business Conduct Rule is as follows:

> *"Canadian financial institution" means any of the following:*
> *(a) an association governed by the Cooperative Credit Associations Act (Canada) or a central cooperative credit society for which an order has been made under section 473(1) of that Act; or*

[1] In 2016, the Caisses Populaires Acadiennes became a federal credit union under the Bank Act (Canada) operating under the trade name of UNI Financial Cooperation

> *(b) a bank, loan corporation, trust company, trust corporation, insurance company, treasury branch, credit union, caisse populaire, financial services cooperative, or league that, in each case, is authorized by an enactment of Canada or a jurisdiction of Canada to carry on business in Canada or a jurisdiction of Canada.*

While we appreciate that this language is reflective of the definition of NI 45-106 Prospectus Exemptions, this definition has legacy language which requires updating. Paragraph (a) of this definition refers to credit union centrals as central cooperative credit societies under s. 473(1) of the *Cooperative Credit Associations Act* (Canada) (the "CCAA"). Section 473(1) of the CCAA provided a mechanism for provincially regulated centrals to "opt in" to federal regulation under the Part XVI of the CCAA. However, in its 2014 Economic Action Plan, the federal government signaled its intention to repeal Part XVI of the CCAA (including s. 473(1)). That repeal was effective on January 15, 2017 and the five provincial / regional centrals returned to being wholly provincially regulated.

On the assumption that the definition of "Canadian Financial Institution" is intended to include all provincially and federally regulated financial institutions, we would therefore propose that the definition of "Canadian financial institution" be amended as follows:

> ***"Canadian financial institution" means any of the following:***
>
> ***(a) a federal financial institution as defined in the Bank Act (Canada); or***
>
> ***(b) a loan corporation, trust company, trust corporation, insurance company, treasury branch, credit union, credit union central, caisse populaire, financial services cooperative, or league that is incorporated and regulated by or under an Act of the legislature of a province.***

The definition of "eligible derivatives party" – Commercial Hedger:

We appreciate that the definition of "eligible derivatives party" has been drafted with a specific derivatives perspective as opposed to repeating the definition of "permitted client" in the securities regulatory regime. In particular, we support the addition of a "commercial hedger" category notably as hedger clients have very specific needs, separate and apart from speculators. However, it is unclear on what basis the CSA Derivatives Committee chose to insert a requirement for commercial hedgers to have net assets of at least $10 million. We are not aware that any sort of quantitative assessment has been made that would indicate that $10 million is an appropriate threshold and we would further submit that the financial threshold should not be included in its entirety, or in the alternative, and it be significantly lowered to be no more than $1 million. The existing OTC derivatives blanket orders (in certain CSA jurisdictions) that govern the current regime in many provinces do not include any financial threshold, so it is unclear

what systemic risk has arisen (or perhaps what analytics have been conducted on the trade reporting data) that warrant this significant financial threshold to be employed.

2. SPECIFIC COMMENTS ON PROPOSED NI 93-101 - BUSINESS CONDUCT RULE:

De Minimis Exemption:

Unlike in the proposed Registration Rule, there is no de minimis exemption (Notional Amount Exemptions) proposed for the derivatives dealer business conduct requirements. While we appreciate that even if a derivatives dealer has only one client that it should still be required to abide by the obligations of Fair Dealing, Conflict of Interest and Know Your Derivatives Party, the burden of having to comply with the balance of the requirements in proposed Business Conduct Rule (in particular the requirements in Part 5 Compliance and Record-Keeping and the need for a separate Senior Derivatives Manager) is inappropriately onerous for firms with a limited business model and comes with a significant cost that outweighs any measured benefit. The need for more prescriptive and process-oriented requirements need to be measured against the burden imposed on small or mid-market firms that pose no systemic risk to the market.

CCUA believes the CSA should apply "proportionality" and a "risked-based" policy lenses to national instruments such as the Business Conduct Rule. These principles are widely used by a range of regulators, including provincial credit union regulators but also the Office of the Superintendent of Financial Institutions (OSFI), the federal market conduct regulator, the Financial Consumer Agency of Canada (FCAC) and the Basel Committee on Banking Supervision (BCBS)[2] .

The application of these principles hinges on the idea that "one-size-fits-all" policies harm competition because of their disproportionate effect on smaller institutions like credit unions and centrals. Constraints on competition, in turn harm the consumer interests that regulatory measures often seek to protect. In this case, the compliance costs of aligning with the proposed Business Conduct Rule could outweigh the benefits of offering these services to members, leading to the withdrawal of these services and possibly a concentration of offerings at larger banks.

As indicated, we have no objection to compliance with the general market conduct requirements of Fair Dealing, Conflict of Interest and Know Your Derivatives Party but we are concerned with the balance of the Business Conduct rule requirements that would impose an unnecessary and unwarranted burden on smaller institutions.

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[2] For a discussion in a prudential context see: http://www.bis.org/fsi/publ/insightsl.htm

We would therefore propose that any firm that meets the final thresholds set forth in Section 50 and 51 (limited notional amount) of the proposed Registration Rule be provided with an outright exemption from the requirements in the Business Conduct Rule other than those requirements contained in Division 1 – General Obligations Towards All Derivative Parties.

Further Comment Period:

We understand that Section 40 of proposed Business Conduct Rule provides an exemption from requirements in the Rule for a derivatives dealer that is a Canadian financial institution and is subject to and complies with corresponding conduct and other regulatory requirements of its prudential regulator as set out in Appendix C of the Instrument. We further note that the proposed Business Conduct Rule continues to state "as of the time of this publication for comment, the equivalency analysis required to populate the Appendices of the Instrument has not been completed. The Appendices will be completed and published for public comment prior to the Instrument being finalized."

In order to provide meaningful comments to the CSA Derivatives Committee, it is important to understand what obligations and requirements of proposed Business Conduct Rule would be applied to centrals and credit unions and their members. Therefore, once this internal review has been completed by the CSA Derivatives Committee, the proposed Rule must be produced for a third comment period so that the impacted market participants can respond to the final proposed regime. CCUA would be pleased to provide any support to the Committee's further work on the Rule Appendices.

Transition Period:

As a follow-on to the comment above, it remains unclear as to the requirements that Canadian financial institutions (and in particular, centrals and credit unions) will be required to meet under the proposed Business Conduct Rule and this makes the systems and technology build-out timeframes uncertain. The CSA Derivatives Committee has signaled that there will be a 1 year transition period after final publication of Proposed Business Conduct Rule before the instrument takes effect. This will not be sufficient time for our industry to build such systems and prepare for implementation. We would propose a 2 year transition period in order to provide our members time to meet the new requirements.

3. SPECIFIC COMMENTS ON PROPOSED NI 93-102 – REGISTRATION RULE:

Consideration of a "Scope Rule" for Different Regulatory Requirements:

We note that in other foreign jurisdictions, the over-the-counter derivatives regulatory regimes have different instruments to address registration, business conduct, clearing etc. and that different instruments that are required under one set of requirements may

not be included under another. In the proposed Canadian regime, OSC Rule 91-506: Derivatives: Product Determination (and equivalent in other jurisdictions), otherwise known as the "Scope Rule", not only confirms what types of instruments should be reported under the trade reporting rules but it is the same "Scope Rule" that governs registration and business conduct.

We would propose to the CSA Derivatives Committee to review the instruments caught in the scope rule. In particular we question the decision to include in the definition of derivative, the purchase or sale of a foreign currency settling in more than two business days (ie. FX forward, deliverable or non-deliverable).

Foreign exchange contracts are commonly used by credit unions and its end user clients to hedge risks associated with its commercial business. We would respectfully submit that the simplicity of these trades and highly transparent foreign exchange market do not pose a systemic risk to the Canadian capital markets to justify a registration requirement.

We further note that unlike more sophisticated derivative instruments like interest rate swaps and credit default swaps, there is no global harmonization over the regulation of over-the-counter foreign exchange instruments.

Lastly, the CSA contemplated that the application of the Product Determination Rules could vary depending on the particular regulatory instrument under consideration. For instance, the following is stated in CSA Consultation Paper 91-301 – Model Provincial Rules – Derivatives Product Determination and Trade:

"The Committee expects that elements of the Scope Rule, subject to necessary amendments, will also be made applicable to certain provisions of securities legislation, and to additional derivatives rules that will be brought into force, including but not limited to rules relating to over-the-counter central counterparty clearing, end-user exemptions, trading platforms, capital and collateral, and registration. However, there may be variations in the application of the Scope Rule for these other rules. In particular, certain contracts or instruments that are prescribed to be securities or derivatives for the purposes of the TR Rule may be treated differently in other rules." [emphasis added]

Need for Harmonization Across the CSA:

We appreciate that Ontario's Securities Act provides that certain specified financial institutions are exempt from registration and as a result, the Ontario Securities Commission (the OSC) will not register those specified financial institutions when they act as derivatives dealers or advisers in the Ontario market. Based on the existing prudential obligations and oversight of centrals and credit unions, we support the OSC's position that registration is not required of a Canadian financial institution. We reference again our above-noted suggested definition for "Canadian Financial Institution".

With regards to the balance of the provincial securities regulators, there currently exist a number of blanket orders and other derivatives legislation that provides for a registration exemption for centrals and credit unions. It is unclear as to what statistical data has been reviewed or market analysis completed that indicates that the existing regime is not adequate and that these market participants pose any systemic risk that warrants a prescriptive securities regulatory regime as opposed to the current prudential regulation of credit unions in each province.

Additional Comment Periods Required to Address and Review Appendix F:

The proposed Registration Rule contains an exemption for Canadian financial institutions where they are subject to and comply with equivalent requirements imposed by a federal or provincial prudential authority. We appreciate that the CSA Derivatives Committee has completed an analysis of the requirements that apply to financial institutions that are regulated by OSFI and by the Autorité des marchés financiers (AMF), however, this is not of assistance to other Canadian financial institutions.

As noted above with regards to proposed Business Conduct Rule, in order to provide meaningful comments to the CSA Derivatives Committee, it is important to understand what obligations and requirements of the proposed Registration Rule would be applied to centrals and credit unions and their members. Therefore, once this internal review has been completed, the proposed Registration Rule must be produced for a lengthy second comment period (minimum of 150 days) so that the market participants can review and respond accordingly. CCUA would be pleased to participate in this review process.

Notional Amount Thresholds:

Notional amount is used in sections 50 and 51 of proposed Registration Rule to establish exemptions from registration for certain derivatives dealers that have a monetary notional amount below a prescribed threshold ($250 million in section 50 and $1 billion under commodities derivatives in section 51).

Given the onerous requirements proposed in the Registration Rule, we respectfully submit that these thresholds be increased to a minimum of $500 million under section 50 and that the amount for commodity derivatives remains the same.

Transition Period:

As noted above, given the significant obligations set forth in the proposed Registration Rule, the transition period should be extended to a minimum of two years.

Conclusion

CCUA is grateful for the opportunity to share its views on the proposed Derivatives Business Conduct Rule and the proposed Registration Rule. We would be pleased to

provide any additional information as required with respect to our comments. Please do not hesitate to contact me at boconnor@ccua.com or directly by phone at 416-232-3405.

Yours sincerely,

Brenda M. O'Connor
Vice President, General Counsel
& Corporate Secretary

Tel. 416-232-3405
Email: boconnor@ccua.com