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VIA ELECTRONIC MAIL

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Ontario Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

c/o:
Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, rue du Square-Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal, Québec H4Z 1G3
consultation-en-cours@lautorite.qc.ca

c/o:
The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8
comments@osc.gov.on.ca

Re: Comments on Proposed National Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* and Proposed Companion Policy 25-102

Dear Sir or Madam:

I. INTRODUCTION

On behalf of The Canadian Commercial Energy Working Group (the "**Working Group**"), Eversheds Sutherland (US) LLP submits this letter in response to the request for public comment from the Canadian Securities Administrators ("**CSA**") on Proposed National Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* ("**Proposed NI 25-102**") and the related Proposed Companion Policy 25-102 ("**Proposed Benchmark CP**") (collectively, the "**Proposed Instrument**").[1] The Working Group

[1] *See* CSA Notice and Request for Comment on Proposed National Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* and Proposed Companion Policy 25-102 (Mar. 14, 2019)

welcomes the opportunity to provide comments on the Proposed Instrument and looks forward to working with Canadian regulators throughout the rulemaking process, including with respect to any future proposals relating to commodity benchmarks.

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 appreciates the efforts of the Canadian regulators to minimize misconduct relating to benchmarks and generally supports the contemplated framework in the Proposed Instrument. In an effort to help ensure a workable framework, the Working Group respectfully offers the comments provided herein, which are intended to facilitate a paradigm that provides an appropriate level of oversight without imposing undue burdens on benchmark contributors and benchmark users.

As the CSA is aware, under the Proposed Instrument, benchmark contributors[2] would be subject to general requirements and additional requirements if they contributed to designated critical benchmarks or designated interest rate benchmarks. With respect to regulated-data benchmarks,[3] benchmark contributors would be subject to a narrower set of requirements.[4] Separately, the Proposed Instrument would impose certain obligations on a benchmark user[5] if all the following apply: (i) the benchmark user uses a designated benchmark; (ii) the cessation of the designated benchmark could have a significant impact on the benchmark user, a security issued by the benchmark user, or any derivative to which the benchmark user is a party; and (iii) the benchmark user is (a) a registrant, (b) a reporting issuer, (c) a recognized exchange, (d) a recognized quotation and trade reporting system, or (e) a recognized clearing agency within the meaning of National Instrument 24-102 *Clearing Agency Requirements*.[6]

The Working Group is generally supportive of the regulatory framework that the Proposed Instrument would establish. However, by incorporating the suggested modifications and concepts discussed herein, the CSA could establish a more workable framework for

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("**CSA Notice**"), https://www.albertasecurities.com/-/media/ASC-Documents-part-1/Regulatory-Instruments/2019/03/5451911-v1-CSA_Notice_and_Request_for_Comment_of_NI_25-102.ashx.

[2] As used herein, "**benchmark contributors**" refers to persons or companies that contribute certain data used to determine the designated benchmarks.

[3] A regulated-data benchmark may be designated as such if it is determined by the application of certain formulas, including input data contributed entirely and directly from a recognized exchange or recognized quotation and trade system in Canada or an exchange or quotation and trade reporting system that is subject to appropriate regulation in a foreign jurisdiction. *See* Proposed Benchmark CP at Section 1(1) (pgs. 76-77).

[4] *See* Proposed NI 25-102 at Section 41 (regarding regulated-data benchmarks, providing exemptions for benchmark contributors from certain of the requirements (*e.g.*, exempt from appointing a compliance officer and maintaining a specified governance and control framework)); *see also* CSA Notice at 15.

[5] As used herein, "**benchmark users**" refers to users of designated benchmarks if all of the criteria listed above applies.

[6] Proposed NI 25-102 at Section 22.

benchmark regulation without compromising its objectives of reducing risk in Canada's capital markets and protecting Canadian investors and Canadian market participants.[7] In addition, given that the CSA is expecting to propose revisions in the future to the Proposed Instrument to incorporate requirements relating to commodity benchmarks, the Working Group respectfully requests that the CSA consider the comments herein as it drafts any such proposals.

A. A Principles-Based Approach Should Be Used.

The CSA should use a principles-based approach with respect to its benchmark regulation regime. A principles-based approach will provide the flexibility necessary: (i) to allow market participants to adopt compliance policies and procedures that are appropriately tailored for their specific business and size; and (ii) to allow regulators and market participants to adapt to changing technology and evolving market practices.

The Proposed Instrument generally strikes a good balance in providing the needed flexibility, but the Working Group has identified certain areas below where the CSA should provide continued flexibility.

- ***Company Structure, Staffing, and Corporate Governance.*** The Proposed Instrument includes requirements related to company structure, staffing, and corporate governance.[8] The Working Group notes that preserving flexibility in these areas helps ensure that certain market participants are not disadvantaged as a result of previous decisions in entity formation or corporate organization.

- ***Compliance Policies and Procedures.*** The Proposed Instrument is generally prescriptive with respect to the kinds of compliance policies and procedures that would be required.[9] Given the nature of the regulatory subject, this approach is understandable. However, the Working Group would encourage the CSA to ensure that a benchmark contributor has the flexibility to implement the required policies and procedures in a manner that is best suited for its business and operations.

- ***Benchmark User Obligations.*** The Working Group appreciates that the Proposed Instrument provides flexibility in the decision-making process for benchmark users. Specifically, the Working Group appreciates that the proposed obligations regarding contingency planning for benchmark users has a reasonable person standard.[10]

In addition to using a principles-based approach, the CSA should consider making changes to the Proposed Instrument to address the specific issues identified below.

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7 *See* CSA Notice at 6 (discussing the substance and purpose).

8 *See, e.g.*, Proposed NI 25-102 at Section 26(1) (proposing obligations on a benchmark contributor with respect to a compliance officer and function) and Section 24(2)(f)(ix) (proposing obligations on a benchmark contributor with respect to access to the board of directors for certain personnel).

9 *See, e.g.*, Proposed NI 25-102 at Section 24 (discussing the code of conduct that would be imposed on benchmark contributors) and Section 25 (discussing control requirements for benchmark contributors).

10 *See, e.g.*, Proposed NI 25-102 at Section 22(2)-(3).

B. The Proposed Instrument's Recordkeeping Requirements Are too Broad and Overly Burdensome.

The Proposed Instrument's recordkeeping requirements are overly broad and would be burdensome for a few reasons. *First*, the scope of the proposed recordkeeping requirement is too broad. For example, the Proposed Instrument, among other things, would require benchmark contributors to keep "records ***relating to***" the following: communications ***in relation to*** the contribution of input data; ***all*** information used by the benchmark contributor to make each contribution; and ***all*** documentation relating to the identification and avoidance of conflicts of interest or mitigation of risks resulting from conflicts of interest.[11] (emphasis added). The proposed scope could be read to cover back-office activities related to benchmark contributions and input data, which are largely mechanical in nature, and the burden associated with keeping such records would not be offset by the minimal probative value provided by those records. Further, it is not clear if the proposed standard would impose an obligation on benchmark contributors to create and keep voice recordings of relevant communications, which would be costly and burdensome.

Second, there are issues with certain content that would be subject to the recordkeeping requirement. Specifically, the proposed requirement for benchmark contributors to retain records that record the rationale for any decision made to use expert judgment in relation to input data and the manner of the exercise of the expert judgment in relation to input data should be removed.[12] The Proposed Instrument's proposed requirement would effectively require benchmark contributors to keep records showing their analytical and decision-making process, which (i) is sensitive and proprietary, (ii) may not normally be retained or in writing, and (iii) would be extremely broad and burdensome. In short, it would not be reasonably feasible to retain records showing the rational for "any decision" made in this context.

To address these issues, the CSA should revise the Proposed Instrument in the following manner:

- Limit the scope of recordkeeping obligations imposed on benchmark contributors to relevant information (not all information) pertaining to the actual submission to the benchmark administrator (not all surrounding circumstances).

- Do not require benchmark contributors to document their analytical or decision-making process.

- Make clear that benchmark contributors and benchmark users are not required to make or retain voice records of phone calls or voicemail under the recordkeeping obligations.

If these issues are not addressed, the burdens may cause some benchmark contributors to refrain from contributing, thus reducing the stability and accuracy of the relevant benchmark.

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11 *See* Proposed NI 25-102 at Section 25(4).

12 Proposed NI 25-102 at Section 25(3).

C. A Person or Company Should Not Be Compelled to Become a Benchmark Contributor.

The Proposed Instrument contemplates that a regulator could require a person or company to provide information to a designated benchmark administrator in relation to a designated benchmark in certain circumstances.[13] Even if a person or company is required by a regulator to provide such information, the person or company would still be a benchmark contributor and would be subject to the provisions of the Proposed Instrument applicable to benchmark contributors.[14]

Given the extensive nature of the proposed obligations, a person or company should not be compelled to come under this regulatory regime. If, however, the CSA decides to maintain its position regarding compelling a person or company to be a benchmark contributor, then the person or company that is being compelled should not be subject to the full set of regulatory obligations that would otherwise apply to voluntary benchmark contributors.

D. Benchmark Administrators Should Not Have Quasi-Regulator Status.

The Working Group is concerned that the Proposed Instrument would effectively grant benchmark administrators quasi-regulator status. For example, in certain circumstances, if required by a benchmark administrator's oversight committee, a benchmark contributor would be obligated to engage a public accountant to provide a compliance report, in accordance with specifications provided by the benchmark administrator's oversight committee.[15] This is a cause for concern as benchmark administrators, which may be private entities with a profit-making motive, would have extensive access into the business operations of benchmark contributors.

As an alternative, the Working Group suggests that the extensive oversight and monitoring that benchmark contributors would be subject to by benchmark administrators could be replaced by a requirement for benchmark contributors to make authorized representations regarding compliance measures.

E. Benchmark Administrators Should Be Required to Consider Input from Benchmark Contributors.

Benchmark administrators should be required to consider input from benchmark contributors. Given the role that benchmark administrators would have in imposing certain standards on benchmark contributors, the Working Group thinks it is important for the Proposed Instrument to be modified to require benchmark administrators to consider the input from benchmark contributors prior to imposing or changing obligations on benchmark contributors.

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13 Proposed Benchmark CP at Part 6 (pg. 86).

14 Proposed Benchmark CP at Part 6 (pg. 86).

15 *See* Proposed NI 25-102 at Section 24(2)(g).

III. CONCLUSION

The Working Group appreciates this opportunity to provide input on the Proposed Instrument and respectfully requests that the comments set forth herein are considered.

If you have any questions, please contact the undersigned.

Respectfully submitted,
/s/ Alexander S. Holtan
Alexander S. Holtan
Blair Paige Scott