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March 31, 2015

SENT VIA E-MAIL (mbrady@bcsc.bc.ca)

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

(collectively called the "**Authorities**")

c/o:
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Dear Sirs/Mesdames:

RE: Comment Letter CSA Multilateral Notice and Request for Comment Proposed Multilateral Instrument 91-101 *Derivatives Product Determination* and Proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting*

This letter is in response to the Authorities request for comments regarding the proposed multilateral instruments 91-101 *Derivatives Product Determination* (the "**Scope Rule**") and its proposed Companion Policy (the "**Scope CP**") and 96-101 *Trade Repositories and Derivatives Data Reporting* (the "**TR Rule**") and its proposed Companion Policy (the "**TR CP**"), (collectively, the "**Proposed Instruments**").

We appreciate the opportunity to comment on the Proposed Instruments and though we strongly support the importance of harmonizing the Proposed Instruments with the *Derivatives: Product Determination* rule or regulation ("**91-506**") and the *Trade Repositories and Derivatives Data Reporting* rule or regulation ("**91-507**") each as issued by the Ontario Securities Commission ("**OSC**"), the Manitoba Securities Commission ("**MSC**") and the Autorité des marchés financiers ("**AMF**"), and encourage the Authorities, the OSC, MSC, and AMF to continue to work toward harmonized trade reporting requirements in Canada, we equally strongly support the efforts of the Authorities to draft rules that consider the nuances of the individual Authority's provincial derivatives markets and how these rules would impact these markets.

As counsel to counterparties ranging from energy producers, energy transporters, and energy trading and marketing organizations to global financial institutions and derivatives market intermediaries, Dentons Canada LLP ("**Dentons**") has extensive involvement with commodity swap transactions from a legal and regulatory perspective. Dentons advised a number of market participants vis-à-vis the reporting requirements of 91-507 and in this letter, we would highlight some of the lessons learnt from helping our clients comply with the reporting requirements under 91-507. We would comment from a legal and regulatory standpoint, as opposed to a business standpoint on certain of the proposals contained in Proposed Instruments, including analysing some of the key differences between the Proposed Instruments, 91-506 and 91-507. We would also respond to certain questions asked by the Authorities in the Proposed Instruments.

This letter reflects the general comments of certain members of Dentons energy transactions and derivatives practice groups and does not necessarily reflect the overall views of our firm or our clients.

Major Lessons Learnt from 91-506 and 91-507

a. 91-506

Market participants are still struggling with uncertainty in determining the intent component of the exclusion provided for commodities contracts in subparagraph 2(1) (d)(i) of 91-506. The lack of explanation by the OSC, the MSC and the AMF in their companion policies and policy statement respectively is the cause of this uncertainty.

Specifically in the commodity trading business, different agreements, contracts and transactions are structured for risk-management purposes and do not involve risk-shifting arrangements that would negate the intention to deliver. The lack of an explanation or a list of characteristics to help market participants determine how the OSC, MSC and AMF would interpret the intent component is the source of great uncertainty.

b. 91-507

As the nexus of jurisdiction over a transaction involving a local counterparty begins by determining if an entity is a local counterparty, one of the determinative issues our clients faced was trying to decipher if they would be deemed to be a "derivatives dealer". Consequently, if they would be the "reporting counterparty" in a transaction that is not cleared through a recognized or exempt clearing agency or if the transaction is entered into with a non-derivatives dealer.

The lack of a registration rule that clearly defines the categories of derivatives registrants is a topic that Authorities have heard a lot and we would not expand further on this in this comment letter.

Another major lesson learnt by market participants in complying with 91-507 is the lack of definition of affiliate and clarification of how the regulators who drafted 91-507 would interpret what an affiliate is. From conversations with the regulators on this, market participants were directed to the definition of affiliate in their respective securities acts.

Key Differences between the TR Rule and the trade reporting rules in effect in Manitoba; Ontario and Quebec

The Authorities have stated that though they "intend that the Scope Rule and the TR Rule be consistent with the corresponding local rules in Manitoba, Ontario and Québec", they are seeking comment in particular on: "whether the proposed differences are appropriate for market participants in our jurisdictions; and whether the proposed differences will result in consequences or issues that are detrimental to market participants, industries or the derivatives market in the jurisdictions and/or in Canada".

The definition of "local counterparty" in the TR Rule

The removal of a counterparty that is registered under the securities legislation of the local jurisdiction as a derivatives dealer or in another category as a consequence of trading in derivatives (i.e., is a locally-registered entity from the local counterparty definition creates a jurisdictional gap of who would be deemed the reporting counterparty if for example an Alberta entity enters into a transaction with a foreign financial institution. The Authorities, in explaining the removal of this category of the definition state that "as a result of this difference in the "local counterparty" definition in the TR Rule, a transaction involving a registrant in the local jurisdiction will **only** be required to be reported under the laws of that local jurisdiction if any one of the following applies:

- the derivatives dealer is organized under the laws of the jurisdiction, or has its head office or principal place of business in the jurisdiction,

- the derivatives dealer is an affiliate of a person referenced in the bullet-point above and that party is responsible for the liabilities of the derivatives dealer, or

- **the other counterparty to the trade is a local counterparty**".[Emphasis added]

Using the explanation above, if a non-dealer Alberta entity enters into an interest rate hedge with a foreign financial institution i.e. a U.S. or European bank that is not organized under the laws of Alberta, the transaction has to be reported because the non-dealer Alberta entity would be a local counterparty and the question to be asked then is who would be the reporting counterparty?

Questions posed by the Authorities

1. Does the Scope CP provide sufficient clarity as to the contracts and instruments that are subject to trade reporting? Please provide specific examples where there is not sufficient clarity.

We commend the Authorities for adding further explanation in the Scope CP that was not provided in the companion policies and policy statement of the MSC, OSC and AMF respectively, which to a certain extent helps determine the intent component of the exclusion provided for commodities contracts in subparagraph 2(1)(d)(i) of the Scope Rule. However, we strongly urge the Authorities to provide greater clarity as many of our clients are still struggling with discerning the intention element. The nuances of certain commodity contracts structured to achieve balance in the supply and demand of the commodity and for risk management purposes do not easily fit into the exclusion in Section 2(1) (d).

2. The Scope Rule and Scope CP indicate that options to purchase commodities are derivatives but that certain optionality embedded in an agreement to purchase commodities for future delivery will not, in itself, result in the agreement being a derivative. Do you agree with this approach? Please explain.

We agree with this approach.

3. In New Brunswick, Nova Scotia and Saskatchewan the definition of derivative specifically excludes a contract or instrument if the contract or instrument is an interest in or to a security and a trade in the security under the contract or instrument would constitute a distribution. In these provinces these contracts or instruments are defined as securities. Is the inclusion of subsection 3(6) necessary given that these provinces have such a carve-out?

Yes the inclusion is necessary as market participants in these provinces can see in the Scope Rule what is not defined as derivative and would not have to refer to their applicable securities act.

4. Is it appropriate to exclude derivatives dealers from the definition of local counterparty appropriate? Please explain. Do you foresee any issues in the jurisdictions adopting a different definition from Manitoba, Ontario and Québec? Please explain.

Please refer to my comment in page 3 under key differences between the TR Rule and the trade reporting rules in effect in Manitoba; Ontario and Quebec.

7. Do you foresee any difficulties in counterparties agreeing as to who will be the reporting counterparty? If so, explain.

Please refer again to my comment in page 3 under key differences between the TR Rule and the trade reporting rules in effect in Manitoba; Ontario and Quebec.

Conclusion

We thank you for the opportunity to comment on the Proposed Instruments and would be pleased to discuss our thoughts with the Authorities further. If you have any questions or comments, please contact the undersigned.

Yours truly,
Dentons Canada LLP

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