ISDA Safe, Efficient Markets

BY E-MAIL September 6, 2013

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumers Affairs Authority of Saskatchewan
Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission

Dear Sirs/Mesdames:

Re: Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting

The International Swaps and Derivatives Association, Inc. (ISDA)[1] is grateful for the opportunity to respond to the Canadian Securities Administrators (CSA) OTC Derivatives Committee's Multilateral CSA Staff Notice 91-302 – *Updated Model Rules – Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting* published on June 6, 2013 on behalf of the Alberta Securities Commission, the British Columbia Securities Commission, the New Brunswick Securities Commission, the Nova Scotia Securities Commission and the Financial and Consumer Affairs Authority of Saskatchewan as well as the province–specific proposed rules published on June 6, 2013 by the Autorité des marchés financiers of Quebec[2], the Manitoba Securities Commission[3] and the Ontario Securities Commission[4].

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[1] ISDA's mission is to foster safe and efficient derivatives markets to facilitate effective risk management for all users of derivative products. ISDA has more than 800 members from 58 countries on six continents. These members include a broad range of OTC derivatives market participants: global, international and regional banks, asset managers, energy and commodities firms, government and supranational entities, insurers and diversified financial institutions, corporations, law firms, exchanges, clearinghouses and other service providers. For more information, visit www.isda.org.

[2] Draft AMF Regulation 91-506 respecting Derivatives Determination and related Policy Statement and Draft AMF Regulation 91-507 respecting Trade Repositories and Derivatives Data Reporting and related Policy Statement.

[3] Proposed MSC Rule 91-506 Derivatives: Product Determination and Proposed MSC Companion Policy 91-506 CP and Proposed MSC Rule 91-507 Trade Repositories and Derivatives Data Reporting and

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The updated model and province–specific rules relating to derivatives product determination are referred to herein as the "Scope Rules" and those relating to trade repositories and derivatives data reporting are referred to herein as the "TR Rules". The Scope Rules and the TR Rules are referred to collectively as the "Updated Model Rules". References to "Guidance" herein are to the applicable Companion Policy or Policy Statement in respect of an Updated Model Rule.

We note that the Updated Model Rules address many of the issues we commented upon in our letter to the Committee dated February 11, 2013 regarding Consultation Paper 91-301 – *Model Provincial Rules – Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting* (the "CP 91-301 Comment Letter") and thank the Committee for taking these comments into account.

ISDA is actively engaged with providing input on regulatory proposals in the United States, the United Kingdom, Europe and Asia. ISDA is leading industry efforts to enhance trade reporting of OTC derivatives data. Our further comments on the Updated Model Rules are derived in part from these efforts and this experience and from consultation with ISDA members operating in Canada and globally. They build upon our comments in the CP 91-301 Comment Letter.

Our comments are organized as follows:

I. General Comments

We again commend the Committee for working cooperatively with the CSA's international counterparts and international bodies to facilitate the global sharing of trade reporting data amongst regulators and reducing inconsistencies and conflicts between the different regulatory regimes in Canada and across borders. As we urged in our CP 91-301 Comment Letter and in our letter to the Committee dated September 12, 2011 regarding Consultation Paper 91-402 on *Derivatives: Trade Repositories*, duplicative reporting, record keeping and other requirements resulting

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Proposed MSC Companion Policy 91-507 CP.

[4] Proposed OSC Rule 91-506 Derivatives: Product Determination and Proposed OSC Companion Policy 91-506 CP and Proposed OSC Rule 91-507 Trade Repositories and Derivatives Data Reporting and Proposed OSC Companion Policy 91-507 CP.

from overlapping regulations that can lead to excessive costs and potential for errors should be avoided. We strongly support the intention of the Committee that the terms, substance and effect of the Updated Model Rules be the same across international jurisdictions and that market participants and derivative products receive the same treatment across Canada. In the course of our comments, we will refer to the final rules and interpretative guidance promulgated by the CFTC and SEC with respect to certain definitions relevant to trade repositories and reporting (the ***US Definition Release***).[5]

We again note the possibility that there will be variations in the final province-specific rules. Given the definition of "local counterparty" that is proposed in the Updated Model Rules, market participants will likely be subject to rules in more than one Canadian jurisdiction. We urge all the CSA to work to minimize any variation between Canadian jurisdictions. Even minor differences in rules could provide a disincentive for dealers to transact with counterparties from Canadian jurisdictions with less significant derivatives activity and thereby decrease liquidity in the Canadian market, which could severely impact the Canadian market, given its size relative to other international markets. Such differences would also render it more difficult for global trade repositories to aggregate the necessary data which would undermine the very purpose of the trade repository reporting rules. We believe that minimizing any and all impediments to access by Canadian market participants to global trade repositories will further the goals of the Updated Model Rules more than adopting any idiosyncratic requirements in a particular Canadian jurisdiction.

We also commend the approach of the Updated Model Rules in creating a consistent trade reporting framework that adopts global reporting standards such as unique legal entity, transaction and product identifiers. But, given the extra-territorial reach of the Updated Model Rules, we urge the Committee to ensure not only that the standards are the same as those in international jurisdictions, but that the data required to be reported is consistent with that required in other foreign jurisdictions. It is important that market participants be able to apply a single set of reporting requirements to fulfill their reporting obligations globally across various jurisdictions without having to consider unique requirements in every jurisdiction that their entities or activities touch. In particular, combining a wide jurisdictional reach with unique requirements will inevitably impose an unnecessary burden on market participants and create disincentives for non-Canadian entities to participate in Canadian derivatives and securities markets.

Consistency of the TR Rules with global reporting standards is also important if the availability of substituted compliance exemptions contemplated by the Committee is to be meaningful. The Committee has indicated that such exemptions will be considered where the foreign report contains all of the

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[5] See CFTC and SEC, Final Rules, *Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 F.R. 48,208 (August 13, 2012).

information required to be reported under the TR Rules. If the TR Rules impose additional or substantially different reporting requirements, such exemptive relief may not be readily available.

The Updated Model Rules appear to allow for only a limited phased approach to implementation of the reporting requirements, with non-dealers being given only an additional nine months to comply. We urge the Committee to reconsider adopting a phased-in approach based on different classes of asset classes and availability of licensed trade repositories for the product. The timeline should also take into consideration the industry's capacity to meet the reporting requirements for the specific asset and product class. For each asset and product class, there exists a diversification in data standards and booking systems. Firms also have several booking systems to support different asset classes. Each system may be unique in its information technology protocol and standards. It can be difficult to deploy systems for extracting data from one booking system to other systems within an organization. Implementing trade reporting systems for each class requires significant time and resources. At the very least, the Canadian reporting requirements should not be imposed ahead of those required under Dodd-Frank.

II. Derivatives: Product Determination - The Scope Rules

We note that each Scope Rule is intended to apply for purposes of its corresponding TR Rule, but that the Committee expects that it will apply to other rules, with necessary modifications. Our comments are, therefore, not related specifically to a consideration of the Scope Rules in the context of the TR Rules. We believe that it is important, however, that market participants be given an opportunity to review and comment on the model scope rules (and accompanying guidance) that will apply with respect to each of the other rules as the implications of a particular definition may only be fully considered in the context of specific rules.

We believe it would also be helpful if the Guidance for each such model scope rule make it clear that the rule was developed in light of the particular policy of the underlying rule and not with a view to determining an appropriate definition of a derivative for other purposes, including capital treatment or insolvency safe-harbours where very different policy considerations may be involved.

We also believe that it is critical that the definitions not depart in any material way from those in the US Definitions Release. To encourage non-Canadian dealers that are not local counterparties to undertake reporting obligations for Canadian counterparties, it should be possible for such entities to rely on the systems and processes they have put in place at great cost to comply with the Dodd-Frank reporting requirements. Also, given the wide definition of "local counterparty", it is inevitable that many non-Canadian entities subject to Dodd-Frank or EMIR reporting requirements will also be caught by the TR Rules' reporting requirements. Canadian institutions are similarly subject to the Dodd-Frank requirements and have made significant investments to develop reporting systems and processes.

We believe that the differences between the categories of exempt transactions in the Scope Rules and those in the CFTC Rule are in some cases quite significant. Avoiding the complexity of the US Definition Release is an understandable goal, but it should be possible to accomplish this objective while still providing for a consistent scope. Below we point out several instances which we believe continue to be material and problematic.

Section 2(c) and Section 2(d) – Restrictions on Cash Settlement

Section 2(c)(i) and 2(d)(ii) provide that a contract will be within the exclusion only if it allows for cash settlement in place of delivery "where all or part of the delivery… is rendered impossible or commercially unreasonable by an intervening event or occurrence not reasonably within the control of the [counter] parties, their affiliates or their agents." The Guidance indicates that, in the case of currency transactions, this language effectively refers to force majeure events. In the case of commodities, the Guidance clarifies that certain provisions in standard contracts providing for cash payments when termination rights are triggered would not themselves be interpreted by the CSA to allow for cash settlement and gives as an example "…a provision where cash settlement is triggered by a termination right arising as a result of the **breach of the terms of the contract** or **event of default** thereunder." (emphasis added)

First, we continue to believe that the rule itself should recognize that this is not a strict requirement by reframing the provision to say that it does not allow for cash settlement in place of physical delivery "*in the ordinary course*" or "*at the option of one of the parties*" or other language to that effect. The Guidance could assist in interpreting what is or is not "ordinary course" or an "option". Our concern is that, as drafted, the rule is narrower than what the CSA actually intend it to be and market participants will be unsure whether they can rely only on the Guidance in the face of what appears to be a more restrictive rule.

Second, we continue to believe that the Guidance describes too narrowly the situations where cash settlement should not affect characterization of the transaction as an excluded derivative. As described, almost no transaction documented under standard industry terms would be an excluded derivative.

Many termination rights are not triggered by a breach of contract *per se* or by an event that is described as an event of default. For example, the commencement of a bankruptcy or reorganization proceeding is an Event of Default under the standard ISDA Master Agreement, but it is not a default in the obligation to deliver the currency or commodity. Nor are such provisions always "standardized" in the sense of being part of the published form or guidance. For example, with various entity types, it may be necessary to add customized termination provisions to reflect the application of different laws (e.g., the winding-up of a pension fund by a regulator). Including these provisions is critical to the close-out netting process. Parties may define these as Events of Default or, alternatively, as Termination Events, or as some other event triggering a close-out of transactions under a master agreement. Spot currency and physical commodity contracts are often transactions under master

agreements covering many other types of transactions and the event that triggers termination may relate to performance defaults under these other transactions. When close-out is triggered, all transactions are terminated, they are valued and those values are included in the calculation of the termination amount. Without clear guidance that the CSA would not interpret this process, regardless of whether it is triggered by a performance default with respect to the delivery of the currency or commodity contract or by an event which is not characterized as an event of default, to allow for cash settlement, it would be difficult to conceive of a physical currency or commodity transaction that ever would be an excluded derivative if documented under standard industry master agreements such as an IFEMA, ISDA Master Agreement, Gas EDI, NAESB or LEAP master.

Physically Settled Forwards on Securities.

The Guidance states that the Committee does not regard securities as physical commodities. We believe it would make sense to treat contracts for the physical delivery of securities in a similar way, however. A physically settled forward with respect to a security is a derivative, but, in certain Canadian jurisdictions, it is also regulated as a trade in a security (even though the forward contract itself may not be a security) and so, in those jurisdictions, there would not seem to be a reason to also treat the forward contract itself as a derivative. We believe that the effect of the rule as drafted is that the forward contract is a derivative (not a security) and is subject to the TR Rules, but also a trade in a security. We understand from the Guidance that the intention of the Scope Rules is to resolve conflicts that arise when a contract meets both the definition of a security and a derivative, but it is unclear how that would apply in this situation. Clarification of this point would be helpful.

Section 2(e) and 2(f) - Deposit Transactions

Only derivative-linked deposits of Canadian deposit-taking institutions are treated as excluded derivatives. This parallels the exclusions from the definition of "security" in the *Securities Act* (Ontario) and from the definition of "forms of investment" regulated under the *Securities Act* (Quebec), and similar exclusions under other local securities and derivatives legislation. We understand that such non-Canadian products could (and likely would) be securities and therefore prescribed not to be derivatives by virtue of Section 4 of the Rule. We continue to believe that it would be helpful if the Guidance made this point clearer.

III. Trade Repositories and Data Reporting Definitions

*"**Local Counterparty**"*

The definition of "local counterparty" establishes the parameters for the trade reporting obligation under the TR Rule. Given the scope of the definition, it will potentially subject Canadian and non-Canadian counterparties to trade reporting obligations in many, and often all, Canadian jurisdictions. While uniformity in the rules will limit the burden of reporting on market participants, it

will still be necessary to determine on a trade-by-trade basis which of the 13 Canadian regulators imposes a reporting obligation with respect to that trade. Compliance with privacy obligations would preclude simply giving access to all Canadian regulators if there is no legal requirement to do so.

The reporting obligation should only be imposed on those entities that each member of the CSA has a legitimate regulatory interest in from the perspective of provincial derivatives regulation. We continue to urge the CSA to cooperate to develop a system to determine one principal Canadian jurisdiction for each local counterparty and the application of the TR Rule of that jurisdiction only. For example, the trade reporting obligation could be imposed on a local counterparty whose "principal Canadian jurisdiction" is the province. This approach would be consistent, for example, with the concept of "principal jurisdiction" under National Instrument 33-109 *Registration Information* which applies to Canadian and non-Canadian filers under that rule.

We urge Canadian regulators to limit the extra-territorial reach of the rule outside of Canada and, in particular, the data reporting obligation so as to avoid the imposition of redundant or inconsistent reporting requirements on market participants.

We recognize that regulators in this industry as in many others have interests that extend beyond the strict borders of their respective jurisdictions. However, the guiding international law principle in defining fair and orderly limits to such extra-territorial jurisdiction is that there be a real and substantial connection to the jurisdiction.

Subsection (b) of the definition of "local counterparty" will impose reporting obligations in respect of the trading activities of a non-Canadian dealer registered as an exempt market dealer or a restricted dealer in Canada regardless of whether such activities have any other connection with Canada. Use of the term "organized under the laws of [x]" in subsection (a) may also capture limited partnerships formed under provincial law but whose general partners and limited partners are all non-Canadian entities with little or no other connection with Canada. In addition, subsection (c) of the definition includes foreign affiliates where their liabilities are the responsibility of a person or company described in subsection (a) or (b). Accordingly, a foreign affiliate of a Canadian bank whose obligations are guaranteed by the bank or an affiliate of a non-Canadian registrant whose obligations are guaranteed by that registrant may be subject to multiple, and potentially inconsistent, reporting obligations under, for example, Dodd Frank, EMIR and the TR Rules, regardless of whether their trading activities have any other connection with Canada. As noted in our CP 91-301 Comment Letter, such entities may also be subject to privacy obligations which are inconsistent with the disclosure obligations under the TR Rules and may encounter substantial logistical obstacles to complying with the TR Rules.

Imposing this regulatory burden on such entities could have negative effects on the access of Canadian entities to relationships with foreign swap providers and

hence on liquidity in the Canadian market Indeed, it could create a disincentive for certain non-Canadian entities to engage in registrable trading (or advisory) activities in the Canadian market or to use Canadian partnership vehicles for their investment activities. This problem will be exacerbated if the data required to be reported differs from that required to be reported in other jurisdictions.

IV. Trade Repository Designation

The Guidance for the TR Rules does not reference any passporting system to be put in place for trade repository recognition and the Committee has indicated that it regards the implementation of such a system as outside the scope of the TR Rules. We would nevertheless urge Canadian regulators to develop a passport system for trade repository designation that will permit a trade repository to apply for designation or recognition to only one CSA member in Canada and that the application requirements for designation or recognition be uniform among the Canadian jurisdictions.

We would also again encourage the Committee to encapsulate in the TR Rules the principle that it recommended in CSA Consultation Paper 91-402 with respect to the recognition of foreign trade repositories subject to appropriate regulation and oversight in its home jurisdiction; namely that the CSA members defer to the regulatory oversight of the trade repository in its home jurisdiction. Further, foreign trade repositories should be permitted to take advantage of a passporting regime so that they only have to deal with one Canadian regulator. Given that local counterparties must report to a trade repository, but trade repositories are not obligated to accept reporting obligations with respect to any particular province, the process should be as streamlined and uniform as possible to encourage trade repositories to readily accept that data.

Confirmation of Data and Data Reporting - Section 23

Section 23 requires a trade repository to confirm with each counterparty or agent for the counterparty (other than a counterparty that is not a participant in such trade repository) that the data that it receives from the reporting counterparty is correct. This is inconsistent with the approach taken under Dodd-Frank and creates substantial logistical issues in a real-time reporting environment. ISDA recommends that this not be a requirement where the data is reported by a SEF, DCO, designated contract market or third party service provider.

V. Data Reporting Rules

Duty to Report – Section 25

As noted in our opening comments regarding the need for a phased-in approach to the implementation of reporting requirements, we believe it is important that Canadian reporting rules in respect of individual classes of derivatives not be out of step with those in other key jurisdictions. For example, it would be inappropriate for Canada to require the reporting of securities-based

swaps before corresponding reporting requirements in the United States come into effect.

Pre-Existing Derivatives – Section 26

ISDA is concerned that the counterparties will not be in a position to comply fully with the requirements of this rule or will be unnecessarily burdened in complying to the extent it requires the reporting of the full set of data that is required with respect to transactions entered into after the TR Rules come into effect. As we stated in our CP 91-301 Comment Letter, ISDA strongly supports the record keeping and reporting objectives for pre-existing transactions to the extent they apply to principal economic terms. Not all derivatives data that are not principal economic terms may have been collected with respect to such transactions. The rules under Dodd-Frank have not required the reporting of more than the principal economic terms for pre-existing trades and the corresponding Canadian rules should avoid requiring the reporting of data that is not required in the United States or elsewhere. A requirement to report the principal economic terms strikes an appropriate balance between the interests of regulators and reporting counterparties given the costs that would be incurred by them in obtaining this data.

Reporting Counterparty – Section 27

It is important that there be clear rules with respect to which party in the relationship is required to report and that the possibility of imposing the requirement on both parties be minimized. We commend the CSA for setting out a more detailed hierarchy so as to minimize the situations in which both parties would be required to report pursuant to subsection 27(1)(d). However, we remain concerned that subsection 27(2) does not relieve end-users from the obligation to report in certain circumstances. For example, if a Canadian pension fund entered into a derivatives transaction with a London-based dealer, a strict reading of subsection 27(2) would require the pension fund to report the details of the trade to a trade repository notwithstanding that the dealer may already have the infrastructure in place to report the trade to the trade repository.

We continue to believe that the retention of responsibility for ensuring timely and accurate reporting under section 27(4) is an impractical and unnecessary rule where the reporting is undertaken by a SEF or DCO. The regulatory oversight of those entities by the appropriate regulator is sufficient to ensure that appropriate responsibility is assumed and monitored. ISDA recommends that this provision recognize an exception where a SEF or DCO is the reporting party at least where the local counterparty is not a derivatives dealer. This is consistent with the approach under the CFTC Reporting Requirement rules.[6]

Real-Time Reporting – Section 28

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[6] Ibid. § 45.3 Swap data reporting: creation data.

Section 28 requires that a reporting counterparty report to a trade repository in real time or, if not technologically practicable to do so, no later than the end of the next business day following the entering into of the transaction, change or event that is to be reported. We recommend that, in the case of inter-affiliate transactions, the timing of these reporting requirement be relaxed. Such inter-affiliate transactions may be numerous and are most likely to involve end-user reporting counterparties who do not have the reporting infrastructure required to comply with such real-time reporting requirements.

Valuation Data – Section 35

We note that Section 35(2)(b) imposes a quarterly valuation requirement on non-dealers in respect of uncleared transactions. This requirement will likely impose significant operational and logistical challenges to parties that do not prepare periodic valuations in the ordinary course of their business and the potential benefits from imposing this requirement on such entities are, in our view, unclear. We ask that the Committee reconsider the need for this reporting requirement or consider narrowing its application to parties (eg entities designated as Large Derivatives Participants) who can be expected to have in place the infrastructure necessary to undertake such valuations.

Records of data reported - Section 36

In our CP 91-301 Comment Letter, we strongly urged the Committee to reconsider the recommendation for a seven year retention period from the date the transaction terminates or expires. This inconsistency with the five year period under Dodd-Frank will involve a heavy cost burden for those entities that are not otherwise subject to a seven year retention period and will provide only a small incremental benefit to Canadian regulators. Local counterparties will not be able to rely on retention by their dealer counterparties if those dealer counterparties are only subject to the five year period under Dodd-Frank. This is an area in which global consistency is important and Canada should not be an outlier, particularly if its definition of "local counterparty" extends to entities not located or domiciled in Canada.

Data available to public - Section 39

This rule requires the trade repository to make aggregate data on open positions, volume, number and prices relating to the transactions reported to it available to the public. In addition, information to be disclosed includes the geographic location of the parties and type of counterparty (s.39 (1) and (2)). This data alone could easily identify the party in some cases. It also requires the trade repository to make transaction level reports of the principal economic terms of each transaction available to the public by the end of the day after receiving those terms from the reporting counterparty if one of the parties is a dealer and otherwise within two days (s.39(3)).

We question whether these tight timelines are appropriate in the context of the Canadian derivatives markets, given their relatively small size and limited liquidity in comparison to, for example, those in the United States. Other jurisdictions whose markets are more comparable to those of Canada, such as Australia[7], have determined that aggregate statistical data need only be disclosed to the public on a weekly basis. We believe that the interests of both Canadian regulators and market participants may be better served by aligning the public disclosure requirements under the TR Rules with those being adopted in more comparable jurisdictions.

We also note that, despite a number of comments received, including in our CP 91-301 Comment Letter, the TR Rules do not contemplate any express exemptions with respect to the disclosure of block trade data. Disclosure of data with respect to block trades could easily result in disclosure of the identity of the parties, especially in the thinner Canadian market. Disclosure of block data of this nature, even on a delayed basis, would likely seriously impair liquidity for large transactions in the market. It could also facilitate market manipulation as it could be possible to identify the parties and determine other confidential and proprietary information and strategies from the disclosed data. As the Committee appreciates, the reporting regime must balance the benefits of post-trade transparency against the harm that may be caused to market participants' ability to hedge risk based on this disclosure. The currently proposed period for disclosure of one or two days is not sufficiently long to allow parties to hedge their positions.

Moreover, while the Committee has indicated in the Guidance a willingness to consider granting exemptions from these requirements on a case-by-case basis, we believe that this will impose undue regulatory burdens and delay on market participants and will not be a practicable solution for entities that have high trading volumes.

Apart from extending reporting timelines to permit hedging of block trades, our concerns may be addressed by imposing limits on the notional amounts disclosed in respect of block trades. The approach suggested in Europe by ISDA was that disclosure in respect of trades above a retail size would have the true notional capped. This would have the benefit of providing transparency for the most sensitive class of market participants while protecting the ability of larger, professional traders to hedge their transactions.

In this regard, it will be important to provide clarity on what constitutes a block trade, including the appropriate threshold of notional amounts. We understand that the development of an appropriate and well-calibrated block trade exception framework is difficult and requires research into the Canadian OTC swap market, different asset classes in the Canadian market and different products within those classes. We strongly urge the Committee to conduct such research and work to

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[7] Australian Securities and Investments Commission, Consultation Paper 205 (March 28, 2013) at p. 17.

develop such an exception before implementing this rule. Access to reported trade data will help the Committee to conduct the appropriate research.

VI. Exemptions

Small Physical Commodity Transactions. We note that the Committee has decided to retain the $500,000 notional value cap. With a cap this low, the TR Rules are likely to capture the trading activities of many small businesses and commercial users of commodities.

Further, we ask the Committee again to consider a similar small transaction cap for reporting obligations for all transactions, at least with respect to parties that are end-users of derivatives.

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ISDA appreciates the opportunity to provide its comments on the Updated Model Rules and, as always, looks forward to providing any assistance to the Committee and the individual securities regulatory authorities in their continued efforts to implement an appropriate regulatory regime for derivatives in Canada. Please feel free to contact me or ISDA's staff at your convenience.

Yours truly,

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