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VIA ELECTRONIC MAIL

Mr. John Stevenson
Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario
M5H 3S8
comments@osc.gov.on.ca

Ms. Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, Tour de la Bourse
Montréal, Québec
H4Z 1G3
Consultation-en-cours@lautorite.qc.ca

cc:

Mr. Derek West
Autorité des marchés financiers
derek.west@lautorite.qc.ca

Mr. Abel Lazarus
Nova Scotia Securities Commission
lazaruah@gov.ns.ca

Mr. Kevin Fine
Ontario Securities Commission
kfine@osc.gov.on.ca

Mr. Dean Murrison
Financial and Consumer Affairs Authority
of Saskatchewan
Dean.Murrison@gov.sk.ca

Ms. Debra MacIntyre
Alberta Securities Commission
debra.macintyre@asc.ca

Ms. Wendy Morgan
New Brunswick Securities Commission
wendy.morgan@nbsc-cvmnb.ca

Mr. Doug Brown
Manitoba Securities Commission
doug.brown@gov.mb.ca

Mr. Michael Brady
British Columbia Securities Commission
mbrady@bcsc.bc.ca

Re: Comments on CSA Staff Notice 91-304, *Model Provincial Rule – Derivatives: Customer Clearing and Protection of Customer Collateral and Positions.*

Dear Mr. Stevenson and Ms. Beaudoin:

I. Introduction.

On behalf of The Canadian Commercial Energy Working Group (the “**Working Group**”), Sutherland Asbill & Brennan LLP hereby submits this letter in response to the request for public comment set forth in the Canadian Securities Administrators’ (the “**CSA**”) Staff

Notice 91-304 (the “**Proposed Customer Collateral Rule**”) along with accompanying Explanatory Guidance (the “**Explanatory Guidance**”).¹

The Working Group is offering comments on a few select issues that will impact the customers of clearing brokers regulated under this proposal. The Working Group welcomes the opportunity to provide comments on this matter and looks forward to working with the CSA throughout the derivatives regulatory reform process.

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.

A. The CSA Should Design its Collateral Segregation Rules so that Canadian Entities Can Access Cleared Swaps Markets in the United States at No Additional Cost.

Given the global nature of derivatives markets, it is imperative that Canadian market participants have efficient access to trading and clearing across the globe. As drafted, the Proposed Customer Collateral Rule would apply to not only clearing members, clearing intermediaries, and derivatives clearing agencies that are domiciled in or have a principal place of business in Canada, but also to any clearing member, clearing intermediary, or derivatives clearing agency that “has received or holds property with respect to the cleared derivative” of an entity that is domiciled in or has a principal place of business in Canada. The CSA must take care to draft and apply these rules in a manner that does not hinder the access of Canadian entities to markets in the United States and elsewhere.

In that vein, the Working Group appreciates that the collateral protection régime contemplated in the CSA’s Proposed Customer Collateral Rule is structurally very similar to the legal segregation with operational commingling model adopted by the U.S. Commodity Futures Trading Commission (the “**CFTC**”). This similarity should facilitate access for Canadian entities to derivatives trading markets in the United States. The Working Group respectfully requests that the CSA continue to carefully consider the implications for Canadian companies that trade derivatives in foreign markets as it works to finalize the Proposed Customer Collateral Rule.

¹ CSA Staff Notice 91-304, *Model Provincial Rule – Derivatives: Customer Clearing and Protection of Customer Collateral and Positions*, 37 OSCB 787 (Jan. 16, 2014), available at http://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20140116_91-304_derivatives-clearing-protection.htm. 23755802.4

B. The CSA Should Clarify the Amount of Customer Collateral Clearing Members Must Hold.

The Proposed Customer Collateral Rule is similar to the CFTC's original proposal on similar issues.² Specifically, under the Proposed Customer Collateral Rule, a clearing member "must **at all times** maintain property in one or more customer accounts at the derivatives clearing agency that is at least equal to the total amount of collateral required by the derivatives clearing agency for the cleared derivatives of its customer(s)." (emphasis added).³ Similarly, under the CFTC Proposal, a clearing broker would have been required to maintain at all times a residual interest in each class of customer funds accounts sufficient to exceed the sum of all customer margin deficits.⁴

The CFTC Proposal would have required clearing brokers to continuously monitor their customers' positions and near instantaneously cover any customer collateral shortfalls with their own capital. The Proposed Customer Collateral Rule could be interpreted to impose a similar requirement. This is a cause for concern since there is a significant difference in levels of required collateral between a system (i) where collateral levels must be maintained, whether by the temporary use of clearing intermediary or clearing member proprietary funds or through frequent customer collateral calls, continuously and (ii) where collateral must be at appropriate levels at one point during the day.⁵

In response to market participants' concerns, the CFTC's final rule on this subject did not require continuous margin maintenance and instead required clearing brokers to calculate and cure collateral deficits with their capital prior to the end of the day.⁶ If the Proposed Customer Collateral Rule requires continuous compliance, it would likely increase margin costs for market participants significantly. Therefore, the Working Group respectfully requests that the CSA amend the Proposed Customer Collateral Rule so that it is clear that clearing intermediaries and

² See, e.g., CFTC Notice of Proposed Rulemaking, *Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations* ("CFTC Proposal"), 77 Fed. Reg. 67,866 (Nov. 14, 2012), available at <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-26435a.pdf>.

³ Proposed Customer Collateral Rule, 37 OSCB at 792.

⁴ See CFTC Proposal, Proposed Rules 1.20(i)(4), 22.2(f)(6), and 30.7(a), 78 Fed. Reg. at 67,941, 67,955, and 67,957.

⁵ See Futures Industry Association ("FIA") Comment Letter on the CFTC Proposal, Costs of the Commission's Proposed Residual Interest Requirement Compared with the FIA Alternative 1 (June 20, 2013), available at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59283&SearchText=>, see also CME, Group Inc. Comment Letter on the CFTC Proposal 5-6 (Feb.15, 2013), available at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59206&SearchText=>.

⁶ See CFTC Final Rule, *Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations*, 78 Fed. Reg. 68,506 (Nov. 14, 2013), available at <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2013-26665a.pdf>; CFTC Regulation 1.22(c)(2), 17 C.F.R. § 1.22(c)(2).
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clearing members are required to cure any customer collateral shortfall by the end of the relevant day and not on a continuous basis.

C. The CSA Should Ensure that Customer Positions and Collateral Can be Transferred in an Efficient Manner.

The ability of customers of clearing intermediaries and clearing members to quickly and efficiently transfer positions and related collateral between accounts with different clearing members or clearing intermediaries is of paramount importance. The ability to transfer positions and related collateral can allow customers to avoid the adverse consequences of a clearing member or clearing intermediary default.

The collapse of MF Global, though it occurred in the United States, is a primary example of why portability of positions is important to derivatives end-users. MF Global's default, even though its customers managed to recover 98% of their funds over a two-year period,⁷ imposed significant costs in the form of time, money, and effort on such customers.

In addition, making positions easily portable will impose competitive discipline on clearing members and intermediaries. Said another way, the ability to move positions and collateral will provide customers with a real choice as to who serves as their clearing broker as they will be able to respond efficiently to costs and burdens imposed by their existing broker by moving their business to a competitor.

The Proposed Customer Collateral Rule does provide a mechanism for the transfer of customer positions and collateral between clearing members and clearing intermediaries. However, the proposal is high-level and does not provide sufficient detail that would allow conclusions to be drawn on how customer positions and collateral could be moved. It is crucial that the mechanism for transfer of customer positions and collateral allows such transfer to happen as quickly and efficiently as possible.

D. Request for Clarification Regarding Excess Customer Collateral and a Request Regarding Future Portfolio Margining.

There are two additional points the Working Group would like to address. *First*, the Proposed Customer Collateral Rule appears to contemplate derivatives clearing agencies holding excess customer collateral.⁸ It is the Working Group's understanding that, typically, excess collateral is required and held by clearing members and clearing intermediaries and not a derivatives clearing agency. As such, the Working Group requests additional clarification as to when a derivatives clearing agency would be in a position to hold excess customer collateral.

⁷ Julie Steinberg, *MF Global Repayments Near: Trustee James Giddens Files Motion on Funds*, The Wall Street Journal (Oct. 2, 2013), <http://online.wsj.com/news/articles/SB10001424052702304906704579111750197462292>.

⁸ See, e.g., Proposed Customer Collateral Rule, Part II, Sec. 5 Excess Margin, 37 OSCB at 792. 23755802.4

Second, under the Proposed Customer Collateral Rule, market participants would be prohibited from portfolio margining across derivatives and other products, such as futures or cleared physical transactions. Though such portfolio margining may not be permitted at this point, there may be future circumstances where portfolio margining may be feasible and offer value to market participants. Therefore, the Working Group requests that the Proposed Customer Collateral Rule not prohibit future portfolio margining outright and provide a mechanism to allow portfolio margining in the future.

III. Conclusion.

The Working Group appreciates this opportunity to provide comments on the Proposed Customer Collateral Rule and respectfully requests that the CSA consider the comments set forth herein as it develops any final rulemaking in this proceeding.

If you have any questions, please contact the undersigned.

Respectfully submitted,

R. Michael Sweeney, Jr.
Alex S. Holtan