



SUTHERLAND ASBILL & BRENNAN LLP  
700 Sixth Street, NW, Suite 700  
Washington, DC 20001-3980

TEL 202.383.0100  
FAX 202.637.3593  
[www.sutherland.com](http://www.sutherland.com)

February 12, 2016

**VIA ELECTRONIC MAIL**

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](mailto:consultation-en-cours@lautorite.qc.ca)

**Re: Comments on Proposed Amendments to the Derivatives Regulation  
Regarding Accredited Counterparty Hedger Certification**

Dear Me 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 from the Autorité des marchés financiers (the “**AMF**”) on its proposed amendments to the Derivatives Regulation (the “**Proposed Amendment**”).<sup>1</sup> Specifically, this comment letter focuses on the proposed requirement for certain persons to deliver a certification in order to rely on their status as accredited counterparties (the “**Hedger Certification**”).

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

---

<sup>1</sup> See Notice and Request for Comment on the Proposed Regulation to Amend the Derivatives Regulation (Jan. 14, 2016), available at <https://www.lautorite.qc.ca/files/pdf/reglementation/instruments-derives/reglements/instruments-derives/2016-01-14/2016jan14-rid-avis-consultation-en.pdf>; Proposed Regulation to Amend the Derivatives Regulation (Jan. 14, 2016), available at <https://www.lautorite.qc.ca/files/pdf/reglementation/instruments-derives/reglements/instruments-derives/2016-01-14/2016jan14-rid-cons-en.pdf>; Proposed Revised Policy Statement Respecting Accredited Counterparties (Jan. 14, 2016), available at <https://www.lautorite.qc.ca/files/pdf/reglementation/instruments-derives/instructions-generales/contreperties/2016-01-14/2016jan14-ig-contreperties-cons-en.pdf>.

developments with respect to the trading of energy commodities, including derivatives, in Canada.

## II. COMMENTS OF THE WORKING GROUP

The Working Group respectfully suggests that the AMF not adopt the Hedger Certification requirement in the Proposed Amendment. As discussed further below, the Hedger Certification requirement may have a broader impact on Québec's derivatives markets than anticipated.

In short, if an entity qualifies as an accredited counterparty in Section 3 of the Derivatives Act solely because it is a hedger under paragraph 12 of the definition of "accredited counterparty" ("**AC Hedger**"), the Proposed Amendment would require that entity to file a Hedger Certification with the AMF if it wants to be considered an "accredited counterparty." The Hedger Certification essentially requires an officer of the filing AC Hedger to certify to the AMF that, to the best of his/her knowledge, having exercised reasonable diligence, the entity either intended the relevant derivative to be a hedge or that the derivative was an effective hedge.<sup>2</sup>

While the AMF may view the Hedger Certification requirement as a limited compliance obligation, the entities seeking to comply with it may not. Any time an officer of an entity is required to make a filing with a regulator that attests to certain information, it is a serious matter. This is especially true for the smaller entities that only qualify as an accredited counterparty because of their hedging status.

Based on the Working Group's members' experience, entities that are likely AC Hedgers may be reticent to file the Hedger Certification. If such entities are unwilling to file the Hedger Certification, their potential counterparties have the choice to either: (a) transact derivatives with these non-accredited counterparties, which may cause the relief from derivatives dealer registration provided in Section 7 of the Derivatives Act to be unavailable; or (b) not to transact derivatives with these non-accredited counterparties. When faced with that choice, many market participants who are not dedicated derivatives dealers will likely choose not to transact derivatives with non-accredited counterparties to avoid the potential obligation to register as a derivatives dealer in Québec. As a consequence, AC Hedgers' counterparty choice may be more limited and liquidity may be reduced. These consequences would be more acute in commodities derivatives markets where AC Hedgers are more likely to transact with counterparties that are not traditionally viewed as derivatives dealers.

As a potential alternative to the Hedger Certification, the Working Group respectfully suggests that the AMF require an AC Hedger to retain records that allow such entity to reasonably demonstrate that its intent in entering into derivatives transactions was to hedge commercial risk in a manner that would satisfy the criteria set forth in paragraph 12 of the definition of "accredited counterparty."

---

<sup>2</sup> See Proposed Regulation to Amend the Derivatives Regulation at Section 10 (Schedule D Hedger Certification).

### **III. CONCLUSION**

The Working Group appreciates this opportunity to provide input on the Proposed Amendment and respectfully requests that the comments set forth herein are considered as any final legislation or regulations are drafted.

If you have any questions, please contact the undersigned.

Respectfully submitted,  
*/s/ R. Michael Sweeney, Jr.*  
R. Michael Sweeney, Jr.  
Alexander S. Holtan  
Blair Paige Scott