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VIA ELECTRONIC MAIL

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Re: Comments on Proposed Amendments to AMF Regulation 91-507 *Respecting Trade Repositories and Derivatives Data Reporting* and AMF Companion Policy 91-507CP

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 the proposed amendments to AMF Regulation 91-507 *Respecting Trade Repositories and Derivatives Data Reporting* (the “**AMF TR Rule**”) and AMF Companion Policy 91-507CP (the “**AMF TR Companion Policy**”).¹ The Working Group welcomes the opportunity to provide comments on the proposed amendments to the AMF TR Rule and the AMF TR Companion Policy (collectively, the “**AMF Proposed TR Amendments**”).

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.

The Working Group appreciates the AMF’s coordinated efforts with the Manitoba Securities Commission (the “**MSC**”)² and the Ontario Securities Commission (the “**OSC**”)³ to establish a workable derivatives reporting regime. The proposed amendments to the AMF TR Rule, MSC TR Rule, OSC TR Rule, and their respective TR Companion Policies (collectively, the “**Proposed TR Amendments**”) reflect the regulators’ willingness to carefully consider the input of market participants. In addition to this comment letter, the Working Group plans to submit separate comment letters to the MSC and OSC on their respective Proposed TR Amendments.

II. COMMENTS OF THE WORKING GROUP

By issuing the AMF Proposed TR Amendments, the AMF has moved closer to establishing a derivatives reporting regime that is largely workable. However, the AMF Proposed TR Amendments raise a few issues for commercial energy companies doing business in Canada. Those issues include: (i) end-user affiliate reporting, generally; (ii) the proposed substituted compliance paradigm in Section 26(5) of the AMF TR Rule; (iii) proposed public dissemination of derivatives data under Appendix C of the AMF TR Rule; and (iv) the definition of “end-user.” Each of these issues will be discussed in detail below.

¹ See AMF Notice on Proposed Amendments to the AMF TR Rule, AMF TR Companion Policy, AMF Scope Rule, and AMF Scope Companion Policy (Nov. 5, 2015) (“**AMF TR/Scope Notice**”), available at <https://www.lautorite.qc.ca/en/consultations-derivatives-pro.html>.

² See MSC Notice on Proposed Amendments to the MSC TR Rule and MSC TR Companion Policy (Nov. 5, 2015), available at <http://docs.mbsecurities.ca/msc/notices/en/126316/1/document.do>.

³ See OSC Notice on Proposed Amendments to the OSC TR Rule and OSC TR Companion Policy (Nov 5, 2015), available at http://www.osc.gov.on.ca/documents/en/Securities-Category9/rule_20151105_91-507_derivatives-data-reporting.pdf.

A. THE AMF SHOULD EXEMPT FROM THE OBLIGATIONS OF THE AMF TR RULE TRANSACTIONS BETWEEN END-USER AFFILIATES.

The Working Group respectfully urges the AMF to exempt all transactions between end-user affiliates from the obligations of the AMF TR Rule. The Working Group recognizes that the AMF Proposed TR Amendments would take meaningful steps to reduce reporting burdens for “end-users.”⁴ However, in order to have a derivatives reporting regime that appropriately balances the costs and benefits, the AMF should exempt all inter-affiliate derivatives transactions between end-users from the obligations of the AMF TR Rule. As discussed further herein, this is because the relief proposed under Section 40.1 and Section 26(5) is partial, reporting compliance costs are significant, and the utility of end-user affiliate reporting data to regulators is limited at best.

For these reasons, the Working Group’s primary recommendation is that the AMF provide an exemption from the obligations of the AMF TR Rule for transactions between end-user affiliates similar to the relief provided by the U.S. Commodity Futures Trading Commission (“CFTC”). Specifically, the CFTC has provided conditional relief in CFTC No-Action Letter 13-09 so that certain end-user affiliate transactions do not have to be reported.⁵ In providing CFTC No-Action Letter 13-09, the CFTC recognized that such end-user affiliate transactions are used for risk management within a corporate group and do not increase the overall systemic risk or warrant the same reporting requirements as external swaps.⁶ Any such relief, however, should also be available to end-users affiliates with a derivatives dealer in their corporate group.

If the AMF does not opt to provide relief for end-user affiliate transactions similar to the relief in CFTC No-Action Letter 13-09, the Working Group respectfully offers the specific comments contained herein in Section II.B on the proposed substituted compliance paradigm in Section 26(5) of the AMF TR Rule.

B. A DERIVATIVES TRANSACTION SHOULD BE EXEMPT UNDER SECTION 26(5) WHERE SUCH TRANSACTION IS EXEMPT UNDER THE LAWS, REGULATIONS, OR GUIDANCE OF AN EQUIVALENT FOREIGN JURISDICTION.

The Working Group appreciates that the AMF Proposed TR Amendments would allow substituted compliance for end-users with respect to reporting derivatives data for transactions

⁴ As used in this comment letter, the term “end-user” has the same meaning as provided in the AMF TR/Scope Notice. Under the AMF TR/Scope Notice, “end-users” are counterparties that are none of the following: derivatives dealers; recognized clearing agencies; exempt clearing agencies; or Canadian financial institutions. AMF TR/Scope Notice at 2-3.

⁵ CFTC No-Action Letter 13-09, *No-Action Relief for Swaps Between Affiliated Counterparties That Are Neither Swap Dealers Nor Major Swap Participants from Certain Swap Data Reporting Requirements under Parts 45, 46, and Regulation 50.50(b) of the Commission’s Regulations* (Apr. 5, 2013), available at <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/13-09.pdf>.

⁶ See CFTC No-Action Letter 13-09 at 3 (explaining the reason market participants submitted requests for relief and noting that the relief is granted “[a]ccordingly”).

with their end-user foreign affiliates.⁷ However, the Working Group respectfully notes that there are issues with one of the conditions to qualify for such relief.⁸

The problematic condition is that to be exempt under Section 26(5) of the AMF TR Rule, the derivatives transaction must be reported to a trade repository pursuant to the laws of certain foreign jurisdictions,⁹ which includes the CFTC's reporting paradigm in the United States.¹⁰ However, as noted earlier, the CFTC has provided conditional relief in CFTC No-Action Letter 13-09 so that certain end-user inter-affiliate transactions do not have to be reported. Thus, end-user inter-affiliate derivatives transactions that are exempt from reporting by CFTC No-Action Letter 13-09 would still need to be reported to qualify for the exemption under Section 26(5) of the AMF TR Rule.

To prevent this unnecessary limitation, the Working Group respectfully requests that Section 26(5) of the AMF TR Rule be modified to allow end-user affiliates to continue to rely on the relief provided by the CFTC while still qualifying for the exception under Section 26(5).

Specifically, the Working Group offers the following suggested amendments to Section 26(5) of the AMF TR Rule:

The Working Group's Proposed Revised Language for Section 26(5) of the AMF TR Rule

Section 26(5)

- (b) the transaction is reported to a recognized trade repository or exempt from such reporting pursuant to
- (i) the securities legislation of a province of Canada other than Québec, or
 - (ii) the laws, regulations, or guidance of a foreign jurisdiction appearing on a list determined by the Authority....

⁷ See AMF Proposed TR Amendments at Section 26(5).

⁸ See AMF Proposed TR Amendments at Section 26(5)(b).

⁹ AMF Proposed TR Amendments at Section 26(5)(b).

¹⁰ The AMF TR Rule provides that the following CFTC Regulations are equivalent for the purposes of the substituted compliance provision in Section 26(5) of the AMF TR Rule:

- CFTC Real-Time Public Reporting of Swap Transaction Data, 17 C.F.R. Part 43 (2013);
- CFTC Swap Data Recordkeeping and Reporting Requirements, 17 C.F.R. Part 45 (2013); and
- CFTC Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 17 C.F.R. Part 46 (2013).

C. APPENDIX C OF THE AMF TR RULE SHOULD BE AMENDED TO REQUIRE DERIVATIVES DATA TO BE HELD BY TRADE REPOSITORIES FOR A MINIMUM TIME PRIOR TO PUBLIC DISSEMINATION.

The Working Group commends the AMF for its efforts in the AMF Proposed TR Amendments to appropriately balance the benefits of post-trade transparency against the potential harm that may be caused to market participants' ability to hedge risk.¹¹ However, as currently drafted, the AMF Proposed TR Amendments under Appendix C of the AMF TR Rule do not achieve the proper balance.

This is because the AMF Proposed TR Amendments provide the time frame by which derivatives data must be publicly disseminated by trade repositories, but still do not provide a minimum time that the data must be held prior to public dissemination.¹² As such, the AMF Proposed TR Amendments still allow a trade repository to publicly disseminate the data as soon as it is received, which would defeat the purpose of the delay – “to avoid signaling the market.”¹³

To provide market participants with necessary protection, the Working Group respectfully requests that the AMF TR Rule be amended to provide a minimum time that the derivatives data be held before such data is permitted to be publicly disseminated by trade repositories. That minimum time should be determined based on the liquidity of the market for the relevant commodity.

D. IF THE AMF USES THE TERM “END-USER” IN A REGULATION, THAT TERM SHOULD BE DEFINED IN THE REGULATION.

For regulatory clarity purposes, if the AMF uses the term “end-user” in a regulation, the Working Group respectfully requests for the AMF to define that term in the regulation. Because the term “end-user” may have different meanings to different people, providing a specific definition in the relevant regulation would help ensure a consistent interpretation and application of the law.

¹¹ AMF TR/Scope Notice at 2-3.

¹² See AMF Proposed TR Amendments at Appendix C.

¹³ AMF TR/Scope Notice at 2-3.

III. CONCLUSION

The Working Group appreciates this opportunity to provide input on the AMF Proposed TR Amendments 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.
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