

May 24, 2016

**VIA ELECTRONIC MAIL**

Alberta Securities Commission  
Autorité des marchés financiers  
British Columbia Securities Commission  
Financial and Consumer Services Commission (New Brunswick)  
Financial and Consumer Affairs Authority of Saskatchewan  
Manitoba Securities Commission  
Nova Scotia Securities Commission  
Nunavut Securities Office  
Ontario Securities Commission  
Office of the Superintendent of Securities, Newfoundland and Labrador  
Office of the Superintendent of Securities, Northwest Territories  
Office of the Yukon Superintendent of Securities  
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

**c/o:**

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

**c/o:**

Ms. Josée Turcotte  
Secretary  
Ontario Securities Commission  
20 Queen Street West  
Suite 1900, Box 55  
Toronto, Ontario M5H 3S8  
[comments@osc.gov.on.ca](mailto:comments@osc.gov.on.ca)

**Re: Comments on Proposed National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives**

Dear Sir or Madam:

**I. INTRODUCTION**

On behalf of The Canadian Commercial Energy Working Group (“**Working Group**”), Sutherland Asbill & Brennan LLP hereby submits this letter in response to the request for public comment on Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (“**Proposed Clearing Rule**”) and Proposed Companion Policy 94-101CP (“**Proposed Clearing Companion Policy**”).<sup>1</sup> The Working Group largely supports

<sup>1</sup> See CSA Notice and Request for Comment on Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* and Proposed Companion Policy 94-101CP (Feb. 24, 2016) (“**CSA Clearing Notice**”), available at [http://www.albertasecurities.com/Regulatory%20Instruments/5226897-v1-CSA\\_Note\\_of\\_Publication\\_Proposed\\_NI\\_94-101.pdf](http://www.albertasecurities.com/Regulatory%20Instruments/5226897-v1-CSA_Note_of_Publication_Proposed_NI_94-101.pdf).

the Proposed Clearing Rule and the Proposed Clearing Companion Policy, and is submitting this letter mainly to confirm its understanding of certain aspects of the Proposed Clearing Rule and Proposed Clearing Companion Policy.

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 would first like to commend the Canadian Securities Administrators (“CSA”) for its continued dedication to establishing a workable derivatives regulatory regime that appropriately balances costs and benefits. Coordinating a multijurisdictional regulatory reform effort is highly difficult, and the Working Group greatly appreciates that the CSA has been receptive to feedback and has adjusted its proposals to reflect such feedback, when appropriate. Specifically, the Working Group appreciates that the CSA incorporated suggestions into the Proposed Clearing Rule and the Proposed Clearing Companion Policy that it received from public comments submitted on the 2015 Draft Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* and Draft Proposed Companion Policy 94-101CP (collectively, the “**Draft Clearing Rule**”).<sup>2</sup>

## II. COMMENTS OF THE WORKING GROUP

The Proposed Clearing Rule and the Proposed Clearing Companion Policy are significant improvements from the Draft Clearing Rule, and the Working Group largely supports them. The Working Group, however, would like the CSA to confirm the Working Group’s understanding of certain aspects of the Proposed Clearing Rule and the Proposed Clearing Companion Policy that pertain to the following: (i) the concept of a “participant of a regulated clearing agency”; and (ii) Canadian entities with foreign affiliate clearing members.

### A. CONCEPT OF A “PARTICIPANT OF A REGULATED CLEARING AGENCY”

As the CSA knows, one of the triggers that could subject an entity to mandatory central clearing is if that entity is a participant of, or affiliated with a participant of, a regulated clearing agency that offers clearing services in respect of the mandatory clearable derivative and it subscribes for clearing services for the class of derivative to which the mandatory clearable derivative belongs.<sup>3</sup> However, the proposed scope of what constitutes a “participant of a regulated clearing agency” may be broader than is intended with respect to Canadian energy markets because of the Natural Gas Exchange’s (“NGX”) unique clearing structure.

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<sup>2</sup> See generally CSA Notice and Request for Comment on Draft Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* and Draft Proposed Companion Policy 94-101CP (Feb. 12, 2015), available at [http://www.albertasecurities.com/Regulatory%20Instruments/5022685-v5-Proposed\\_NI\\_94-101\\_package.pdf](http://www.albertasecurities.com/Regulatory%20Instruments/5022685-v5-Proposed_NI_94-101_package.pdf).

<sup>3</sup> See Proposed Clearing Rule at Section 3(1).

Specifically, the Proposed Clearing Rule defines “participant” as “a person or company that has entered into an agreement with a regulated clearing agency to access the services of the regulated clearing agency and is bound by the regulated clearing agency’s rules and procedures.”<sup>4</sup> Because of NGX’s unique structure, a broad reading of that definition could potentially capture any market participant clearing through NGX since NGX’s operational structure allows any market participant to clear transactions without using a clearing member.<sup>5</sup> In short, any entity transacting on NGX is potentially a “participant” because they do not clear through a clearing member.

The Working Group believes it was not the CSA’s intent to potentially subject each market participant on NGX to mandatory clearing. Comments from Canadian regulators on the scope of applicability of mandatory clearing in another context support this conclusion. Specifically, in discussing this concept, Canadian regulators referred to a “participant” as a “clearing member.”<sup>6</sup> Since NGX does not use a clearing member construct, the Working Group does not think the CSA intended for a “participant” to include those clearing through NGX.

The Working Group understands that the products NGX currently clears are not “specified derivatives”<sup>7</sup> under the various Scope Rules<sup>8</sup> and are outside the scope of the Proposed Clearing Rule. Therefore, NGX, under its current formulation, would not be offering clearing services in respect of a mandatory clearable derivative even if certain energy derivatives were subject to mandatory clearing. However, the Working Group requests that the CSA make clear that NGX’s clearing model would not cause market participants using the platform to be “participants” in the event NGX did offer a derivative that could be subjected to mandatory clearing.

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<sup>4</sup> See *id.* at Section 1(1).

<sup>5</sup> See *NGX Clearinghouse Overview 2015 Q4* at 6 and 11, NGX.com, <http://www.ngx.com/presentations/NGX%20Clearing%20Overview%20WEBSITE%20-%20Q1%202016.pdf> (last visited May 24, 2016).

<sup>6</sup> See PowerPoint from the February 24, 2016 Webinar Hosted by the Alberta Securities Commission and the British Columbia Securities Commission at 47 (discussing the scope of the clearing mandate). Information regarding this Webinar is posted on the British Columbia Securities Commission’s website. See *Industry Events – Learn How to Comply with Derivatives Trade Reporting Rules*, BCSC.bc.ca, [http://www.bsc.bc.ca/About\\_Us/Events/Industry\\_Events/Learn\\_how\\_to\\_comply\\_with\\_Derivatives\\_Trade\\_Reporting\\_Rules/](http://www.bsc.bc.ca/About_Us/Events/Industry_Events/Learn_how_to_comply_with_Derivatives_Trade_Reporting_Rules/) (last visited May 24, 2016).

<sup>7</sup> See, e.g., National Instrument 91-101 at Section 2(1)(g) (providing that a “specified derivative” does not include a contract or instrument that is traded on an exchange if that exchange is recognized or exempt by a securities regulatory authority in a jurisdiction of Canada). NGX is recognized in Alberta and has received exemption orders in the following Canadian jurisdictions: Ontario; Manitoba; Saskatchewan; British Columbia; and Québec. See *Regulatory & Compliance*, NGX.com, [http://www.ngx.com/?page\\_id=396](http://www.ngx.com/?page_id=396) (last visited May 24, 2016).

<sup>8</sup> See Proposed Clearing Companion Policy at 1 (Specific Comments). The Scope Rule for each province and territory of Canada is as follows:

- For each Ontario, Manitoba, and Québec, the Scope Rule is a local regulation numbered 91-506.
- For the remaining Canadian jurisdictions, the Scope Rule is National Instrument 91-101.

## **B. CANADIAN ENTITIES WITH FOREIGN AFFILIATE CLEARING MEMBERS**

As the CSA is aware, the Proposed Clearing Rule applies to “an affiliate of an entity that is a participant of a regulated clearing agency...”<sup>9</sup> It is the Working Group’s understanding that a Canadian entity would not be subject to mandatory clearing under the Proposed Clearing Rule simply because it has foreign affiliates that are clearing members of clearinghouses in non-Canadian jurisdictions.

*First*, such clearinghouses would have to be regulated clearing agencies in Canada for the Proposed Clearing Rule to apply. *Second*, the products that the foreign affiliate clears through the clearinghouse would have to be “specified derivatives” under the Scope Rule for the Proposed Clearing Rule to apply. Thus, the Working Group would like to confirm that unless both of those conditions are satisfied, the Proposed Clearing Rule would not apply to an entity in this context.

## **III. CONCLUSION**

The Working Group appreciates any response the CSA can provide regarding the Working Group’s understanding discussed herein of the Proposed Clearing Rule and the Proposed Clearing Companion Policy.

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

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<sup>9</sup> See Proposed Clearing Rule at Section 3(1)(b).