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

November 24, 2015

VIA ELECTRONIC MAIL

Cooperative Capital Markets Regulatory System
comment@ccmr-ocrmc.ca

Re: Comments on Proposed CMRA Regulation 91-501 *Derivatives and Strip Bonds* of the Draft Initial Regulations under the Capital Markets Act for the Cooperative Capital Markets Regulatory System

Dear Sir or Madam:

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 on Proposed CMRA Regulation 91-501 *Derivatives and Strip Bonds* ("**Proposed 91-501**") of the Draft Initial Regulations under the Capital Markets Act for the Cooperative Capital Markets Regulatory System (the "**Cooperative System**").[1] The Working Group welcomes the opportunity to provide comments on the substance of Proposed 91-501.

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 respectfully notes that its participation in this comment process should not be construed as either supporting or opposing the establishment of the Cooperative System. Rather, the Working Group's hope is that the derivatives regulatory infrastructure ultimately adopted in Canada, whether in the form of the Cooperative System or at the Provincial level, properly accounts for the unique nature and operation of Canada's energy derivatives markets.

[1] *See* Proposed CMRA Regulation 91-501 *Derivatives and Strop Bonds* (Aug. 25, 2015), *available at* http://ccmr-ocrmc.ca/wp-content/uploads/91-501_reg_en.pdf.

The Working Group appreciates the Participating Jurisdictions'[2] efforts to develop Proposed 91-501 as well as the related regulatory proposals published in connection with the implementation of the Cooperative System. In addition to this comment letter on Proposed 91-501, the Working Group plans to submit separate comment letters on Proposed CMRA Regulation 91-502 *Trade Repositories and Derivatives Data Reporting* and the proposed revisions to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*.

II. COMMENTS OF THE WORKING GROUP

The proposed Cooperative System and the associated regulatory reforms may cause significant changes to the manner in which Canadian derivatives markets are regulated. This transformation must be undertaken in a way that avoids unintended consequences that could adversely affect energy markets in Canada. To this end, the Working Group understands that the CMR Jurisdictions generally seek to maintain continuity and minimize disruption for market participants in the transition to the Cooperative System.[3] With this in mind, the Working Group's comments contained herein provide recommendations for issues that should be considered at the onset of the transition to achieve the CMR Jurisdictions' stated goals, as well as to avoid unintended consequences that could adversely affect Canadian energy markets.

1. The Proposed Exemption from the Registration and Prospectus Requirements Is Necessary and Appropriate.

The Working Group supports the proposed exemption from the registration requirement and the prospectus requirement of the Capital Markets Act with respect to an over-the-counter ("**OTC**") derivatives trade "where each party to the trade is a permitted client or a qualified party, each acting as principal" (the "**Qualified Party Exemption**").[4] The Working Group appreciates that the proposed Qualified Party Exemption is substantively equivalent to derivatives-related exemptions currently effective in, for example, British Columbia, New Brunswick, Saskatchewan, Manitoba, Alberta, and Quebec.[5]

Specifically, under the Qualified Party Exemption, market participants would be exempt from registration as both derivatives dealers and derivatives advisers and would be exempt from the obligation to provide a prospectus in connection with any OTC derivative where both

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[2] British Columbia, New Brunswick, Ontario, Prince Edward Island, Saskatchewan, Yukon (collectively, the "**CMR Jurisdictions**"), and the Government of Canada (collectively, the "**Participating Jurisdictions**").

[3] *See* Commentary on the Draft Initial Regulations under the Capital Markets Act for the Cooperative Capital Markets Regulatory System at 68 (Aug. 25, 2015), *available at* http://ccmr-ocrmc.ca/wp-content/uploads/commentary-draft-initial-regulations-en.pdf.

[4] Proposed 91-501 at Part 4, Section 10.

[5] *See* British Columbia Securities Commission Blanket Order 91-501 (BC) *Over-the-Counter Derivatives*, New Brunswick Financial and Consumer Services Commission Local Rule 91-501 *Derivatives*, Saskatchewan Financial Services Commission General Order 91-907 *Over-the-Counter Derivatives*, Manitoba Securities Commission Blanket Order 91-501 *Over-the-Counter Trades in Derivatives*, Alberta Securities Commission Blanket Order 91-506 *Over-the-Counter Trades in Derivatives*, and Quebec Derivatives Act at Section 7.

counterparties are qualified parties or permitted clients.[6] Proposed 91-501 states that these exemptions are:

> …being provided on the basis that qualified parties…and permitted clients…will be able to determine for themselves, without assistance from a registrant or any mandated disclosure under the Act, whether entering into an OTC derivative is appropriate in the circumstances. Similarly, it is assumed that qualified parties and permitted clients can assess the creditworthiness of their counterparties and the risks inherent in entering into OTC derivatives.[7]

The Working Group agrees with this rationale. OTC derivatives transactions between qualified parties or permitted clients are between sophisticated entities that have the knowledge and the assets to enter into such derivatives in an informed manner and on their own terms. This type of trading relationship is viewed by market participants as one between counterparties or principals, not between a client and their dealer or adviser.

The Working Group supports the proposed Qualified Party Exemption because it provides a clear and workable exemption. Without such a clear and workable exemption, most commercial market participants (*i.e.*, non-financial entities whose primary business involves the delivery or consumption of physical commodities) will likely avoid entering into derivatives transactions that could be deemed dealing activity or entering into trading relationships where they could possibly be viewed as an adviser. In turn, this may result in (i) lower liquidity by forcing available counterparties for commercial market participants out of the market, (ii) further consolidation of risk in systemically important financial institutions, and (iii) an increase in volatility and less competitive pricing, which will ultimately have an adverse impact on consumers. All of these outcomes, whether together or individually, are not in the public interest as they will likely result in Canadian consumers paying more for commodities like gasoline and electricity.

Given the nature of a trading relationship between qualified parties or permitted clients and considering the current existence of numerous similar registration and prospectus exemptions in Canadian Provinces, the Working Group strongly supports the proposed Qualified Party Exemption. Adopting the proposed Qualified Party Exemption would strike an appropriate balance between providing qualified market participants the freedom to enter into OTC derivatives without unnecessary regulatory burdens, while providing protections for less sophisticated market participants.[8]

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[6] Proposed 91-501 at Part 4, Section 10.

[7] Proposed 91-501 Companion Policy at Part 4.

[8] Such an approach would also be consistent with Canada's G-20 commitment, which does not require or contemplate the regulation of derivatives dealers. *See generally* Leaders' Statement: The Pittsburg Summit (Sept. 24-25, 2009), *available at* https://g20.org/wp-content/uploads/2014/12/Pittsburgh_Declaration_0.pdf.

2. If Further Action Is Contemplated with Respect to Derivatives Dealer Registration, a *De Minimis* Exception Should Be Provided.

The Working Group recognizes that the proposed Qualified Party Exemption may just be a place holder for future derivatives-related registration rules as the CMR Jurisdictions "have not sought to modernize derivatives regulation" with the Draft Initial Regulations, but rather seek to "[maintain] continuity and [minimize] disruption for market participants in the transition to the Cooperative System."[9] To the extent that the Participating Jurisdictions are contemplating proposing a new regulatory regime for derivatives dealers in the future, the Participating Jurisdictions should strongly consider retaining the proposed Qualified Party Exemption for the reasons stated above.

To the extent the Participating Jurisdictions do choose to adopt a new derivatives dealer registration regime, a clear and workable exception should be provided for market participants that are not primarily engaged in the business of dealing derivatives, but engage in a *de minimis* amount of derivatives dealing activity. That exception could be implemented in the form of the Qualified Party Exemption or as a stand-alone *de minimis* exception to dealer registration rules.

An exception of the nature and type described above would be particularly important in commodity derivatives markets since a meaningful amount of derivatives transactions are executed where both counterparties are commercial firms, rather than market participants that are traditionally viewed as dealers. This form of regulatory relief from mandatory dealer registration will also help ensure that these markets continue to function efficiently. The failure to provide a *de minimis* exception or a version of the Qualified Party Exemption will likely have material negative consequences for the integrity of, and liquidity in, Canadian commodity derivatives markets. For a more complete discussion of the necessity of a *de minimis* exception, please refer to the Working Group's White Paper attached hereto as **Appendix I**.

[9] Commentary on the Draft Initial Regulations under the Capital Markets Act for the Cooperative Capital Markets Regulatory System at 68.

III. CONCLUSION

The Working Group appreciates this opportunity to provide input on Proposed 91-501 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

APPENDIX I

WHITE PAPER ON THE NEED FOR A *DE MINIMIS* EXCEPTION FROM REGISTRATION AS A DERIVATIVES DEALER IN CANADIAN PROVINCES AND PROPOSED APPROACHES FOR IMPLEMENTATION

SUBMITTED TO CANADIAN REGULATORS ON SEPTEMBER 8, 2015, BY SUTHERLAND ASBILL & BRENNAN LLP ON BEHALF OF THE CANADIAN COMMERCIAL ENERGY WORKING GROUP

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THE CANADIAN COMMERCIAL ENERGY WORKING GROUP

SEPTEMBER 8, 2015

WHITE PAPER

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THE NEED FOR A *DE MINIMIS* EXCEPTION FROM REGISTRATION AS A DERIVATIVES DEALER IN CANADIAN PROVINCES AND PROPOSED APPROACHES FOR IMPLEMENTATION

I. INTRODUCTION.

On behalf of The Canadian Commercial Energy Working Group (the "**Working Group**"), Sutherland Asbill & Brennan LLP respectfully offers this White Paper discussing (i) the need for a *de minimis* exception from registration as a derivatives dealer in Canadian provinces ("***De Minimis* Exception**") and (ii) proposed approaches for implementation.

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, owners, and consumers of energy commodities. One of the Working Group's objectives is to provide a voice for energy market participants on regulatory issues related to financial and physical trading of energy commodities and derivatives in Canada.

The Working Group appreciates Canadian regulators' efforts to implement a regulatory framework for derivatives dealer registration that is consistent with Canada's G20 commitment to improve transparency, mitigate systemic risk, and protect against market abuse.[1] To help preserve the integrity of Canada's derivatives markets, however, any derivatives dealer registration regime must appropriately balance these regulatory objectives with the burdens imposed on market participants. Failure to strike an appropriate balance could potentially introduce costs and risks that outweigh the benefits and result in unintended consequences. A *De Minimis* Exception is needed to create a balanced derivatives regulatory framework. To be effective, a *De Minimis* Exception must (i) be set at a workable threshold and (ii) be appropriately implemented.

Part I of this White Paper addresses why a *De Minimis* Exception is needed to achieve a balanced derivatives regulatory framework by explaining why it would: (i) help mitigate unintended consequences while furthering public policy objectives; (ii) provide necessary clarity to market participants; and (iii) establish a proper regulatory scope as regulating all market participants that engage in derivatives dealing activity as derivatives dealers may not be beneficial to Canadian derivatives markets.

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[1] *See* Leaders' Statement: The Pittsburg Summit at 9 (Sept. 24-25, 2009), *available at* https://g20.org/wp-content/uploads/2014/12/Pittsburgh_Declaration_0.pdf.

Part II of this White Paper focuses on implementation. Specifically, it addresses how to implement a workable threshold for the *De Minimis* Exception by: (i) discussing the need for Canadian regulators to first complete a study on the potential impact on Canadian derivatives markets of derivatives dealer registration requirements both with and without a *De Minimis* Exception; (ii) proposing potential approaches to a *De Minimis* Exception that are consistent with Canadian regulators' overarching policy goals for derivatives reform; and (iii) discussing the calculation of a notional value threshold for commodity derivatives.[2]

II. WHY A *DE MINIMIS* EXCEPTION IS NEEDED TO ACHIEVE A BALANCED DERIVATIVES REGULATORY FRAMEWORK.

A. A *DE MINIMIS* EXCEPTION WOULD MITIGATE UNINTENDED CONSEQUENCES AND FURTHER PUBLIC POLICY OBJECTIVES.

The Working Group is concerned that without a clear and workable *De Minimis* Exception, most commercial market participants (*i.e.*, non-financial entities whose primary business involves the delivery or consumption of physical commodities) will avoid entering into derivatives transactions that could be deemed dealing activity. In turn, this may result in (i) lower liquidity by forcing available counterparties for end-users out of the market, (ii) further consolidation of risk in systemically important financial institutions, and (iii) an increase in volatility and less competitive pricing. All of these outcomes, whether together or individually, are not in the public interest as they will likely result in Canadian consumers paying more for commodities like gasoline and electricity.

The consequences of the absence of an effective *de minimis* exception have already been observed in the United States. The U.S. Commodity Futures Trading Commission ("**CFTC**") originally set an arbitrary and excessively low *de minimis* exception from registration as a swap dealer for transactions with "special entities."[3] This created a significant issue for so-called "utility special entities" (*e.g.*, government owned or sponsored utilities). Since the *de minimis* level was so low and the consequences of becoming a swap dealer are so significant, the majority of the utility special entities' non-bank counterparties disappeared and liquidity was significantly impaired for utility special entities. To remedy this situation, the CFTC subsequently increased the *de minimis* exception from registration as a swap dealer for transactions with utility special entities.

By adopting a *De Minimis* Exception, Canadian regulators will help mitigate unintended consequences and further public policy objectives, including preserving the integrity of the Canadian derivatives markets and preventing market participants' resources from unnecessarily being diverted from new projects and investment opportunities.

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[2] Discussion of what specifically constitutes "derivatives dealing activity" is outside the scope of this White Paper.

[3] The CFTC defines "special entity" to include (i) federal, state, city, county, or municipal governments, entities, or agencies, (ii) certain employee benefit plans, and (iii) certain non-profit entities. *See* CFTC Regulation 23.401(c), *available at* http://www.ecfr.gov/cgi-bin/text-idx?SID=58d66ecadbdc398152f84dd31ae19286&mc=true&node=se17.1.23_1401&rgn=div8.

B. A *De Minimis* Exception Would Provide the Regulatory Certainty Necessary to Ensure the Efficient Operation of Markets.

Although the derivatives dealer registration regime across the Canadian provinces has not been finalized at this time,[4] it will likely impose significant consequences and burdens on those required to register. Such consequences will likely include mandatory capital and margin requirements, the loss of the end-user exemption from mandatory clearing, and the imposition of certain other bank-like regulatory requirements, all of which will result in significant costs.[5]

Given the potential significance of registering as a derivatives dealer, market participants should have a clear understanding as to when registration is required. To provide market participants with additional clarity as to when registration as a derivatives dealer would be required, Canadian regulators should establish a *De Minimis* Exception. A *De Minimis* Exception will allow market participants to (i) engage in a specified amount of activity that ***might constitute*** derivatives dealing activity and (ii) monitor and assess their potential status as a derivatives dealer. In the absence of a *De Minimis* Exception, it is likely that most commercial market participants that currently engage in any degree of activity that could potentially be viewed as dealing activity will cease doing such activity rather than incur any risk of becoming a derivatives dealer. The cessation of such activity by commercial market participants will likely have a material impact on liquidity and may concentrate risk within systemically important financial institutions.

C. A *De Minimis* Exception Would Establish a Proper Regulatory Framework for Regulating Market Participants That Engage in Derivatives Dealing Activity.

In certain derivatives markets, it is clear which market participants are dealers. Markets, such as the interest rate derivatives market and the credit default swap market, typically operate in a hub-and-spoke manner. Under this market structure, dealers are at the center of the market and the vast majority of transactions likely have at least one counterparty that is a bank functioning as a dealer.[6] In markets where there is a clear delineation of dealers and non-dealers, a *De Minimis* Exception may not be necessary.

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[4] The Working Group recognizes that Quebec has a derivatives dealer registration regime in place. The Working Group notes that under Quebec's derivatives dealer registration regime, there is an exemption from registration as a derivatives dealer for counterparties transacting with only "accredited counterparties." Thus, Quebec's derivatives dealer registration regime lends credence to the Working Group's assertion in Section II.C of this White Paper that it is not appropriate to regulate all market participants as derivatives dealers. *See, e.g.*, Quebec Derivatives Act at Section 7 (providing the exemption) and Section 3 (defining "accredited counterparty"), *available at* http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/I_14_01/I14_01_A.html.

[5] *See* CSA Consultation Paper 91-407 Derivatives: Registration (Apr. 18, 2013), *available at* http://www.albertasecurities.com/Regulatory%20Instruments/4516880-v1-CSA_Consultation_Paper_Derivatives_-_Registration.pdf.

[6] For example, in interest rate derivative markets, there are likely very few, if any, market participants that engage in dealing activity that are not clearly identifiable as dealers.

However, this is not the case in physical commodity derivatives markets. In the Working Group's experience, there are a meaningful number of transactions between non-dealers in Canadian physical commodity derivatives markets. For example, two commercial market participants may have naturally offsetting risk profiles (*e.g.*, a producer and a refiner). Such offsetting risk profiles allow these counterparties to engage in transactions that have the mutually beneficial purpose of reducing their respective physical commodity price risk exposure.

In certain transactions between commercial market participants, one counterparty might be viewed as engaging in derivatives dealing activity. However, as long as that activity does not reach a meaningful level, registration as a derivatives dealer is not appropriate as there are legitimate commercial reasons for that activity. Those legitimate commercial reasons include the fact that counterparties may have an existing physical commodity trading relationship, so transacting derivatives together is more efficient (*e.g.*, one relationship is easier to manage), and may reduce credit risk as physical and financial exposures can be offset.

In sum, and as noted above, the absence of a properly established *De Minimis* Exception will likely lead to a diminution in commercial market participant to commercial market participant transactions. The reduction in available counterparties will likely harm liquidity and may increase (i) volatility, (ii) the cost of hedging, and (iii) costs for Canadian energy consumers. It may also serve to further concentrate risk in systemically important financial institutions.

III. POTENTIAL APPROACHES TO A *DE MINIMIS* EXCEPTION.

A. CANADIAN REGULATORS SHOULD COMPLETE A STUDY BEFORE PROPOSING A *DE MINIMIS* EXCEPTION THRESHOLD.

It is critical for Canadian regulators to ensure that the regulatory framework for derivatives dealer registration is compatible with the unique characteristics of the derivatives market in Canada. Canadian regulators have recognized that Canadian derivatives markets "[comprise] a relatively small share of the global market and a substantial portion of transactions entered into by Canadian market participants involve foreign counterparties."[7] Given these realities, it is critical that the derivatives dealer registration framework does not impose unnecessary regulatory or economic burdens on Canadian market participants or foreign market participants, as this may cause them to exit the Canadian derivatives markets. In addition, it is critical that the derivatives dealer registration framework does not limit Canadian market participants' access to foreign derivatives markets. Ultimately, increased derivatives-related domestic regulatory burdens imposed on commercial market participants and similar regulatory burdens imposed on foreign market participants likely will lead to higher energy prices for Canadian consumers.

It would be difficult to propose an appropriate and meaningful threshold for a *De Minimis* Exception without first conducting a study to better understand trading in Canadian derivatives

[7] CSA Consultation Paper 92-401 Derivatives Trading Facilities at 3 (Jan. 29, 2015), *available at* http://www.albertasecurities.com/Regulatory%20Instruments/5043114-v1-CSA_Consultation_Paper_92-401_-_Derivatives_Trading_Facilities.pdf.

markets. As such, the Working Group respectfully suggests that Canadian regulators conduct a study on the potential impact on Canadian derivatives markets of derivatives dealer registration requirements both with and without a *De Minimis* Exception prior to proposing any new derivatives dealer registration requirements. That study should utilize the data and insights provided to Canadian regulators from their respective derivatives reporting regimes as well as any other relevant publicly available data. With the benefit of a study, Canadian regulators would be able to make informed decisions about the impact of the potential regulatory requirements.

B. ALTERNATIVE APPROACHES FOR A *DE MINIMIS* EXCEPTION.

There are numerous approaches that regulators could take to implement a *De Minimis* Exception.

1. A Notional-Based Model for a *De Minimis* Exception.

One option for Canadian regulators to consider adopting is an approach similar to the approach utilized by the CFTC. That approach measures the notional value of an enterprise's dealing activity over the previous 12 months. Under the CFTC's approach, an entity may engage in up to $8 billion gross notional of swap dealing activity over the 12 months immediately preceding the calculation date before registration is required.[8] A market participant would include the dealing activity of affiliates to determine if it has exceeded the *de minimis* threshold.

An approach similar to the CFTC's could be applied at differing levels for each macro category of derivatives (*e.g.*, interest rates, credit, physical commodities). The ultimate determination of an appropriate *de minimis* level would turn on the specific characteristics and composition of each market.

Finally, given the differences in market structure discussed in Section II.C of this White Paper, Canadian regulators could provide a *De Minimis* Exception solely for commodity derivatives markets in order to avoid the potential adverse consequences discussed herein. If a notional-based *De Minimis* Exception is adopted, Canadian regulators should set a higher *de minimis* threshold and adjust it as they deem appropriate after collecting and analyzing market data.

2. A "Relative" Model for a *De Minimis* Exception.

As another option, Canadian regulators could adopt a "relative approach." Under this option, a market participant would have to register as a derivatives dealer if its dealing activity comprised more than a certain percentage of one of any number of metrics.

Percentage of Market or Revenues. For example, an entity could be required to register as a derivatives dealer only once its dealing activity exceeded a certain percentage of the size of

[8] The CFTC's current $8 billion *de minimis* threshold is set to automatically drop to $3 billion in December of 2017, unless the CFTC takes an action to the contrary. The Working Group does not recommend including a trigger that would automatically lower the *de minimis* threshold in any rulemaking implementing a *De Minimis* Exception.

the relevant market. The market data used in that determination should be the market information required to be made publicly available under the various Canadian derivatives reporting rules.[9] In the alternative, regulators could adopt a relative approach where an entity would be obligated to register as a derivatives dealer if more than a certain percentage of its revenue was derived from derivatives dealing activity.[10]

Number of Dealing Transactions or Dealing Counterparties. Alternatively, Canadian regulators could adopt a *De Minimis* Exception based on the number of dealing transactions an entity enters into or the number of counterparties with which an entity enters into derivatives dealing transactions. Such an approach would be consistent with a number of registration regimes across the world, including the CFTC's commodity trading advisor registration regime, which provides an exemption from registration for entities that have 15 or fewer customers.[11]

Counterparty Characteristics. Finally, Canadian regulators could adopt another form of exemption from derivatives dealer registration based on the character of an entity's counterparties. For example, Canadian regulators could require registration as a derivatives dealer only if an entity engages in a certain level of derivatives dealing activity with counterparties that are not "accredited counterparties" or "qualified parties."[12] As noted in footnote 4 of this White Paper, such an approach would be consistent with Quebec's current derivatives dealer regime.

C. CALCULATING A NOTIONAL VALUE THRESHOLD FOR COMMODITY DERIVATIVES.

The use of a notional value-based threshold for a *De Minimis* Exception raises the issue of how notional value should be calculated for commodity derivatives. The calculation of notional value for commodity derivatives is not as straightforward as it is for other derivatives. The notional value of commodity derivatives is a function of the notional volume of the underlying commodity and not a notional dollar amount, as is used for other products. For example, the notional value of a $100 million interest rate swap is $100 million. However, the notional value of a swap based on 100,000 barrels of crude oil is a function of the price of that crude oil. With that in mind, the Working Group respectfully recommends the following approach for calculating the notional value of a commodity derivative:

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[9] For example, in Ontario, Quebec, and Manitoba, the public dissemination requirements are provided in Section 39 of each province's respective Rule 91-507 Trade Repositories and Derivatives Data Reporting.

[10] If regulators elect to use a relative approach, the Working Group suggests that it is done so in a way that does not harm the development of new or small markets (in the case of a market-based relative approach) or unfairly limit activity by smaller market participants (in the case of an entity-based relative approach).

[11] *See, e.g.*, CFTC Regulation 4.14(a)(10), *available at* http://www.ecfr.gov/cgi-bin/text-idx?SID=57d5e19a7d8ec01beff39af874691fee&mc=true&node=se17.1.4_114&rgn=div8. CFTC Regulation 4.14(a)(10) provides an exemption from registration as a commodity trading advisor if, during the course of the preceding 12 months, an entity has not furnished commodity trading advice to more than 15 persons and it does not hold itself out generally to the public as a commodity trading advisor.

[12] *See, e.g.*, Quebec Derivatives Act at Section 7 (providing an exemption from registration as a derivatives dealer for counterparties transacting with only "accredited counterparties"). Under Section 3 of the Quebec Derivatives Act, an "accredited counterparty" is defined to include government entities, financial institutions, persons that meet standards with respect to their knowledge and assets, and hedgers meeting certain conditions.

- For a fixed price for floating price commodity swap, the notional value would be the difference between the fixed and floating prices at calculation multiplied by the total volume of the contract.

- For a floating price commodity swap, the notional value would be the difference between the two floating prices at calculation multiplied by the total volume of the contract.

- For an option, the notional value would be the premium multiplied by the total volume of the option.

Further, compliance with any *De Minimis* Exception that relies on a notional value threshold should be measured over a period of at least 12 months. Measuring over at least 12 months would avoid short term price swings in commodities markets causing market participants to inadvertently exceed a *De Minimis* Exception.

IV. CONCLUSION.

The ongoing derivatives reform process in Canada will result in significant changes to the Canadian derivatives markets. The resulting changes will be in terms of how the derivatives markets function and how market participants function within it. As the derivatives dealer registration regime is a key component to the reform process, the regulatory actions prompting change must be based on fully-informed decisions, must be undertaken in a manner that avoids unintended consequences, and must preserve the integrity of the Canadian derivatives markets.

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Should you have any questions about the content contained herein, please contact R. Michael Sweeney, Jr., Alexander S. Holtan, or Blair Paige Scott at Sutherland Asbill & Brennan LLP.