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VIA ELECTRONIC MAIL

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

Re: Comments on Proposed CMRA Regulation 91-502 *Trade Repositories and Derivatives Data Reporting* 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 91-502 *Trade Repositories and Derivatives Data Reporting* ("**Proposed 91-502**") 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 91-502.

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 91-502 *Trade Repositories and Derivatives Data Reporting* (Aug. 25, 2015), *available at* http://ccmr-ocrmc.ca/wp-content/uploads/91-502_reg_en.pdf.

The Working Group appreciates the Participating Jurisdictions'[2] efforts to develop Proposed 91-502 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 91-502, the Working Group plans to submit separate comment letters on Proposed CMRA Regulation 91-501 *Derivatives and Strip Bonds* ("**Proposed 91-501**") and the proposed revisions to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("**Proposed NI 31-103**").

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 Canadian energy markets. In this respect, the Working Group recognizes that the CMR Jurisdictions generally "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."[3] Consequently, the Working Group's comments set forth herein identify issues with respect to Proposed 91-502 that should be addressed 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. As discussed below, such issues pertain to: (i) the definition of "derivatives dealer"; (ii) public dissemination of data and data available to counterparties; (iii) the exclusion from reporting commodity derivatives for non-derivatives dealers; and (iv) other technical matters.

A. DEFINITION OF "DERIVATIVES DEALER"

1. Additional Guidance Should Be Provided as to Who Qualifies as a Derivatives Dealer.

Proposed 91-502 defines "derivatives dealer" as "a person engaging in or holding himself, herself or itself out as engaging in the business of trading in derivatives in a CMR Jurisdiction as principal or agent."[4] The Proposed 91-502 Companion Policy states that "[r]eporting obligations on derivatives dealers apply irrespective of whether the derivatives dealer is a registrant."[5] Without additional guidance, however, it is unclear as to who would be obligated to report as a derivatives dealer for the purposes of Proposed 91-502. Additional guidance is also needed to provide clarity as to whether the practical application of the definition

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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] 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 91-502 at Section 1(1).

[5] Proposed 91-502 Companion Policy at Section 26 (Aug. 25, 2015), *available at* http://ccmr-ocrmc.ca/wp-content/uploads/91-502_cp_en.pdf.

of "derivatives dealer" in Proposed 91-502 is substantively different from the "business trigger" analysis set forth in NI 31-103.[6]

It is the Working Group's understanding that under Proposed 91-502, the determination of whether an entity is a derivatives dealer for the purpose of reporting is the same "business trigger" analysis that would be used under NI 31-103. Based on this understanding, the analysis of whether an entity must report as a derivatives dealer is not conducted on a transaction-level basis, but rather the analysis is based on an entity's derivatives activity in the aggregate. In other words, if an entity is acting like a derivatives dealer with respect to a particular transaction, it would not be required to report that transaction as a derivatives dealer if it would not otherwise be a derivatives dealer based on an analysis of its aggregate derivatives activity.

The Working Group respectfully requests that the Participating Jurisdiction confirm whether the Working Group's understanding of this issue is correct.

2. The "Derivatives Dealer" Definition Should Ultimately Be Revised to Capture Only an Entity That Is Registered or Required to Register as a Derivatives Dealer in a CMR Jurisdiction.

The Working Group is concerned that once the anticipated derivatives dealer registration rules are in place, the use of a definition of "derivatives dealer" in the final version of CMRA Regulation 91-502 that is not tied to registration as a dealer could cause confusion. Only entities registered as derivatives dealers in a CMR Jurisdiction (or foreign derivatives dealers that are not registered in a CMR Jurisdiction because of substituted compliance) should be required to report as a derivatives dealer. To require otherwise could create two classes of derivatives dealers, one for registration purposes and one for reporting purposes, which would likely cause unnecessary confusion and undue burdens on market participants.

Once the anticipated final derivatives dealer registration rules are in place, the Working Group recommends that the CMR Jurisdictions amend the definition of "derivatives dealer" in the final version of CMRA Regulation 91-502 to capture only an entity that is (i) registered in a CMR Jurisdiction as a derivatives dealer or (ii) required to register as a derivatives dealer in a CMR Jurisdiction, but is otherwise exempt from registration because of substituted compliance. In addition, the CMR Jurisdictions should indicate in the final Companion Policy to CMRA Regulation 91-502 that they plan on amending the definition of "derivatives dealer" in the final version of CMRA Regulation 91-502 in such a manner.

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[6] *See* NI 31-103 at Section 8.4 (Unofficial Consolidation as of Jan. 11, 2015), *available at* https://www.osc.gov.on.ca/documents/en/Securities-Category3/ni_20150111_31-103_unofficial-consolidated.pdf (contemplating a business trigger for dealer registration). The Working Group notes that the Participating Jurisdictions have proposed revisions to the NI 31-103 Companion Policy that would add factors to consider when evaluating whether a person is in the business of trading in derivatives in a CMR Jurisdiction, and thus, required to register as a dealer (*i.e.*, the "business trigger" for dealer registration). *See* Proposed NI 31-103 Companion Policy at Section 1.3. The Working Group plans on providing comments to that proposal in a separate letter.

3. A *De Minimis* Exception or Similar Exemption Is Needed to Provide Necessary Clarity with Respect to Registration and Reporting as a Derivatives Dealer.

To provide necessary regulatory certainty to market participants as to whether they are obligated to report derivatives as a derivatives dealer under Proposed 91-502, the CMR Jurisdictions should provide a *de minimis* exception or similar exemption.[7] Specifically, the CMR Jurisdictions should allow entities that engage in derivatives dealing below a certain level to avoid registration and reporting as a derivatives dealer. Providing a *de minimis* exception from registration and reporting as a dealer would allow market participants to better anticipate their potential derivatives reporting obligations.

B. PUBLIC DISSEMINATION OF DATA AND DATA MADE AVAILABLE TO COUNTERPARTIES

1. A Minimum Time That Data Must Be Held Prior to Public Dissemination Is Needed to Provide Market Participants Necessary Protection.

Proposed 91-502 would require designated trade repositories to make available to the public certain transaction-level data for each derivatives transaction reported pursuant to Proposed 91-502, such as underlying commodity, quantity, and price (the "**Data Required for Public Dissemination**").[8] Pursuant to Proposed 91-502, depending on the counterparty, a designated trade repository would be required to publicly disseminate such data by either (i) the end of the day following the day on which it receives the data or (ii) the end of the second day following the day on which it receives the data.[9] The stated purpose of the public reporting delays is to "ensure that counterparties have adequate time to enter into any offsetting transaction that may be necessary to hedge their positions."[10]

Proposed 91-502, however, only provides the maximum time delay a designated trade repository has until it must publish the Data Required for Public Dissemination and does not provide a minimum time that such data must be held prior to public dissemination. As currently drafted, Proposed 91-502 would allow a designated trade repository to publish the Data Required for Public Dissemination as soon as it is received, which would defeat the purpose of the delay and, as discussed further below, would pose risks to market integrity similar to those seen in the United States.

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[7] In lieu of a *de minimis* exception, the CMR Jurisdictions could extend the registration exemption in Proposed 91-501 regarding trades in derivatives between qualified parties or permitted clients to Proposed 91-502. *See, e.g.,* Proposed 91-501 at Section 10 (providing an exemption from the registration requirement and the prospectus requirement in respect of a trade in an OTC derivative where each party to the trade is a permitted client or a qualified party).

[8] *See* Proposed 91-502 at Section 40(3) (proposing to require that a designated trade repository make available to the public the Data Required for Public Dissemination, which is identified in Appendix A of Proposed 91-502).

[9] *See id.*

[10] Proposed 91-502 Companion Policy at Section 40(3).

As the CMR Jurisdictions are likely aware, a similar framework for real-time public dissemination of data was implemented in the United States under the Commodity Futures Trading Commission's ("**CFTC**") regulations.[11] That framework has raised a number of issues for market participants. U.S. market participants' primary concerns are related to the potential disclosure of the identity of counterparties and, in less liquid markets, exposure of counterparties to "front-running" of hedging activity by market participants and the possibility that the public transaction-level data will make it more difficult for counterparties to execute a desired trading strategy.

Specifically, the time delays provided in the CFTC's Real-Time Reporting Rules "are not sufficient for illiquid markets."[12] For example, the Treasurer of Southwest Airlines Co. ("**Southwest**") testified in a Congressional hearing that the inadequate reporting delays could cost Southwest $60 million annually and stated that non-counterparty dealers "plainly were aware of trades [Southwest] had entered into…."[13] The CFTC responded to these concerns by issuing a no-action letter, which provided a 15-day time delay for the public dissemination of certain swaps the CFTC deemed susceptible to the risk of "front-running."[14]

To provide market participants with necessary protection, the Working Group respectfully requests that the CMR Jurisdictions establish a minimum time that the Data Required for Public Dissemination must be held before such data is permitted to be publicly disseminated. That minimum time should be determined based on the liquidity of the market for the relevant commodity. The 15-day time delay provided to Southwest by the CFTC was for transactions in the West Texas Intermediate ("**WTI**") and Brent derivatives, both of which are considered relatively liquid markets, even at the two-year tenor covered by the CFTC's no-action relief. Accordingly, less liquid markets (*e.g.*, the Western Canadian Select ("**WCS**")) may need longer delays, while more liquid markets (*e.g.*, the Canadian Dollar Libor-based interest rate swaps) may require shorter delays.

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[11] The CFTC's regulations on real-time public dissemination of data are found in Part 43 of the CFTC Regulations, 17 C.F.R. Part 43 (the "**CFTC's Real-Time Reporting Rules**").

[12] Testimony of Chris Monroe, Treasurer of Southwest Airlines Co., Before the U.S. House of Representatives Committee on Agriculture, Subcommittee on General Farm Commodities and Risk Management at 2 (July 24, 2013), *available at* http://agriculture.house.gov/sites/republicans.agriculture.house.gov/files/pdf/hearings/Monroe130724.pdf.

[13] *Id*. at 2.

[14] *See* CFTC No-Action Letter 14-134, Division of Market Oversight, *Time Limited No-Action Relief: Further Time Delay for Public Dissemination of Long-Dated Brent and WTI Crude Oil Swap and Swaption Contracts Executed by or with Southwest Airlines* (Nov. 6, 2014), *available at* http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-134.pdf.

2. Additional Parameters and Guidance on How Designated Trade Repositories Must Treat Data Required for Public Dissemination Are Needed to Help Protect Identities of Counterparties.

Proposed 91-502 would require designated trade repositories to ensure that the Data Required for Public Dissemination is anonymized.[15] Designated trade repositories, however, would not be required to determine whether anonymized published data could reveal the identity of a counterparty based on the terms of the transaction.[16] In this respect, the Working Group is concerned that Proposed 91-502 and the Proposed 91-502 Companion Policy do not provide adequate safeguards to ensure that that "anonymized" data published by designated trade repositories would not reveal the identity of a counterparty to a large notional trade based on the terms of the transaction.

For example, disclosure of the exact notional value of trades with large notional values in certain commodities can provide enough information to the market so that hedging such transactions can become uneconomical. This is an undesirable consequence that needs to be addressed at the onset.

Based on the foregoing, the Working Group respectfully requests that the CMR Jurisdictions provide designated trade repositories with additional parameters and guidance on how they must treat the Data Required for Public Dissemination to ensure that "anonymized" data published by designated trade repositories does not reveal the identity of a counterparty to a large notional trade based on the terms of a transaction.

3. Additional Guidance Is Needed on How a Designated Trade Repository Should Provide Counterparties Timely Access to Relevant Derivatives Data.

Under Section 39 of Proposed 91-502, a designated trade repository must, among other things, provide each counterparty to a derivatives transaction timely access to all derivatives data relevant to that transaction submitted to that designated trade repository, regardless of whether the counterparties are participants of that designated trade repository.[17] Proposed 91-502 does not, however, discuss how a designated trade repository should go about providing access to non-participants whose trades are reported to it.

To provide clarity on all aspects of the requirement in Section 39 of Proposed 91-502, the Working Group respectfully requests that the CMR Jurisdictions provide additional guidance on how trade repositories should be required to provide access to relevant derivatives data to all counterparties.

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[15] *See* Proposed 91-502 at Section 40(4); *see also* Proposed 91-502 Companion Policy at Section 40(4) (explaining that when designated trade repositories publish Data Required for Public Dissemination, such data published "must be anonymized and the names or legal entity identifiers of counterparties must not be published").

[16] Proposed 91-502 Companion Policy at Section 40(4).

[17] *See* Proposed 91-502 at Section 39(1).

C. EXCLUSION FROM REPORTING COMMODITY DERIVATIVES FOR NON-DERIVATIVES DEALERS

Proposed 91-502 would provide an exclusion from reporting derivatives data for a transaction that relates to a commodity derivative entered into between non-derivatives dealers, if certain conditions are met (the "**Non-Derivatives Dealer Exclusion**").[18] To be eligible for the proposed relief under the Non-Derivatives Dealer Exclusion, a non-derivatives dealer to a transaction would need to have less than a yet-to-be-determined aggregate notional value under all outstanding derivatives transactions, including the additional notional value related to that transaction.

The Working Group welcomes the CMR Jurisdictions' proposed Non-Derivatives Dealer Exclusion, and with the modifications discussed below, the proposed Non-Derivatives Dealer Exclusion could provide meaningful relief.

1. Additional Guidance Is Needed with Respect to Calculating the Notional Value Threshold.

The use of a notional value-based threshold for the Non-Derivatives Dealer Exclusion 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. Specifically, 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 derivatives. 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 volume and 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:

- 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, the notional value threshold for the Non-Derivatives Dealer Exclusion 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 the notional value threshold for the Non-Derivatives Dealer Exclusion.

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[18] *See* Proposed 91-502 at Section 41; *see also* Proposed 91-502 Companion Policy at Section 41.

The Working Group also respectfully notes that the use of a counterparty's gross notional value of outstanding commodity derivatives, at the time of execution of a transaction, as the relevant threshold for the reporting exclusion will be difficult to implement given the volatility in commodity prices. For example, a refiner that has the capacity to refine 4 million barrels of Canadian crude oil a month, or 48 million barrels a year, in its U.S. refineries could enter into WCS/WTI basis swaps[19] to hedge its crude oil needs for the next year. If the current price differential between WCS and WTI was $10, that entity would qualify for a reporting exclusion set at $500 million notional, since its notional value would be $480 million. However, if the differential between WCS and WTI reached $11, that entity's notional value may no longer qualify for the proposed exclusion based solely on factors outside of its control. As such, if the refiner would like to access the full universe of available counterparties, it must build out its derivatives reporting infrastructure in anticipation of potentially losing the exclusion overnight.

2. The Aggregate Notional Threshold for the Non-Derivatives Dealer Exclusion Should Be Set at $500 Million to Provide Meaningful Relief.

As previously noted by commenters, the aggregate notional value threshold needs to be at a sufficient level to provide meaningful relief.[20] To provide meaningful relief, the Working Group recommends that the CMR Jurisdictions set the notional value threshold for the Non-Derivatives Dealer Exclusion at $500 million.

To provide more effective relief for non-derivatives dealers, the Working Group recommends that the Participating Jurisdictions provide a reporting exclusion for transactions where each counterparty is a non-derivatives dealer that had commodity derivatives on its books at the end of each of the previous four calendar quarters with a total average of less than $500 million gross notional value. Once a non-derivatives dealer exceeds that threshold, it should be permitted one calendar quarter to prepare to operate without the exclusion or to get under the $500 million threshold. Such an approach will provide non-derivatives dealers with enough time and flexibility to make the relief provided by the proposed exclusion from derivatives reporting meaningful.

To illustrate the concept, consider the following example. A non-derivatives dealer has the following quarter-end gross notional values for the commodity derivatives on its books: Q1 2016 - $500 million; Q2 2016 - $460 million; Q3 2016 - $520 million; Q4 2016 - $500 million. This non-derivatives dealer would qualify for a Non-Derivatives Dealer Exclusion set at $500 million since its total average is less than $500 million. If at the end of Q1 2017 the non-derivatives dealer has $580 million gross notional value of commodity derivatives on its books, the entity should be able to continue to qualify for the Non-Derivatives Dealer Exclusion, and if it has less than $400 million gross notional value of commodity derivatives on its books at

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[19] This could be done in connection with a NYMEX CL futures position to hedge both directional price risk and the basis risk between the two prices.

[20] *See* Comment Letter of Shell Energy North America (Canada) Inc. on Canadian Securities Administrators Consultation Paper 91-301 (Feb. 4, 2013), *available at* http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20130204_91-301_kerrp.pdf; *see also* Comment Letter of Suncor Energy Inc. on Canadian Securities Administrators Consultation Paper 91-301 (Feb. 4, 2013), *available at* https://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20130204_91-301_serrac.pdf.

the end of Q2 2017 it should retain the use of the Non-Derivatives Dealer Exclusion. If it does not, it would lose the Non-Derivatives Dealer Exclusion until its average gross notional value outstanding of commodity derivatives falls under $500 million.

D. TECHNICAL MATTERS

1. Clarification Is Required with Respect to the Scope of the Recordkeeping Requirement in Section 37 of Proposed 91-502.

The text of Proposed 91-502 requires the reporting counterparty to keep "transaction records," but the header of Section 37 of Proposed 91-502 is "Records of data reported." As such, it is unclear whether the recordkeeping requirement in Section 37 of Proposed 91-502 covers all data reported to a designated trade repository or a subset of that data referred to in Proposed 91-502 as "transaction records." As such, the Working Group respectfully requests additional clarification on the scope the recordkeeping requirement in Section 37 of Proposed 91-502.

2. The Exclusion of Derivatives Contracts Traded on an "Exchange" Should Recognize and Include a Broader Universe of Regulated Trading Facilities.

Proposed 91-502 provides that derivatives traded on certain exchanges that are recognized by a securities regulatory authority or a recognized foreign exchange are excluded and thus, not subject to the requirements under Proposed 91-502. Notably, an "exchange" in this context of Proposed 91-502 would not include any of the following:

- a "swap execution facility," as defined in the Commodity Exchange Act (United States);
- a "multilateral trading facility," as defined in Directive 2014/65/EU Article 4(1)(22) of the European Parliament; or
- an "organized trading facility," as defined in Directive 2014/65/EU Article 4(1)(23) of the European Parliament.[21]

As such, derivative transactions on the above facilities would be subject to Proposed 91-502. Reporting of such derivatives transactions may be difficult, unless the trading facility can be used to satisfy the required reporting obligations in each relevant Canadian jurisdiction.[22]

The Working Group respectfully requests that the CMR Jurisdictions recognize additional trading facilities as an "exchange" or provide other necessary compliance relief, in order to avoid imposing unnecessary reporting obligations on Canadian entities, which may limit their access to financial markets abroad.

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[21] Proposed 91-502 Companion Policy at Section 25(g).

[22] Proposed 91-502 at Section 25(g).

III. CONCLUSION

The Working Group appreciates this opportunity to provide input on Proposed 91-502 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,
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