ISDA Safe, Efficient Markets

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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

Grace Knakowski, Secretary
Ontario Securities Commission
20 Queen Street West, 22nd Floor
Toronto, Ontario M5H 3S8
Email: comments@osc.gov.on.ca

Me Philippe Lebel, Corporate Secretary and
Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400Québec
(Québec) G1V 5C1
Email: consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

Re: CSA Notice and Second Request for Comment – Proposed Amendments to National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* and Proposed Changes to Companion Policy 94-101 *Mandatory Central Counterparty Clearing of Derivatives*

The International Swaps and Derivatives Association, Inc. ("**ISDA**")[1] appreciates the opportunity to provide comments to the Canadian Securities Administrators ("**CSA**") with

[1] Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 925 member institutions from 75 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org. Follow us on Twitter, LinkedIn, Facebook and YouTube.

International Swaps and Derivatives Association, Inc.
10 East 53rd Street, 9th Floor
New York, NY 10022
P 212 901 6000 F 212 901 6001
www.isda.org

NEW YORK WASHINGTON
LONDON BRUSSELS
HONG KONG SINGAPORE
TOKYO

respect to the proposed amendments (the "**Proposed Rule Amendments**") to National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (the "**National Instrument**") and proposed changes (the "**Proposed CP Changes**") to Companion Policy 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (the "**CP**"). In this letter, we refer to the Proposed Rule Amendments and the Proposed CP Changes together as the "**Proposed Amendments**" and the National Instrument and CP together as the "**Mandatory Clearing Rule**".

The Proposed Amendments were published by the CSA on September 3, 2020 and would refine the scope of counterparties to which the clearing requirement under the National Instrument applies as well as the types of derivatives mandated for clearing under the National Instrument.

ISDA has been actively engaged for many years with providing input on regulatory reforms impacting derivatives in major jurisdictions globally, including Canada. ISDA provided comments to the CSA during the consultation process which led up to the publication of the National Instrument and the CP in January 2016 and provided comments to the CSA in respect of the proposed amendments to the National Instrument and CP published for public comment on October 12, 2017. To help facilitate compliance with the new requirements, ISDA published a Canadian Clearing Classification Letter (the "**Classification Letter**") on March 30, 2017 in order to allow market participants to exchange information and determine whether their transactions are in scope for mandatory clearing.

ISDA is pleased to provide feedback regarding the Proposed Amendments on behalf of its members.

1. Effective Date of the Proposed Amendments

ISDA appreciates the CSA's clarification of the types of counterparties to which the clearing requirement under the National Instrument would apply and the types of derivatives which are mandatory clearable derivatives. The Classification Letter is widely used by market participants to provide their counterparties with status information in order to determine if they are in scope for the purposes of the Mandatory Clearing Rule. To help facilitate continued compliance with the Mandatory Clearing Rule following implementation of the Proposed Amendments, ISDA will need to amend the Classification Letter to reflect the Proposed Amendments and market participants will need to provide updated Classification Letters to their counterparties.

We submit that the effective date of the Proposed Amendments should fall nine (9) months after approval by the applicable Provincial Government to allow sufficient time for ISDA to address the Proposed Amendments in the Classification Letter and for market participants to complete updated Classification Letters and provide them to their counterparties, which may require significant lead time.

2. Intragroup Exemption

ISDA is generally supportive of the Proposed Amendments to the intragroup exemption from the mandatory clearing requirement set forth in Section 7 of the National Instrument (the "**Intragroup Exemption**"). We are also supportive of the CSA's work to reduce regulatory burden. In particular, the Ontario Securities Commission's 2019 report on Reducing Regulatory Burden in Ontario's Capital Markets provided a clear commitment to ensuring the costs of regulation do not outweigh the benefits. However, the conditions set out in Section 7(b) and Section 7(d) of the National Instrument requiring: (i) both affiliated counterparties to agree to rely on the Intragroup Exemption and (ii) the affiliated counterparties to have a formal written agreement governing the intragroup trading relationship, add unnecessary complexity and administrative burden for market participants relying on the Intragroup Exemption.

The Intragroup Exemption is based on the premise that the risk created by mandatory clearable derivatives entered into between counterparties in the same group should be managed in a centralized manner allowing for intragroup risk to be identified and managed appropriately. Further, following implementation of the Proposed Amendments, affiliated entities must appear together on consolidated financial statements or be supervised on a consolidated basis by a prudential regulator. Consequently, affiliated entities for the purpose of the Intragroup Exemption would not be treated as financially separate entities.

Relying on the Intragroup Exemption is the easiest way forward for market participants and reliance on the Intragroup Exemption is expected to be the default position. It is unclear how agreement on the application of the Intragroup Exemption or entering into a formal written trading agreement between the affiliated entities would further the primary purpose of the National Instrument to reduce counterparty risk through central clearing. If affiliated counterparties feel that an intragroup trade should be cleared, this option is always available to them.

The requirement for affiliated entities to agree that the Intragroup Exemption applies also creates a significant compliance burden on local counterparties relying on the Intragroup Exemption. Local counterparties will need to seek affirmative agreement from their affiliated counterparties and track their responses for each individual trade in a mandatory clearable derivative. Further, the requirement for affiliated entities to enter into formal written agreements to document their intragroup trades may result in significant costs to market participants. Market participants would need to draft and enter into formal agreements and individual written trade confirmations for intragroup derivatives transactions designed to manage risk and reduce costs within a financially consolidated organization, or otherwise submit those derivatives trades for central clearing.

Since intragroup derivatives transactions do not increase the overall risk in the market, and it is unlikely that disputes will arise in respect of intragroup transactions appearing on the same consolidated financial statements, any reductions in counterparty risk or benefits to market stability as a result of these two preconditions to the Intragroup Exemption are likely minimal and are outweighed by the significant cost and time input by market participants to comply with these requirements.

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ISDA therefore proposes that the requirements for both affiliated entities to agree to rely on the Intragroup Exemption and for the affiliated entities to have a formal written agreement governing the intragroup trading relationship each be removed as a precondition to the application of the Intragroup Exemption.

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ISDA and its members would like to reiterate our appreciation to the CSA for the opportunity to provide feedback on the Proposed Amendments. We are happy to discuss our responses and to provide any additional information that may be helpful.

Thank you for your consideration of these important issues to market participants. Please contact the undersigned if you have any questions or concerns.

Yours very truly,

Name: Katherine Darras
Title: General Counsel