

ASC STAFF NOTICE 91-706
PROPOSED REPLACEMENT OF
ASC BLANKET ORDER 91-505
OVER-THE-COUNTER DERIVATIVES TRANSACTIONS

17 September 2014

Introduction

Staff of the Alberta Securities Commission (ASC) advise that we intend to ask the Members of the ASC to revoke ASC Blanket Order 91-505 *Over-the-Counter Derivatives Transactions* (Existing Blanket Order) effective 31 October 2014 and to concurrently issue a replacement blanket order (Replacement Blanket Order) addressing over-the-counter (OTC) trades in derivatives and derivative-like securities.

Staff of the ASC invite interested parties to comment on the proposed Replacement Blanket Order on or before October 17, 2014.

Reason for Proposed Replacement Blanket Order

We anticipate that the *Securities Amendment Act, 2014* (Amending Act) will be proclaimed into force on or about October 31, 2014. The Amending Act will amend the *Securities Act* (Alberta) (Act) to create a framework for the regulation of derivatives. These changes will impact the Existing Blanket Order in a number of significant ways requiring that it be amended. Some of the statutory amendments that are relevant to the Existing Blanket Order include the following:

- the repeal of the terms “futures contract” and “exchange contract”;
- a revised definition of “security” that no longer includes reference to a futures contract;
- the introduction of a definition of “derivative” which excludes from it a product that has the attributes of a derivative if the product is also a security, e.g., by virtue of being a note, option or investment contract;
- the creation of a regulatory framework for derivatives that contemplates a registration requirement for those in the business of trading derivatives but does not contemplate a prospectus requirement in connection with the distribution of a derivative; and
- a revised definition of “trade” which contemplates among other things the entering into of a derivative; a material amendment to, terminating, assigning, selling or otherwise acquiring or disposing of a derivative; as well the novation of a derivative, other than a novation with a clearing agency.

Changes from Existing Blanket Order

The changes made from the Existing Blanket Order are primarily intended to reflect the changes to be made by the Amending Act. If adopted, the Replacement Blanket Order will reflect the new statutory framework for derivatives and the new terminology.

Changes were also made to update certain outdated terminology and provisions and align the language more closely with that used in similar provisions in other instruments. For example, to the extent appropriate, the definition of qualified party was more closely aligned with the definition of accredited investor in National Instrument 45-106 *Prospectus and Registration Exemptions*.

The most significant change in the proposed Replacement Blanket Order may be the clarification provided in the definition of “qualified party” around what staff have previously considered a ‘commercial end-user’.

Summary of Proposed Replacement Blanket Order

If adopted, the proposed Replacement Blanket Order is intended to continue to provide an exemption from the registration requirement for both products that will be termed “derivatives” under the amended Act and products that have the attributes of a derivative but are termed “securities” under the Act because they meet the definition of a security.

If the Amending Act is proclaimed, the prospectus requirement will no longer apply to products that are derivatives but will continue to apply to derivative-like securities; accordingly, staff anticipate proposing to the Commission that a prospectus exemption continue to be available for derivative-like securities.

If adopted as proposed, the Replacement Blanket Order will continue to provide exemptions from the prospectus and registration requirement for any person or company trading a physical commodity contract, that is, a derivative or derivative-like security that is not listed on an exchange, contains an obligation to make or take future delivery of a commodity (other than cash or currency) and is intended by the counterparties to be physically settled.

Similarly, exemptions would also continue to be available for trades of derivatives and derivative-like securities that occur between persons or companies that each meet the definition of a “qualified party”. The definition of qualified party refers generally to governments, financial institutions, registrants, and other persons or companies that meet prescribed financial tests.

The ASC is working with other members of the Canadian Securities Administrators and other domestic and foreign regulators to develop a harmonized regulatory regime for OTC-traded derivatives. Staff anticipate that the proposed Replacement Blanket Order will be only an interim measure until that regulatory regime is implemented.

The text of the proposed Replacement Blanket Order is included as an annex to this Notice.

Comments

If you have comments in respect of the proposal to revoke the Existing Blanket Order and issue a Replacement Blanket Order please send them in writing to the following:

Chadwick E. Conrad
Legal Counsel, Corporate Finance
600, 250-5th Street S.W.
Calgary, AB T2P 0R4
(403) 297-4295
chad.conrad@asc.ca

The comment period will be open until **October 17, 2014**.

Written comments may be posted on our website. Accordingly, you should not include any personal information in them.

Annex

ALBERTA SECURITIES COMMISSION

BLANKET ORDER 91-50*

Citation: Blanket Order 91-***, Re, 2014 ABASC ***

Date: 2014****

Over-the-Counter Trades in Derivatives

Definitions

1. Terms defined in the *Securities Act* (Alberta) (the **Act**) or in National Instrument 14-101 *Definitions* have the same meaning in this Order.

2. In this Order:

“**derivative-like security**” means a security that is an option, swap, futures contract, forward contract or other financial or commodity contract or instrument whose market price, value, delivery obligations, payment obligations or settlement obligations are derived from, referenced to or based on an underlying interest including a value, price, rate, variable, index, event, probability;

“**managed account**” means an account of a client for which a person or company who is registered or authorized to carry on business as an adviser or the equivalent under the securities legislation of a jurisdiction of Canada or a foreign jurisdiction, makes the investment decisions if that person or company has discretion to trade in securities or derivatives for the account without requiring the client’s express content to a transaction;

“**over-the-counter trade**” means a trade other than a trade that is both

- (a) executed on an exchange pursuant to standardized terms determined by the exchange, and
- (b) cleared by a clearing agency;

“**physical commodity contract**” means a derivative or derivative-like security that is not listed for trading on an exchange, that both

- (a) contains an obligation to make or take future delivery of a commodity, other than cash or a currency, and
- (b) at the time it is traded, is intended by the counterparties to be physically settled;

“**qualified party**” means any of the following, if acting as principal or, where specified, on behalf of a managed account:

- (a) an association governed by the *Cooperative Credit Associations Act* (Canada) or a central cooperative credit society for which an order has been made under section 473(1) of that statute;
- (b) a bank, loan corporation, trust company, trust corporation, insurance company, treasury branch, credit union, caisse populaire, financial services cooperative, or league that, in each case, is authorized by an enactment of Canada or a jurisdiction of Canada to carry on business in Canada or a jurisdiction of Canada;
- (c) an authorized foreign bank in Schedule III of the *Bank Act* (Canada);
- (d) the Business Development Bank of Canada continued under the *Business Development Bank of Canada Act* (Canada);
- (e) a person or company registered under the securities legislation of a jurisdiction of Canada as an adviser or investment dealer;
- (f) a pension fund that is regulated by the Office of the Superintendent of Financial Institutions (Canada), or by a pension commission or similar regulatory authority of a jurisdiction of Canada;
- (g) a wholly-owned subsidiary of a pension fund referred to in paragraph (f);
- (h) a person or company organized in a foreign jurisdiction that is analogous to a person or company referred to in any of paragraphs (a) to (g);
- (i) the government of Canada or of a jurisdiction of Canada, or a Crown corporation, agency or wholly-owned entity of any such government;
- (j) a national, federal, state, provincial, territorial or municipal government of or in a foreign jurisdiction, or an agency of that government;
- (k) a municipality in Canada;
- (l) a trust company or trust corporation registered or authorized to carry on business under the *Trust and Loan Companies Act* (Canada) or under comparable legislation of a jurisdiction of Canada or of a foreign jurisdiction, acting on behalf of a managed account;
- (m) a person or company acting with authority on behalf of a managed account;
- (n) an investment fund if one or more of the following apply:

- (i) each investor in the fund is a qualified party;
- (ii) the fund is managed by a person or company registered as an investment fund manager under the securities legislation of a jurisdiction of Canada,
- (iii) the fund is advised by a person or company authorized to act as an adviser under the securities legislation of a jurisdiction of Canada;
- (o) a person or company that buys, sells, trades, produces, markets, brokers or otherwise uses a commodity in its business and that executes an over-the-counter trade in a derivative or a derivative-like security provided that a material component of the underlying interest of the derivative or derivative-like security is any of the following:
 - (i) a commodity that the person or company buys, sells, trades, produces, markets, brokers, or otherwise uses in the ordinary course of business;
 - (ii) a commodity, security or variable that directly or indirectly affects the commodity that the person or company buys, sells, trades, produces, markets, brokers or otherwise uses in the ordinary course of its business;
 - (iii) a commodity, security or variable for which there is a high degree of correlation between the movement in its value and the movement in the value of the commodity that the person or company buys, sells, trades, produces, markets, brokers, or otherwise uses in the ordinary course of its business;
 - (iv) another derivative or derivative-like security which is not listed for trading on an exchange, where a material component of the underlying interest of that other derivative or derivative-like security is a commodity, security or variable referred to in any of paragraphs (i) to (iii);
- (p) a person or company to which, with its affiliates, either of the following applies:
 - (i) the person or company has executed one or more over-the-counter trades in derivatives or derivative-like securities with counterparties that are not its affiliates, provided that each of the following apply:
 - (A) the trades had a total gross value of at least \$1 billion (or its equivalent in another currency) in notional principal amount, and
 - (B) any of the derivatives or derivative-like securities relating to one of these trades was outstanding on any day within the 15 months prior to the trade;

- (ii) the person or company had on any day since the date that is 15 months prior to the trade total gross marked-to-market positions of at least \$100 million (or its equivalent in another currency) aggregated across counterparties, in one or more over-the-counter trades in derivatives or specified securities;
- (q) an individual who, either alone or with their spouse, has net assets of at least \$5 million;
- (r) a person or company, other than an individual or an investment fund, that has net assets of at least \$25 million as shown on their most recently prepared annual financial statements or interim report;
- (s) a person or company which is directly or indirectly wholly-owned (not taking into account securities required by law to be held by directors) by one or more qualified parties;
- (t) a person or company that directly or indirectly wholly owns (not taking into account securities required by law to be held by directors) a qualified party;
- (u) a person or company that is directly or indirectly wholly-owned (not taking into account securities required by law to be held by directors) by a person or company referred to in paragraph (t);
- (v) a person or company directly or indirectly controlled by one or more qualified parties that are not individuals or investment funds;
- (w) a person or company whose obligations under the derivative or derivative-like security that is being traded are fully guaranteed by one or more qualified parties.

Background

3. The Act prohibits a person or company from acting as a dealer, i.e., engaging in or holding themselves out as engaging in the business of trading in securities or derivatives as principal or agent, unless registered under the Act.
4. In the absence of an available exemption from the registration requirement, a person or company who acts as a dealer in respect of an over-the-counter trade in a derivative or derivative-like security is subject to the dealer registration requirement.
5. The Act prohibits a person or company from trading in a security on the person's or company's own account or on behalf of any other person or company if the trade would be a distribution unless a receipt has been issued for a prospectus.
6. Although the prospectus requirement does not apply to a derivative, in the absence of an available exemption from the prospectus requirement, a person or company trading a

derivative-like security where that trade would be a distribution, for example, the trade of a derivative-like security that has not been previously issued, is subject to the prospectus requirement.

Order

7. Subject to section 8, the Commission, considering it would not be prejudicial to the public interest, orders under section 213 of the Act that the dealer registration requirement does not apply to an over-the-counter trade in a derivative or a derivative-like security and the prospectus requirement does not apply to an over-the counter trade in a derivative-like security if either of the following apply:
 - (a) at the time of the trade each counterparty is a qualified party;
 - (b) the trade is in a physical commodity contract.
8. A person or company relying on section 7 must comply with the requirements that the Executive Director of the Commission may impose on such person or company in respect of a trade or class of trades, including one or more of the following:
 - (a) that the trade or class of trade be reported to a trade repository recognized or exempted from recognition by the Commission;
 - (b) that the trade or class of trades be made on an exchange recognized or exempted from recognition by the Commission;
 - (c) that the trade or class of trades be cleared or cleared and settled through a clearing agency that is recognized or exempted from recognition by the Commission;
 - (d) that in respect of a trade or class of trades not cleared through a clearing agency, the person or company have at least a prescribed minimum excess working capital.
9. The Commission hereby orders under section 214 of the Act that Blanket Order 91-505 *Over-the-Counter Derivatives Transactions* is revoked.

This Order comes into force on [31 October 2014].

For the Commission:

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October 15, 2014

DELIVERED VIA ELECTRONIC MAIL: CHAD.CONRAD@ASC.CA

Alberta Securities Commission
600, 250-5th Street S.W.
Calgary, AB T2P

Attention: Chadwick E. Conrad,
Legal Counsel, Corporate Finance

Dear Mr. Conrad:

RE: Comment letter in response to the ASC's proposals in Staff Notice 91-706 concerning the revocation and replacement of Blanket Order 91-505

Capital Power Corporation, together with its affiliates and subsidiaries (collectively, "**Capital Power**"), makes this submission to comment on Alberta Securities Commission ("**ASC**" or the "**Commission**") Staff Notice 91-706 *Proposed Replacement of ASC Blanket Order 91-505 Over-the-Counter Derivatives Transactions* ("**Staff Notice 91-706**"). The Commission published Staff Notice 91-706 on September 17, 2014, to solicit comments from interested parties regarding Commission Staff's intention to ask the Members of the ASC to revoke ASC Blanket Order 91-505 *Over-the-Counter Derivatives Transactions* ("**Existing Blanket Order**") effective October 31, 2014 and to concurrently issue a replacement blanket order ("**Replacement Blanket Order**") addressing over-the-counter ("**OTC**") trades in derivatives and **derivative-like securities**. [Emphasis added].

Capital Power generally supports the efforts of the Commission to create a framework for the regulation of OTC derivatives in Alberta, as part of the Canadian Securities Administrators' ("**CSA**") efforts to establish a regulatory regime for the Canadian OTC derivatives market and as required by Canada's G-20 commitments. Capital Power appreciates the opportunity to comment on the Replacement Blanket Order contained in Staff Notice 91-706.

Capital Power is a growth-oriented North American power producer headquartered in Edmonton, Alberta. Capital Power owns more than 2600MW of power generation capacity at 14 facilities in Canada and the United States and owns 371MW of capacity through power purchase agreements. An additional 490MW of owned generation capacity is currently under construction in Alberta and Ontario. Capital Power operates and optimizes power generation from a variety of

fuel sources including coal, natural gas, bio-waste and wind. In Alberta, Capital Power's portfolio, including interests in joint venture facilities, comprises approximately 1000MW of merchant generation capacity. Assuming an Alberta electricity pool price of \$60/MWh, Capital Power's Alberta portfolio represents an annual notional value of approximately half a billion dollars for which the commodity price exposure is actively managed and optimized.

Capital Power optimizes and hedges its portfolio using physical forward contracts for electricity, natural gas, environmental commodities and USD/CDN currency exchange, and financial derivative transactions based on those same commodities. Capital Power's trading counterparties include other independent power producers, utility companies, banks, hedge funds and other energy industry market participants. Trading activities take place through electronic exchanges, such as ICE (Intercontinental Exchange) and NGX (Natural Gas Exchange), brokered transactions and directly with counterparties using OTC derivative transactions. Capital Power is also a licensed marketer of retail electricity services in the Province of Alberta and offers such services to large commercial and industrial customers.

SPECIFIC COMMENTS:

Capital Power has the following specific substantive comments regarding the Replacement Blanket Order:

1. Definitions and Interpretations

i. Derivative-like Security

The Replacement Blanket Order includes a definition of "derivative-like security". That term is not defined in either the *Securities Act* (Alberta) (the "**Act**") or in Bill 3, the *Securities Amendment Act, 2014* (the "**Amendment Act**"), which upon proclamation will amend the Act. Capital Power respectfully requests that Commission Staff explain the reasons for the inclusion of this definition in the Replacement Blanket Order.

Further to this request, Capital Power notes that the definition of "derivatives-like security" is almost identical to the definition of "derivative" in the Amendment Act. Capital Power wonders therefore why the Replacement Blanket Order doesn't simply use the definition of a "derivative" as defined in the Amendment Act? Capital Power also respectfully requests that Commission Staff please explain what sorts of instruments the definition of "derivative-like security" is intended to capture that aren't already captured by the definition of "derivative"? To the extent that the two definitions are different, particularly the use of the words "or thing" in the definition of "derivative" and the lack of those words in the definition of "derivative-like security", Capital Power asks that Commission Staff please explain if those differences are material and if yes, how they are material?

In Staff Notice 91-706, Commission Staff list a number of statutory amendments in the Amendment Act that necessitate the Replacement Blanket Order, including the following:

- the repeal of the terms “futures contract” and “exchange contract” ;
- a revised definition of “security” that no longer includes reference to a futures contract; and
- the introduction of a definition of “derivative” which excludes from it a product that has the attributes of a derivative if the product is also a security, e.g., by virtue of being a note, option or investment contract.

In light of these amendments Capital Power wonders why Commission Staff have defined “derivative-like security” in the Replacement Blanket Order to still include reference to a “futures contract”? In other words, since the amended definition of “security” in the Act will no longer include a reference to a “futures contract”, why should the definition of “derivative-like security” in the Replacement Blanket Order include “a security that is an option, swap, **futures contract**, ...”? [Emphasis added].

Capital Power respectfully submits that the addition of “derivative-like security” in the Replacement Blanket Order may cause confusion and may conflict with previous definitions of similar terms provided by Commission Staff. In particular, in *Multilateral CSA Staff Notice 91-302 Updated Model Rules – Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting*, (“**Multilateral Staff Notice 91-302**”) published on June 6, 2013, Commission Staff described how it would view, among other things: “derivatives that are securities”; and “derivatives described to be securities” for the purposes of derivatives data reporting. Capital Power respectfully asks Commission Staff to clarify if “derivative-like security” in the Replacement Blanket Order is intended to capture the same instruments as the terms “derivatives that are securities” and/or “derivatives described to be securities” in Multilateral Staff Notice 91-302?

If the same instruments are contemplated then Capital Power respectfully submits that the same terms should be used in all publications by the Commission for the sake of regulatory consistency, alignment among jurisdictions and to facilitate compliance by derivatives market participants. Rather than using “derivative-like security” in the Replacement Blanket Order, Commission Staff should use the terms they previous used in Multilateral Staff Notice 91-302. Those same terms are also consistently used in the Ontario, Manitoba and Quebec Scope Rules.

ii. Physical Commodity Contract

Capital Power believes that the definition of “physical commodity contract” in the Replacement Blanket Order is somewhat confusing because sub-paragraph (a) speaks to “an obligation to make or take future delivery of a commodity”, while sub-paragraph (b) speaks to an intention by the counterparties, at the time the derivative is traded (which includes entering into, assigning, novating, etc.), to “physically settle” the derivative. The conditions in both sub-paragraphs must be satisfied for a trade to qualify as a “physical commodity contract”, trading in which is exempted from registration and prospectus requirements by virtue of Sec. 7 of the Replacement Blanket Order.

Capital Power believes that it is not clear if the difference between the uses of the words “delivery” and “physically settled” in the two sub-paragraphs of the definition of “physical commodity contract” reflects a different intended meaning and if so, what that different meaning might be? In normal industry practice, a physical commodity contract is typically settled by physical delivery of the commodity. So, if the words “physically settled” were intended to mean “settled by physical delivery”, then Capital Power respectfully submits that Commission Staff should change the words accordingly.

In addition, Capital Power believes that the definition of “physical commodity contract” is also problematic because it isn’t clear what constitutes a “physical commodity” under either the Replacement Blanket Order or the Act. Capital Power finds the current definition of “commodity” under the Act to be quite broad and vague except with respect to currencies, gems and precious stones. This vagueness will not change under the Amendment Act because the current definition of “commodity” is not being amended.

Under Sec. 10 of the Act, the Commission may make designating orders, including with respect to what is, or isn’t a commodity (Sec. 10(1)(a)); or that a derivative, or class of derivatives, are not derivatives (Sec. 10(1)(f) as amended by the Amending Act). In the absence of a more specific definition of either “physical commodity” or “commodity” in the Act, either through the Replacement Blanket Order, or through a Sec. 10 order, Capital Power respectfully submits that the Commission should provide a definition, or guidance about the meaning, of “physical commodity”. Capital Power further respectfully submits that such definition should include, among other things, natural gas, electricity, and environmental commodities such as carbon credits, emissions offsets and renewable energy certificates.

Capital Power notes that Commission Staff, in Multilateral Staff Notice 91-302, and the OSC, AMF and MSC, in the Companion Policies and/or Policy Statements to the Scope Rules, have all recognized that natural gas, electricity and environmental commodities, among others, were all “commodities capable of physical delivery”. Capital Power recommends that Commission Staff reaffirm, in the Replacement Blanket Order, their previous guidance from Multilateral Staff Notice 91-302 regarding what Commission Staff recognizes as “physical commodities”.

iii. Physical Delivery

Further to the point of “physical delivery”, neither the Act nor the Replacement Blanket Order provides any definition or guidance about what “physical delivery” means. In the context of environmental commodities, Capital Power respectfully submits that the Commission should recognize, either in the Replacement Blanket Order or through some other means, that physical delivery comprises transfer of legal title in the environmental commodity within a registry system that evidences ownership of such commodities. In the context of electricity, and particularly the Alberta wholesale electricity markets, Capital Power respectfully submits that the Commission should recognize that “physical delivery” of wholesale electricity is accomplished by the exchange of electricity through the Alberta Power Pool (“**Power Pool**”) by pool participants, which includes generators, load serving entities, wholesalers, retailers and large consumers of electricity.

With respect to the retail electricity market in Alberta, “physical delivery” of electricity to an end-use customer (like a home-owner or small business) by an electricity retailer involves the retailer

arranging for the delivery of electricity from the Power Pool to the customer's electricity meter through the inter-connected electric transmission and distribution system. The Power Pool acts as a spot market for physical electricity transactions but electricity is not physically delivered directly from a generator to an end-user because of the pooled commodity structure of the market. Notwithstanding this nuance, Capital Power respectfully submits that the exchange of electricity through the Power Pool should be considered "physical delivery of a commodity" and therefore within the exclusion contemplated by Sec. 7 of the Replacement Blanket Order.

Capital Power notes that the Commission has previously granted the Power Pool Council an Order¹ on December 21, 1995, upon the enactment of Alberta *Electric Utilities Act* and its implementing regulations, exempting participants in the Power Pool and other qualified parties from the prospectus and registration requirements of the Act. Consistent with the December 1995 Order, Capital Power respectfully submits that the Commission should now issue an order, under Sec. 10 of the Act, designating physical electricity transactions and other physical energy based derivative transactions not to be derivatives under the Act.

2. Physical Commodity Contract Exclusion and Regulatory Consistency

Capital Power would like to draw the attention of Commission Staff to the "physical commodity contract exclusion", from the prospectus and registration requirement, that is imbedded in the definition of "physical commodity contract" and the provisions of Sec. 7 of the Replacement Blanket Order. Rather than providing for exclusions to registration and prospectus requirements based on some definition of "physical commodity contract" unique to the Replacement Blanket Order, the Replacement Blanket Order should instead provide exclusions based on language aligned to previous definitions and concepts already adopted by Commission Staff in Multilateral Staff Notice 91-302 and by the OSC, MSC and AMF in the Scope Rules. In other words, a more aligned approach to the registration and prospectus exclusion in the Replacement Blanket Order would be to base the exclusion on prescribing certain derivative contracts or instruments not to be derivatives, and therefore not triggering any registration or prospectus requirements.

For the Commission's ease of reference, we have reproduced below the relevant parts of Sec. 2(d) of the Scope Rule and Multilateral Staff Notice 91-302:

2.(1) A contract or instrument is prescribed not to be a derivative if it is

- (d) a contract or instrument for delivery of a commodity other than cash or currency that,*
 - (i) is intended by the counterparties, at the time of execution of the transaction, to be settled by delivery of the commodity, and*
 - (ii) does not allow for cash settlement in place of delivery except where all or part of the delivery is rendered impossible or commercially unreasonable by an intervening event or occurrence not reasonably within the control of the counterparties, their affiliates, or their agent.*

¹

Through Sec. 7 and the definition of “physical commodity contract”, the Replacement Blanket Order attempts to provide the same type of exclusion (albeit in the context of exclusion from registration and prospectus filing rather than exclusion from reporting) as was provided by the OSC, MSC and AMF in Sec. 2(d) of their respective Scope Rules, and by Commission Staff in Multilateral Staff Notice 91-302 (as quoted above). The Replacement Blanket Order uses significantly different language however to provide the exclusion. Among other differences, the Scope Rules and Multilateral Staff Notice 91-302 use the words “settled by delivery of the commodity” rather than the “physically settled” language used in the Replacement Blanket Order. In addition, the Scope Rules and Multilateral Staff Notice 91-302 specify that except in certain limited circumstances, a contract for delivery of a commodity should not allow for cash settlement in place of delivery. No such restriction is found in the Replacement Blanket Order.

A stated goal of the CSA in connection with derivatives regulation has been to promulgate rules and regulations across Canada that are substantively similar. Capital Power respectfully submits that aligned rules and regulations, including consistently defined terms, across Canada promote regulatory consistency and facilitate compliance by derivatives market participants. In Multilateral Staff Notice 91-302 Commission Staff had adopted language with respect to derivatives product determination (**including physical commodity contract exclusions**), trade repositories and derivatives data reporting, that was substantively similar to the relevant language in the now promulgated Ontario, Manitoba and Quebec Scope Rules.

In light of these facts, Capital Power respectfully submits that the language of the Replacement Blanket Order should align, as much as possible, with the language in the Scope Rules and in Multilateral Staff Notice 91-302.

Capital Power respectfully requests that Commission Staff consider its comments and thanks Commission Staff for the opportunity to submit comments. Capital Power looks forward to further consultation with the Commission in connection with the creation of a regulatory framework to regulate derivatives in Alberta. If you have any questions, or if we may be of further assistance, please contact the undersigned at [REDACTED].

Yours Truly,

“CAPITAL POWER”

Per: *“Zoltan Nagy-Kovacs”*
Zoltan Nagy-Kovacs
Senior Counsel



Canadian Market
Infrastructure Committee

Mr. Chadwick E. Conrad
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October 17, 2014

Dear Sirs/Mesdames:

Re: Alberta Securities Commission ("ASC") Staff Notice 91-706 – Proposed Replacement of ASC Blanket Order 91-505 Over-the-Counter Derivatives Transactions

INTRODUCTION

The Canadian Market Infrastructure Committee ("CMIC")¹ welcomes the opportunity to comment on ASC Staff Notice 91-706 and the draft blanket order replacing ASC Blanket Order 91-505 annexed to such Staff Notice (the "**Draft Blanket Order**").²

This letter outlines our concerns with the Draft Blanket Order from the perspective of harmonization with other provincial rules and with respect to drafting clarity.

CMIC submits that the goal of harmonization across Canada is of utmost importance. We understand that each Province's existing regime governing derivatives, exchange contracts and securities may be different. However, to the extent possible, CMIC is of the view that all new rules governing derivatives should be harmonized. In particular, we note that the defined term "**derivative-like security**" is a term that is not used in other provincial rules. Moreover, the drafting of the definition is confusing and is not clear as to what types of products are meant to be captured by the definition. For example, the only difference between the definitions of "derivative" and "derivative-like security" are the words "a security that is" at the beginning of the definition of "derivative-like security". As such, a derivative-like security would appear to be a "security" that is also a "derivative", yet the definition of "derivative" expressly excludes a "security". What is also not clear is the reason why this hybrid category of a

¹ CMIC was established in 2010, in response to a request from public authorities, to represent the consolidated views of certain Canadian market participants on proposed regulatory changes. The membership of CMIC consists of the following: Bank of America Merrill Lynch, Bank of Montreal, Caisse de dépôt et placement du Québec, Canada Pension Plan Investment Board, Canadian Imperial Bank of Commerce, Deutsche Bank A.G., Canada Branch, Fédération des Caisses Desjardins du Québec, Healthcare of Ontario Pension Plan, HSBC Bank Canada, JPMorgan Chase Bank, N.A., Toronto Branch, Manulife Financial Corporation, National Bank of Canada, OMERS Administration Corporation, Ontario Teachers' Pension Plan Board, Royal Bank of Canada, The Bank of Nova Scotia, and The Toronto-Dominion Bank. CMIC brings a unique voice to the dialogue regarding the appropriate framework for regulating the Canadian OTC derivatives market. The membership of CMIC has been intentionally designed to present the views of both the 'buy' side and the 'sell' side of the Canadian OTC derivatives market, including both domestic and foreign owned banks operating in Canada. As it has in all of its submissions, this letter reflects the consensus of views within CMIC's membership about the proper Canadian regulatory regime for the OTC derivatives market.

² Available at: http://www.albertasecurities.com/Regulatory%20Instruments/4950920-v6-ASC_Notice%2091-706.pdf

“derivative-like security” is necessary given the ability of the ASC to designate a “derivative” as a security, or a “security” as a derivative, in each case, under section 10 of the Alberta *Securities Act* (once the *Securities Amendment Act, 2014* (Alberta) is proclaimed into force). As a result of this authority to designate, the prospectus requirement should only apply to “securities” and an exemption from the prospectus requirement would not be required under the Draft Blanket Order since it would not apply to a “derivative”.

If, for purposes of the Draft Blanket Order, the ASC believes this term is necessary, CMIC submits that a clear definition should be provided or, at a minimum, guidance should be provided to clarify what types of securities are intended to be covered by the term, “derivative-like security”.

CMIC further suggests the following drafting changes to section 7 of the Draft Blanket Order. Without these changes, it is not clear that the exemptions set out in subsections 7(a) and 7(b) would apply to both the dealer registration requirement as well as the prospectus requirement (assuming, given the comments above relating to the term “derivative-like security”, the ASC believes the Draft Blanket Order still needs to include an exemption for the prospectus requirement).

“Subject to section 8, the Commission, considering it would not be prejudicial to the public interest, orders under section 213 of the Act that (i) the dealer registration requirement does not apply to an over-the-counter trade in a derivative or a derivative-like security, and (ii) the prospectus requirement does not apply to an over-the-counter trade in a derivative-like security, in each case, if either of the following apply:...”

CMIC welcomes the opportunity to discuss this response with representatives from the ASC. The views expressed in this letter are the views of the following members of CMIC:

Bank of America Merrill Lynch
 Bank of Montreal
 Caisse de dépôt et placement du Québec
 Canada Pension Plan Investment Board
 Canadian Imperial Bank of Commerce
 Deutsche Bank A.G., Canada Branch
 Fédération des Caisses Desjardins du Québec
 Healthcare of Ontario Pension Plan
 HSBC Bank Canada
 JPMorgan Chase Bank, N.A., Toronto Branch
 Manulife Financial Corporation
 National Bank of Canada
 OMERS Administration Corporation
 Ontario Teachers' Pension Plan Board
 Royal Bank of Canada
 The Bank of Nova Scotia
 The Toronto-Dominion Bank

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October 17, 2014

SENT VIA E-MAIL: CHAD.CONRAD@ASC.CA

Chadwick Conrad
Legal Counsel, Corporate Finance
Alberta Securities Commission
Suite 600
250 - 5th Street SW
Calgary AB T2P 0R4

Attention: Mr. Conrad

Dear Sir:

RE: Comment Letter in Response to ASC Staff Notice 91-706 and Proposed Replacement Blanket Order to ASC Blanket Order 91-505- Over-the-Counter Derivatives Transactions

On September 17, 2014, the Alberta Securities Commission (the "**Commission**") published a *Staff Notice 91-706 Proposed Replacement of ASC Blanket Order 91-505 Over-the-Counter Derivatives Transactions* ("**ASC Staff Notice 91-706**") seeking comments from interested parties regarding Commission Staff's intention to ask the Members of the ASC to revoke ASC Blanket Order 91-505 Over-the-Counter Derivatives Transactions ("**Existing Blanket Order**") effective October 31, 2014 and to concurrently issue a replacement blanket order ("**Replacement Blanket Order**") addressing over-the-counter ("**OTC**") trades in derivatives and derivative-like securities.

As counsel to many market participants ranging from energy producers, energy trading and marketing organizations to global financial institutions, global central counterparties, other financial market infrastructures and derivatives market intermediaries, some of whom are regulated by the Commission; Dentons Canada LLP ("**Dentons**") has had extensive involvement with the OTC derivatives market, and its regulation specifically in Alberta and generally in the rest of Canada and globally. As an interested stakeholder, we appreciate the opportunity to comment on the ASC Staff Notice 91-706 and the Replacement Blanket Order.

In this letter, we comment from a legal and regulatory, as opposed to a business, standpoint on certain proposals contained in ASC Staff Notice 91-706 and the Replacement Blanket Order. This comment letter reflects the general comments of certain members of Dentons energy transactions and derivatives practice groups in Calgary and does not necessarily reflect the overall views of our firm or our clients.

I. BACKGROUND

Commission Staff state in ASC Staff Notice 91-706 that they “anticipate that the Securities Amendment Act, 2014 (“**Amending Act**”) will be proclaimed into force on or about October 31, 2014”. The Amending Act, further to Commission Staff “will amend the Act to create a framework for the regulation of derivatives” and these changes will impact the Existing Blanket Order in a number of significant ways requiring that it be amended.

Commission Staff list some of the statutory amendments that are relevant to the Existing Blanket Order to include the following:

- the repeal of the terms “futures contract” and “exchange contract”;
- a revised definition of “security” that no longer includes reference to a futures contract;
- the introduction of a definition of “derivative” which excludes from it a product that has the attributes of a derivative if the product is also a security, e.g., by virtue of being a note, option or investment contract;
- the creation of a regulatory framework for derivatives that contemplates a registration requirement for those in the business of trading derivatives but does not contemplate a prospectus requirement in connection with the distribution of a derivative; and
- a revised definition of “trade” which contemplates among other things the entering into of a derivative; a material amendment to, terminating, assigning, selling or otherwise acquiring or disposing of a derivative; as well the novation of a derivative, other than a novation with a clearing agency.

Commission Staff also state the proposed changes to the Existing Blanket Order that are reflected in the Replacement Blanket Order are primarily intended to reflect the changes to be made by the Amending Act. If the Amending Act is adopted the changes in the Replacement Blanket Order will reflect the new statutory framework for derivatives and the new terminology to replace outdated terminology and provisions that align the language in the Replacement Blanket Order more closely with that used in similar provisions in other instruments in applicable Alberta securities laws.

Lastly, Commission Staff state in ASC Staff Notice 91-706 that “the most significant change in the proposed Replacement Blanket Order may be the clarification provided in the definition of “qualified party” around what Staff have previously considered a ‘commercial end-user’”.

II. **SPECIFIC COMMENTS**

We have the below comments related to the Replacement Blanket Order:

1. **Definition of “Qualified Party”**

We respectfully request that Staff explain why it has made the changes to the definition of a qualified party in the Replacement Blanket Order from the definition in the Existing Blanket. Specifically, in the Existing Blanket Order in Section 3, persons or companies are prevented from acting as a dealer "... as principal or agent..." unless registered under the Act and a "qualified party" could be any of the entities listed in the Appendix if each was acting as "principal, or as an agent or trustee for accounts that are managed by it". In the Replacement Blanket Order Staff have introduced the definition of "managed account"¹ and removed the agent and trustee wording that was in the Existing Blanket Order. We believe that Staff has attempted to incorporate the meaning in some sections of the 'qualified party' definition. We respectfully state that given that pension funds act through their administrators and cannot contract as "principals" as pension plans do not have a legal personality and some of those administrators may not be regulated under securities legislation as they may be plan administrators formed by the companies who own these pension funds, we respectfully request that the wording of "agent or trustee" needs to be added back into the definition of "qualified party".

In addition, the wording "provincial or territorial pension commissions" needs to be added back into the definition of "qualified party" as not all pension funds are regulated federally.

2. Definition of a Derivative-Like Security

In the Replacement Blanket Order, Staff includes a definition of "derivative-like security". This term is not defined in either the Securities Act (*Alberta*) (the "**Act**") or in the Amending Act, which upon proclamation will amend the Act. We respectfully request that Commission Staff explain the reasons for the addition of this definition in the Replacement Blanket Order.

We also note that the definition of "derivatives-like security" is almost identical to the definition of "derivative" in the Amending Act. We ask why the Replacement Blanket Order doesn't simply use the definition of a "derivative" as defined in the Amending Act, instead of introducing a definition that does not exist in any applicable Alberta securities laws to date, in particular in the Amending Act which will give the Commission the legislative authority once certain sections of it are proclaimed the authority to establish a framework to regulate derivatives? We respectfully ask if Commission Staff was intending to capture other instruments not captured by the 'derivative' definition in the Amending Act in this definition and if so to please list what sorts of instruments the definition of "derivative-like security" is going to capture that is not already captured by the definition of 'derivative'.

In ASC Staff Notice 91-706, Commission Staff list a number of statutory amendments from the Amending Act that it states necessitate the Replacement Blanket Order that we have above. Based on those statutory amendments, we ask why Commission Staff have defined "derivative-like security" in the Replacement Blanket Order to still include reference to a "**futures contract**". [Emphasis added] In other words, since the amended definition of "security" in the Act will no longer include a reference to a "**futures contract**", why should the definition of "derivative-like security" in the Replacement Blanket Order include "a security that is an option, swap, "**futures contract**"?

¹ means an account of a client for which a person or company who is registered or authorized to carry on business as an adviser or the equivalent under the securities legislation of a jurisdiction of Canada or a foreign jurisdiction, makes the investment decisions if that person or company has discretion to trade in securities or derivatives for the account without requiring the client's express content to a transaction

We fear that that the addition of “derivative-like security” in the Replacement Blanket Order may cause confusion and may conflict with previous definitions of similar terms provided by Commission Staff. In Multilateral CSA Staff Notice 91-302 *Updated Model Rules – Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting*, (the “**Multilateral Staff Notice 91-302**”), which Commission Staff along with staff of the other multilateral jurisdictions published on June 6, 2013, Commission Staff described how it would view, among other things: “derivatives that are securities”; and “derivatives described to be securities” for the purposes of derivatives data reporting. We respectfully ask Commission Staff to explain if “derivative-like security” in the Replacement Blanket Order is intended to capture the same instruments as the terms “derivatives that are securities” and/or “derivatives described to be securities” in Multilateral Staff Notice 91-302?

If the same instruments are contemplated then we respectfully request that the same terms should be used in all publications by the Commission for the sake of regulatory consistency, alignment among jurisdictions and to facilitate compliance by derivatives market participants. Rather than using “derivative-like security” in the Replacement Blanket Order, Commission Staff should use the terms they previous used in Multilateral Staff Notice 91-302. Those same terms are also consistently used in the Ontario, Manitoba and Quebec Scope Rules.

3. Definition of Physical Commodity Contract

We find the current definition of “commodity” under the Act to be quite broad, ambiguous and inconsistent with Commission’s staff views in the Multilateral Staff Notice 91-302 except with respect to currencies, gems and precious stones. As the definition of “commodity” is not amended in the Amending Act, it means this ambiguity will not change. Commission Staff, in Multilateral Staff Notice 91-302, and the OSC, AMF and MSC, in the Companion Policies and/or Policy Statements to the Scope Rules, have all recognized that natural gas, electricity and environmental commodities, among others, were all “commodities capable of physical delivery”, we respectfully ask that Commission Staff align the definition of a Physical Commodity Contract to include what it views as “commodities” in the Replacement Blanket Order from its previous guidance from Multilateral Staff Notice 91-302.

4. Definition of Over-the-Counter Trade

Commission Staff defines “over-the-counter trade” to mean “trade other than a trade that is both (a) executed on an exchange pursuant to standardized terms determined by the exchange, and (b) cleared by a clearing agency. As the trading of OTC transactions have evolved with the use of technology over the years, it is now quite common that OTC transactions that are first negotiated bilaterally are then matched on an exchange or an electronic trading platform and then sent to a clearing agency for clearing. These contracts are still considered OTC or bilateral transactions and most of them would fall under the Staff’s definition of a Physical Commodity Contract. For example the Intercontinental Exchange (“**ICE**”), which operates as a U.S. Commodity Futures Trading Commission regulated exempt commercial market under the U.S. Commodity Exchange Act, offers the energy industry that include many Alberta market participants “OTC energy contracts, listing them on a widely-distributed, trading platform that provides access to a range of contracts to satisfy hedging and trading objectives” that include: “global crude, and North American natural gas and power bilateral contracts that are physically settled; and real-time market data ticker, full breadth and depth of market, and market data products.

As a result, we respectfully request that Commission Staff align its definition of “over-the-counter trade” to the evolution of how such OTC transactions are now traded.

5. Section 8 of the Replacement Blanket Order

In Section 8 of the Replacement Blanket Order, Commission Staff kept the Executive Director of the Commission’s authority to impose certain conditions on a person or company in respect of a trade or class of trades in the Existing Blanket Order.

Section 8 provides that a “person or company relying on section 7 must comply with the requirements that the Executive Director of the Commission may impose on such person or company in respect of a trade or class of trades, including one or more of the following:

- a. that the trade or class of trade be reported to a trade repository recognized or exempted from recognition by the Commission;
- b. that the trade or class of trades be made on an exchange recognized or exempted from recognition by the Commission;
- c. that the trade or class of trades be cleared or cleared and settled through a clearing agency that is recognized or exempted from recognition by the Commission;
- d. that in respect of a trade or class of trades not cleared through a clearing agency, the person or company have at least a prescribed minimum excess working capital.”

The Executive Director’s authority in the Existing Blanket Order to impose those conditions was derived from Section 8(2) of the Commission Rules that provides the Executive Director with the power to require any class of registrants, as a condition of registration, to report all trades in the OTC market to an agency. However, Section *(2) of the Commission Rules currently provides the Executive Director with the power to require any class of registrants, **as a condition of registration**, to report all trades in the OTC market to an agency. [Emphasis added.] In our comment letter² to the Existing Blanket Order of November 16, 2012, we had drawn the Commission’s attention to the fact “the Notice of Republication and Request for Comment suggests that the amendments “will provide the Executive Director with power to require registrants to comply with the G20 Commitments respecting trading and clearing of OTC derivatives trades”, and it appears that the Commission’s intent in proposing these amendments is to give the Commission additional powers which it sees as necessary in order to assist Canada in meeting its various G20 Commitments. Section 8(2) of the Commission Rules only contemplated the imposition of conditions related to registration, but does not mandate registration itself. The Proposed Amendments that gave rise to the Existing Blanket Order seemed to suggest the Executive Director will have the authority to impose additional conditions on registration **if mandated**. [Emphasis added].

We respectfully ask if it is necessary for Commission Staff to include the Executive Director’s authority to impose the conditions listed above since when certain sections of the Amending Act are proclaimed, will amend the Act and create a regulatory framework for derivatives in Alberta.

² <http://www.dentons.com/en/insights/articles/2012/november/16/letter-in-response-to-request-for-comments-from-the-alberta-securities-commission--november-16--2012>

We thank you for the opportunity to comment on ASC Staff Notice 91-706 and the Replacement Blanket Order. If you have any questions or wish to discuss our comments, please contact in Dentons Calgary Office, Priscilla Bunke at [REDACTED]

Yours truly,

“*DENTONS CANADA LLP*”

INCLUDES COMMENT LETTERS



Enbridge Inc.

3000, 425 – 1st Street SW
Calgary, Alberta T2P 3L8

October 16, 2014

DELIVERED VIA ELECTRONIC MAIL

Alberta Securities Commission
600, 250-5th Street S.W.
Calgary, AB T2P 0R4

Attention: Chadwick E. Conrad, Legal Counsel, Corporate Finance
e-mail: chad.conrad@asc.ca

Dear Sir:

Re: Comment Letter to ASC Staff Notice 91-706, Proposed Replacement of ASC Blanket Order 91-505 Over-the-Counter Derivatives Transactions

Enbridge Inc. ("Enbridge") hereby respectfully submits these comments below in response to Alberta Securities Commission's (the "ASC") request for comments in connection to the *ASC Staff Notice 91-706 – Proposed Replacement of ASC Blanket Order 91-505* (the "**Replacement Blanket Order**"). The Replacement Blanket Order would replace the existing Blanket Order 91-505.

I. INTRODUCTION OF ENBRIDGE

Enbridge is a transporter of energy, operating the world's longest, most sophisticated crude oil and liquids pipeline system in Canada and the United States, shipping on average more than 2.2 million barrels every day. Enbridge's natural gas gathering and transmission system transports natural gas throughout North America, moving billions of cubic feet of gas per day. It also operates Canada's largest natural gas distribution company in Ontario, and provides distribution services in Quebec, New Brunswick, and New York State.

Like many other "end-users", Enbridge and its subsidiaries and affiliates transact in both OTC and cleared derivatives to manage and mitigate the risks associated with its core business of transporting and processing energy commodities as well as marketing activities. Enbridge would consider itself and its subsidiaries and affiliates as "qualified parties".

Enbridge appreciates the opportunity to comment on the Replacement Blanket Order.

II. ENBRIDGE'S GENERAL COMMENTS ON THE REPLACEMENT BLANKET ORDER

a) Definition of physical commodity contract

The energy industry practice is companies that engage in energy physical commodity transactions can either choose to transact on an exchange or privately over-the-counter ("OTC"). There are various reasons why companies may not want to or cannot transact certain energy physical

commodity transactions on an exchange even if the product is available for transacting on the exchange. For example, transparency of their pricing to competitors and producers who subscribe to read-only access to exchanges, which could distort the price being offered in the market.

The proposed Section 7 of the Replacement Blanket Order reads as follows:

7. Subject to section 8, the Commission, considering it would not be prejudicial to the public interest, orders under section 213 of the Act that the dealer registration requirement does not apply to an over-the-counter trade in a derivative or a derivative-like security and the prospectus requirement does not apply to an over-the-counter trade in a derivative-like security if **either** of the following apply:

- (a) at the time of the trade each counterparty is a qualified party;
- (b) **the trade is in a physical commodity contract.** (*emphasis added*)

Until rules come into force mandating that certain physical commodity contracts must be cleared on an exchange, companies that trade off an exchange (whether a qualified party or not) need to be able to utilize the exemption as outlined in Section 7 of the Replacement Blanket Order. The current wording of the physical commodity contract definition would preclude smaller companies of utilizing this exemption who were exempted under Blanket Order 91-505 given the wording of Section 7 and the change in the definition of "qualified party" in section (r). Even if the company in question is not a "qualified party", in the energy industry, there are many sophisticated parties that may need to execute for example, a forward contract, and if they are forced to execute the transaction on an exchange, Enbridge respectfully submits, this may impact their ability to operate in an economical fashion. Given the new definition of "derivative-like security", there are many transactions that were not previously captured, that will now be transparent to a small market and margined. The end result is the smaller companies that need to be able to execute these transactions will simply not be able to transact and will not transact.

b) Section 8 of the Replacement Blanket Order– Further Requirements Upon Use of Exemption in Section 7

Section 8 allows the Executive Director of the Commission to impose on a person or company further requirements with respect to a trade or a class of trades. The market should have certainty and advance notice of what trades or class of trades may be required to be reported, transacted on an exchange and settled through a clearing agency. For these requirements to be equitable, Enbridge respectfully submits that these requirements should be imposed on all persons and companies at the same time, with proper notice, not on a one-off basis which may render the transaction uneconomical after the fact.

c) Pension Plans

In Section 3, persons or companies are prevented from acting as a dealer "... as principal or agent..." unless registered under the Act. In the existing Blanket Order, 91-505, a "qualified party" could be any of the entities listed in the Appendix if each was acting as "principal, **or as an agent or trustee** for accounts that are managed by it" (*emphasis added*). The agent and trustee wording is now missing from the definition of "qualified party" in the new proposed blanket order. Given that pension funds act through their administrators and cannot contract as "principals" as pension plans do not have a legal personality,

Enbridge respectfully requests that the concept of "agent or trustee" needs to be added back into the definition of "qualified party". In addition, the wording "provincial or territorial pension commissions" needs to be added back into the definition of "qualified party" as not all pension funds are regulated federally.

III. **CONCLUSION**

Enbridge thanks the ASC for the opportunity to submit our comments on the *ASC Staff Notice 91-706 – Proposed Replacement of ASC Blanket Order 91-505* and hope the ASC would consider our comments and recommendations. We would be pleased to discuss our thoughts with you further. If you have any questions or comments, please contact the undersigned.

Respectfully submitted,

Enbridge Inc.

A handwritten signature in cursive script, appearing to read "Kari Olesen", is written over a horizontal line.

Kari Olesen
Legal Counsel



NEXEN MARKETING
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T [REDACTED] www.nexencnooltd.com
Email [REDACTED]

October 16, 2014

DELIVERED VIA ELECTRONIC MAIL: CHAD.CONRAD@ASC.CA

Alberta Securities Commission
600, 250-5th Street S.W. Calgary, AB T2P
Attention: Chadwick E. Conrad,
Legal Counsel, Corporate Finance

Dear Mr. Conrad:

RE: Comment letter in response to the ASC's proposals in Staff Notice 91-706 concerning the revocation and replacement of Blanket Order 91-505

Nexen Marketing makes this submission to comment on Alberta Securities Commission ("ASC") Staff Notice 91-706: Proposed Replacement of ASC Blanket Order 91-505 Over-the-Counter Derivatives Transactions.

Nexen Marketing has the following substantive comments regarding the replacement blanket order, and specifically the proposed definition of "physical commodity contract". Nexen Marketing respectfully requests the ASC to provide further detail and/or guidance to clarify what the definition of "physical commodity contract" is intended to capture, particularly:

- (i) on the meaning of "an exchange", and what constitutes "an exchange" for the purposes of the definition; and
- (ii) on the meaning of "listed for trading", and what would constitute being "listed for trading on an exchange" for the purposes of the definition.

Nexen Marketing respectfully requests that the ASC consider its comments and thanks the ASC for the opportunity to submit comments.

Yours truly,

Jerrad Kubik
Legal Counsel

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Calgary, Alberta, Canada T2P 5H1
403.260.7000 MAIN
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OSLER

October 17, 2014

SENT BY ELECTRONIC MAIL

Chadwick E. Conrad
Legal Counsel, Corporate Finance
Alberta Securities Commission

Dear Mr. Conrad:

Comments on Proposed Replacement of ASC Blanket Order 91-505 *Over-the-Counter Derivatives Transactions* (the “Existing Blanket Order”)

This letter is in response to the request for comments regarding the proposal set forth in ASC Staff Notice 91-706 to revoke the Existing Blanket Order and concurrently issue a replacement blanket order (the “**Replacement Blanket Order**”) addressing over-the-counter trades in derivatives and derivative-like securities.

Osler, Hoskin & Harcourt LLP has had extensive involvement with derivatives transactions as counsel to a broad spectrum of derivatives market participants, including exchanges, clearing agencies, trade repositories, intermediaries and end users, such as commodity producers, distributors, pension funds and investment funds. The Existing Blanket Order is very useful to industry and provides certainty for Alberta market participants engaging in trades of derivatives and derivative-like securities. We therefore appreciate the proposal of the Alberta Securities Commission (“**ASC**”) to issue a Replacement Blanket Order that continues this important exemptive relief while reflecting the changes to be made to securities laws in Alberta by the *Securities Amendment Act, 2014* (the “**Amending Act**”). It is a worthwhile exercise to update outdated terminology and align the language in the Replacement Blanket Order more closely with language used in similar provisions in other instruments.

In this letter, we offer our comments on four aspects of the proposed Replacement Blanket Order. Our comments address the following:

- harmonization of definitions;
- definition of “physical commodity contract”;
- definition of “over-the-counter trade”; and
- proposal by staff to the ASC of the continued availability of a prospectus exemption for derivative-like securities.

I. Harmonization of Definitions

We commend the ASC for its efforts to align the language in the Replacement Blanket Order more closely with language used in similar provision in other instruments, such as National Instrument 45-106 *Prospectus and Registration Exemptions*. We support any effort to harmonize other instruments (whether Alberta local rules, multilateral instruments or national instruments) where warranted. It can be cumbersome and confusing for market participants to apply different definitions in different provinces. Therefore we would encourage the ASC to work with securities regulators and regulatory authorities in British Columbia, Saskatchewan, New Brunswick and Québec to harmonize, to the extent possible, definitions of “Qualified Party” and “Accredited Counterparty” that are relevant for derivatives-related registration and prospectus exemptions.

II. Definition of “Physical Commodity Contract”

The Replacement Blanket Order proposes to define “physical commodity contract” as follows:

a derivative or derivative-like security that is not listed for trading on an exchange, that both: (a) contains an obligation to make or take future delivery of a commodity, other than cash or a currency, and (b) at the time it is traded, is intended by the counterparties to be physically settled.

This proposed definition is generally consistent with the definition in the Existing Blanket Order, and we think it is a helpful addition to include the words “at the time it is traded” to the intention component of the definition. However, we note that the proposed definition of “physical commodity contract” is different from the definition of “physical commodity contract” proposed by the ASC on June 6, 2013 in CSA Staff Notice 91-302 *Updated Model Rules – Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting* (“91-302”). We note that the proposed definition of “physical commodity contract” in 91-302 is consistent with the definition that appears in local scope rules 91-506 currently in force in Manitoba, Ontario and Québec.

The definition of “physical commodity contract” is very important to Alberta market participants. Therefore it would be very helpful to know whether the ASC intends to impute a different meaning to the term in the Replacement Blanket Order than it has in 91-302 or 91-506. As a related point, it would be helpful to know whether Alberta market participants should refer to the companion policy guidance on “physical commodity contracts” in 91-302 and 91-506 when interpreting the meaning of such term in the Replacement Blanket Order.

As noted above, harmonization of terms and definitions is very important. It would be helpful for the ASC to use definitions in the Replacement Blanket Order that are

consistent with other Alberta local rules, multilateral instruments or national instruments wherever possible, unless there is a valid policy reason to use different definitions.

III. Definition of “Over-the-Counter Trade”

We respectfully submit that the proposed changes in the definition of “over-the-counter trade” as proposed by the Replacement Blanket Order could have unintended negative consequences for market participants in Alberta. If the Replacement Blanket Order is adopted as drafted, certain transactions that Alberta market convention, and derivatives laws outside Alberta, would consider to be “over-the-counter” transactions will no longer benefit from prospectus and registration exemptive relief. This could negatively impact the ability of Alberta market participants to access the types of derivatives products necessary to carry on their businesses.

The proposed definition of “over-the-counter trade” in the Replacement Blanket Order excludes any trade that is both: (a) executed on an exchange pursuant to standardized terms determined by the exchange, and (b) cleared by a clearing agency. In our view, this exclusion is not consistent with international developments in derivatives regulatory reform. For example, in the United States, certain over-the-counter swaps transactions “made available to trade” must be executed on derivatives trading facilities, like a swap execution facility (a “SEF”), and cleared.¹

Alberta market participants have an interest in trading over-the-counter derivatives that are traded on a SEF and cleared. Since 2013, a number of SEFs have sought and obtained exemptive relief from the exchange recognition requirement in the *Securities Act* (Alberta) to provide access to trading to Alberta market participants. As noted above, certain swaps traded on these SEFs by Alberta market participants may be cleared. In our view, cleared swaps traded by an Alberta market participant on a SEF should benefit from exemptive relief under the Replacement Blanket Order. Therefore, we urge the ASC to reconsider the proposed definition of “over-the-counter trade” to account for cleared derivatives trading on derivatives trading facilities (other than futures exchanges), such as SEFs.

IV. Proposal by Staff to the ASC of the Continued Availability of a Prospectus Exemption for Derivative-Like Securities.

ASC Staff Notice 91-706 noted that if the Amending Act is proclaimed, the prospectus requirement in Alberta securities laws will no longer apply to products that are derivatives but will continue to apply to derivative-like securities. The staff notice also noted that ASC staff anticipate that the ASC will propose a prospectus exemption for trades in derivative-like securities between qualified parties. It would be helpful for the

¹ For background, please see http://www.futuresindustry.org/downloads/mat_factsheet_final.pdf.



ASC to provide further information related to the status of this proposal prior to the repeal of the Existing Blanket Order.

* * * *

Thank you for the opportunity to comment on the proposed revocation of the Existing Blanket Order and issuance of the Replacement Blanket Order. If you have any questions or comments, please contact [REDACTED]

Yours very truly,

Osler, Hoskin & Harcourt LLP