Jan. 18, 2012

To: Alberta Securities Commission
Autorite des Marches Financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Ontario Securities Commission
Saskatchewan Financial Services Commission

This letter is being sent in response to the invitation for public comment by the Canadian Securities Administrators consultation paper 91-403, derivatives: surveillance and enforcement.

The issue which I find to be of greatest importance concerning paper 91-403 is found in the operational issues segment. The options presented include the Canadian Securities Administrators being given power over the surveillance and enforcement aspect of the Over The Counter derivatives market. In my opinion, the attempt by the presenters of this paper to empower itself places the Canadian Securities Administrators in a possible conflict of interest. As such, in my opinion, all present and future recommendations by the Canadian Securities Administrators on the matter of over the counter derivatives should be viewed as containing a certain amount of bias.

In consultation paper 91-403 there is no specific mention of funding for the surveillance and enforcement of the over the counter derivatives market. With many governments in Canada facing budget difficulties, it will be a challenge to obtain sufficient money to perform this new function. A dedicated tax or transaction fee may be needed to be paid by market participants to fund proper surveillance. Without proper funding to do the job, any attempt at reforming the over the counter derivatives market would be unsuccessful.

The repetitive insistence that the commitment made by the federal government of Canada during a past G-20 summit be carried out, has been at least partly negated by the supreme court of Canada. The court ruled in December of 2011 that a federal securities regulator over reaches our constitutional national concern section. The implication of the ruling is that the federal government does not have the ability to intrude on provincial authority by making such a commitment, without explicit support of all provinces. In the future I would suggest that the Canadian Securities Administrators refrain from referring to the possibly unconstitutional G-20 summit commitment.

In consultation paper 91-403 the derivatives committee again claims the best path to follow involves harmonization with international standards. Unfortunately, certain nations will find it profitable to have rules which allow corporations to ignore the regulations of their home jurisdictions. This highlights the reality that there is no such thing as a truly consistent international standard. An example of the desire by different nations to have independent financial regulations occurred during the recent negotiations in the European Union on a new treaty. Great Britain did not agree with the new treaty provisions specifically because the British government did not wish to give up the right to regulate its financial sector. The insistence of the Canadian Securities Administrators derivatives committee that Canadians allow ourselves to be placed in a position that foreigners prefer, will only lead to an unwelcome vigorous impregnation of our financial sector by foreign financial powerhouses.

Since the over the counter derivatives market is a relatively new area for surveillance and enforcement, one rule that would have a substantial impact is a ban on speculative and/or redundant derivative contracts. Contracts that allow a person or corporation to insure a risk will be useful to business in general. Banning speculation will reduce systemic risk, complexity and future surveillance costs.

An aspect of the Canadian situation that was not raised in paper 91-403 is the legal variants between provinces. The legal systems based on British common law function differently than legal systems based on the historical laws of France. These differences may preclude a single surveillance agency for Canada.

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