CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

CSA Notice and Third Request for Comment

Proposed National Instrument 93-101
Derivatives: Business Conduct

Proposed Companion Policy 93-101CP
Derivatives: Business Conduct

January 20, 2022

Introduction

We, the Canadian Securities Administrators (the **CSA** or **we**), are publishing the following for a third comment period of 60 days, expiring on March 21, 2022:

- Proposed National Instrument 93-101 *Derivatives: Business Conduct* (the **Instrument**);
- Proposed Companion Policy 93-101 *Derivatives: Business Conduct* (the **CP**).

Collectively, the Instrument and the CP are referred to as the **Proposed Instrument** in this Notice.

We are issuing this Notice to invite comments on the Proposed Instrument. Please note that the CSA will not be publishing Proposed National Instrument 93-102 *Derivatives: Registration* and Proposed Companion Policy 93-102 *Derivatives: Registration* concurrently with the Proposed Instrument at this time.

We welcome all comments on this publication and have also included specific questions in the Comments section.

In developing the Proposed Instrument, the CSA have consulted with the Bank of Canada, the Office of the Superintendent of Financial Institutions (**OSFI**) and the Department of Finance (Canada). We intend to continue to consult with these entities throughout the development and subsequent implementation of the Proposed Instrument.

Substance and Purpose

The CSA is publishing revisions to the Proposed Instrument that address comments we received during the previous comment period, including comments about the benefits of a business conduct regime tailored for over-the-counter (**OTC**) derivatives and the potential for negative impacts of such a regime on derivatives market liquidity, having regard to, among other things, the regulatory experience of derivatives dealers and advisers in other jurisdictions. As a result, we have accepted the majority of the comments and accordingly, we have made changes to the Proposed Instrument to streamline the operationalization of the Proposed Instrument's requirements and to ensure that access to derivatives products will not be unduly limited for investors/customers in the Canadian OTC derivatives markets and that costs will remain competitive.

The CSA have developed the Proposed Instrument to help protect participants in the OTC derivatives markets, reduce risks including potential systemic risk, improve transparency, increase accountability and promote responsible business conduct in the OTC derivatives markets.[1]

During the financial crisis of 2008, the inappropriate sale of financial instruments had a substantial impact on global financial markets and led to major losses for retail and institutional participants. The International Organization of Securities Commissions (**IOSCO**) noted in 2012 that "until recently, OTC derivatives markets have not been subject to the same level of regulation as securities markets. Insufficient regulation allowed certain participants to operate in a manner that created risks to the global economy that manifested during the financial crisis of 2008."[2] Moreover, since the financial crisis, there have been numerous cases of serious market misconduct in the global derivatives market and short-term FX market; for example, misconduct relating to the manipulation of benchmarks and front-running of customer orders, breaches of client confidentiality and failure to adequately manage conflicts of interest. In addition, the International Monetary Fund reported in 2019 that Canada's "[o]ngoing reforms in the areas of conduct of business of over-the-counter (OTC) derivatives and duties towards clients should be completed."[3]

To address these issues, the Proposed Instrument will establish a robust regime that is tailored for OTC derivatives markets, meets IOSCO's international standards, and creates a market conduct regime that is also consistent with the regulatory approach taken by most IOSCO jurisdictions with active derivatives markets.[4] As a result, the Proposed Instrument will help protect participants in the OTC derivatives markets from unfair, improper or fraudulent practices and will foster confidence in the Canadian financial markets.

The Proposed Instrument is intended to create a uniform approach to derivatives markets conduct regulation in Canada and promote consistent protections for OTC derivatives market participants regardless of the type of derivatives firm they deal with, while also ensuring that derivatives dealers and advisers operating in Canada are subject to consistent regulation.

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1 The Proposed Instrument applies to derivatives as determined in accordance with the product determination rule applicable in the relevant jurisdiction.

2 https://www.iosco.org/library/pubdocs/pdf/IOSCOPD381.pdf (DMI Report) at p 1.

3 Financial System Stability Assessment of Canada, published on June 24, 2019 (Country Report No.19/177).

4 https://www.iosco.org/library/pubdocs/pdf/IOSCOPD497.pdf (DMI Implementation Review) at p. 13.

The Proposed Instrument applies to a person or company if it meets the definition of "derivatives adviser" or a "derivatives dealer", regardless of whether it is registered or exempted from the requirement to be registered in a jurisdiction. As a result, the Proposed Instrument applies to federally regulated Canadian financial institutions that are in the business of trading or advising in OTC derivatives.

As described in Annex B – *Summary of Comments and Responses*, a business trigger test is used to determine if the person or company is in the business of trading or advising in OTC derivatives. Even if a person or company is in the business of trading in OTC derivatives in a CSA jurisdiction, they may be exempt from the requirements of the Proposed Instrument if they qualify for an exemption available in the Proposed Instrument. Finally, even if a person or company is subject to the requirements of the Proposed Instrument, those requirements are tailored depending on the nature of the derivatives dealer's or derivatives adviser's derivatives party.

The Proposed Instrument sets out a principled approach to regulating the conduct of participants in the OTC derivatives markets, including requirements relating to the following:

- Fair dealing
- Conflicts of interest
- Know your derivatives party (KYDP)
- Suitability
- Pre-transaction disclosure
- Reporting
- Compliance
- Senior management duties
- Recordkeeping
- Treatment of derivatives party assets

Many of the requirements in the Proposed Instrument are similar to existing market conduct requirements applicable to registered dealers and advisers under National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**), but have been modified to reflect the different nature of derivatives markets.

Much like NI 31-103, the Proposed Instrument takes a two-tiered approach to investor/customer protection, as follows:

- certain obligations apply in all cases when a derivatives firm is dealing with or advising a derivatives party, regardless of the level of sophistication or financial resources of the derivatives party; and

- certain additional obligations:

    - apply if the derivatives firm is dealing with or advising a derivatives party that is not an eligible derivatives party (i.e., a "non-eligible derivatives party"), and

    - apply but may be waived if the derivatives firm is dealing with or advising a derivatives party who is an eligible derivatives party that is an individual or a specified commercial hedger.

The term "eligible derivatives party" (**EDP**) is used to refer to those derivatives parties that do not require the full set of protections afforded to "retail" customers or investors, either because they may reasonably be considered sophisticated or because they have sufficient financial resources to purchase professional advice, or otherwise protect themselves through contractual negotiation with the derivatives firm.

Note that we are monitoring the implementation of Client Focused Reforms[5] for securities market participants. We will consider whether comparable provisions are appropriate for the OTC derivatives market in the future.

Background

The Proposed Instrument was developed over the course of an extensive consultation process that included the following:

- On April 18, 2013, CSA Consultation Paper 91-407 *Derivatives: Registration,* which outlined a proposed registration and business conduct regime for participants in the OTC derivatives markets was published for comment;

- On April 4, 2017, Proposed National Instrument 93-101 *Derivatives: Business Conduct* and Proposed Companion Policy 93-101 *Derivatives: Business Conduct* was published for a first comment period;

- On June 14, 2018, Proposed National Instrument 93-101 *Derivatives: Business Conduct* and Proposed Companion Policy 93-101 *Derivatives: Business Conduct* was published for a second comment period (the **second consultation**).

The comment period for the second consultation closed on September 17, 2018. In addition, public consultation meetings were held in some CSA member jurisdictions.

We have revised the Proposed Instrument in response to the comments we received during the second consultation and are publishing the revisions for another comment period.

Summary of Written Comments Received by the CSA

During the comment period for the second consultation, we received submissions from 20 commenters. We thank all commenters for their input. The names of the commenters and a summary of their comments, together with our responses, are contained in Annex A – *List of Commenters* and Annex B – *Summary of Comments and Responses* of this Notice.

Copies of the submissions on the Proposed Instrument can be found on the following websites:

- the Alberta Securities Commission at www.albertasecurities.com

[5] See CSA Notice of Amendments to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* and to Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations*—Reforms to Enhance the Client-Registrant Relationship (**Client Focused Reforms**), published on October 3, 2019.

- the Autorité des marchés financiers at www.lautorite.qc.ca

- the Ontario Securities Commission at www.osc.gov.on.ca

Summary of Changes to the Proposed Instrument

In developing the Proposed Instrument, we carefully reviewed the comments that we received during the second consultation. Public comments make a valuable contribution to the rulemaking process. This includes finding the right balance between achieving regulatory goals and the associated regulatory burdens. We found many of the comments recommending changes to be persuasive and revised the Proposed Instrument accordingly.

We believe we have achieved an appropriate balance of promoting investor/customer protection, while preserving derivatives market access and reducing the impact of compliance costs. This balance is achieved by streamlining the Proposed Instrument to address potential negative impacts on derivatives market liquidity, as well as removing obstacles to a derivatives firm's ability to efficiently operationalize the market conduct requirements within its existing compliance system.

Among the more notable changes to the Proposed Instrument, which are summarized in more detail below, we have made the following changes:

- added a new foreign liquidity provider exemption for foreign dealers when they transact with derivatives dealers in Canada;

- added a new exemption for foreign sub-advisers that is similar to the exemption for international sub-advisers in NI 31-103;

- included a transition period to allow derivatives firms to treat existing permitted clients, accredited counterparties, qualified parties, as well as eligible contract participants under the US Commodity Futures Trading Commission (**CFTC**) rules, as EDPs for up to five years;

- added a new exemption for registered advisers from certain requirements in the Proposed Instrument if they comply with corresponding requirements in NI 31-103 with respect to their derivatives activity in order to allow registered advisers to leverage their existing compliance systems;

- revised the senior derivatives manager provisions in Part 5 of the Instrument so that they only apply to derivatives dealers and added an exemption from the senior derivatives manager provisions for derivatives dealers that have a limited notional amount of derivatives outstanding;

- populated the Appendices of the Instrument related to exemptions for foreign dealers and foreign advisers that are subject to and in compliance with conduct and other regulatory requirements that are comparable to those set out in the Instrument; and

- applied a limited sub-set of requirements in the Instrument to certain derivatives dealers that are Canadian financial institutions with respect to short-term foreign exchange (**FX**) contracts in the institutional foreign exchange market.

In addition to these changes, the revised Proposed Instrument includes other changes to the Instrument, as well as revisions to the guidance in the CP that are intended to clarify the interpretation of the Instrument.

Foreign liquidity provider exemption

- We have added a new foreign liquidity provider exemption for foreign dealers that transact with derivatives dealers in Canada. This is an outright exemption from the requirements in the Instrument in order to preserve market access and facilitate liquidity in the inter-dealer market. There are no notice, or filing requirements, or other conditions for relying on this exemption. This new exemption is in addition to the general foreign dealer exemption, which remains available when foreign dealers transact with derivatives parties that are eligible derivatives parties.

Foreign Derivatives Dealer and Foreign Derivatives Adviser Exemptions

- We have streamlined the foreign derivatives dealer exemption and the foreign derivatives adviser exemption so that they more closely conform to the international dealer and international adviser exemptions in NI 31-103. Consequently, a foreign derivatives dealer or a foreign derivatives adviser that complies with the conditions of the exemption will be able to transact with derivatives parties that are EDPs located in Canada on an exempt basis if the foreign dealer or foreign adviser is located in one of the jurisdictions that the CSA have assessed as having a comparable regulatory regime on an outcomes basis.

Foreign Derivatives Sub-Adviser Exemption

- We have added a new exemption for foreign derivatives sub-advisers that is similar to the exemption for international sub-advisers in NI 31-103. This exemption will permit a foreign derivatives sub-adviser to provide advice to certain registrants, without having to register as an adviser in Canada.

Eligible Derivatives Party (EDP) Definition

- We have made numerous changes to the "eligible derivatives party" definition, including the following:

    - eliminating the $10 million financial threshold in the non-individual commercial hedger category;

- including a transition period to allow derivatives firms that meet certain conditions to treat existing permitted clients, accredited counterparties, qualified parties, as well as eligible contract participants under CFTC rules, as EDPs for up to five years.

Registered Advisers

- We have made significant changes that allow registered advisers to leverage their existing compliance systems. These changes include the following:

    - revising the senior derivatives manager provisions so that they do not apply to derivatives advisers;

    - exempting registered advisers from certain requirements of the Proposed Instrument if they comply with corresponding requirements in NI 31-103 in respect of their derivatives activity;

    - including a transition period that allows registered advisers to treat permitted clients as EDPs for up to five years.

Exemptions from the Designation and Responsibilities of a Senior Derivatives Manager

- We have revised the senior derivatives manager provisions by adding exemptions for derivatives dealers whose aggregate outstanding gross notional amount of derivatives transactions fall below certain financial thresholds (the threshold is set at $250 million for the general *de minimis* exemption that is available to all derivatives dealers, and at $3 billion for the *de minimis* exemption available to commodity derivatives dealers dealing exclusively in commodity derivatives).

Exemption for Derivatives Traded on a Derivatives Trading Facility where the Identity of the Derivatives Party is Unknown

- We have expanded the exemption for derivatives traded on a derivatives trading facility in circumstances where the identity of the counterparty is unknown. The exemption now applies whether or not the transaction is eventually cleared and extends to all requirements in the Proposed Instrument except a limited subset of provisions.

Exemptions for Derivatives Dealers that are IIROC Dealer Members or Canadian Financial Institutions

- We have exempted derivatives dealers that are IIROC dealer members from many provisions of the Instrument when they comply with IIROC requirements relating to a transaction with a derivatives party that correspond to certain provisions of the Instrument.

- We have also exempted Canadian financial institutions from many provisions of the Instrument when they comply with the *Bank Act* or OSFI requirements relating to a transaction with a derivatives party that correspond to certain provisions of the Instrument.

Business Trigger

- We have included additional guidance in the Companion Policy on the application of the business trigger test as it relates to dealers that conduct activities in Canada and in foreign jurisdictions. We have clarified, among other things, that Schedule III banks under the *Bank Act*, are to be treated as foreign dealers for the purposes of this Instrument.

Short-Term Foreign Exchange Contracts in the Institutional FX Market

- We have included short-term foreign exchange (**FX**) contracts in the institutional FX market (i.e., wholesale FX market) within the scope of this Instrument for certain derivatives dealers that are Canadian financial institutions with significant derivatives activity. As a result, these derivatives dealers will be required to comply with fair dealing, conflicts of interest, complaints handling, and compliance and recordkeeping obligations in respect of their activity in the institutional foreign exchange market. [6]

Handling Complaints—Core Conduct Obligation Towards All Derivatives Parties

- We have applied the complaints handling provision of the Proposed Instrument to all derivatives parties, which previously only applied to transactions involving (i) non-EDPs or (ii) individual EDPs or eligible commercial hedger EDPs that did not waive the application of this provision.

Tied Selling—Core Conduct Obligation Towards All Derivatives Parties

- We have applied the tied selling provision of the Proposed Instrument to all derivatives parties. These protections previously applied only to transactions involving (i) non-EDPs or (ii) individual EDPs or eligible commercial hedger EDPs that did not waive the application of this provision. Note that an exemption from this provision remains available to a Canadian financial institution that complies with the equivalent provisions of its prudential regulator.

- We have also amended the tied selling provision of the Proposed Instrument so that it more closely conforms to the corresponding provision in NI 31-103, including by removing the requirement to provide written disclosure of the restriction to a derivatives party.

Transition Period

[6] Québec law does not give the AMF a mandate to oversee short-term FX contracts. These requirements would therefore not apply in the province unless it brings forth legislative amendments.

- We have included a delayed effective date of one year from the date of the final publication of the Proposed Instrument, together with new transition provisions that allow derivatives firms to treat existing permitted clients, qualified parties, accredited counterparties and eligible contract participants as EDPs for up to five years.

In addition to these notable changes, guidance related to these changes that will help derivatives firms operationalize the requirements of the Instrument is set out in the CP.

The changes to the Proposed Instrument and our reasons for making them are discussed in more detail in Annex B – *Summary of Comments and Responses*.

List of Annexes

This notice contains the following annexes:

- Annex A – *List of Commenters*
- Annex B – *Summary of Comments and Responses*
- Annex C – Proposed National Instrument 93-101 *Derivatives: Business Conduct*
- Annex D – Proposed Companion Policy 93-101 *Derivatives: Business Conduct*
- Annex E – *Local Matters*

Comments

In addition to your comments on all aspects of the Proposed Instrument, the CSA also seeks specific feedback on the following questions:

1) Foreign Liquidity Provider Exemption

We have introduced a new foreign liquidity provider exemption in section 36 of the Instrument for foreign dealers that transact with derivatives dealers located in Canada. This is an outright exemption from the requirements in the Proposed Instrument intended to preserve market access and maintain general liquidity in the inter-dealer market. As a result, a Canadian derivatives dealer, regardless of its size, will benefit from this provision. This also means that the core provisions in the Instrument will not apply when a local derivatives dealer is transacting with a foreign derivatives dealer.

Do you support including this additional exemption in section 36 of the Proposed Instrument?

2) Foreign Derivatives Dealer and Foreign Derivatives Adviser Exemptions—Comparability Determinations

A foreign dealer or adviser from a foreign jurisdiction that, on an outcomes-basis, has comparable requirements to those in the Instrument will receive a complete exemption from the Instrument where that foreign dealer or adviser complies with the conditions of the exemption in section 38 or the exemption in section 43. Outcomes-based assessments have been conducted for the jurisdictions listed in Appendices A and D. Please provide any comments you may have on the inclusion of any of the foreign jurisdictions listed in these Appendices.

Should any other foreign jurisdiction(s) with comparable requirements be added to these Appendices? Please explain your response with reference to the applicable legislation and related requirements.

3) Foreign Derivatives Dealer Exemption—Requirements

We have clarified that if the person or company that is a derivatives dealer is not located in the local jurisdiction (i.e., a foreign derivatives dealer), the obligations in the Instrument apply only to its dealing activities with a derivatives party that is located in the local jurisdiction. We have further clarified that any reports made by a foreign derivatives dealer to the regulator or securities regulatory authority under section 38(1)(d) are limited exclusively to the derivatives activity being conducted with a derivatives party located in Canada.

Do you support limiting the reports to the regulator contemplated by section 38(1)(d) to only cover a foreign derivatives dealer's activities with a derivatives party that is located in Canada?

4) Commercial Hedger Category of the "Eligible Derivatives Party" (EDP) Definition

We have eliminated the $10 million financial threshold in the non-individual commercial hedger category of the definition of "eligible derivatives party" (in section 1(1) paragraph (n) of the Instrument). This means that more firms may qualify as eligible commercial hedgers under the Instrument. It is important to note, however, that, for a person or company to qualify as an eligible commercial hedger, they must provide a written waiver of their right to receive all or some of the additional protections in the Instrument (these are the additional protections that apply to all transactions with persons or companies that do not qualify as EDPs). Additionally, for a person or company to qualify as an eligible commercial hedger, they must still provide specific representations that they have the requisite knowledge and experience to evaluate certain derivatives information, as well as the suitability and characteristics of the derivative that is being transacted.

Do you support eliminating the $10 million financial threshold for qualifying as a commercial hedger? Will this new approach have any effect, positive or negative, on the ability of non-EDP clients to access liquidity from dealers or on a dealer's willingness to trade with non-EDP clients?

5) Exemptions from the Designation and Responsibilities of a Senior Derivatives Managers

We have added exemptions in section 31.1 of the Instrument from the senior derivatives manager requirements for persons and companies to rely on (i) a general *de minimis* exemption available to all derivatives dealers whose aggregate gross notional amount of outstanding derivatives does not exceed $250 million or (ii) a *de minimis* exemption available to derivatives dealers that exclusively deal in commodities derivatives and whose aggregate gross notional amount of outstanding commodity derivatives does not exceed $3 billion.[7]

[7] Note, FX derivatives are not treated as commodity derivatives for the purposes of the CSAs over-the-counter derivatives rules. Also note that the *de minimis* exemptions **are not** available for any derivative instrument that has a cryptoasset as an underlying interest.

Do you support the additional exemptions in section 31.1 from the senior derivatives manager requirements?

6) Short-Term FX Contracts in the Institutional FX Market

We have applied a limited subset of provisions in section 1.1 of the Instrument to any Canadian financial institution that is a derivatives dealer with respect to its short-term FX transactions in the institutional FX market (commonly referred to as 'FX spot' in the 'wholesale FX' market) if its gross notional amount of derivatives outstanding exceeds $500 billion. This provision is only intended to capture those transactions between such derivatives dealers and their counterparties that are also considered wholesale FX market participants for the purposes of the FX Global Code of Conduct.[8]

Do you support applying the specified provisions to this subset of derivatives dealers?

7) Treatment of Registered Advisers under Securities or Commodity Futures Legislation

We have added an exemption in section 45 for registered advisers under securities or commodity futures legislation from certain requirements of the Proposed Instrument listed in Appendix E if the registered adviser complies with corresponding requirements in NI 31-103 relating to a transaction with a derivatives party. In such cases, we anticipate that the existing compliance systems of the registered adviser can easily be extended to address any of the residual obligations of the Instrument, which residual obligations ensure that NI 31-103 requirements are extended to the registered adviser's derivatives activities.

Please provide any comments you may have on this approach and the requirements listed in Appendix E.

We understand that some derivatives parties rely on the expertise of a derivatives adviser to develop or implement derivatives trading strategies to help them achieve their organizational objectives. Section 7 of the Instrument exempts derivatives advisers from many of the requirements of the Instrument when they are advising an EDP.

Are there any scenarios where derivatives advisers that are advising EDPs should be required to comply with any of the requirements that section 7 provides an exemption from?

8) Conflicts of Interest

Section 9 of the Instrument was developed with the intention that it would be generally consistent with the conflicts of interest provisions of NI 31-103. The Client Focused Reforms amended the conflicts of interest provisions of NI 31-103 (through amendments to section 13.4 and the addition of section 13.4.1) and adopted related companion policy changes. We are considering further

[8] See FX Global Code, as it may be amended, restated or further supplemented from time to time at https://www.globalfxc.org/fx_global_code.htm.

changes to conform the conflicts of interest requirements so that they are consistent with those in NI 31-103, along with other changes to conform the requirements to be consistent with the requirements found in Client Focused Reforms. Please provide any comments relating to the inclusion of such corresponding changes to the Proposed Instrument.

Please provide your comments in writing by **March 21, 2022**.

We cannot keep submissions confidential because securities legislation in certain provinces requires publication of a summary of the written comments received during the comment period. In addition, all comments received will be posted on the websites of each of the Alberta Securities Commission at www.albertasecurities.com, the *Autorité des marchés financiers* at www.lautorite.qc.ca and the Ontario Securities Commission at www.osc.gov.on.ca. Therefore, you should not include personal information directly in comments to be published. It is important that you state on whose behalf you are making the submission.

Thank you in advance for your comments.

Please address your comments to each of the following:

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

Please send your comments only to the following addresses. Your comments will be forwarded to the remaining jurisdictions:

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Questions

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Summary of Comments and Responses on
Proposed National Instrument 93-101 Derivatives: Business Conduct and
Proposed Companion Policy 93-101CP Derivatives: Business Conduct

Annex A
List of Commenters

Commenter
Alternative Investment Management Association
ATB Financial
BlackRock Asset Management Canada Limited
BP Canada Energy Group ULC
The Canadian Advocacy Council for Canadian CFA Institute Societies
The Canadian Commercial Energy Working Group
Canadian Credit Union Association
The Canadian Life and Health Insurance Association
Canadian Market Infrastructure Committee
Capital Power Corporation
EncoreFX Inc.
Franklin Templeton Investments Corp.
International Energy Credit Association
International Swaps and Derivatives Association, Inc.
Japanese Bankers Association
Olympia Trust Company
Portfolio Management Association of Canada
SIFMA AMG
Stikeman Elliott LLP
Western Union Business Solutions

Annex B

Summary of Comments and Responses

This summarizes the written public comments we received on the June 14, 2018 publication for comment of the proposed business conduct rule, proposed National Instrument 93-101 *Derivatives: Business Conduct* (the **business conduct rule** or **NI 93-101**), and our responses to those comments. In some cases, comments have been combined with comments on the April 19, 2018 publication for comment of the proposed registration rule, proposed National Instrument 93-102 *Derivatives: Registration* (the **registration rule** or **NI 93-102**). This summary of comments primarily focuses on comments received on the business conduct rule, but may address comments received on both proposed rules where relevant.

In this summary of comments, the following terms have the following meanings:

"Canadian securities legislation" means "securities legislation" as defined in NI 14-101 and includes legislation related to both securities and derivatives

"CSA" means the Canadian Securities Administrators

"CFTC" means the U.S. Commodity Futures Trading Commission

"EDP" means "eligible derivatives party" as defined in NI 93-101 and NI 93-102

"IIROC" means the Investment Industry Regulatory Organization of Canada

"IOSCO" means the International Organization of Securities Commissions

"NI 14-101" means National Instrument 14-101 *Definitions*

"NI 31-103" means National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*

"NI 45-106" means National Instrument 45-106 *Prospectus Exemptions*

"NI 93-101" or the "business conduct rule" means National Instrument 93-101 *Derivatives: Business Conduct*

"NI 93-102" or the "registration rule" means National Instrument 93-102 *Derivatives: Registration*

"OSFI" means the federal Office of the Superintendent of Financial Institutions

"Product Determination Rules" means

- in Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan and Yukon, Multilateral Instrument 91-101 *Derivatives: Product Determination*,

- in Manitoba, Manitoba Securities Commission Rule 91-506 *Derivatives: Product Determination*,

- in Ontario, Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination*, and

- in Québec, *Regulation 91-506 respecting Derivatives Determination*

"permitted client" has the meaning ascribed to that term in section 1.1[*definitions*] of NI 31-103;

"regulator" means the regulator or securities regulatory authority in a jurisdiction

"Schedule III bank" means an authorized foreign bank named in Schedule III of the *Bank Act* (Canada)

"SEC" means the U.S. Securities and Exchange Commission

"specified foreign jurisdiction" means any of Australia, Brazil, Hong Kong, Japan, South Korea, New Zealand, Singapore, Switzerland, United Kingdom of Great Britain and Northern Ireland, any member country of the European Union, and the United States of America

"U.K." means the United Kingdom of Great Britain and Northern Ireland, and

"U.S." means the United States of America.

1. General comments and themes

General support for the initiative

The majority of commenters generally supported the efforts of the CSA to develop a modernized, harmonized and streamlined approach to the regulation of over-the-counter (**OTC**) derivatives in Canada, although many commenters also had significant comments or concerns with respect to aspects of the proposed rules and how they might apply to their businesses.

One commenter, an industry association for registered investment management firms, commented that it supports the CSA's aim to establish a robust investor protection regime that meets IOSCO standards with respect to OTC derivatives and the work of the CSA to ensure that all derivatives firms remain subject to certain minimum standards in relation to their business conduct towards both investors and counterparties. They also applauded the CSA for developing a harmonized derivatives registration and business conduct regime across Canada and believed that the establishment of a national regime is a positive step for industry, the Canadian economy, and investors.

However, this commenter believed that the CSA's consultations on the registration and business conduct rules were primarily focused on addressing policy issues arising from *dealing* activities and did not identify specific investor or market protection issues with respect to the activities of advisers, particularly portfolio managers, vis-à-vis derivatives. The commenter disagreed with the CSA's assessment in the consultation that the costs of portfolio managers complying with the proposed derivatives regime are proportionate to the benefits to the Canadian market of implementing NI 93-101 and NI 93-102, as currently drafted.

One commenter, an industry organization representing alternative investment funds, commended the CSA for their continuing analysis and consultation with respect to the issues and potential regulatory responses regarding the regulation of OTC derivatives. The commenter agreed that, in light of the 2008 financial crisis, enhanced regulatory oversight of the OTC derivatives market was required. However, the commenter urged the CSA to consider all regulatory developments, both internationally and domestically, and consider their effect on investors and advisers before imposing a potential additional layer of

regulatory requirements that may in fact be unnecessary or the cost of which may outweigh the intended benefits.

One commenter, an industry association for portfolio managers and other investment professionals in Canada, supported the bifurcation of the registration rule from the business conduct rule and agreed all derivatives advisers and dealers should be subject to minimum conduct standards. This commenter supported the principles behind the registration rule and the business conduct rule, which include reducing systemic risk and meeting IOSCO's international goals. The commenter also supported more harmonized standards for listed derivatives and OTC derivatives, particularly with respect to the reporting and disclosure by derivative parties.

One commenter, an industry committee representing domestic and foreign-owned banks operating in Canada as well as major Canadian institutional market participants, supported the harmonization of derivatives rules across Canada but noted that the OTC derivatives market is a global market with Canada representing only approximately 4% of that global market. Accordingly, the commenter stated that it is very important that our OTC derivatives rules are harmonized across Canada and also harmonized with regimes in larger markets outside Canada. It will otherwise become too costly for a foreign counterparty to enter into OTC derivatives transactions with a Canadian counterparty if it requires analysis and compliance with rules that are different across provinces and territories and inconsistent with global rules.

CSA Response

We thank the commenters for their comments. We have carefully considered all of the comments and have made significant changes to the business conduct rule to streamline the requirements and to better harmonize the requirements with the regimes in larger markets, including the U.S.

Overview of comments and concerns with the initiative

Although the majority of commenters generally supported the initiative, many commenters had significant comments or concerns with respect to aspects of the proposed rules and how they might apply to their businesses. The principal comments we received on the business conduct rule were as follows:

- Comments on the importance of harmonizing Canadian OTC derivatives rules with the rules in larger markets outside Canada, as well as concerns with the potential impact of the proposed rules on foreign dealers and with the potential impact of the proposed rules on liquidity

- Concerns with the definition of "eligible derivatives party" (**EDP**), and particularly

    - differences between the EDP definition and the "permitted client" definition in NI 31-103
    - the financial thresholds in the "commercial hedger" category
    - the knowledge and experience representations
    - the need for a reasonable transition period to deal with customers who are permitted clients under NI 31-103 or eligible contract participants under CFTC rules

- Concerns with the potential impact of the proposed rules on registered advisers (portfolio managers (**PMs**) and registered advisers under commodity futures legislation)

- Concerns with the application of the business conduct rule to unregistered entities, such as

- Canadian financial institutions that are subject to prudential regulation, and
- entities that may be able to rely on the *de minimis* exemptions under the proposed registration rule

- Concerns over the timing of implementation and the need for a reasonable transition period

- Comments and concerns in response to the specific requests for comment

- Miscellaneous other comments and concerns (by Part and section of the rule)

CSA Response

We have made significant changes to the business conduct rule to streamline the requirements and to better harmonize the requirements with the regimes in larger markets, including the U.S.

The significant changes to the business conduct rule (from the version published for comment in June 2018) include the following:

- We have added a new foreign liquidity provider exemption for foreign dealers that trade with derivatives dealers in Canada. This exemption is in addition to the foreign dealer exemption but contains fewer conditions than are found in the foreign dealer exemption. The foreign dealer exemption remains available for when foreign dealers trade with derivatives parties that are not derivatives dealers in Canada.

- We have significantly streamlined the foreign dealer exemption and the foreign adviser exemption so that they more closely conform to the international dealer and international adviser exemptions in NI 31-103; consequently, a foreign dealer or adviser that complies with the conditions of the exemption will receive a complete exemption from the business conduct rule rather than a more limited exemption from specific provisions of the business conduct rule based on tables in the appendices for each foreign jurisdiction.

- We have added a new exemption for foreign sub-advisers similar to the exemption for international sub-advisers in NI 31-103.

- We have included additional guidance on the application of the business trigger test as it relates to dealers that conduct activities in Canada and in foreign jurisdictions as well as on the availability of exemptions from business conduct requirements, including the foreign liquidity provider exemption, the end-user exemption, the foreign dealer exemption and the foreign adviser exemption.

- We have made significant changes to the EDP definition including

    - eliminating the $10 million financial threshold in the non-individual commercial hedger category (from $10 million to $0); and

    - including a transition period to allow derivatives firms to treat permitted clients, qualified parties, accredited counterparties and eligible contract participants under CFTC and SEC

rules, as EDPs for up to five years;

As a result of these changes, we have significantly expanded the class of persons and companies with whom a foreign dealer or foreign adviser may deal on an exempt basis in reliance on the foreign dealer, adviser and sub-adviser exemptions. In addition, in the case of registered firms and other firms that are subject to the business conduct requirements, these changes allow these firms to deal with these derivatives parties that are more sophisticated on a "lighter touch" basis, as set out in section 7 of the rule.

We acknowledge that the removal of the financial threshold in the non-individual commercial hedger category of the EDP definition for entities that trade or advise others in relation to *OTC* derivatives potentially creates a significant regulatory differential for registered firms and international firms that trade or advise others in related to *listed* derivatives (i.e., exchange-traded options and futures), since the definition of "permitted client" in NI 31-103 and the IIROC definition of "institutional customer" does not currently include a non-individual commercial hedger category. We intend to consult with CSA and IIROC staff with a view to addressing this regulatory differential as between OTC derivatives and listed derivatives.

- We have made significant changes to the business conduct rule to reduce its impact on registered advisers and to allow registered advisers to leverage their existing compliance systems. These changes include the following:

    - revising various provisions of NI 93-101, such as the senior derivatives manager provisions in Part 5 of NI 93-101, so that they apply to derivatives dealers but not to derivatives advisers;

    - exempting registered advisers from certain requirements of NI 93-101 if they comply with corresponding requirements in NI 31-103; and

    - including a transition period to allow registered firms to treat non-individual permitted clients as EDPs for up to five years.

- We have added an exemption from certain requirements in the business conduct rule, including an exemption from the senior derivatives manager requirements in Part 5 of the rule, for persons and companies eligible to rely on the *de minimis* exemptions in NI 93-102 (the threshold is set at $250 million for the general *de minimis* exemption available to all derivatives dealers and at $3 billion for *de minimis* exemption available to commodity derivatives dealers).

- We have expanded the exemption for derivatives traded on a derivatives trading facility where the identity of the counterparty is unknown (s. 41).

- We have included a delayed effective date of one year from the date of the final publication of the rule, together with transition provisions to allow registered firms to treat permitted clients, qualified parties, accredited counterparties, and eligible contract participants in the context of similar CFTC rules, as EDPs for up to five years.

The principal comments and themes together with the CSA responses are summarized below.

2. Comments on the importance of harmonizing Canadian OTC derivatives rules with the rules in larger markets outside Canada and concerns with the potential impact of the proposed rules on liquidity

As noted above, a number of commenters emphasized the importance of harmonizing Canadian OTC derivatives rules with regimes in larger markets outside Canada and expressed concerns over the potential negative impact the business conduct rule would have on liquidity in the Canadian derivatives market, and in particular the liquidity provided by foreign dealers to the Canadian market.

One commenter noted that ensuring that Canadian OTC derivatives market regulation does not significantly reduce liquidity is a critical objective. Regulation that imposes unique requirements will deter market makers from continuing to participate in the Canadian OTC derivatives market. This deterrent effect will be felt by both foreign banks and domestic banks, especially in those Canadian jurisdictions where they currently have a modest presence. Maintaining a robust, competitive Canadian OTC derivatives market is important for systemic and economic purposes. A properly functioning modern economy requires businesses to be able to hedge risks to their businesses.

Similarly, one commenter expressed concerns over certain conditions in the foreign dealer and adviser exemptions, the substituted compliance approach (predicated on foreign dealers and advisers being subject to a similar regulatory regime on a requirement by requirement basis in their home jurisdictions) reflected in these exemptions and the absence of an exemption for trades with a Canadian derivatives dealer (either a registered derivatives dealer or a Canadian financial institution exempt from registration under section 35.1 of the *Securities Act* (Ontario)). The commenter noted that NI 31-103 contains an exemption for trades with a registered dealer in section 8.5 [*Trade through or to a registered dealer*] and that this exemption serves an important function in Canadian securities markets by supporting robust trading and liquidity within Canada and cross-border by enabling unregistered firms, including foreign dealers, to trade securities with Canadian registered investment dealers without the unregistered firm being subject to a Canadian registration requirement. The commenter was concerned that under the proposed registration and business conduct rules, a trade between an unregistered firm and a Canadian derivatives dealer could potentially subject the unregistered firm to registration or the need to comply with business conduct obligations, or at minimum the need to conduct an analysis of whether registration and business conduct requirements apply. This may cause significant harm to liquidity in Canadian derivatives markets without any corresponding benefit of protection to Canadian investors or market participants. Foreign dealers may be unwilling to perform the required analysis to determine their obligations under the proposed rules and avoid transacting with Canadian counterparties unless they are guided to a specific waiver or exemption. The commenter therefore proposes that an exemption for derivatives transactions conducted with a Canadian derivatives dealer be included in the proposed rules.

CSA Response

We have made significant changes to the business conduct rule to minimize the potential impact of the

proposed rules on foreign dealers and advisers, and therefore access to liquidity these firms provide, including

- introducing a new foreign liquidity provider exemption for foreign dealers that trade with derivatives dealers in Canada;
- streamlining the foreign dealer and foreign adviser exemptions so that they more closely conform to the international dealer and international adviser exemptions in NI 31-103;
- adding a new exemption for foreign sub-advisers similar to the international sub-adviser exemption in NI 31-103;
- making significant changes to the EDP definition including
    - eliminating the $10 million financial threshold in the non-individual commercial hedger category (from $10 million to $0); and
    - including a transition period to allow derivatives firms to treat permitted clients, qualified parties, accredited counterparties, and eligible contract participants under CFTC rules, as EDPs for up to five years; and
- including additional guidance on the application of the business trigger test as it relates to dealers that conduct activities in Canada and in foreign jurisdictions, as well as on the availability of exemptions from business conduct requirements.

(i) New foreign liquidity provider exemption

We have included a new exemption in section 36 of the rule for foreign dealers that trade with derivatives dealers in Canada. This exemption is in addition to the foreign dealer exemption but contains fewer conditions than are found in the foreign dealer exemption. The foreign dealer exemption remains available for when foreign dealers trade with derivatives parties that are not derivatives dealers in Canada.

Under the foreign liquidity provider exemption, a foreign dealer is exempt from the proposed business conduct rule if

- the transaction is made with a registered derivatives dealer, an investment dealer registered under securities legislation, or a derivatives dealer in Ontario that, in each case, is transacting as principal and for its own account;
- the person or company is registered, licensed, authorized, or operates under an exemption or exclusion under the securities, commodity futures or derivatives legislation of a foreign jurisdiction in which its head office or principal place of business is located to carry on the activities in that jurisdiction that registration as a derivatives dealer would permit it to carry on in the local jurisdiction;
- the person or company is **not** any of the following:
    - a registered derivatives dealer whose head office or principal place of business is located

in Canada**;** or

- a derivatives dealer that is a Canadian financial institution.

It is important to note that the foreign liquidity provider exemption is available to a foreign dealer from **any** foreign jurisdiction. The foreign liquidity provider exemption is not limited to foreign dealers in specified foreign jurisdictions, as is the case for the regular foreign dealer (section 38) and foreign adviser exemptions (section 43).

In addition, the foreign liquidity provider exemption is available to a foreign dealer that is registered, licensed, authorized, or *operates under an exemption or exclusion* under the securities, commodity futures or derivatives legislation of its home jurisdiction. The foreign liquidity provider exemption is not limited to foreign dealers that are registered or licensed under their home jurisdiction, and therefore includes foreign dealers that may be exempt from registration or licensing, such as under the CFTC 's $8 billion *de minimis* exemption from swap dealer registration.

(ii) Amendments to the foreign dealer and foreign adviser exemptions and addition of new foreign sub-adviser exemption

We have significantly streamlined the foreign dealer exemption (section 38) and the foreign adviser exemption (section 43) so that they more closely conform to the international dealer and international adviser exemptions (in sections 8.18 and 8.26 of NI 31-103).

In addition, we have added a new exemption for foreign sub-advisers (section 44) similar to the exemption for international sub-advisers in section 8.26.1 of NI 31-103. This exemption permits a foreign sub-adviser to provide advice to certain registrants, without having to register as an adviser in Canada.

Consequently, a foreign dealer, adviser or sub-adviser that complies with the conditions of these exemptions will receive a *full exemption* from the business conduct rule provided they are located in a specified jurisdiction, rather than a more limited exemption from specific provisions of the rule based on an equivalence assessment of every single provision for each foreign jurisdiction.

Limitation of exemption to foreign firms in "specified foreign jurisdictions"

In view of the fact foreign dealers and foreign advisers may be trading with or advising EDPs that could include small businesses or other derivatives parties that would not meet the financial thresholds in the permitted client definition in NI 31-103 – the class of investors that international dealers and advisers are permitted to deal with under NI 31-103 – and in view of the fact that the regulatory regimes for derivatives in many foreign jurisdictions remain less developed than the securities regulatory regimes, we have limited the "regular" foreign dealer, adviser and sub-adviser exemptions in NI 93-101 to certain G20 Jurisdictions plus certain additional foreign jurisdictions[1] that have committed to adopting a

[1] The foreign jurisdictions under consideration include Australia, Brazil, the member jurisdictions of the European Economic Area, Hong Kong, Japan, South Korea, New Zealand, Singapore, Switzerland, United States of America and the United Kingdom.

comprehensive regulatory framework that are comparable, on an outcome's basis, to the core principles in the rule.

In the case of other foreign jurisdictions not listed in the appendices, we will consider applications for relief from firms in these foreign jurisdictions (allowing for future amendments to the list, once the CSA has had an opportunity to consider the regulatory regime in these other jurisdictions).

(iii) Changes to the definition of "eligible derivatives party"

As described in the next section, we have made significant changes to the EDP definition including

- eliminating the $10 million financial threshold in the non-individual commercial hedger category (from $10 million to $0); and

- including a transition period to allow derivatives firms to treat non-individual permitted clients, qualified parties, accredited counterparties, and eligible contract participants under CFTC rules, as EDPs for up to five years;

As a result of these changes, we have significantly expanded the class of persons and companies with whom a foreign dealer or foreign adviser may deal on an exempt basis in reliance on the foreign dealer, adviser and sub-adviser exemptions. Please see the summary of comments and the CSA response in the next section.

(iv) Additional guidance on the application of the rule as it relates to dealers that conduct activities in Canada and in foreign jurisdictions

In response to the request for additional Companion Policy guidance, we have included additional guidance to clarify

- that a foreign dealer will be a derivatives dealer in a local jurisdiction (and therefore subject to the proposed rules in that local jurisdiction) if it conducts trading or advising activities with a derivatives party located in the local jurisdiction;

- a non-dealer counterparty (i.e., a customer of a derivatives dealer) will be in a local jurisdiction if its head office or principal place of business is located in such local jurisdiction or if it maintains an office or place of business in the local jurisdiction and receives trading or advising services through that office or place of business;

- the assessment of whether a firm is a derivatives dealer or derivatives adviser is based on a holistic assessment of the firm's activities and the manner in which it holds itself out to Canadian counterparties; accordingly, the activities of the firm in one jurisdiction may, depending on the facts, affect the characterization of its activities in another jurisdiction; for example, a U.S. firm that is registered as a swap dealer with the CFTC will generally be considered to be a derivatives dealer when it transacts with a counterparty in Canada;

- if a foreign dealer is subject to the proposed business conduct rule, the obligations in the proposed rule will only apply to trading or advising activities with respect to derivatives parties located in the local jurisdiction.

As discussed below, a foreign dealer that is a Schedule III Bank may conduct derivatives-related activities from a place of business in Canada and rely on the foreign liquidity provider exemption in section 36 of the business conduct rule.

3. Comments on the definition "eligible derivatives party"

In the business conduct rule, the term "eligible derivatives party" (**EDP**) is used to refer to those derivatives parties that do not require the full set of protections afforded to "retail" customers or investors, either because they may reasonably be considered sophisticated or because they have sufficient financial resources to purchase professional advice or otherwise protect themselves through contractual negotiation with the derivatives firm.

Similar to the approach in NI 31-103, the business conduct rule takes a two-tiered approach to investor/customer protection, as follows:

- certain core obligations (fair dealing, conflict of interest, know your derivatives party, handling complaints, compliance and recordkeeping) apply in all cases when a derivatives firm is dealing with or advising a derivatives party, regardless of the level of sophistication or financial resources of the derivatives party; and

- certain additional obligations (e.g., a suitability determination):

    - do not apply if the derivatives firm is dealing with or advising a derivatives party that is an EDP and is neither an individual nor an eligible commercial hedger, and

    - apply but may be waived if the derivatives firm is dealing with or advising a derivatives party who is an EDP that is an individual or an eligible commercial hedger.

In the version of the proposed rules published for comment in 2018, the definition of EDP was drafted to be similar to the definition of "permitted client" in NI 31-103, with some modifications to reflect the different nature of derivatives markets and participants.

The principal difference between the definition of EDP in the proposed rules and the definition of "permitted client" in NI 31-103 related to the inclusion of the category of non-individual commercial hedger in clause (n) of the definition:

> "eligible derivatives party" means, for a derivatives party of a derivatives firm, any of the following:
>
> …
>
> (n) a person or company, other than an individual, that has represented to the derivatives firm, in writing, that
>
> (i) it has the requisite knowledge and experience to evaluate the information provided to the person or company about derivatives by the derivatives firm, the suitability of the derivatives for the person or company, and the characteristics of the derivatives to be transacted on the person or company's behalf,
>
> ~~(ii) it has net assets of at least $10 000 000 as shown on its most recently prepared financial statements, and~~
>
> (iii) it is a commercial hedger in relation to the derivatives that it transacts with the derivatives firm;

Because the financial threshold to qualify as a commercial hedger has been removed, subsection (ii) of clause (n) of the EDP definition has now been deleted from the rule.

The category of non-individual commercial hedger does not exist in the definition of "permitted client" in NI 31-103.

Summary Comments and Responses in relation to the EDP Definition	
Comments and concerns	CSA response
Preference by some commenters for existing "permitted client" definition in NI 31-103 A number of commenters expressed concern that the CSA was developing a new definition for sophisticated customers and proposed either that the CSA instead use the existing "permitted client" definition or amend the definition of EDP to include "any 'permitted client' (as defined in NI 31-103) that is not an individual". These commenters noted that the "permitted client" definition is an established definition for sophisticated investors. If a registered adviser has already determined that a client is a permitted client, it is an unnecessary regulatory burden to force the registered firm to "repaper" the client as an EDP – particularly if the registered firm now has to obtain representations from the client that the client has sufficient "knowledge and experience" to trade derivatives. One commenter argued that all derivatives transactions with "permitted clients", "accredited counterparties" or "qualified parties" that pre-exist the effective date of NI 93-101 should be grandfathered to ease regulatory burden without any corresponding deleterious impact to markets or EDPs. In the alternative, the application of requirements with respect to EDPs should be delayed for such preexisting transactions for a period of 4 years.	We remain of the view that the proposed rules should include a definition of "eligible derivatives party" that is based on the definition of "permitted client" in NI 31-103 but is tailored to reflect the different nature of derivatives markets and participants. As currently drafted, the definition of "eligible derivatives party" is generally consistent with the current regulatory regimes in the U.S. and Canada in relation to OTC derivatives. In addition, the eligible derivatives party concept is generally similar to the definition of "permitted client" in NI 31-103. We have amended the proposed rules to include a transition period (i.e., of up to five years) that would • allow a derivatives firm to rely on an existing documentation that establishes that a client is a permitted client and to treat that client as an EDP during the transition period, and • obtain new documentation confirming that the client is an EDP after the transition period has expired.

Non-individual Commercial hedgers – $10 million financial threshold A number of commenters expressed concerns with the commercial hedger category of the definition of "eligible derivatives party" (clause (n) reproduced above) and suggested that the financial threshold of $10 million net assets should be reduced or eliminated. Several commenters argued that a financial threshold is not a good proxy for sophistication as it relates to para. (n). A new company with limited financial resources may be run by experienced and educated personnel. Such counterparties may be special purpose vehicles, intentionally structured to minimize net assets. If they do not qualify as EDPs, many hedgers will not be able to have the benefit of a key risk management tool where derivatives dealers make a decision only to deal with EDPs, particularly with respect to foreign exchange forwards, swaps and options, and interest rate swaps. Several commenters argued that if there is to be a financial threshold, $10 million in net assets is not appropriate and it should be significantly lowered to be no more than $1 million. If the threshold of $10 million is to be maintained, it was suggested that total assets and not net assets should be used. One commenter argued that commercial hedger should not be subject to a financial requirement twice as onerous as that required of individuals, and the requirement should be structured to allow parties who own financial assets with an aggregate realizable value before tax but net of any related liabilities of less than $5 million with the ability to be categorized as EDPs, if they can demonstrate they are commercial hedgers. One commenter argued the hedging exemption should be similar to the "hedger" category under the "accredited counterparty" definition in the QDA and the hedger exemption included as a class of "qualified party" in the various provincial OTC derivatives blanket orders currently in force.	We have removed the financial threshold for the non-individual commercial hedger category of the EDP definition. The removal of the financial threshold for this category is consistent with the current regulatory regimes in Canada in relation to OTC derivatives and represents a lower threshold than the $1 million in net assets for hedgers in the U.S. As a result of these changes, we have significantly expanded the class of persons and companies with whom a foreign dealer or foreign adviser may deal on an exempt basis in reliance on the foreign dealer, adviser and sub-adviser exemptions. In the case of registered firms and other firms that are subject to the business conduct requirements, these changes allow these firms to deal with these derivatives parties on a "light touch" basis, as set out in section 7 of the rule. We acknowledge that the removal of the financial threshold in the non-individual commercial hedger category of the EDP definition for entities that trade or advise others in relation to *OTC* derivatives potentially creates a regulatory differential for registered firms and international firms that trade or advise others in related to *listed* derivatives (i.e., exchange-traded options and futures), since the definition of "permitted client" in NI 31-103 and the IIROC definition of "institutional client" in IIROC Rule subsection 1201(2) does not currently include a non-individual commercial hedger category. We intend to consult with CSA and IIROC staff and relevant stakeholders with a view to addressing this regulatory differential as between OTC derivatives and listed derivatives.
A number of commenters proposed that the financial thresholds under paras. (m), (n) and (o) be harmonized with the thresholds for an "eligible contract participant" under CFTC rules (i.e., for a non-individual counterparty, total assets of USD 10 million,	As noted above, we have removed the financial threshold for the non-individual commercial hedger category of the EDP definition. As a result of this change, the financial thresholds for a non-individual commercial hedger will be lower in Canada than under CFTC rules.

and for a non-individual counterparty that is a hedger, net worth of USD 1 million). Two commenters proposed that the definition of EDP be amended to include "any derivatives party that is an eligible contract participant under CFTC rules".	We have also included a transition period in section 47 of the proposed business conduct rule relating to derivatives parties that are eligible contract participants. Specifically, a derivatives firm that has previously confirmed a derivatives party's status as a permitted client or eligible contract participant prior to the effective date of NI 93-101 (for example, in documentation such as an ISDA master agreement, account opening documentation or an investment management agreement) is able to treat that representation as if the derivatives party had represented to the derivatives firm that it qualifies as an "eligible derivatives party" for the purposes of NI 93-101. This transition provision is only available for use by a derivatives firm with respect to non-individual permitted clients. Please refer to Section 47 of the Companion Policy for additional guidance on this transition period for existing customers.
Commercial hedgers – knowledge and experience representations A number of commenters expressed concern over the knowledge and experience representations in clauses (m), (n) and (o) and suggested these should be removed. These commenters noted there is no corresponding requirement in the definitions of "permitted client" in NI 31-103 or "eligible contract participant" in the U.S. Two commenters argued that no knowledge and experience requirement should apply to paras. (m), (n) and (o), similar to NI 31-103 where a bright line financial resources test is used. Under the *Quebec Derivatives Act* (**QDA**), a knowledge and experience test only applies to the accredited counterparty definition under paragraph (7) and not the hedger branch of the definition under paragraph (12). In addition, creating an affirmative obligation on dealers and advisers to assess the reasonableness of representations from counterparties who satisfy the financial thresholds in paragraphs (m), (n) or (o) of the EDP definition imposes a significant burden with no meaningful benefit to derivatives parties.	The modifications to the "eligible derivatives party" definition, including the proposed $0 financial threshold for a entity to qualify as an eligible commercial hedger, represents a departure from the traditional delineation between "permitted client" and retail clients in the context of the securities regime to ensure the derivatives regime is tailored appropriately to derivatives markets. The rationale for using financial thresholds as a proxy to assess the degree of sophistication is generally based a combination of the customer's ability to withstand the risk loss and their ability to understand the risks. OTC derivatives are complex financial products; therefore, this representation remains necessary to ensure that the counterparties who wish to qualify as "eligible derivatives parties" under paragraphs (m), (n) or (o) are required to assess their ability to understand the risks and therefore, could be treated as a retail customer for the purposes of the rule in circumstances where they do not believe they have sufficient knowledge and experience to transact in derivatives (or a particular derivative) without the benefit of the additional customer protections in the rule. Further, by removing the financial threshold for commercial hedgers to qualify as an "eligible derivatives party", it is especially important for those entities that wish to

	qualify under that category of "eligible derivatives party" to assess their ability to understand the risks of transacting in derivatives.
One commenter proposed that the definition be expanded to include corporations and other entities that are controlled by individuals who otherwise meet the definition of EDP, similar to paragraph (t) of the definition of "accredited investor" in NI 45-106.	Clause (p) of the definition of EDP is intended to fulfil a similar function. Clause (p) provides as follows: "eligible derivatives party" means, for a derivatives party of a derivatives firm, any of the following: … (p) a person or company, other than an individual, that has represented to the derivatives firm, in writing, that its obligations under derivatives that it transacts with the derivatives firm are fully guaranteed or otherwise fully supported, under a written agreement, by one or more eligible derivatives parties, other than a person or company that only qualifies as an eligible derivatives party under paragraph (n) or under paragraph (o).

4. Comments on the equivalence schedules for derivatives dealers that are IIROC dealer or Canadian financial institutions

The equivalence schedules, which were not populated in the previous publication of the rule, have now been completed.

Section 39 of the rule includes an exemption for derivatives dealers that are IIROC dealers that comply with corresponding IIROC provisions relating to a transaction with a derivatives party. Similarly, this exemption can be relied on provided (i) the dealer is complying with relevant the IIROC requirements that correspond to the provision specified in Appendix B, and (ii) the applicable Canadian regulator is notified of instances of material non-compliance with any of the provisions specified in Appendix B.

Section 40 of the rule now includes an exemption for derivatives dealers that are Canadian financial institutions that comply with corresponding Bank Act or OSFI requirements relating to a transaction with a derivatives party (note, the provisions a Canadian financial institution is exempt from are listed in Appendix C of the rule). This exemption can be relied on provided (i) the dealers is complying with relevant the OSFI requirement (or *Bank Act*) requirements that correspond to the provision specified in Appendix C, and (ii) the applicable Canadian regulator is notified of instances of material non-compliance with any of the provisions specified in Appendix C.

5. Concerns with the potential impact of proposed rules on registered advisers

Exemption for registered advisers

Several commenters argued that registered advisers should be exempt from NI 93-101 given the rigorous proficiency standards, fiduciary duty of care owed by advisers to their investors, minimum insurance and capital requirements, and the robust, principles-based regime registered advisers must adhere to under NI 31-103. The creation of a parallel, but not identical, regulatory regime is not warranted to address IOSCO's OTC derivatives market concerns, as portfolio managers are subject to sufficiently robust regulation. Pursuant to NI 31-103, fair dealing, conflicts of interest, derivatives party specific needs and objectives, suitability and fair terms and pricing obligations already exist for advisers and should be removed from NI 93-101 to avoid similar, but not identical, obligations.

Accordingly, several commenters proposed that the CSA provide an exemption from the derivatives business conduct and registration rules for a person or company that is

- registered as an adviser under securities or commodity futures legislation, and
- satisfies the adviser proficiency requirements for advisers that advise in relation to options and futures.

One commenter suggested that, if not granted an outright exemption, advisers and sub-advisers should only be required to comply with Part 3 Division 1 (i.e., fair dealing, conflict of interest, and know-your-derivatives party).

CSA Response

Although we generally agree with many of these comments, we do not support a complete exemption for registered advisers as we are concerned that this will

- create regulatory gaps and uncertainty,[2]
- result in inconsistent treatment between different categories of registered firms (such as derivatives dealers and portfolio managers) that perform similar activities,[3] and

[2] This is because certain requirements in NI 31-103, such as the know-your-client (KYC) and suitability requirements in Part 13 of NI 31-103 and the client disclosure requirements in Part 14 of NI 31-103, are framed in terms of "purchases" and "sales" of "securities" rather than "transactions" in "derivatives". We also believe it would create significant regulatory uncertainty to regulate certain types of OTC derivatives as securities for registered advisers but as derivatives for investment dealers and other derivatives dealers.

[3] For example, both registered advisers and investment dealers/IIROC members advise funds and manage accounts that may contain OTC derivatives. We believe it would create significant regulatory uncertainty to regulate derivatives advisers as securities advisers and investment dealers/IIROC members as derivatives dealers for the same managed account activities.

- result in an increased regulatory burden for registered advisers.[4]

However, we agree with the principle that registered advisers are already subject to a comprehensive registration and business conduct regime through NI 31-103, and the derivatives rules should, as much as possible, allow these firms to leverage off these existing regimes. We should only impose new requirements on registered advisers where we have identified a significant regulatory gap.

We believe we can minimize the impact of the new rules on registered advisers through

- revising certain requirements (such as the senior derivatives manager requirements in Part 5 of NI 93-101) so that they apply to "derivatives dealers" rather than "derivatives firms"

- including a provision similar to section 9.3 [*Exemptions from certain requirements for IIROC members*] of NI 31-103 to exempt, where appropriate, a registered adviser from a requirement in the derivatives rules if they comply with the similar requirement in NI 31-103

- explaining through Companion Policy guidance how compliance with certain requirements of NI 31-103 could reasonably be viewed as also satisfying similar requirements for derivatives in the derivatives rules.

6. Concerns with the application of the business conduct rule to unregistered entities

A number of commenters suggested that the business conduct rule should only apply to a person or company that is required to be registered under the proposed registration rule, NI 93-102.

These commenters suggested that to otherwise apply the business conduct rule to firms that are not otherwise subject to the registration rule could cause uncertainty and confusion and result in two different principal regulators. In addition, the value of having the *de minimis* exemption in NI 93-102 would be undercut if market participants are not able to rely on the same exemption under NI 93-101. Consistent exemptions should be provided across NI 93-101 and NI 93-102.

These comments focused on the following types of entities:

- Canadian financial institutions
- Entities that offer foreign exchange (FX) products and services
- Entities that may be exempt from registration under the *de minimis* exemption in NI 93-102 or CFTC and SEC rules

Canadian financial institutions

One commenter suggested that, if the CSA used an outcomes-based approach in determining substituted compliance taking into account OSFI Guideline B-7 and other OSFI prudential rules, Canadian financial institutions that are subject to OSFI supervision would be exempt from all the requirements under NI 93-

[4] This is because, in many respects, the proposed derivatives rules represent a "lighter regulatory touch" than NI 31-103. For example, the EDP definition in the derivatives rules includes a "commercial hedger" category that is not included in the "permitted client" definition in NI 31-103.

101.

This commenter noted that substituted compliance extended to Canadian banks by the CFTC recognizes the absence of the need to address the requirements set out in the IOSCO DMI Report[5] because of the presence of prudential regulation by OSFI through extensive and effective regulations and guidance. Accordingly, IOSCO's recommendations recognize that appropriate prudential regulation in a particular jurisdiction can easily provide sufficient regulatory coverage. Existing OSFI regulations and guidance are effective and supply the basis to exempt Canadian financial institutions from the requirements under NI 93-101. However, if the CSA does not accept this approach, the commenter referred the CSA to the completed Appendix A of the Initial Draft of NI 93-101 for foreign derivatives dealers and Appendix C for Canadian federally regulated financial institutions (**FRFIs**) showing which specific sections should be given substituted compliance.

FX Transactions

A number of commenters suggested that FX transactions should be excluded from the scope of NI 93-101, including, e.g., if a derivatives dealer is in compliance with the FX Global Code of Conduct.[6] These products are largely used for hedging and risk management, and not speculative purposes. They introduce no systemic risk.

Entities that may be exempt from registration under de minimis exemptions

A number of commenters expressed concern over the fact that the business conduct rule may apply to firms that are otherwise exempt from registration as a derivatives dealer, such as under the proposed *de minimis* exemptions in the proposed registration rule (the **Registration De Minimis Exemptions**).[7] The commenters were concerned that the application of the business conduct rule to firms that were exempt under the Registration De Minimis Exemptions could severely limit the efficacy of any such exemption as the costs imposed on otherwise exempt derivatives dealers could be significant. The commenter noted that some of these obligations, such as the obligations regarding recordkeeping and senior management, would impose significant burdens on some derivatives firms because of the introduction of broad, new regulatory obligations.

CSA Response

As previously explained, the CSA have chosen to split the derivatives registration and business conduct regimes into two separate rules to ensure that all derivatives firms remain subject to certain minimum standards in relation to their business conduct towards their customers and counterparties, regardless of their registration status in certain jurisdictions.

We remain of the view that this is the appropriate approach. However, we have carefully considered the commenters' comments and have made changes to the proposed rules to reflect the comments.

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[5] IOSCO "International Standards for Derivatives Market Intermediary Regulation, Final Report", June 2012 ("DMI Report").

[6] See FX Global Code at https://www.globalfxc.org/docs/fx_global.pdf and see also https://www.bis.org/about/factmktc/fx_global_code.htm

[7] See the exemptions in section 50 [*Derivatives dealers with a limited notional amount under derivatives*] and section 51 [*Commodity derivatives dealers with a limited notional amount under commodity derivatives*]

Response re Canadian financial institutions

We remain of the view that Canadian financial institutions that may be exempt from registration in certain jurisdictions such as Ontario should nevertheless be subject to minimum of standards of business conduct when dealing with their customers.

We note that many of these financial institutions are subject to business conduct obligations when dealing with customers in the U.S. under CFTC and SEC rules and do not believe it would be fair or appropriate for a Canadian financial institution to be subject to business conduct obligations when dealing with a customer in the U.S., but not be subject to similar business conduct rules when dealing with a customer in Canada.

We believe that this approach is supported by recent events, such as

- Events that led to the development of the (voluntary) FX Code of Conduct by the Bank for International Settlements, various central banks and FX market participants[8]
- Recent OSC settlement agreements with two Canadian banks related to compliance failures in the banks' foreign exchange (FX) trading businesses.[9] These failures allowed FX traders to share confidential customer information in chatrooms with FX traders at competitor firms.
- Recent events that have led the federal government to expand the Financial Consumer Agency of Canada (FCAC) oversight of banks' internal business processes and procedures including ensuring that a bank's product and service offerings are appropriate for, and take into consideration, the customer's needs and circumstances. The FCAC will also have the right to ensure that remuneration paid to bank staff, including benefits, do not impede any policies and procedures implemented to ensure the "appropriateness" of offered products or services.

Response re FX Transactions

Since the financial crisis, there have been numerous cases of serious market misconduct in the global derivatives market and short-term FX market; for example, misconduct relating to the manipulation of benchmarks and front-running of customer orders, breaches of client confidentiality and failure to adequately manage conflicts of interest. Therefore, we remain of the view that FX transactions should be subject to the core business conduct obligations of the rule.

Response re entities exempt from registration under de minimis exemptions in NI 93-102

We remain of the view that entities that trade OTC derivatives with regularity and that engage in dealer-like activities (such that they do not come within the conditions of the end-user exemption in section 37 of the business conduct rule) should be subject to the core business conduct obligations of the rule,

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[8] https://www.bis.org/press/p170525.htm

[9] *Re Royal Bank of Canada* (August 30, 2019) https://www.osc.ca/en/tribunal/tribunal-proceedings/royal-bank-canada-re and *The Toronto-Dominion Bank* (August 30, 2019) https://www.osc.ca/en/tribunal/tribunal-proceedings/toronto-dominion-bank-re

including the fair-dealing, gatekeeper KYC and conflicts of interest provisions in Division 1 of Part 3 of the rule and the basic record-keeping requirements in Part 5 of the rule.

However, we accept that for smaller derivatives dealers, such derivatives dealers that would meet the conditions of the Registration De Minimis Exemptions that were proposed in the registration rule, the costs of complying with certain obligations under the business conduct rule, including the Senior Derivatives Manager provisions in Part 5 of NI 93-101, may outweigh the benefits to market participants.

Accordingly, we have included an exemption from certain requirements in the business conduct rule, including the Senior Derivatives Manager provisions in Part 5 of NI 93-101, for entities whose total aggregate notional amount of derivatives outstanding does not exceed certain specified thresholds.

7. Concerns with the timing of implementation and the need for a reasonable transition period

We received a large number of comments on the timing and implementation of NI 93-101. Comments included the following:

- Harmonization of NI 93-101 to US rules, taking into account the smaller market size in Canada, is critically important, and the implementation of NI 93-101 should be delayed until the later of the date on which the complete revised CFTC business conduct rules are in force and the date on which the SEC`s business conduct rules are in force.

- A transition period of at least three years, starting with the date the rules come into force, should be provided and NI 93-101 and NI 93-102 should take effect concurrently.

- At least a one-year implementation period, after date of final publication, is reasonable. This includes with respect to energy commodity derivatives market participants.

- A one-year transition period is not reasonable. At least a two-year transition period in required to provide time to meet the new requirements.

- Further to section 45(3), clarification is required to determine under what circumstances sections 20 and 28 will need to be complied with. When relying on the representations as set out in section 45(3)(b), only section 8 should need to be complied with as it relates to such individual EDPs and commercial hedgers.

- The CSA should assess the impact of the proposed amendments to NI 31-103 (the Client Focused Reforms) on the CSA's investor protection and market efficiency concerns prior to implementation of this regime.

CSA Response

We have amended the business conduct rule to include a one-year delay to the effective date of the rule together with transition provisions as described below.

Response re effective date

NI 93-101 has been amended to provide as follows:

49. **(1)** This Instrument comes into force on [*insert date of publication + one year*].

(2) In Saskatchewan, despite subsection (1), if these regulations are filed with the Registrar of Regulations after [insert date], these regulations come into force on the day on which they are filed with the Registrar of Regulations.

Response re transition periods

We have amended NI 93-101 to include transition periods in relation to existing non-individual derivatives parties and existing transactions.

As noted above, section 47 includes a transition period of up to five years that that would

- allow a derivatives firm to rely on an existing documentation that establishes that a client is a permitted client and to treat that client as an EDP during the transition period, and

- obtain new documentation confirming that the client is an EDP after the transition period has expired.

In addition, section 48 provides that the requirements of NI 93-101, except for section 8 [*Fair dealing*], do not apply to a pre-existing transaction with a permitted client, accredited counterparty, qualified party, or an eligible contract participant under CFTC rules.

As explained in Part 8 of the Companion Policy, a derivatives firm that has previously confirmed a derivatives party's status as a permitted client, qualified party, accredited counterparty, or eligible contract participant, prior to the effective date of the business conduct rule (for example, in documentation such as an ISDA master agreement, account opening documentation or an investment management agreement) is able to treat that representation as if the derivatives party had represented to the derivatives firm that it qualifies as an "eligible derivatives party" for the purposes of the business conduct rule. This transition provision is only available for use by a derivatives firm with respect to non-individual permitted clients.

Following the effective date of NI 93-101, (i) for any transaction entered into with a derivatives party where the derivatives firm has not confirmed a derivatives party's status (as a permitted client, qualified party, accredited counterparty or an eligible contract participant) or (ii) in circumstances where the derivatives firm establishes an entirely new relationship with a derivatives party, the expectation is that the documentation (for example, in documentation such as an ISDA master agreement, account opening documentation or an investment management agreement) used by a derivatives firm to confirm the derivatives party's status under the business conduct rule, will refer exclusively to the term and categories of eligible derivatives party as defined in section 1(1) of the business conduct rule.

For example, if an institutional end-user (such as a pension fund) enters into a derivative transaction with a derivatives firm following the effective date of the business conduct rule and the derivatives firm has already confirmed the derivatives party's status as a permitted client or an eligible contract

participant in writing (for example, in documentation such as an ISDA master agreement, account opening documentation or an investment management agreement), then the derivatives firm can treat such representations as having obtained the required eligible derivatives party representation. If however, a derivatives firm enters into a derivatives transaction following the effective date of the business conduct rule with an institutional end-user and the derivatives firm has not previously obtained the required representation from the derivatives party, then the derivatives firm is required to confirm a derivatives party's status as an eligible derivatives party by using the definition and the categories of eligible derivatives party defined in section 1(1) of the business conduct rule.

8. Responses to Specific Requests for Comment

a) Definition of Affiliate

In the Notice and Request for Comment in respect of the proposed business conduct rule published on June 14, 2018, we asked the following question:

> 1) Definition of "affiliated entity"
>
> The Instrument defines "affiliated entity" on the basis of "control" and sets out certain tests for "control". In the context of other rules relating to OTC derivatives, we are also considering a definition of "affiliated entity" that is based on accounting concepts of "consolidation" (a proposed version of the definition is included in Annex IV). Please provide any comments you may have on (i) the definition in the Instrument, (ii) the definition in Annex IV, and (iii) the appropriate balance between harmonization across related rules and using different definitions to more precisely target specific entities under different rules.

A number of commenters noted that a consistent definition of "affiliated entity" should be used across all OTC derivatives rules in all provinces and suggested a separate consultation. However, overall a majority of the commenters indicated that they preferred the control-based test for concept of affiliate for NI 93-101 and NI 93-102.

Several commenters noted that a definition based on "control" is the preferable definition across all derivatives rules because that approach is consistent with definitions of affiliation found in business corporations' statutes across Canada and is therefore a concept with which businesses are familiar. In addition, the only instance of connecting affiliated entities by consolidated financial statements is in NI 94-101 *Mandatory Central Counterparty Clearing of Derivatives*, which related to an intragroup exemption.

One commenter suggested that the definition of "affiliated entity" be expanded to include discretionary portfolio management/advisory authority, as many investment managers will have advisory relationships with managed accounts and investment funds that they do not control by virtue of the definitions, and also do not consolidate for accounting purposes.

CSA Response

While we acknowledge that a consistent definition of "affiliated entity" across all OTC derivatives rules may be desirable, we note that certain rules that apply to derivatives markets that are primarily aimed at addressing systemic risk are based on accounting concepts of consolidation (which is consistent with

similar rules domestically and globally that are aimed at addressing systemic risk). Yet, we are also concerned about creating inconsistencies with other rules that may apply to the derivatives firms, such as NI 31-103 and NI 52-107 *Acceptable Accounting Principles and Auditing Standards*, as well as corporate legislation.

Accordingly, we have retained the control-based test for the purposes of the present republication of the proposed rules for comment but are continuing to review this matter and may propose a separate consultation at a later date on this.

As part of this consultation, we will consider the comment that the definition of affiliate should be expanded to include discretionary portfolio management/advisory authority to cover managed accounts and investment funds that advisers do not control by virtue of the definitions, and also do not consolidate for accounting purposes. Part 2 [*Application*] of the business conduct rule contemplates that the proposed business conduct rule will not apply to inter-affiliate transactions, other than an affiliated entity that is an investment fund.[10] We remain of the view that the business conduct rule should apply to situations where a derivatives adviser provides advisory services to a managed account or investment fund, regardless of whether the account or investment fund is considered an affiliate. Accordingly, we do not anticipate the consultation on the definition of affiliate as affecting the scope of this exclusion.

The responses to the other specific requests for comment are dealt with elsewhere in this summary.

9. Miscellaneous other comments (by Part and Section)

Part 1 Definitions and Interpretation

Definitions – Canadian financial institution

One commenter commented that the CSA should harmonize the definitions of "Canadian financial institution", "managed account", the definitions used for the purposes of categorizing an EDP and other definitions across all relevant national instruments including, specifically, NI 31-103, NI 45-106 and the proposed derivatives business conduct and registration rules.

Two commenters noted that the definition of "Canadian Financial Institution" in the proposed rules is no longer accurate and needs to be updated. One of those commenters specifically noted as follows:

> *"More specifically, it is reflective of the definition of NI 45-106, but this definition has legacy language which requires updating. Paragraph (a) of this definition refers to credit union centrals as central cooperative credit societies under s. 473(1) of the Cooperative Credit Associations Act (Canada) (CCAA).*

[10] Section 4 provides as follows:

Application – affiliated entities
4. A person or company is exempt from the requirements of this Instrument in respect of dealing with or advising an affiliated entity of the person or company, other than an affiliated entity that is an investment fund.

Section 473(1) of the CCAA provided a mechanism for provincially regulated centrals to "opt in" to federal regulation under the Part XVI of the CCAA. However, in its 2014 Economic Action Plan, the federal government signaled its intention to repeal Part XVI of the CCAA (including s. 473(1)). That repeal was effective on January 15, 2017 and the five provincial / regional centrals returned to being wholly provincially regulated.

The definition should be amended as follows:

"Canadian financial institution" means any of the following:

(a) a federal financial institution as defined in the Bank Act (Canada); or

(b) a loan corporation, trust company, trust corporation, insurance company, treasury branch, credit union, credit union central, caisse populaire, financial services cooperative, or league that is incorporated and regulated by or under an Act of the legislature of a province."

CSA Response

We thank the commenters for the comments. As a separate initiative, the CSA Legislative Review Committee (LRC) is developing an updated definition of this term for inclusion in NI 14-101.

It is currently anticipated that the new definition in NI 14-101 would read as follows:

"Canadian financial institution" means

(a) a bank listed in Schedule I or II to the *Bank Act* (Canada);
(b) a body corporate to which the *Trust and Loan Companies Act (Canada)* applies;
(c) an association to which the *Cooperative Credit Associations Act (Canada)* applies;
(d) an insurance company or a fraternal benefit society incorporated or formed under the *Insurance Companies Act (Canada);*
(e) a trust, loan or insurance corporation incorporated by or under an Act of the legislature of a province or territory;
(f) a credit union, credit union central, caisse populaire, financial services cooperative or credit union league or federation that is authorized to carry on business by or under an Act of the legislature of a province or territory; or
(g) a treasury branch established and regulated by or under an Act of the legislature of a Canadian province or territory;

This proposed definition was published for comment in April 2021. Once this new definition has been included in NI 14-101, consequential amendments to existing CSA rules that include this term will be made to delete the definition in these rules.

Definitions – Derivatives dealer – business trigger test

A number of commenters expressed concern with the "business trigger" test for determining whether an entity is a derivatives dealer for the purposes of the proposed rules. In addition, a number of commenters questioned the appropriateness of one or more of the factors set out in Section 1 [*Factors in determining a business purpose – derivatives dealer*] of the proposed companion policies to the proposed rules. These factors are as follows:

- Acting as a market maker

- Directly or indirectly carrying on the activity with repetition, regularity or continuity
- Facilitating or intermediating transactions
- Transacting with the intention of being compensated
- Directly or indirectly soliciting in relation to transactions
- Engaging in activities similar to a derivatives adviser or derivatives dealer
- Providing derivatives clearing services

Several commenters suggested that one or more of the above factors should be deleted, and that the determination of whether or not an entity was a derivatives dealer should be limited to the first factor, namely acting as a market maker. However, other commenters suggested that parties should be able to make a market in derivatives without necessarily being considered a derivatives dealer.

A common theme underlying many of the comments was that the commenters wished the CSA to provide additional guidance to make it clear that the proposed rules would not apply to their activities.

Many of these comments were similar to comments previously raised in connection with the April 2017 publication for comment of the proposed business conduct rule. Accordingly, in addition to the responses below, please see the CSA's previous responses to these comments published in June 2018.

CSA Response

In Canada, the registration requirement for securities and derivatives market participants is set out in Canadian securities legislation. Under this legislation, unless an exemption from registration is available, a person or company is generally required to register in one or more categories of registration if they are, *inter alia*,

- in the business[11] of trading securities or derivatives,[12]
- in the business of advising others in relation to securities or derivatives, or
- hold themselves out as being in the business of trading or advising others in relation to securities or derivatives.

The test for determining whether a person or company is considered "in the business" of trading or advising others in relation to securities or derivatives is commonly referred to as the "business trigger".

The CSA have provided guidance on the interpretation of the business trigger as it relates to securities market participants in Section 1.3 [*Fundamental concepts*] of the companion policy to NI 31-103. This guidance reflects prior case law and regulatory decisions that have interpreted the business trigger test for securities matters.

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[11] In British Columbia, Manitoba and New Brunswick, the statutory trigger for registration is based on a trade trigger, but NI 31-103 provides an exemption for entities not in the business of trading securities.

[12] In Ontario, the registration requirement for entities in the business of trading in derivatives that are not securities has not yet been proclaimed into force.

The CSA have provided proposed guidance on the interpretation of the business trigger as it relates to derivatives market participants in Section 1 [*Factors in determining a business purpose – derivatives dealer*] of the proposed companion policies to the proposed rules. The criteria set out in the companion policies are based on the similar criteria set out in the companion policy to NI 31-103 but have been modified to reflect the different nature of derivatives markets and derivatives market participants. In particular, the criteria have been modified to place greater emphasis on the factor of "acting as a market maker" while retaining the flexibility to consider the other criteria as appropriate.

As explained in the companion policies to the proposed rules, in determining whether a person or company should be considered in the business of trading derivatives, the person or company should consider its activities holistically. We do not consider that all of the factors discussed above necessarily carry the same weight or that any one factor will be determinative.

In determining whether a person or company is subject to business conduct requirements under the proposed rule, a person should also consider the availability of exemptions in the proposed rule, such as the end-user exemption in section 37 of the proposed rule, for entities that may transact in derivatives with regularity but that do not otherwise engage in specified "dealer-like" activities. The CSA have included this exemption to provide market participants with regulatory certainty as to whether the requirements of the rules apply to their activities. The CSA recognize that many businesses may transact in derivatives as part of their regular business and may not deal with non-EDPs or otherwise engage in specified "dealer-like" activities. The CSA agree that it is not necessary for end-users that satisfy the criteria described in the end-user exemption to comply with the requirements of the business conduct rule either because they may not be considered "in the business of trading" or because they can rely on the exemption for end-users that do not engage in specified dealer activities.

Comparison with swap-dealer criteria in the U.S.

We also note that the criteria for determining whether a person or company is a derivatives dealer are generally similar to the criteria used by the U.S. CFTC and SEC in determining whether a person or company is a "swap dealer" or a "security-based swap dealer". The CFTC and SEC guidance have issued the following guidance in determining whether an entity is a swap dealer or security-based swap dealer:[13]

> The Dodd-Frank Act definitions of the terms "swap dealer" and "security-based swap dealer" focus on whether a person engages in particular types of activities involving swaps or security-based swaps. Persons that meet either of those definitions are subject to statutory requirements related to, among other things, registration, margin, capital and business conduct.
>
> The CEA and Exchange Act definitions in general encompass persons that engage in any of the following types of activity:

[13] See Commodity Futures Trading Commission and Securities and Exchange Commission Joint Final Rule, Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant", available at http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2012-10562a.pdf

(i) Holding oneself out as a dealer in swaps or security-based swaps,
(ii) making a market in swaps or security-based swaps,
(iii) regularly entering into swaps or security-based swaps with counterparties as an ordinary course of business for one's own account, or
(iv) engaging in any activity causing oneself to be commonly known in the trade as a dealer or market maker in swaps or security-based swaps.

These dealer activities are enumerated in the CEA and Exchange Act in the disjunctive, in that a person that engages in any one of these activities is a swap dealer under the CEA or security-based swap dealer under the Exchange Act, even if such person does not engage in one or more of the other identified activities. … [Footnotes omitted]

In the case of derivatives market participants that engage in derivatives activities in both Canada and the U.S., the CSA will consider the regulatory status of the participant in the U.S. in determining whether the participant should be subject to business conduct and registration obligations under the proposed rules.

Definitions – Derivatives dealer – proprietary trading firms

A number of commenters suggested that further clarification on the business trigger should be provided, including with respect to incidental activity, market making, proprietary trading and other factors.

One commenter suggested that a clear distinction between proprietary trading and activities that would deem a party to a derivatives dealer should be made similar to that made by the CFTC. It would follow that an exemption within the current end-user exemption should be provided. A definition of proprietary trading should consider the purposes of accommodating own risk management needs and speculating in changes in the market value of a derivative.

CSA Response

As noted above, we have included additional guidance on the business trigger test as well as the availability of exemptions from business conduct requirements, including the end-user exemption for entities that may transact in derivatives with regularity but that do not otherwise engage in traditional "dealer-like" activities.

As is the case for proprietary trading firms that trade securities or exchange-traded options or futures with regularity in connection with their business, a proprietary trading firm that transacts in OTC derivatives with regularity may, depending on the nature and extent of its activities, be considered "in the business" of trading derivatives. However, to the extent a proprietary trading firm is considered in the business of trading derivatives, it should consider whether it may rely on the exemption in section 37 [*Exemption for certain derivatives end-users*] of the proposed business conduct rule.

Definitions – Derivatives adviser – energy market participants

One commenter suggested that guidance specific to energy market participants should be provided to prevent activities of energy market participants from inadvertently moving out of the "end user" category

into the "derivatives adviser" category. A longer transitional period is essential were a former end user energy market participant be required to transition to the derivatives adviser category.

CSA Response

We have not included guidance specific to energy market participants but have added guidance in relation to the end-user exemption for all types of market participants.

We have included a delayed effective date of one year from the date of the final publication of the rule together with transition provisions to allow registered firms to treat permitted clients, qualified parties, accredited counterparties, and eligible contract participants under CFTC rules, as EDPs for up to five years.

Definitions – derivatives party assets

One commenter suggested that the definition should be more precisely defined, since the definition, as currently drafted, could be interpreted to include assets that are transferred outright to a dealer by a customer (and not merely pledged) as well as assets delivered to a dealer that are not directly related to derivatives transactions.

CSA Response

Additional clarification has been provided in the Companion Policy that the CSA's expectations with respect to derivatives party assets is that a dealer is at minimum expected to maintain records that allow the positions and the value of collateral delivered by each customer in connection with a derivatives transaction to be identified.

Definitions – commercial hedger

One commenter suggested the commercial hedger definition be expanded to include the hedging of an asset that the person or company uses in its business.

One commenter noted that, with respect to fluctuating foreign exchange rates involved in international commercial transactions, such as the Canadian energy industry, where a company's working currency, currency of index prices referenced in its transactions, and currency of settlement may not be the same currency, clarity should be provided that a person or company that hedges this currency risk would qualify as a commercial hedger. In addition, specific guidance should be provided on what transactions constitute a qualifying hedge, similar to those provided in foreign jurisdictions.

CSA Response

We have amended the definition of commercial hedger to the following:

> "commercial hedger" means a person or company that carries on a business and that transacts a derivative to hedge a risk in respect of that business related to any of the following:
>
> (a) an asset that the person or company owns, produces, manufactures, processes, or merchandises or, at the time the transaction occurs, reasonably anticipates owning, producing, manufacturing, processing, or merchandising;

(b) a liability that the person or company incurs or, at the time the transaction occurs, reasonably anticipates incurring;

(c) a service which the person or company provides, purchases or, at the time the transaction occurs, reasonably anticipates providing or purchasing;

In our view, the types of risks described in the commenters' comments come within the types of risks described in the definition. Please see also the additional Companion Policy guidance on the commercial hedger definition.

Part 2 Application and Exemption

Section 6 – Application – governments, central banks and international organizations

One commenter suggested that, to ensure consistency with NI 93-102, crown corporations should be provided an exemption.

CSA Response

We have not made this change. As noted above, the CSA have chosen to split the proposed derivatives registration and business conduct regimes into two separate rules to ensure that all derivatives firms remain subject to certain minimum standards in relation to their business conduct towards their customers and counterparties, regardless of their registration status in certain jurisdictions.

We note that the policy reasons for providing an entity with an exemption from registration may differ from the policy reasons for providing an entity with an exemption from business conduct requirements towards their customers and counterparties, including level-playing field concerns in circumstances where crown corporations are competing with other dealers in the market that are subject to these standards.

Section 7 – Exemptions from the requirements of this Instrument when dealing with or advising an eligible derivatives party

One commenter suggested the waiver requirement under section 7(2) with respect to eligible commercial hedgers be removed and eligible commercial hedgers be treated the same as all other EDPs. If a waiver is not obtained, access to the OTC derivatives market will effectively be eliminated.

One commenter questioned why specific waivers are required in areas in which such waivers are not required under NI 31-103 are required.

CSA Response

As previously explained in the Notice in connection with the June 2018 publication for comment, proposed NI 93-101, much like NI 31-103, takes a two-tiered approach to investor/customer protection, as follows:

- certain obligations apply in all cases when a derivatives firm is dealing with or advising a derivatives party, regardless of the level of sophistication or financial resources of the derivatives party; and
- certain obligations:
    - do not apply if the derivatives firm is dealing with or advising a derivatives party that is an EDP and is neither an individual nor an eligible commercial hedger, and
    - apply but may be waived if the derivatives firm is dealing with or advising a derivatives party who is an EDP that is an individual or an eligible commercial hedger.

See Appendix A to this Annex for a Table comparing the protections that do not apply to, or may be waived by, EDPs under Proposed NI 93-101 and "permitted clients" under NI 31-103.

Modifications have been made to the rule to facilitate the balancing of investor/customer protections and ensure access to derivatives products will not be limited; however, in order to ensure certain EDPs, such as those that qualify only on the basis of the eligible commercial hedger category of EDP can avail themselves of additional protections in the rule, those additional protections are assumed to apply unless those protections are expressly waived by the customer (and these additional protections would have automatically applied to many commercial hedgers but for the removal of the financial threshold for a commercial hedger to qualify as an EDP under the current proposal). The form of waiver is not prescribed; however, a derivatives firm may wish to use a form of waiver that is similar to the types of forms used by securities market participants when a permitted client provides a waiver from certain suitability/disclosure obligations under NI 31-103.

Part 3 Dealing with or advising derivatives parties

Division 1 – General Obligations towards all Derivatives Parties

Section 8 – Fair dealing

Two commenters suggested that the commentary on "fair" pricing should be removed. Given the nature of derivatives transactions, the term "fair" in the context of "fair price" should be interpreted to mean what is commercially reasonable.

One commenter suggested that, as it relates to EDPs, there should not be an obligation to transact under "fair" terms. Imposing a duty to provide a "fair" price will have unintended consequences. The end-user counterparty is usually in the best position to determine the best price for a transaction since it has the ability to solicit quotes from a number of derivatives dealers.

This commenter also suggested that the Companion Policy should be amended to provide that the expectation that a derivatives firm provide a derivatives party with information about the implications of terminating a derivative prior to maturity, including potential exit costs, and that deliberately selling a derivative that is not suitable for a derivatives party would not be considered "fair" only apply when facing non-EDPs.

One commenter suggested that the Companion Policy language on suitability is more properly address under section 12 (currently section 14) to remove any uncertainty that a dealer would be expected to consider suitability when dealing with EDPs.

This commenter also argued the Companion Policy language on providing a derivatives party with information about the implications of terminating a derivative prior to maturity should be clarified to state it only applies when termination is being discussed or negotiated, and there is no additional pre-transaction disclosure obligation that applies in respect of every transaction—implications of termination, including costs, are wholly dependent on market conditions at the time of termination.

This commenter also argued there are no analogous obligations of fair pricing imposed on securities dealers, and accordingly, if it is not appropriate to impose specific pricing obligations on spot FX transactions that may often involve customers with less sophistication and less bargaining power than derivatives parties, then it is not appropriate to do so with respect to FX derivatives transactions. If a dealer has satisfied the disclosure obligations in good faith, and the client has opportunity to consider pricing and consult third-parties prior to committing to a transaction, there should be no sweeping obligation to determine prices in a fair and equitable manner. Concerns on counterparties not understanding derivatives pricing should be addressed in section 19.

CSA Response

We remain of the view that flexible and principles-based companion policy guidance is appropriate and have accordingly made some changes to the wording of the commentary in the companion policy.

We have removed the reference to "suitability" to avoid confusion with the concept of suitability in section 14 of the proposed rule.

We do not believe it is correct to say that there are no analogous obligations of fair pricing imposed on securities dealers. A fair-pricing obligation may, depending on the nature and sophistication of the client, be an extension of the fair dealing obligation that applies to all registered firms and registered individuals.

Section 10 – Know your derivatives party

One commenter questioned the need for the know-your-derivatives party obligations in section 10(2) and (3) of the proposed rule and felt there was no strong policy justification for imposing additional requirements under NI 93-101. The commenter commented that Section 10(2)(b) is not an appropriate consideration when a dealer transacts opposite a third-party, and Section 10(3) should not apply when a dealer is already subject to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act.*

CSA Response

We have not made changes to this section. The requirements in section 10 of proposed NI 93-101 represent a requirement to establish, maintain and apply reasonable policies and procedures relating to verifying the identity of a derivatives party. These requirements are substantially consistent with the "Gatekeeper KYC" requirements in section 13.2(2)(a), (b) and (d) of NI 31-103 and will already be familiar to most registered firms and firms that are registered with FINTRAC as money-service businesses. If a particular derivatives firm identifies a specific concern with any of these requirements, either in NI 31-103 or NI 93-101, CSA staff would be pleased to discuss these concerns with the firm.

Section 11 – Handling complaints

Three commenters commented that this section should not be expanded to all derivatives parties. There is already an incentive to manage complaints from all derivatives parties in an appropriate manner to preserve relationships. Clarity should be provided that this section only applies to derivatives operations.

One commenter argued that the requirement should not apply to portfolio managers subject to NI 31-103 or foreign derivatives advisers relying on an exemption.

CSA Response

We have moved this obligation to Division 1 of Part 3 of the business conduct rule. As a result of this change, this obligation is an obligation that will apply to a derivatives firm's dealings with all derivatives parties.

It is important to note that the obligation is expressly framed as a "reasonable person" obligation:

> **Handling complaints**
>
> **11(2)** A derivatives firm must document and, <u>in a manner that a reasonable person would consider fair and effective</u>, promptly respond to each complaint made to the derivatives firm about any product or service offered by the derivatives firm or an individual acting on behalf of the derivatives firm.

Accordingly, the obligation is principles-based and context-specific. Conduct that may be considered unfair when dealing with a non-EDP may be considered fair and part of ordinary commercial practice when dealing with an EDP. For example, the manner in which a derivatives firm responds to a complaint may be interpreted differently if the derivatives party is an individual or small business than from how it would be interpreted if the derivatives party is a sophisticated market participant, such as a global financial institution. Additional clarity has been provided that this section only applies to derivatives operations in the companion policy.

For registered adviser firms, even though this core obligation still technically applies, since this obligation is principles-based, where the firm complies with the corresponding complaint handling obligations in NI 31-103 in respect of its derivatives activity with its clients, we would view this as satisfying the requirement under section 11(2) of this rule.

This obligation does not apply to a foreign adviser if the firm complies with the conditions of the foreign adviser or foreign sub-adviser exemptions in the rule.

Section 12 – Tied selling

One commenter argued that the tied-selling provisions should be deleted as existing regulations deal with tied selling, and no comparable provisions are provided under CFTC rules or MiFID II.

One commenter argued that the obligation to engage in derivatives may be required in borrower-specific circumstances as a risk mitigation tool as a matter of practice, firms will typically engage in those derivatives with the lending financial institution as a means to manage fees and administration associated with borrowing arrangements. The definition of EDP should include a "qualified party" as used in various blanket orders, and alternatively, non-EDPs should qualify as EDPs by obtaining the services of a registered derivatives adviser.

One commenter argued that this requirement should not apply to derivatives advisers as a similar requirement is already provided in NI 31-103.

CSA Response

The tied-selling restriction in section 12 of the business conduct rule conduct rule is generally similar to the corresponding prohibitions in sections 11.7 and 11.8 of NI 31-103 and as such should be familiar to firms that are registrants.

For registered adviser firms, even though this core obligation still technically applies, since this obligation is principles-based, where the firm complies with the corresponding tied selling obligations in NI 31-103 in respect of its derivatives activity with its clients, we would view this as satisfying the requirement under section 12 of this rule.

Division 2 – Additional obligations when dealing with or advising certain derivatives parties

Section 14 – Suitability

Three commenters commented that to impose fiduciary or fairness standards on the OTC derivatives market will significantly reduce liquidity in the Canadian market. A similar safe harbour to the CFTC rules should be included.[14] The scope of the suitability obligations in respect of individuals is too wide—it was suggested that only the trader or only counterparty-facing individuals (e.g., salespersons, traders and advisers on derivative transactions) should be responsible for assessing suitability. Only registrants are required to assess suitability under NI 31-103 and a similar approach should be taken.

One commenter commented that it is not market practice to second-guess clients entering into spot FX contracts and the same principle should apply in respect of FX forwards and options. The Companion Policy should confirm that when entering a transaction at arm's length with a counterparty that is requesting to enter into an FX transaction, there is no need to go further and inquire as to the nature of the counterparty's commercial objectives such as the basis on which the counterparty determined size, timing and tenor of the transaction. This would be consistent with CFTC Regulation 23.434, whereby a safe harbour is provided that disapplies Rule 23.434 if a dealer discloses in writing that it is acting in its capacity as a counterparty and is not undertaking to assess suitability of the swap or trading strategy.

CSA Response

We have responded to these comments as follows:

We have made a number of significant changes to the EDP definition including eliminating the $10 million financial threshold in the non-individual commercial hedger category (from $10 million to $0). As a result of this change, we have significantly expanded the class of derivatives parties in respect of whom a derivatives dealer may deal without being subject to a suitability obligation.

Specifically, by virtue of section 7 of the rule, the suitability obligation

- **does not apply** if the derivatives party is an EDP and is not an individual or a non-individual commercial hedger, and

- **applies but may be waived** if the derivatives party is an EDP and is an individual or a non-individual commercial hedger.

Please see also the response under Section 2 of this summary addressing the concerns with the potential impact of the proposed rules on liquidity.

[14] CFTC's Regulation 23.434(b) has a safe harbour provision that is subject to three pre-conditions in transactions with non-governmental counterparties: (a) the dealer must reasonably determine, via a written representation from the counterparty or otherwise, that the counterparty is capable of independently evaluating investment risks with regard to the relevant derivative or trading strategy; (b) the counterparty represents in writing that it is exercising independent judgment in evaluating the recommendations of the dealer with regard to the relevant derivative or trading strategy and (c) the dealer discloses in writing that it is acting in its capacity as a counterparty and is not undertaking to assess the suitability of the derivative or trading strategy.

The proposed business conduct rule does not impose a fiduciary standard on any derivatives market participant. However, a fiduciary standard may otherwise apply by virtue of other statutes or by common law or in Quebec civil law.

The proposed business conduct rule does impose a fair dealing obligation on derivatives market participants, other than derivatives market participants that are exempt from the rule such as entities that may rely on various exemptions from the rule, including the foreign liquidity provider exemption, the foreign dealer and foreign adviser exemptions and the end-user exemption.

The fair-dealing obligation is similar to the fair-dealing obligation that currently applies to registered firms and registered individuals. [15] We have included a fair-dealing obligation in the business conduct rule to ensure that entities that may be exempt from registration in some jurisdictions, such as Canadian financial institutions, are nevertheless subject to minimum standards of business conduct. This will ensure a level-playing field in terms of business conduct standards between firms that are registered and firms that are exempt from registration.

We have not included an exemption similar to the CFTC safe harbor commentary referred to by the commenters as we believe the existing Companion Policy guidance already provides guidance to make it clear that the concept of fairness when applied to derivatives market participants is context-specific. Conduct that may be considered unfair when dealing with a non-EDP may be considered fair and part of ordinary commercial practice when dealing with an EDP. For example, the fair dealing obligation may be interpreted differently if the derivatives party is an individual or small business than from how it would be interpreted if the derivatives party is a sophisticated market participant, such as a global financial institution. Similarly, conduct that may be considered to be unfair when acting as an agent to facilitate a derivatives transaction with a third-party may be considered fair when entering into a derivative as principal, where it would be expected that each party negotiating the derivative is seeking to ensure favourable financial terms.

When a derivatives firm is dealing with or advising an EDP, we generally interpret the fair dealing obligation in section 8 in a similar manner to the "fair and balanced communications" obligation as it is conceived in the context of similar rules in the United States.

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[15] See section 14 of the Securities Rules, B.C. Reg. 194/97 **[B.C. Regulations]** under the *Securities Act* (British Columbia), R.S.B.C. 1996, c. 418 **[B.C. Act]**; section 75.2 of the *Securities Act* (Alberta) R.S.A. 2000, c.S-4 **[Alberta Act]**; section 33.1 of *The Securities Act, 1988* (Saskatchewan), S.S. 1988-89, c. S-42.2 **[Saskatchewan Act]**; subsection 154.2(3) of *The Securities Act* (Manitoba) C.C.S.M. c. S50 **[Manitoba Act]**; section 2.1 of OSC Rule 31-505 *Conditions of Registration* ; section 65 of the *Derivatives Act* (Québec), R.S.Q., c. 14.01 **[Québec Act]**; section 39A of the *Securities Act* (Nova Scotia), R.S.N.S. 1989, c. 418 **[N.S. Act]**; subsection 54(1) of the *Securities Act* (New Brunswick) S.N.B. 2004, c. S-5.5 **[N.B. Act]**; section 90 of the *Securities Act* (Prince Edward Island), R.S.P.E.I. 1988, c. S-3.1 **[P.E.I. Act]**; subsection 26.2(1) of the *Securities Act* (Newfoundland and Labrador), R.S.N.L.1990, c. S-13 **[Newfoundland Act]**; section 90 of the *Securities Act* (Nunavut), S.Nu. 2008, c. 12 **[Nunavut Act]**; section 90 of the *Securities Act* (Northwest Territories), S.N.W.T. 2008, c. 10 **[N.W.T. Act]**; and section 90 of the *Securities Act* (Yukon), S.Y. 2007, c. 16 **[Yukon Act]**.

In the case of derivatives dealers that wish to offer CfDs, forex and other similar OTC derivatives products to individual investors who are not EDPs, we anticipate that these firms will continue to be able to offer these products through order-execution-only (OEO), suitability-exempt platforms in accordance with Canadian securities legislation and IIROC requirements, as they do today.

In our view, the foregoing changes and responses address the commenters' comments re suitability.

Section 17 –Disclosing referral arrangements to a derivatives party

One commenter mentioned that disclosure of referral arrangements should not be required when the referring party has no ongoing role in the derivatives relationship (sections 13(1)(c),15, 18(1)(e); (currently sections 15(1)(c), 17,18(1)(c)). If a dealer acquires a list of business leads in accordance with existing contractual obligations and applicable laws, then pricing agreed for referral should not be subject to disclosure. In the alternative, the exact quantum should not be required disclosed.

CSA Response

The obligation to disclose referral arrangements in section 17 of the business conduct rule is generally consistent with the obligation to disclose referral arrangements in Part 13 of NI 31-103 and as such should be familiar to firms that are registrants.

In the case of firms that are not registrants, this may represent a new obligation for these firms. However, as previously noted, we have made a number of significant changes to the EDP definition including eliminating the $10 million financial threshold in the non-individual commercial hedger category (from $10 million to $0).

As a result of this change, we have significantly expanded the class of derivatives parties in respect of whom a derivatives dealer may deal without being subject to the obligation to disclose referral arrangements.

To the extent a derivatives firm is dealing with a derivatives party that is not an EDP, or is an individual EDP or a non-individual commercial hedger EDP that has not waived the right to receive this disclosure, we believe this is important information.

Part 4 Derivatives Party Accounts

Division 1 – Disclosure to derivatives parties

Section 18 – Relationship disclosure information

One commenter argued this requirement should not apply to derivatives advisers as a similar requirement is already provided in NI 31-103.

One commenter argued an exemption should be provided where a derivatives firm complies with substantially equivalent harmonized disclosure, reporting and documentary practices that may be developed from time to time by global trade associations in standard industry documentation based on requirements applicable in the major global markets.

CSA Response

The relationship disclosure obligations in section 18 of the business conduct rule conduct rule are generally similar to the corresponding relationship disclosure obligations in section 14.2 of NI 31-103 and as such should be familiar to firms that are registrants. This obligation does not apply to a registered adviser firm if the firm complies with the corresponding provisions in NI 31-103 in respect of its derivatives activity with its clients.

In the case of firms that are not registrants, this may represent a new obligation for these firms. However, as previously noted, we have made a number of significant changes to the EDP definition including eliminating the $10 million financial threshold in the non-individual commercial hedger category(from $10 million to $0).

As a result of this change, we have significantly expanded the class of derivatives parties in respect of whom a derivatives dealer may deal without being subject to the relationship disclosure obligation. Specifically, by virtue of section 7 of the rule, the relationship disclosure obligation

- does not apply if the derivatives party is an EDP and is not an individual or a non-individual commercial hedger, and

- applies but may be waived if the derivatives party is an EDP and is an individual or a non-individual commercial hedger.

To the extent a derivatives firm is dealing with a derivatives party that is not an EDP or is an individual EDP or a non-individual commercial hedger EDP that has not waived the right to receive this disclosure, we believe this is important disclosure for investors and should be retained.

Section 19 – Pre-transaction disclosure

One commenter argued requirements under section 19 may not be entirely aligned with disclosure practices in the OTC derivatives industry and should be eliminated. In the alternative, these requirements should be incorporated into the relationship disclosure information delivery requirements.

One commenter requested that clarification should be provided on when section 19(2)(b) would be applicable. Section 19(2) provides as follows:

> **(2)** Before transacting in a derivative with, for or on behalf of a derivatives party, a derivatives dealer must advise the derivatives party of all of the following:
>
> (a) any material risks or material characteristics that are materially different from those described in the disclosure required under subsection (1);
>
> (b) if applicable, the price of the derivative to be transacted and the most recent valuation;
>
> (c) any compensation or other incentive payable by the derivatives party relating to the derivative or the transaction.

CSA Response

As noted above, we have made a number of significant changes to the EDP definition including eliminating the $10 million financial threshold in the non-individual commercial hedger category (from $10 million to $0).

As a result of this change, we have significantly expanded the class of derivatives parties in respect of whom a derivatives dealer may deal without being subject to the pre-transaction disclosure obligation. Specifically, by virtue of section 7 of the rule, the pre-transaction disclosure obligation

- does not apply if the derivatives party is an EDP and is not an individual or a non-individual commercial hedger, and

- applies but may be waived if the derivatives party is an EDP and is an individual or a non-individual commercial hedger.

To the extent a derivatives firm is dealing with a derivatives party that is not an EDP or is an individual EDP or a non-individual commercial hedger EDP that has not waived the right to receive this disclosure, we believe this is important disclosure for investors and should be retained.

In the case of the comment in relation to section 19(2)(b), we expect derivatives firms that are required to provide this disclosure will be able to provide this disclosure in a similar manner to the manner in which derivatives dealers that are investment dealers/IIROC dealer members provide this information to their clients under current rules.

Section 20 – Daily reporting

Two commenters argued derivatives parties should be given the option of not being provided with the daily valuation required under section 20(1) as certain derivatives parties may not be interested in receiving that information.

Two commenters argued the marked-to-market value of an FX forward or option would only be of interest to a speculator, not a commercial hedger who is actually going to deliver against the contract. Whether the hedge is in-the-money or out-of-the money once it is booked is irrelevant and could mislead if reported on a daily basis. Daily valuation may not reflect pricing available in the market, is often intra-day, and it would be difficult to explain assumptions made in reaching the valuation. The ability to offer stream-lined FX hedging services by voice or electronic means may be frustrated. The no-action relief granted under CFTC Letter No. 13-12, which provides an exemption from the requirement to provide pre-market pricing information for most ordinary FX forwards and swaps, should be considered.

CSA Response

As noted above, we have made a number of significant changes to the EDP definition including eliminating the $10 million financial threshold in the non-individual commercial hedger category (from $10 million to $0).

As a result of this change, we have significantly expanded the class of derivatives parties in respect of whom a derivatives dealer may deal without being subject to the daily reporting disclosure obligation.

Specifically, by virtue of section 7 of the rule, the daily reporting disclosure obligation

- does not apply if the derivatives party is an EDP and is not an individual or a non-individual commercial hedger, and

- applies but may be waived if the derivatives party is an EDP and is an individual or a non-individual commercial hedger.

To the extent a derivatives firm is dealing with a derivatives party that is not an EDP or is an individual EDP or a non-individual commercial hedger EDP that has not waived the right to receive this disclosure, we believe this is important disclosure for investors and should be retained.

Section 21 – Notice to derivatives parties by non-resident derivatives firms

One commenter suggested that, with respect to all or substantially all of the assets of a derivatives firm as used in section 21(b), it should be confirmed that at least those firms located outside Canada and having a Canadian branch meets this condition.

CSA Response

The non-resident firm disclosure obligation in section 21 of the business conduct rule conduct rule is generally similar to the corresponding non-registrant firm disclosure obligation in section 14.5 of NI 31-103 and as such should be familiar to firms that are registrants. This obligation does not apply to a registered adviser firm if the firm complies with the corresponding provisions in NI 31-103.

This obligation does not apply to a foreign dealer or adviser to the extent it is relying on any of the following exemptions:

- foreign liquidity provider (s. 36)
- foreign derivatives dealer (s. 38)
- foreign derivatives adviser (s. 43)
- foreign derivatives sub-adviser (s. 44)

As noted above, we have made a number of significant changes to the EDP definition including eliminating the $10 million financial threshold in the non-individual commercial hedger category (from $10 million to $0).

As a result of this change, we have significantly expanded the class of derivatives parties in respect of whom a derivatives dealer may deal without being subject to the non-resident firm disclosure obligation. Specifically, by virtue of section 7 of the rule, the non-resident firm disclosure obligation

- does not apply if the derivatives party is an EDP and is not an individual or a non-individual commercial hedger, and

- applies but may be waived if the derivatives party is an EDP and is an individual or a non-individual commercial hedger.

To the extent a derivatives firm is dealing with a derivatives party that is not an EDP or is an individual EDP or a non-individual commercial hedger EDP that has not waived the right to receive this disclosure, we

believe this is important disclosure for investors and should be retained.

Division 2 – Derivatives party assets

Section 23 – Interaction with other instruments

One commenter noted that OSC Staff have concluded in the past that rehypothecation of collateral deposited by an investment fund with a counterparty is generally not permitted under NI 81-102, without distinguishing between variation and initial margin. In accordance with industry practice and prior advice from OSC staff, many investment funds take the position that variation margin is not subject to the collateral rules in NI 81-102 and that rehypothecation is permitted. This position should be clarified in all applicable rules. Future rules dealing with margin and collateral requirements for non-centrally cleared derivatives is the more appropriate instrument to address collateral and margin requirements.

CSA Response

Section 23 provides as follows:

> **23.** A derivatives firm is exempt from the requirements in this Division if any of the following apply:
>
> (a) the derivatives firm is subject to and complies with or is exempt from sections 3 to 8 of National Instrument 94-102 *Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* in respect of derivatives party assets;
>
> (b) the derivatives firm is subject to and complies with Guideline E-22 *Margin Requirements for Non-Centrally Cleared Derivatives* issued by the federal Office of the Superintendent of Financial Institutions (OSFI);
>
> (c) the derivatives firm is subject to and complies with a regulation as may be prescribed by the regulator or the securities regulatory authority in respect of derivatives party assets;
>
> (d) the derivatives firm is subject to and complies with National Instrument 81-102 *Investment Funds* in respect of derivatives party assets.

Accordingly, this comment relates to the treatment of collateral rules under NI 81-102. CSA Derivatives Committee staff consulted with CSA Investment Funds staff with a view to determining whether additional guidance is necessary. They confirmed that this issue with respect to the treatment of variation margin has recently been reviewed and clarified as part of an exemptive relief decision. If you have any additional questions in this regard please follow-up with CSA Investment Funds staff in your jurisdiction. The intention is generally for the approach in NI 93-101 to be consistent with the approach under NI 81-102 on this point.

Section 24 – Segregating derivatives party assets

One commenter noted that it is unclear how segregation, use, holding and investment of derivatives party assets apply to a portfolio manager with a fiduciary duty not to commingle client assets.

One commenter noted NI 93-101, and not just its Companion Policy, should allow for accounting segregation. The Companion Policy should further explain that accounting segregation is consistent with re-use or rehypothecation of collateral.

CSA Response

This obligation does not apply to a registered adviser firm if the firm complies with the corresponding provisions in NI 31-103.

The companion policy includes additional guidance to clarify that accounting segregation is acceptable (i.e., customer collateral may be segregated by maintaining records that allow the positions and the value of collateral delivered by each customer to be identified)..

Section 25 – Holding initial margin and Section 26 – Investment or use of initial margin

Two commenters suggested that sections 25 and 26 be amended to provide that only if requested by a counterparty, the derivatives firm would be required to segregate initial margin and invest initial margin as stipulated by the counterparty to avoid additional fees or a higher spread that will be passed to a counterparty.

One commenter suggested that sections 25 and 26 should not apply to EDPs.

Two commenters suggested that sections 25 and 26 should be removed and instead added to the Proposed National Instrument 95-401 – *Margin and Collateral Requirements for Non-Centrally Cleared Derivatives.* In the alternative, equivalence should be provided where entities are subject to equivalent prudential or other rules.

Finally, one commenter suggested Sections 25 and 26 only make sense as applied to a derivatives dealer and would be contrary to an adviser's fiduciary duties. If not removed from the NI 93-101, these provisions should apply only to derivatives dealers.

CSA Response

As noted above, section 23 provides as follows:

> **23.** A derivatives firm is exempt from the requirements in this Division if any of the following apply:
>
> (a) the derivatives firm is subject to and complies with or is exempt from sections 3 to 8 of National Instrument 94-102 *Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* in respect of derivatives party assets;
>
> (b) the derivatives firm is subject to and complies with Guideline E-22 *Margin Requirements for Non-Centrally Cleared Derivatives* issued by the federal Office of the Superintendent of Financial Institutions (OSFI);
>
> (c) the derivatives firm is subject to and complies with a regulation as may be prescribed by the regulator or the securities regulatory authority in respect of derivatives party assets;
>
> (d) the derivatives firm is subject to and complies with National Instrument 81-102 *Investment Funds* in respect of derivatives party assets.

The obligations in this division do not apply to a registered adviser if the firm complies with the corresponding provisions in NI 31-103. See section 45.

In addition, the obligations in sections 25 and 26

- do not apply if the derivatives party is an EDP and is not an individual or a non-individual commercial hedger, and

- apply but may be waived if the derivatives party is an EDP and is an individual or a non-individual commercial hedger.

To the extent a derivatives firm is dealing with a derivatives party that is not an EDP or is an individual EDP or a non-individual commercial hedger EDP that has not waived the right to receive this disclosure, we believe the obligations in sections 25 and 26 are important investor protection measures and should be retained.

Division 3 – Reporting to Derivatives Party

Section 27 – Content and delivery of transaction information

One commenter suggested that an exemption be provided where a derivatives firm complies with substantially equivalent harmonized disclosure, reporting and documentary practices that may be developed from time to time by global trade associations in standard industry documentation based on requirements applicable in the major global markets.

One commenter noted that advisers typically handle all trading documentation for clients, including reviewing derivatives transaction confirmations. Authority is typically granted in investment management agreements. Market practice is for a derivatives dealer to provide confirmation to the derivatives adviser as agent for the derivatives party. In lieu of section 27(1)(b), language in 27(1)(a) should be changed to read "if the derivatives party or its authorized agent(s) consents…"

CSA Response

The transaction confirmation disclosure obligation in section 27 of the business conduct rule conduct rule is generally similar to the corresponding trade confirmation disclosure obligation in section 14.12 of NI 31-103 and as such should be familiar to firms that are registrants. This obligation does not apply to a registered adviser firm if the firm complies with the corresponding provisions in NI 31-103. See section 45.

Additional language has been included in the companion policy to clarify that when a transaction is executed on a derivatives trading facility or analogous trading venue and the trading facility pursuant to its rulebook provides a trade confirmation to each counterparty to a transaction, we would not expect a derivatives firm in this scenario to provide a separate and additional trade confirmation to the derivatives party.

The specific disclosure obligations in subsection 27(2)

- do not apply if the derivatives party is an EDP and is not an individual or a non-individual commercial hedger, and

- apply but may be waived if the derivatives party is an EDP and is an individual or a non-individual commercial hedger.

To the extent a derivatives firm is dealing with a derivatives party that is not an EDP or is an individual EDP or a non-individual commercial hedger EDP that has not waived the right to receive this disclosure, we believe the obligations in subsection 27(2) are important investor protection measures and should be retained. Note that the additional information referred to in section 27(2) applies only if applicable.

With respect to the commenter's comment in relation to the wording of s. 27(1)(a), relating to adviser consents, we have retained the current wording to maintain consistency in drafting between section 27 of the proposed rule and section 14.12 of NI 31-103:

NI 31-103	Proposed NI 93-101
14.12 Content and delivery of trade confirmation **(1)** A registered dealer that has acted on behalf of a client in connection with a purchase or sale of a security must promptly deliver to the client or, if the client consents in writing, to a registered adviser acting for the client, a written confirmation of the transaction, setting out the following: (a) …	**Content and delivery of transaction information** **27. (1)** A derivatives dealer that transacts with, for or on behalf of a derivatives party must promptly deliver a written confirmation of the transaction to (a) the derivatives party, or (b) if the derivatives party has consented in writing, a derivatives adviser acting for the derivatives party.

Section 28 – Derivatives party statements

One commenter mentioned that this requirement should not apply to derivatives advisers as a similar requirement is already provided in NI 31-103.

CSA Response

The derivatives party statements obligation in section 28 of the business conduct rule conduct rule is generally similar to the account statements obligation in section 14.14 of NI 31-103 and as such should be familiar to firms that are registrants. This obligation does not apply to a registered adviser firm if the firm complies with the corresponding provisions in NI 31-103. See section 45.

Part 5 Compliance and Recordkeeping

Division 1 – Compliance

Section 30 – Policies and procedures

Section 30 of the business conduct rule provides as follows:

Policies and procedures

30. A derivatives firm must establish, maintain and apply policies, procedures, controls and supervision sufficient to provide reasonable assurance that all of the following are satisfied:

(a) the derivatives firm and each individual acting on its behalf in relation to transacting in, or providing advice in relation to, a derivative, comply with securities legislation relating to trading and advising in derivatives;

(b) the risks relating to its derivatives activities within the derivatives business unit are managed in accordance with the derivatives firm's risk management policies and procedures;

(c) each individual who performs an activity on behalf of the derivatives firm relating to transacting in, or providing advice in relation to, derivatives, prior to commencing the activity and on an ongoing basis,

(i) has the experience, education and training that a reasonable person would consider necessary to perform the activity competently,

(ii) without limiting subparagraph (i), has the understanding of the structure, features and risks of each derivative that the individual transacts in or advises in relation to, and

(iii) has conducted themselves with integrity.

We received the following comments on section 30.

One commenter noted that registered advisers already have documents and controls in place given NI 31-103 to establish and maintain policies and procedures to ensure compliance with securities legislation, rendering unnecessary any requirements with respect to integrity. Individuals also must already abide by the CFA Institute Code of Ethics and Standards of Professional Conduct which incorporates integrity as a central principle.

Three commenters suggested that section 30(1)(c)(iii) should be deleted. In their view, it would be extremely difficult to design compliance procedures, the requirement to act honestly and in good faith is a more objective and manageable standard, and individuals and derivatives firms are already incentivized to act with integrity in order to attract and maintain business and client relationships.

One commenter suggested that additional guidance and outreach with respect to Section 30(1)(c)(iii) will be critical.

One commenter suggested clarification be added that a company-wide code of conduct may be relied upon to fulfill section 30(1)(c)(iii), and that this requirement only applies to derivatives activity.

CSA Response

The policies and procedures obligation in section 30 of the business conduct rule conduct rule is generally similar to the policies and procedures obligation in section 11.1 of NI 31-103 and as such should be familiar to firms that are registrants.

In the case of the comments relating to the requirement in subsection 30(1)(c)(iii) that a derivatives firm establish, maintain and apply policies, procedures, controls and supervision sufficient to provide reasonable assurance that individuals that act on their behalf conduct themselves with integrity, this

requirement is intended to ensure that derivatives firms that are not registered firms are subject to similar obligations as registered firms in this regard.

The obligation on registered firms to take similar steps in relation to individuals that act on their behalf is explained in Part 4 of the CP to NI 93-102 (which is similar to the obligations imposed on registered firms in NI 31-103):

> **Responsibilities of a sponsoring derivatives firm**
>
> A registered derivatives firm is responsible for the conduct of the individuals who act on its behalf.
>
> A registered derivatives firm
>
> - must undertake due diligence before sponsoring an individual to be registered to act on its behalf (see further guidance in Part 4 of the Companion Policy to NI 33-109), and
>
> - has an ongoing obligation under section 38 [*Compliance policies and procedures*] to establish, maintain and apply written policies and procedures that are reasonably designed to establish a system of controls and supervision sufficient to ensure that the registered derivatives firm and each individual acting on its behalf in relation to derivatives complies with securities legislation.
>
> These obligations apply even when the individual may be exempted from the requirement to register under subsection 16(3) or 16(4).
>
> Failure of a registered derivatives firm to fulfill these responsibilities may be relevant to the firm's continued fitness for registration.
>
> **Fitness for registration**
>
> We will only register an individual applicant if they appear to be fit for registration. Following registration, an individual must maintain their fitness in order to remain registered. If we determine that a registrant has become unfit for registration, we may suspend or revoke the registration. See Division 2 of Part 5 of this Companion Policy for guidance on suspension and revocation of an individual's registration.
>
> *Assessing fitness for registration – individuals*
>
> We use three fundamental criteria to assess whether an individual is or remains fit for registration:
>
> - proficiency
> - integrity, and
> - solvency
>
> (a) Proficiency
>
> …
>
> (b) Integrity
>
> Registered individuals must conduct themselves with integrity and honesty. We will assess the integrity of individuals through the information they are required to provide on registration application forms and other

forms required to be filed under securities legislation, including forms required under NI 33-109, and through compliance reviews. For example, applicants are required to disclose information about conflicts of interest, such as other employment or partnerships, service as a member of a board of directors, or relationships with affiliates, and about any regulatory or legal actions against them.

…

We remain of the view that it is appropriate for derivatives dealers that are not registered firms in some jurisdictions, such as Canadian financial institutions, to maintain similar policies and procedures in relation to the persons that act on their behalf as is required for registered firms.

We believe that this approach is supported by recent events, such as

- Events that led to the development of the (voluntary) FX Code of Conduct by the Bank for International Settlements, various central banks and FX market participants,[16]

- Recent OSC settlement agreements with two Canadian banks related to compliance failures in the banks' foreign exchange (FX) trading businesses.[17] These failures allowed FX traders to share confidential customer information in chatrooms with FX traders at competitor firms, and

- Recent events that have led the federal government to expand the Financial Consumer Agency of Canada (FCAC) oversight of banks' internal business processes and procedures including ensuring that a bank's product and service offerings are appropriate for, and take into consideration, the customer's needs and circumstances. The FCAC will also have the right to ensure that remuneration paid to bank staff, including benefits, do not impede any policies and procedures implemented to ensure the "appropriateness" of offered products or services.

With respect to section 30(c)(iii), we have clarified in the companion policy that a firm-wide code of conduct/ethics policies can be relied on as part of satisfying the obligation under subparagraph 30(c)(iii) and that we expect derivatives firms to require the employees in its derivatives business to read the code of conduct and for each employee to provide some form of an acknowledgement (typically updated annually) to the derivatives firm that they are complying with such code of conduct.

Section 31(1) [formerly section 30(2)] – Designation and responsibilities of senior derivatives managers

Three commenters argued the senior derivatives manager regime should be removed, as there are no identified benefits identified from its implementation. Alternatively, the regime should apply only to a derivatives business unit of a derivatives firm that deals with, or advises, non-EDPs.

Six commenters argued that it is onerous to require an additional individual in the role of senior derivatives manager who is tasked with fulfilling substantially the same role as the Ultimate Designated Person (UDP), the Chief Risk Officer (CRO) and the Chief Compliance Officer (CCO). While the UK has a

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[16] https://www.bis.org/press/p170525.htm

[17] *Re Royal Bank of Canada* (August 30, 2019) https://www.osc.ca/en/tribunal/tribunal-proceedings/royal-bank-canada-re and *The Toronto-Dominion Bank* (August 30, 2019) https://www.osc.ca/en/tribunal/tribunal-proceedings/toronto-dominion-bank-re

similar role to that of the senior derivatives manager, there is no prescription of categories that require firms to register individuals in oversight and compliance roles. Furthermore, the CCO may be impeded in the performance of his or her functions if the senior derivatives manager is required to "respond, in a timely matter, to any material non-compliance" rather than to promptly escalate the matter outside the derivatives business unit and report it to the CCO.

One commenter mentioned that the internal reporting obligations should be consolidated to one annual report to avoid duplicative efforts, and the requirements should only apply to registered derivatives firms. There is an overlap between the internal reporting obligations of senior derivatives managers and, under NI 93-102, the derivatives chief compliance officers, the derivatives chief risk officers, and derivatives ultimate designated persons.

CSA Response

We have amended the senior derivatives manager requirements in section 31 of the proposed business conduct rule (section 30(2) of the version published for comment in June 2018) so that the provisions apply to a "derivatives dealer" rather than a "derivatives firm" (which term also includes derivatives advisers).

We remain of the view that it is appropriate to establish a senior derivatives manager regime for derivatives dealers, and believe this approach is supported by recent events, such as

- Events that led to the development of the (voluntary) FX Code of Conduct by the Bank for International Settlements, various central banks and FX market participants[18]

- Recent OSC settlement agreements with two Canadian banks related to compliance failures in the banks' foreign exchange (FX) trading businesses. [19] These failures allowed FX traders to share confidential customer information in chatrooms with FX traders at competitor firms.

- Recent events that have led the federal government to expand the Financial Consumer Agency of Canada (FCAC) oversight of banks' internal business processes and procedures including ensuring that a bank's product and service offerings are appropriate for, and take into consideration, the customer's needs and circumstances. The FCAC will also have the right to ensure that remuneration paid to bank staff, including benefits, do not impede any policies and procedures implemented to ensure the "appropriateness" of offered products or services.

In response to the comments that suggested that there is an overlap between the internal reporting obligations of senior derivatives managers and, under NI 93-102, the derivatives chief compliance officers and derivatives ultimate designated persons, we acknowledge that, for some smaller firms, this

[18] https://www.bis.org/press/p170525.htm

[19] *Re Royal Bank of Canada* (August 30, 2019) https://www.osc.ca/en/tribunal/tribunal-proceedings/royal-bank-canada-re and *The Toronto-Dominion Bank* (August 30, 2019) https://www.osc.ca/en/tribunal/tribunal-proceedings/toronto-dominion-bank-re

may be the case and have included an exemption in section 31.1(c) from the requirement to designate a senior derivatives manager for a derivatives dealer that operates only one derivatives business unit and the individual that would have been designated as the senior derivatives manager that unit is registered under NI 93-102 as either a derivatives ultimate designated person or a derivatives chief compliance officer. However, for larger derivatives dealers, including Canadian financial institutions, there will be no overlap between the individuals a derivatives firm could designate as senior derivatives managers and the individuals that could be designated as a derivatives chief compliance officer or a derivatives ultimate designated person under NI 93-103.

With respect to the comment about potential overlap of internal reporting structures, we have added a provision in the rule (section 31(4)) to allow for the report prepared by a senior manager to be submitted to the board of directors by the chief compliance officer.

Section 32 – Responsibility of derivatives firm to report material non-compliance

A number of commenters expressed concern over the proposal in section 32 to report to the regulator or securities regulatory authority in a timely manner any circumstance in which the derivatives firm is not or was not in material compliance with the business conduct rule or securities legislation relating to trading in derivatives and one or more of the following applies:

(a) the non-compliance creates, in the opinion of a reasonable person, a risk of material harm to a derivatives party;

(b) the non-compliance creates, in the opinion of a reasonable person, a risk of material harm to capital markets;

(c) the non-compliance is part of a pattern of material non-compliance.

Comments included the following.

Three commenters argued imposing a self-reporting requirement of material non-compliance greatly exceeds the scope of the business conduct rule, as there are no similar self-reporting requirements for other market participants under applicable provincial securities law.

One commenter argued that information provided to the CSA by a federally regulated financial institution (FRFI) under section 32 could include prescribed supervisory information (**PSI**), for example, relating to prudential aspects of record keeping (e.g., business and strategic planning; audit, compliance and risk management; minutes of meetings of Boards of Directors). PSI is protected under federal law and FRFIs are prohibited from sharing such information. FRFIs can only provide this information to OSFI and it is OSFI's decision as to what information may be shared with provincial regulators. The business conduct rule should be amended to expressly exclude FRFIs from being obliged to disclose PSI to provincial regulators.

One commenter argued self-reporting requirements may be inconsistent, for example, in the financial crimes area under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* as administered

by the Financial Transactions and Reports Analysis Centre of Canada. Reporting firms are subject to specific restrictions against disclosure of suspicious transactions or activities.

One commenter argued it is novel that exemptions are premised on the concept of substantial compliance, as is the requirement to notify the applicable Canadian regulator of instances of material non-compliance. Despite the guidance provided, this notification requirement is overly broad. The CSA should build in the following concepts:

(i) Notification should only be required if the matter giving rise to the non-compliance is material to, and affects, Canadian clients serviced under the relevant exemption;

(ii) It should be clear that notification to the Canadian securities regulators is to be given only after notification has been given to the foreign firm's regulator in its home jurisdiction; and

(iii) The form of filing that the foreign firm used in its home jurisdiction should be accepted by the CSA (e.g., if the matter required an update to a firm's Form ADV that was filed with the SEC, then the firm should be able to file the updated Form ADV as its notification to the Canadian securities regulators).

CSA Response

We have amended section 32 of the business conduct rule so that the obligation to report non-compliance to the regulator or securities regulatory authority applies to a derivatives dealer rather than a derivatives firm (which term also includes derivatives advisers).

We have otherwise not made changes to this provision and remain of the view that it is necessary and appropriate to require timely disclosure of non-compliance to the regulator or securities regulatory authority in the circumstances where there is a risk of material harm to a derivatives party of the firm or to the capital markets or the non-compliance represents a pattern of material non-compliance.

In response to the comments, we note the following:

We do not agree that imposing a self-reporting requirement of material non-compliance greatly exceeds the scope of the business conduct rule, or the assertion that there are no similar self-reporting requirements for other market participants under applicable provincial securities law or imposed by other comparable regulators.

In particular, we note the following:

The self-reporting obligation in section 32 of the business conduct rule is similar to the requirement in paragraph 5.2(c) of NI 31-103 which requires the CCO of a registered firm to report to the UDP any instances of non-compliance with securities legislation that:

- create a risk of material harm to a client or to the market, or
- are part of a pattern of material non-compliance

Paragraph 5.2(d) of NI 31-103 requires the CCO to submit an annual report to the board of directors. The annual report prepared by the CCO for the board is typically requested by and disclosed to the CSA in the context of compliance reviews. Accordingly, the self-reporting obligation in section 32 of the business conduct rule does not in substance represent a new requirement for registered firms; it simply changes the timing by which this disclosure is provided to the regulators.

Similarly, many of the largest FRFIs are also reporting issuers (public companies) under Canadian securities legislation and subject to periodic and timely disclosure requirements, including prospectus, annual information form (AIF) disclosure and material change reporting requirements. Accordingly, to the extent information that may be the subject of a section 32 notification filing constitutes a material fact or a material change, the FRFIs may already be subject to disclosure obligations under Canadian securities legislation. In the case of a section 32 notification to the regulator, this would be a confidential filing to the regulator rather than public disclosure by the FRFI in a prospectus, AIF or material change report.

Finally, we note that the Financial Consumer Agency of Canada (FCAC) supervises federally regulated financial institutions to ensure they comply with their legislative obligations, voluntary codes of conduct and public commitments (collectively, "market conduct obligations") that are overseen by FCAC.
As stipulated in FCAC's Supervision Framework, the FCAC requires financial institutions to report to the FCAC breaches of a market conduct obligation that would normally be reported to the institution's compliance division if the breach meets, at a minimum, one of the following:

- once detected by the institution, the breach took longer or will take longer than 120 calendar days to fix and remediate;
- the breach affected or affects more than 250 consumers; or
- the breach was or is ongoing for more than 1 year before the institution detected it.

See Mandatory reporting guide for federally regulated financial institutions available at https://www.canada.ca/en/financial-consumer-agency/services/industry/forms-guides/mandatory-reporting-guide-frfi.html .

Accordingly, the requirement to report breaches of legislation in relation to conduct obligations should not be a novel requirement for FRFIs.

In response to the comment that suggested that self-reporting requirements may be inconsistent, for example, in the financial crimes area under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* as administered by the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), we note that reporting firms are already required to provide disclosure of suspicious transactions or activities to the regulators.

See CSA Staff Notice 31-352 *Monthly Suppression of Terrorism and Canadian Sanctions Reporting Obligations* and the *CSA Guide to Monthly Suppression of Terrorism and Canadian Sanctions Reporting* for

more information.

Division 2 -- Recordkeeping

Section 33 – Derivatives party agreement

Two commenters suggested that an exemption from the written agreement requirement for FX transactions be provided as it is current market practice for FX transactions to be entered into between parties without entering into a written ISDA (or similar) master agreement due to the fact that the FX markets are mature and transparent. It is unlikely that derivatives firms in Canada will be able to enter into a comparable protocol to the ISDA Dodd-Frank protocol providing for deemed ISDA master agreements, in light of the small size of the Canadian derivatives market and the resulting difficulty of obtaining responses to a client outreach.

One commenter suggested that cclarification should be provided on whether section 33 (e.g., with respect to general terms such as default) can be met by way of confirmation required to be delivered under section 27(1).

CSA Response

We have added Companion Policy guidance to reflect these comments.

Section 33 – Derivatives party agreement (continued)

One commenter suggested that an exemption be provided where a derivatives firm complies with substantially equivalent harmonized disclosure, reporting and documentary practices that may be developed from time to time by global trade associations in standard industry documentation based on requirements applicable in the major global markets.

CSA Response

We have not made any changes in response to this comment.

Section 33 of the business conduct rule is principles-based in that it requires a derivatives firm before transacting in a derivative with, for or on behalf of a derivatives party, enters into an agreement with that derivatives party. We have included Companion Policy guidance to clarify we intend for this provision to be interpreted flexibly to accommodate substantially equivalent harmonized disclosure, reporting and documentary practices that may be developed from time to time by global trade associations in standard industry documentation based on requirements applicable in the major global markets. And we have also included guidance to address the timing sequence involved in the process of reaching an agreement with a new counterparty, as well as guidance about what we would consider an acceptable agreement in the context of certain types of foreign exchange transactions that are not typically documented under

standard form industry documentation.

Accordingly, we do not believe an exemption from section 33 is necessary or appropriate.

Section 34 – Records

One commenter was concerned that the Companion Policy could be interpreted to require that a derivatives firm capture and retain records of all derivatives customer-facing interactions, including e-mail, instant, and even that there is an affirmative obligation to record phone lines. Clarification should be provided that a derivatives firm is only obligated to retain records of communications related to the negotiation of derivatives, the execution of derivatives, and any amendment or termination of derivatives.

CSA Response

We have not made any changes in response to this comment.

We believe section 34 of the business conduct rule sets out reasonable record-keeping requirements in relation to the firm's derivatives business and activities conducted with derivatives parties, and compliance with applicable provisions of securities legislation.

We believe these requirements are consistent with the following:

- the record-keeping requirements applicable to existing registered firms under Part 11 of NI 31-103;

- the record-keeping requirements applicable to derivatives dealers under comparable international regimes, such as the record-keeping requirements applicable to swap dealers under CFTC regulation 23.202 and 23.203.

Part 6 – Exemptions

Division 1 – Exemptions from this Instrument

One commenter commented that clarification is required that the exemptions for foreign derivatives dealers and foreign derivatives advisers will also extend to Canadian branches of foreign dealers and advisers that are subject to a similar regulatory regime in their home jurisdiction.

This commenter also suggested that an exemption for derivatives transactions conducted with a Canadian derivatives dealer should be included to prevent harm to liquidity as a trade between an unregistered firm and a Canadian derivatives dealer could potentially subject the unregistered firm to registration or the need to comply with business conduct obligations, or at minimum the need to conduct an analysis.

One commenter suggested that an inter-dealer exemption from the application of NI 93-101 should be

given to all derivatives dealers when transacting with another derivatives dealer or with a clearing agency with no conditions attached. Equivalence for foreign dealers is insufficient to address concerns, including that foreign dealers, particularly those whose home jurisdiction does not appear on Appendices A and D, may be led to exit or not enter the Canadian market due to a unique Canadian regulatory burden.

CSA Response

As previously indicated, we have made a number of changes to the proposed rules to minimize the potential impact of the proposed rules on foreign dealers, including

- introducing a new foreign liquidity provider exemption for foreign dealers that trade only with registered investment dealers or derivatives dealers;
- streamlining the foreign dealer and foreign adviser exemptions so that they more closely conform to the international dealer and international adviser exemptions in NI 31-103; and
- adding a new exemption for foreign sub-advisers similar to the international sub-adviser exemption in NI 31-103.

The new foreign liquidity provider exemption is available for activities that are conducted through a Canadian branch of a Schedule III bank. See section 36.

Division 1 – Exemptions from this Instrument (Continued)

One commenter proposed that an exemption for insurance companies dealing in certain insurance products be included, with such exemption mirroring the language found in section 2.39 of NI 45-106.

Two commenters suggested that, in view of proportionality and risk-based policy considerations, any firm that meets the final *de minimis* thresholds set forth in sections 50 and 51 (limited notional amount) of NI 93-102 should be provided with an outright exemption. In the alternative, one commenter suggested that an exemption other than those requirements contained in Part 3, Division 1 – General Obligations Towards All Derivative Parties should be provided.

CSA Response

We have not included an exemption for insurance companies dealing in certain insurance products based on the exemption for variable insurance contracts in 2.39 of NI 45-106. As with other derivatives rules, the extent to which the business conduct rule will apply to insurance companies dealing in insurance products is generally determined by the Product Determination Rules. These rules generally include an exclusion in Part 2 for, *inter alia*,

(b) an insurance or annuity contract entered into,

(i) with an insurer holding a licence under insurance legislation of Canada or a jurisdiction of Canada and regulated as insurance under that legislation, or

(ii) outside of Canada with an insurer holding a licence under insurance legislation of a foreign jurisdiction, if it would be regulated as insurance under insurance legislation of Canada or Ontario if it had been entered into in Ontario;

If an insurance company determines that it is transacting in derivatives that are not covered by the above exclusion, we would recommend that the insurance company consult with staff of the regulator in the jurisdiction in which its head office is located.

In response to the comments relating to a proposed exemption for any firm that meets the final *de minimis* notional amount thresholds set forth in sections 50 and 51 of NI 93-102, we have not included an exemption from NI 93-101 as we believe that such firms should be subject to minimum standards of business conduct, regardless of their registration status. However, we have included a more limited exemption for such firms from certain obligations in the business conduct rule, including the senior derivatives manager provisions in Part 5 of the rule.

Division 1 – Exemptions from the Instrument (Continued)

One commenter requested that clarity be provided with respect to whether section 37 applies in all of Canada without exception, and not only in British Columbia, Manitoba and New Brunswick.

CSA Response

The exemption in section 37 [*Exemption for certain derivatives end-users*] in NI 93-101 applies in all jurisdictions of Canada.

Section 48 [*Persons or companies not in the business of trading in British Columbia, Manitoba and New Brunswick*] of proposed NI 93-102 only applies in British Columbia, Manitoba and New Brunswick. Similar to the exemption in section 8.4 [*Persons or companies not in the business of trading in British Columbia, Manitoba and New Brunswick*] of NI 31-103, this exemption from the registration requirement is necessary in these jurisdictions because the registration requirement in these jurisdictions is based on the "trade" trigger.

Section 38 – Foreign derivatives dealers

One commenter argued that, as no compelling rationale for the application of first-tier requirements to a foreign derivatives firm has been articulated, which is generally already subject to adequate market protection requirements in a foreign jurisdiction, the terms and conditions of this exemption should be much more closely aligned with the terms and conditions of the international dealer exemption under NI 31-103.

Two commenters argued that foreign derivatives dealers that are registered as swap dealers under CFTC

rules and investment firms that are subject to the requirements of MiFID II should be exempt from all the requirements under NI 93-101. If the CSA does not accept this recommendation, equivalence should be applicable for almost all of the provisions of NI 93-101, including the senior derivatives manager provisions.

Two commenters suggested a broad approach to assessing equivalence while prioritizing an avoidance of disruption of cross-border trade flows should be taken whereby any jurisdiction that is a member of IOSCO may be an appropriate equivalent regime.

One commenter suggested that an equivalence assessment without imposing any conditions to qualify for the exemption should be granted, as it would be appropriate to be regulated by home authorities, particularly with respect to compliance requirements on a derivatives business unit prescribed in sections 29-35. In the alternative, clarification is required as to whether pursuant to the exemption in section 38, a foreign derivatives dealer will only need to comply with either its home jurisdiction or a third country where its home jurisdiction or a third country is listed in Appendix A.

This commenter also noted that Japan has already implemented the OTC derivatives regulations following the G20 agreement by incorporating them into the Financial Instruments and Exchange Act, whose equivalence to U.S. regulations has been recognized by the CFTC.

This commenter also requested clarification that, with respect to all or substantially all of the assets of a derivatives firm as used in section 38(2)(b)(ii), it should be confirmed that at least those firms located outside Canada and having a Canadian branch meets this condition.

CSA Response

After careful consideration of the comments and further consideration of the policy rationale that underlie the foreign dealer and foreign adviser exemptions, we have decided to place greater weight on the policy rationale of facilitating EDP access to the products and services offered by foreign dealers and advisers and have amended the foreign dealer exemption in s. 38 of NI 93-101 and the foreign adviser exemption in s. 43 of NI 93-101 so that they more closely conform to the model established by the international dealer exemption in s. 8.18 of NI 31-103 and the international adviser exemption in section 8.26 of NI 31-103.

Specifically, we have amended the wording of these exemptions from the versions of the exemptions published for comment in June 2018 so that a foreign dealer or adviser that complies with the conditions of the exemption will receive a complete exemption from the business conduct rule rather than a more limited exemption from specific provisions of the Instrument based on equivalence tables for each foreign jurisdiction that would have been set out in an Appendix to the business conduct rule.

One important difference as between the foreign dealer and adviser exemptions in NI 93-101 and the international dealer and adviser exemptions in NI 31-103 is that the exemptions in NI 93-101 are limited

to foreign dealers and advisers in a "specified foreign jurisdiction", namely any of Australia, Brazil, Hong Kong, Japan, South Korea, New Zealand, Singapore, Switzerland, United States of America, United Kingdom of Great Britain and Northern Ireland, any member country of the European Union, and any other jurisdiction that is recognized or designated by the securities regulatory authority or, except in Ontario and Quebec, the regulator.

The fact that a foreign jurisdiction has not been included in the list of jurisdictions in the definition "specified foreign jurisdiction" is not intended to suggest that we have concluded that the regulatory regimes in other foreign jurisdictions would not meet broad principles of comparability on an outcomes basis . Rather, we are limiting the foreign dealer/adviser exemptions to entities in specified foreign jurisdictions at this time because we have not yet had an opportunity to conduct a comparability analysis for other foreign jurisdictions and/or the international derivatives regulatory regimes in other foreign jurisdictions may be less developed than international securities regulatory regimes.

Accordingly, we would be willing to consider the situation of foreign dealers and foreign advisers located in other foreign jurisdictions on a case-by-case basis and anticipate that this list would be updated from time to time.

Section 38 – Foreign derivatives dealers – reporting of non-compliance – section 38(1)(d)

Two commenters suggested that the reporting requirement in section 38(1)(d) greatly exceeds the regulatory reporting requirements that apply to most foreign firms and registered securities firms and exempt securities firms in Canada. Regulatory reporting should not be a condition to the exemption, and if reporting is necessary, reporting of only regulatory actions should be required in a consistent manner with the timing of reporting in the home jurisdiction. Self-reporting requirements may be inconsistent with a firm's home country regulatory restrictions which may prohibit the reporting or communicating of certain types of breaches of local laws.

One commenter suggested that wording should be added to section 38(3)(d) to state that the provision is "subject to any blocking, privacy or secrecy laws applicable to the derivatives dealer, and, where customary, giving preference to the cooperation between home and host country regulatory authority regarding books and records access."

CSA Response

We have amended the reporting requirement in section 38(1)(d) of NI 93-101 to make it clear that the reporting obligation is focused on non-compliance that may have an impact on Canadian derivatives market participants. Specifically, this section now states:

> (d) the derivatives dealer reports to the regulator or, in Québec, the securities regulatory authority in a timely manner any circumstance in which the derivatives dealer is not or

was not in compliance with the laws of the foreign jurisdiction relating to trading in derivatives to which the derivatives dealer is subject if any of the following apply:

(i) the non-compliance creates or created, in the opinion of a reasonable person, a risk of material harm to a derivatives party whose head office or principal place of business is located in Canada;

(ii) the non-compliance creates or created, in the opinion of a reasonable person, a risk of material harm to capital markets of Canada;

(iii) the non-compliance is part of a pattern of material non-compliance relating to the activities being conducted with one or more derivatives parties whose head office or principal place of business is in Canada.

We have not added wording to state that the provision is "subject to any blocking, privacy or secrecy laws applicable to the derivatives dealer, and, where customary, giving preference to the cooperation between home and host country regulatory authority regarding books and records access."

In view of the fact that the reporting requirement focuses on non-compliance that may have a material impact on derivatives market participants in Canada, and in view of the corresponding requirement on Canadian derivatives dealers to report similar non-compliance under section 32 [*Responsibility of derivatives firm to report material non-compliance*], we remain of the view that current conditions are reasonable and proportionate.

Section 38 – Foreign dealers trading with Canadian derivatives dealers

Two commenters suggested that a similar exemption to section 8.5 of NI 31-103 should be granted to enable unregistered firms, including foreign dealers, to trade securities with Canadian registered investment dealers without the unregistered firm being subject to Canadian requirements under NI 93-101 and NI 93-102.

CSA Response

As noted above, we have added a new foreign liquidity provider exemption for foreign dealers that trade only with registered derivatives dealers.

Section 40 – Canadian financial institutions

One commenter argued that Canadian financial institutions that are subject to OSFI supervision should be exempt from all the requirements under NI 93-101. If the CSA does not accept this recommendation, equivalence should be applicable for almost all of the provisions of NI 93-101, including the senior derivatives manager provisions.

Two commenters argued that information provided to the CSA by a FRFI under section 40(b) could include prescribed supervisory information (**PSI**), for example, relating to prudential aspects of record keeping (e.g., business and strategic planning; audit, compliance and risk management; minutes of meetings of Boards of Directors). PSI is protected under federal law and FRFIs are prohibited from sharing such information. FRFIs can only provide this information to OSFI and it is OSFI's decision as to what information may be shared with provincial regulators. NI 93-101 should be amended to expressly exclude FRFIs from being obliged to disclose PSI to provincial regulators.

CSA Response

We have made a number of minor changes to the exemption in section 40 [*Canadian financial institutions*] but generally have not adopted these comments.

While we acknowledge that Canadian financial institutions are subject to OSFI supervision, it is important to note that the purpose of prudential oversight is not to protect the financial institution's customers but rather to protect the financial institution itself, as well as its depositors and creditors. Prudential supervision and market regulation are complements rather than substitutes. They have different mandates. The protection of the financial institution's customer when the financial institution acts as a dealer is the responsibility of conduct regulators, such as the CSA in Canada.

We are aware, however, that there may be overlap between conduct regulation and prudential oversight and have, therefore, included in the proposed regime exemption from those requirements that are equivalent to existing prudential requirements. As a result, we can have both prudential oversight and market regulation without duplicating the regulatory burden of financial institutions.

We also note that the concept of business conduct obligations should not be novel for Canadian financial institutions that act as derivatives dealers as many of them are already registered as swap dealers with the CFTC and subject to the CFTC's business conduct standards. We believe it would be anomalous if the major Canadian financial institutions were subject to conduct obligations in the U.S. when dealing with U.S. counterparties but were not similarly subject to conduct obligations when dealing with derivatives parties in Canada.

We do not believe it would be fair or appropriate for a Canadian financial institution to be subject to business conduct obligations when dealing with a customer in the U.S. under CFTC rules but not be subject to similar business conduct rules when dealing with a customer in Canada.

We believe that this approach is supported by recent events, such as

- Events that led to the development of the (voluntary) FX Code of Conduct by the Bank for International Settlements, various central banks and FX market participants[20]

[20] https://www.bis.org/press/p170525.htm

- Recent OSC settlement agreements with two Canadian banks related to compliance failures in the banks' foreign exchange (FX) trading businesses. [21] These failures allowed FX traders to share confidential customer information in chatrooms with FX traders at competitor firms.

- Recent events that have led the federal government to expand the Financial Consumer Agency of Canada (FCAC) oversight of banks' internal business processes and procedures including ensuring that a bank's product and service offerings are appropriate for, and take into consideration, the customer's needs and circumstances. The FCAC will also have the right to ensure that remuneration paid to bank staff, including benefits, do not impede any policies and procedures implemented to ensure the "appropriateness" of offered products or services.

Section 41 – Derivatives traded on a derivatives trading facility where the identity of the derivatives party is unknown

We received comments that the exemption in section 41 [*Derivatives traded on a derivatives trading facility where the identity of the derivatives party is unknown*] needs to be further broadened.

Comments included the following:

- This exemption is appropriate for transactions executed on a trading facility or that are centrally cleared.

- This exemption should apply to any transaction entered into with a counterparty where the counterparty's identity is unknown, whether or not that transaction is cleared and whether or not the transaction is entered into on a DTF. The onus of ensuring only EDPs have been accepted by DTFs should not be on derivatives dealers.

- Similar to the CFTC's exclusion, this exemption should be expanded to all requirements when derivatives are traded on derivatives trading facilities, given that derivatives trading facilities and clearing houses have their own rules and compliance requirements that derivatives firms must abide by. In the alternative, all anonymous trades should be exempt from section 9.

- This exemption should be expanded to also cover: section 9 (Conflicts of interest), section 11 (Derivatives-party-specific needs and objectives), section 12 (Suitability), section 18 (Relationship disclosure information) and section 19 (Pre-transaction disclosure). A derivatives dealer is unable to determine and comply with these sections where a counterparty's identity is unknown; a derivatives dealer transacts with such a counterparty through an agent and the agent should be responsible for complying with these sections.

- For transactions executed on a trading facility that are centrally cleared, this exemption be expanded to cover all situations where a derivatives firm is expected to provide documentation (e.g., section 28).

[21] *Re Royal Bank of Canada* (August 30, 2019) https://www.osc.ca/en/tribunal/tribunal-proceedings/royal-bank-canada-re and *The Toronto-Dominion Bank* (August 30, 2019) https://www.osc.ca/en/tribunal/tribunal-proceedings/toronto-dominion-bank-re

CSA Response

We have broadened the exemption in section 41 so that dealers are exempt from all requirements in the business conduct rule, except fair dealing, complaints handling and Part 5 [*compliance and recordkeeping*] requirements when the transaction is executed and subject to the rules of a derivatives trading facility (or analogous platform or trading venue) and the derivatives dealer does not know the identity of its counterparty at the time the transaction is executed. This exemption applies whether or not the transaction is ultimately cleared.

Additionally, when a dealer is transacting with a counterparty and the transaction is being negotiated on behalf of the counterparty by an adviser in respect of a managed account, there are circumstances where even though a dealer is arranging the transaction with the adviser, the dealer will not necessarily know the identity of the ultimate counterparty the transaction will be allocated to under a particular derivatives agreement. In accordance with subsection 1(6) of the rule, the intention in this rule is that an adviser of a managed account will be viewed from the perspective of the dealer as an EDP for the purposes of the Instrument and therefore, the very basic core principles (fair dealing, delivering a trade confirm, ensuring that a dealer has in place adequate compliance framework in place to disclose identifiable conflicts (if any), as well as having in place a complaints handling procedure) would be extended to the adviser, as the agent on behalf of the ultimate counterparty. As a result, we do not believe it would be fair or appropriate to provide an additional exemption in the instrument specific to the circumstance where the identity of the derivatives party is unknown because the transaction in question involves a block trade.

We note that the CFTC rules are much more prescriptive than the principles-based framework in this rule. In our view any recommendations or dealings with a client in respect of cleared transactions or transactions executed on a derivatives trading facility (or analogous trading venue) with clients that are EDPs should remain subject to the limited set of core principles (fair dealing, ensuring that a dealer has in place adequate compliance framework to disclose identifiable conflicts (if any), as well as having in place a complaints handling procedure).

Division 3 – Exemptions for Derivatives Advisers

Section 42 – Advising generally

One commenter argued that the conditions in sections 42(1)(d) and (e) are very broad and should be reconsidered as they may present unnecessary compliance issues/obstacles for advisers.

CSA Response

We have not made changes as we believe the conditions are appropriate.

The exemption in section 42 [*Advising generally*] is intended to complement and work in a similar manner to the exemption in section 8.25 [*Advising generally*] of NI 31-103 (and, in Ontario, section 34 [*Exemption from registration requirements, advisers*] of the *Securities Act* (Ontario).

A comparison of the two provisions is as follows:

Section 8.25 [*Advising generally*] of NI 31-103	**Proposed section 42 [*Advising generally*] of NI 93-101**
8.25 Advising generally **(1)** For the purposes of subsections (3) and (4), "financial or other interest" includes the following: (a) ownership, beneficial or otherwise, in the security or in another security issued by the same issuer; (b) an option in respect of the security or another security issued by the same issuer; (c) a commission or other compensation received, or expected to be received, from any person or company in connection with the trade in the security; (d) a financial arrangement regarding the security with any person or company; (e) a financial arrangement with any underwriter or other person or company who has any interest in the security.	**Advising generally** **42.(1)** For the purpose of subsection (3), "financial or other interest" in relation to a derivative or a transaction includes the following: (a) ownership of, beneficial or otherwise, an underlying interest or underlying interests of the derivative; (b) ownership of, beneficial or otherwise, or another interest in, a derivative that has the same underlying interest as the derivative; (c) a commission or other compensation received or expected to be received from any person or company in relation to a transaction, an underlying interest in the derivative or a derivative that has the same underlying interest as the derivative; (d) a financial arrangement in relation to the derivative, an underlying interest in the derivative or a derivative that has the same underlying interest as the derivative; (e) any other interest that relates to the transaction.
(2) The adviser registration requirement does not apply to a person or company that acts as an adviser if the advice the person or company provides does not purport to be tailored to the needs of the person or company receiving the advice.	**(2)** A person or company that acts as a derivatives adviser is exempt from the provisions of this Instrument applicable to a derivatives adviser if the advice that the person or company provides does not purport to be tailored to the needs of the person or company receiving the advice.
(3) If a person or company that is exempt under subsection (2) recommends buying, selling or holding a specified security, a class of securities or the securities of a class of issuers in which any of the following has a financial or other interest, the person or company must disclose the interest concurrently with providing the advice: (a) the person or company; (b) any partner, director or officer of the person or company; (c) any other person or company that would be an insider of the first-mentioned person or	**(3)** If the person or company that is referred to in subsection (2) recommends a transaction involving a derivative, a class of derivatives or the underlying interest of a derivative or class of derivatives in which any of the following has a financial or other interest, the person or company must disclose the interest, including a description of the nature of the interest, concurrently with providing the advice: (a) the person or company; (b) any partner, director or officer of the person or company;

company if the first-mentioned person or company were a reporting issuer.	(c) where the person is an individual, the spouse or child of the individual; (d) any other person or company that would be an insider of the first mentioned person or company if the first mentioned person or company were a reporting issuer.
(4) If the financial or other interest of the person or company includes an interest in an option described in paragraph (b) of the definition of "financial or other interest" in subsection (1), the disclosure required by subsection (3) must include a description of the terms of the option.	
(5) This section does not apply in Ontario.	

Section 43 – Foreign derivatives advisers

We received a number of comments in relation to the foreign adviser exemption that generally paralleled similar comments received on the foreign dealer exemption.

These comments included the following:

- Exemptions for foreign derivatives advisers and sub-advisers, similar to exemptions set out in NI 31-103, such as sections 8.26 and 8.26.1 of NI 31-103, should be included to avoid unintended consequences to investors and the Canadian market. As foreign jurisdictions generally do not have registration regimes applicable to derivatives advisers in respect of OTC derivatives transactions, securities legislation should be considered. IOSCO member jurisdictions that have implemented IOSCO's recommendations should be granted equivalence.

- As no compelling rationale for the application of first tier requirements to a foreign derivatives firm has been articulated, which is generally already subject to adequate market protection requirements in a foreign jurisdiction, the terms and conditions of this exemption should be much more closely aligned with the terms and conditions of the international adviser exemption under NI 31-103.

CSA Response

As explained above, we have amended the foreign dealer exemption in s. 38 of NI 93-101 and the foreign adviser exemption in s. 43 of NI 93-101 so that they more closely conform to the model established by the international dealer exemption in s. 8.18 of NI 31-103 and the international adviser exemption in section 8.26 of NI 31-103. Please see the response to comments received on the foreign dealer exemption in section 38 of NI 93-101 for additional information about this change.

We have also included a new exemption for foreign sub-advisers in section 44 of NI 93-101 based on the similar exemption for international sub-advisers in section 8.26.1 of NI 31-103.

Section 43 – Foreign derivatives advisers (continued)

One commenter suggested that a category similar to "commodity trading advisors" under the CFTC's rules for those who provide tailored advice to their energy clients but do not have authority to trade on their clients' behalf would be beneficial to prevent a competitive advantage to any foreign derivatives adviser (or adviser out of Quebec), including US energy companies, over other Canadian energy companies, including those in Alberta, that engage in similar activities.

CSA Response

We have not made any changes in response to this comment as believe the existing foreign derivatives adviser exemption would cover firms registered as "commodity trading advisors" under the CFTC's rules.

Section 43 – Foreign derivatives advisers – reporting of non-compliance – section 43(1)(d)

Similar to the comments provided on the similar condition in section 38(1)(d), two commenters suggested that the reporting requirement in section 43(1)(d) greatly exceeds the regulatory reporting requirements that apply to most foreign firms and registered securities firms and exempt securities firms in Canada. Regulatory reporting should not be a condition to the exemption, and if reporting is necessary, reporting of only regulatory actions should be required in a consistent manner with the timing of reporting in the home jurisdiction. Self-reporting requirements may be inconsistent with a firm's home country regulatory restrictions which may prohibit the reporting or communicating of certain types of breaches of local laws.

CSA Response

We have clarified that this reporting is limited only to activity involving Canadian clients; otherwise, we have not made any changes in response to this comment. Please see the response to the comments provided on the similar condition in section 38(1)(d).

Appendix A

Comparison of protections that do not apply to, or may be waived by, "eligible derivatives parties" under Proposed NI 93-101 *Derivatives: Business Conduct* and "permitted clients" under NI 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*

Certain requirements in the Proposed Instrument are similar to existing market conduct requirements applicable to registered dealers and advisers under National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**) but have been modified to reflect the different nature of derivatives markets.

Subject to the Exemptions found in Part 6 of NI 93-101 *Derivatives: Business Conduct* (including exemptions for foreign derivatives firms, Canadian financial institutions, IIROC investment dealers, registered advisers, as well as transactions executed on a derivatives trading facility where the identity of the derivatives party is not known), the following chart sets out the general framework for assessing which obligations do not apply, or apply unless waived, when dealing with or advising an eligible derivatives party:

Obligation	Approach under NI 31-103	Approach under NI 93-101
Fair dealing[22]	Applies in respect of all clients	Applies in respect of all derivatives parties (s. 8)
Identifying and responding to conflicts of interest	Applies in respect of all clients (s. 13.4) However, client relationship disclosure obligations in relation to conflicts of interest do not apply in respect of a permitted client that is not an individual (s. 14.2(6))	Applies in respect of all derivatives parties (s. 9) However, relationship disclosure obligations in Part 4 in relation to conflicts of interest do not apply in respect of • an EDP that is not an individual • an EDP that is an individual that has waived in writing this obligation • an EDP that is an eligible commercial hedger that has waived in writing this obligation (ss. 7 and 18)

[22] See section 2.1 of OSC Rule 31-505 *Conditions of Registration*; section 14 of the Securities Rules, B.C. Reg. 194/97 **[B.C. Regulations]** under the *Securities Act* (British Columbia), R.S.B.C. 1996, c. 418 **[B.C. Act]**; section 75.2 of the *Securities Act* (Alberta) R.S.A. 2000, c.S-4 **[Alberta Act]**; section 33.1 of *The Securities Act, 1988* (Saskatchewan), S.S. 1988-89, c. S-42.2 **[Saskatchewan Act]**; subsection 154.2(3) of *The Securities Act* (Manitoba) C.C.S.M. c. S50 **[Manitoba Act]**; section 65 of the *Derivatives Act* (Québec), R.S.Q., c. 14.01 **[Québec Act]**; subsection 54(1) of the *Securities Act* (New Brunswick) S.N.B. 2004, c. S-5.5 **[N.B. Act]**; section 90 of the *Securities Act* (Prince Edward Island), R.S.P.E.I. 1988, c. S-3.1 **[P.E.I. Act]**; section 39A of the *Securities Act* (Nova Scotia), R.S.N.S. 1989, c. 418 **[N.S. Act]**; subsection 26.2(1) of the *Securities Act* (Newfoundland and Labrador), R.S.N.L.1990, c. S-13 **[Newfoundland Act]**; section 90 of the *Securities Act* (Nunavut), S.Nu. 2008, c. 12 **[Nunavut Act]**; section 90 of the *Securities Act* (Northwest Territories), S.N.W.T. 2008, c. 10 **[N.W.T. Act]**; and section 90 of the *Securities Act* (Yukon), S.Y. 2007, c. 16 **[Yukon Act]**.

Obligation	Approach under NI 31-103	Approach under NI 93-101
Gatekeeper KYC (AML, etc.)	Applies in respect of all clients (s. 13.2) However, this does not apply if the client is a registered firm, Canadian financial institution or Schedule III bank (s. 13.2(5))	Applies in respect of all derivatives parties (s. 10) However, this does not apply if the derivatives party is a registered firm or a Canadian financial institution (including a Schedule III bank) (s. 10(5)).
Client-specific KYC (investment needs and objectives, etc.) Suitability	Applies in respect of all clients (ss. 13.2(2)(c) and 13.3) May be waived in writing by a permitted client (including an individual permitted client) if registrant does not act as an adviser in respect of a managed account for the client (ss. 13.2(6) and 13.3(4))	Applies in respect of all derivatives parties other than • an EDP that is not an individual • an EDP that is an individual that has waived in writing this obligation • an EDP that is an eligible commercial hedger that has waived in writing this obligation • (ss. 7, 13 and 14)
Complaints Handling	Applies in respect of all clients (s. 13.15)	Applies in respect of all derivatives parties (s. 11)
Tied Selling	Applies in respect of all clients (ss. 11.7 and 11.8)	Applies in respect of all derivatives parties (s. 12)
Miscellaneous other obligations	Do not apply to a permitted client • Disclosure when recommending the use of borrowed money – s. 13.13(2) • When the firm has a relationship with a financial institution – s. 14.4(3)	Apply in respect of all derivatives parties other than • an EDP that is not an individual • an EDP that is an individual that has waived in writing this obligation • an EDP that is an eligible commercial hedger that has waived in writing this obligation (ss. 7 and 19)
Miscellaneous other obligations	Do not apply to a permitted client that is not an individual • Relationship disclosure information – s. 14.2(6) • Pre-trade disclosure of charges – s. 14.2.1(2), • Restriction on self-custody and qualified custodian requirement – s. 14.5.2 • Additional statements – s. 14.14.1 • Security position cost information – s. 14.14.2 • Report on charges and other compensation – s. 14.17 • Investment performance report – s. 14.18	Apply in respect of all derivatives parties other than • an EDP that is not an individual • an EDP that is an individual that has waived in writing this obligation • an EDP that is an eligible commercial hedger that has waived in writing this obligation (See ss. 7 and Part 4)

ANNEX C

PROPOSED NATIONAL INSTRUMENT 93-101
DERIVATIVES: BUSINESS CONDUCT

PART 1
DEFINITIONS AND INTERPRETATION

Definitions and interpretation

1. (1) In this Instrument

"Canadian financial institution"[1] means any of the following:

(a) an association governed by the *Cooperative Credit Associations Act* (Canada)

(b) a bank named in Schedule I or II of the *Bank Act* (Canada),

(c) a loan corporation, trust company, insurance company, treasury branch, credit union, central credit union, caisse populaire, financial services cooperative, or league that, in each case, is authorized to carry on business in Canada or a jurisdiction of Canada or the Confédération des caisses populaires et d'économie Desjardins du Québec;

"collateral" means cash, securities or other property that is

(a) received or held by a derivatives firm from, for or on behalf of a derivatives party, and

(b) intended to or does margin, guarantee, secure, settle or adjust one or more derivatives between the derivatives firm and the derivatives party;

"commercial hedger" means a person or company that carries on a business and that transacts a derivative to hedge a risk in respect of that business related to any of the following:

(a) an asset that the person or company owns, produces, manufactures, processes, or merchandises or, at the time the transaction occurs, reasonably anticipates owning, producing, manufacturing, processing, or merchandising;

(b) a liability that the person or company incurs or, at the time the transaction occurs, reasonably anticipates incurring;

(c) a service that the person or company provides, purchases, or, at the time the transaction occurs, reasonably anticipates providing or purchasing;

"commodity derivative" means a derivative that has, as its only underlying interest, a commodity other than cash, currency or a cryptoasset;

"derivatives adviser" means

(a) a person or company engaging in or holding themselves out as engaging in the business of advising others in respect of derivatives, and

(b) any other person or company required to be registered as a derivatives adviser under securities legislation;

"derivatives dealer" means

(a) a person or company engaging in or holding themselves out as engaging in the business of trading in derivatives as principal or agent, and

(b) any other person or company required to be registered as a derivatives dealer under securities legislation;

"derivatives firm" means a derivatives dealer or a derivatives adviser, as applicable;

[1] Final publication expected to reference the definition of "Canadian financial institution" in NI 14-101.

"derivatives party" means,

(a) in relation to a derivatives dealer, any of the following:

(i) a person or company for which the derivatives dealer acts or proposes to act as an agent in relation to a transaction;

(ii) a person or company that is, or is proposed to be, a party to a derivative if the derivatives dealer is the counterparty, and

(b) in relation to a derivatives adviser, a person or company to which the adviser provides or proposes to provide advice in relation to a derivative;

"derivatives party assets" means any asset, including collateral, received or held by a derivatives firm from, for or on behalf of a derivatives party;

"derivatives position" means the economic interest of a counterparty in an outstanding derivative at a point in time;

"derivatives sub-adviser" means an adviser to any of the following:

(a) a derivatives adviser;

(b) an adviser that is registered as an adviser under securities or commodity futures legislation;

(c) a registered investment dealer or a derivatives dealer that is, in each case, a dealer member of IIROC acting as an adviser in accordance with the rules of IIROC;

"eligible commercial hedger" means a person or company that only qualifies as an eligible derivatives party under paragraph (n) of the definition of "eligible derivatives party";

"eligible derivatives party" means, for a derivatives party of a derivatives firm, any of the following:

(a) a Canadian financial institution;

(b) the Business Development Bank of Canada continued under the *Business Development Bank of Canada Act* (Canada);

(c) a subsidiary of a person or company referred to in paragraph (a) or (b), if the person or company owns all of the voting securities of the subsidiary, except the voting securities required by law to be owned by directors of the subsidiary;

(d) a person or company registered under the securities legislation of a jurisdiction of Canada as at least one of the following:

(i) a derivatives dealer;

(ii) a derivatives adviser;

(iii) an adviser;

(iv) an investment dealer;

(e) a pension fund that is regulated by the federal Office of the Superintendent of Financial Institutions or a pension commission or similar regulatory authority of a jurisdiction of Canada or a wholly-owned subsidiary of the pension fund;

(f) an entity organized under the laws of a foreign jurisdiction that is analogous to any of the entities referred to in paragraphs (a) to (e);

(g) the Government of Canada or the government of a jurisdiction of Canada, or any crown corporation, agency or wholly-owned entity of the Government of Canada or the government of a jurisdiction of Canada;

(h) a government of a foreign jurisdiction, or any agency of that government;

(i) a municipality, public board or commission in Canada and a metropolitan community, school board, the Comité de gestion de la taxe scolaire de l'île de Montréal or an intermunicipal management board in Québec;

(j) 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 in a jurisdiction of Canada or a foreign jurisdiction, acting on behalf of a managed account managed by the trust company or trust corporation, as the case may be;

(k) a person or company that is acting on behalf of a managed account if the person or company is registered or authorized to carry on business as one of the following:

(i) an adviser or a derivatives adviser in a jurisdiction of Canada;

(ii) the equivalent of an adviser or a derivatives adviser under the securities legislation of a jurisdiction of Canada or of a foreign jurisdiction;

(l) an investment fund if either of the following apply:

(i) the investment fund is managed by a person or company registered as an investment fund manager under the securities legislation of a jurisdiction of Canada;

(ii) the investment fund is advised by an adviser registered or exempted from registration under securities legislation or under commodity futures legislation of a jurisdiction of Canada;

(m) a person or company, other than an individual, that has represented to the derivatives firm, in writing, that

(i) it has the requisite knowledge and experience to evaluate the information provided to the person or company about derivatives by the derivatives firm, the suitability of the derivatives for the person or company, and the characteristics of the derivatives to be transacted on the person or company's behalf, and

(ii) it has net assets of at least $25 000 000 as shown on its most recently prepared financial statements;

(n) a person or company, other than an individual, that has represented to the derivatives firm, in writing, that

(i) it has the requisite knowledge and experience to evaluate the information provided to the person or company about derivatives by the derivatives firm, the suitability of the derivatives for the person or company, and the characteristics of the derivatives to be transacted on the person or company's behalf, and

(ii) it is a commercial hedger in relation to the derivatives that it transacts with the derivatives firm;

(o) an individual who has represented to the derivatives firm, in writing, that

(i) the individual has the requisite knowledge and experience to evaluate the information provided to the individual about derivatives by the derivatives firm, the suitability of the derivatives for the individual, and the characteristics of the derivatives to be transacted on the individual's behalf, and

(ii) the individual beneficially owns financial assets, as defined in section 1.1 of National Instrument 45-106 *Prospectus Exemptions*, that have an aggregate realizable value before tax but net of any related liabilities of at least $5 000 000;

(p) a person or company, other than an individual, that has represented to the derivatives firm, in writing, that its obligations under derivatives that it transacts with the derivatives firm are fully guaranteed or otherwise fully supported, under a written agreement, by one or more eligible derivatives parties, other than a person or company that only qualifies as an eligible derivatives party under paragraph (n) or (o);

(q) a qualifying clearing agency;

"institutional foreign exchange market" means the global foreign exchange market comprised of persons or companies that are active in foreign exchange markets as part of their business and transact in foreign exchange contracts or instruments, including short-term foreign exchange contracts or instruments;

"investment dealer" means a person or company registered as an investment dealer under the securities legislation of a jurisdiction of Canada;

"IIROC" means the Investment Industry Regulatory Organization of Canada;

"managed account" means an account of a derivatives party for which another person or company makes the trading

decisions if that person or company has discretion to transact derivatives for the account without requiring the derivatives party's express consent to the transaction;

"non-eligible derivatives party" means a derivatives party that is not an eligible derivatives party;

"permitted depository" means a person or company that is any of the following:

(a) a Canadian financial institution;

(b) a qualifying clearing agency;

(c) the Bank of Canada or the central bank of a permitted jurisdiction;

(d) in Québec, a person recognized or exempted from recognition as a central securities depository under the *Securities Act* (Québec);

(e) a person or company

(i) whose head office or principal place of business is in a permitted jurisdiction,

(ii) that is a banking institution or trust company of a permitted jurisdiction, and

(iii) that has shareholders' equity, as reported in its most recent audited financial statements, of not less than $100 000 000;

(f) with respect to derivatives party assets that it receives from a derivatives party, a derivatives dealer;

"permitted jurisdiction" means a foreign jurisdiction that is any of the following:

(a) a country where the head office or principal place of business of a Schedule III bank is located, and a political subdivision of that country;

(b) if a derivatives party has provided express written consent to the derivatives dealer entering into a derivative in a foreign currency, the country of origin of the foreign currency used to denominate the rights and obligations under the derivative entered into by, for or on behalf of the derivatives party, and a political subdivision of that country;

"qualifying clearing agency" means a person or company if any of the following apply:

(a) it is recognized or exempted from recognition as a clearing agency or a clearing house, as applicable, in a jurisdiction of Canada;

(b) it is regulated by an authority in a foreign jurisdiction that applies regulatory requirements that are consistent with the *Principles for financial market infrastructures* applicable to central counterparties, as amended from time to time, and published by the Bank for International Settlements' Committee on Payments and Market Infrastructures and the International Organization of Securities Commissions;

"referral arrangement" means any arrangement in which a derivatives firm agrees to pay or receive a referral fee;

"referral fee" means any compensation, regardless of its form, whether made directly or indirectly, paid for the referral of a derivatives party to or from a derivatives firm;

"registered derivatives firm" means a derivatives dealer or a derivatives adviser that is registered under the securities legislation of a jurisdiction in Canada as a derivatives dealer or a derivatives adviser;

"registered firm" means a registered derivatives firm or a registered securities firm;

"registered securities firm" means a person or company that is registered as a dealer, an adviser or an investment fund manager in a category of registration specified in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*;

"Schedule III bank" means an authorized foreign bank named in Schedule III of the *Bank Act* (Canada);

"short-term foreign exchange contract or instrument" means a contract or instrument referred to in the following:

(a) in Manitoba, paragraph 2(1)(c) of Manitoba Securities Commission Rule 91-506 Derivatives: Product Determination;

(b) in Ontario, paragraph 2(1)(c) of Ontario Securities Commission Rule 91-506 Derivatives: Product Determination;

(c) in Québec, paragraph 2(c) of Regulation 91-506 respecting Derivatives Determination;

(d) in all other jurisdictions, paragraph 2(1)(c) of Multilateral Instrument 91-101 Derivatives: Product Determination;

"segregate" means to separately hold or separately account for a derivatives party's positions related to derivatives or derivatives party assets;

"transaction" means either of the following:

(a) entering into a derivative or making a material amendment to, terminating, assigning, selling or otherwise acquiring or disposing of a derivative;

(b) the novation of a derivative, other than a novation with a qualifying clearing agency;

"valuation" means the value of a derivative as at a certain date determined in accordance with applicable accounting standards for fair value measurement using a methodology that is consistent with derivatives industry standards;

(2) In this Instrument, "adviser" includes

(a) in Manitoba, an "adviser" as defined in *The Commodity Futures Act* (Manitoba),

(b) in Ontario, an "adviser" as defined in the *Commodity Futures Act* (Ontario), and

(c) in Québec, an "adviser" as defined in the *Securities Act* (Québec).

(3) In this Instrument, a person or company is an affiliated entity of another person or company if one of them controls the other or each of them is controlled by the same person or company.

(4) In this Instrument, a person or company (the first party) is considered to control another person or company (the second party) if any of the following apply:

(a) the first party beneficially owns or directly or indirectly exercises control or direction over securities of the second party carrying votes which, if exercised, would entitle the first party to elect a majority of the directors of the second party unless the first party holds the voting securities only to secure an obligation;

(b) the second party is a partnership, other than a limited partnership, and the first party holds more than 50% of the interests of the partnership;

(c) all of the following apply:

(i) the second party is a limited partnership;

(ii) the first party is a general partner of the limited partnership referred to in subparagraph (i);

(iii) the first party has the power to direct the management and policies of the second party by virtue of being a general partner of the second party;

(d) all of the following apply:

(i) the second party is a trust;

(ii) the first party is a trustee of the trust referred to in subparagraph (i);

(iii) the first party has the power to direct the management and policies of the second party by virtue of being a trustee of the second party.

(5) In this Instrument, a person or company is a subsidiary of another person or company if one of the following applies:

(a) the person or company is controlled by

(i) the other person or company,

(ii) the other person or company and one or more persons or companies each of which is controlled by that person or company, or

(iii) 2 or more persons or companies each of which is controlled by the other person or company;

(b) the person or company is a subsidiary of a person or company that is that other person or company's subsidiary.

(6) For the purpose of this Instrument, a person or company described in paragraph (k) of the definition of "eligible derivatives party" is deemed to be transacting as principal when it acts as an agent or trustee for a managed account.

(7) In this Instrument, in Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan and Yukon, "derivative" means a "specified derivative" as defined in Multilateral Instrument 91-101 *Derivatives: Product Determination*.

PART 2
APPLICATION AND EXEMPTION

Application to registered and unregistered persons or companies

2. For greater certainty, this Instrument applies to a person or company whether or not the person or company is a registered derivatives firm or an individual acting on behalf of a registered derivatives firm.

Application – scope of Instrument

3. This Instrument applies to,

(a) in Manitoba,

(i) a derivative other than a contract or instrument that, for any purpose, is prescribed by any of sections 2, 4 and 5 of Manitoba Securities Commission Rule 91-506 *Derivatives: Product Determination* not to be a derivative, and

(ii) a derivative that is otherwise a security and that, for any purpose, is prescribed by section 3 of Manitoba Securities Commission Rule 91-506 *Derivatives: Product Determination* not to be a security,

(b) in Ontario,

(i) a derivative other than a contract or instrument that, for any purpose, is prescribed by any of sections 2, 4 and 5 of Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination* not to be a derivative, and

(ii) a derivative that is otherwise a security and that, for any purpose, is prescribed by section 3 of Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination* not to be a security, and

(c) in Québec, a derivative specified in section 1.2 of *Regulation 91-506 respecting Derivatives Determination*, other than a contract or instrument specified in section 2 of that regulation

(d) in Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan and Yukon, a "specified derivative" as defined in Multilateral Instrument 91-101 *Derivatives: Product Determination*.

Application – short-term foreign exchange contract or instrument

3.1 (1) Despite section 3, this Instrument applies to a person or company when transacting with a derivatives party referred to in paragraphs (a) to (m) and (q) of the definition of eligible derivatives party in a short-term foreign exchange contract or instrument in the institutional foreign exchange market if all of the following apply:

(a) the person or company is a Canadian financial institution;

(b) the person or company is a derivatives dealer;

(c) the person or company has had, at any time after the date on which this Instrument comes into force, a month-end gross notional amount under all outstanding derivatives that exceed $500 000 000 000.

(2) In respect of a short-term foreign exchange contract or instrument to which subsection (1) applies, this Instrument does not apply other than the following provisions:

(a) section 8 [*Fair dealing*];

(b) section 9 [*Conflicts of interest*];

(c) section 11 [*Handling complaints*];

(d) Division 1 [*Compliance*] of Part 5 [*Compliance and recordkeeping*].

Application – affiliated entities

4. This Instrument does not apply to a person or company in respect of dealing with or advising an affiliated entity of the person or company unless the affiliated entity is an investment fund.

Application – qualifying clearing agencies

5. This Instrument does not apply to a qualifying clearing agency.

Application – governments, central banks and international organizations

6. This Instrument does not apply to any of the following:

(a) the Government of Canada, the government of a jurisdiction of Canada or the government of a foreign jurisdiction;

(b) the Bank of Canada or a central bank of a foreign jurisdiction;

(c) the Bank for International Settlements;

(d) the International Monetary Fund.

Exemptions from certain requirements in this Instrument when dealing with or advising an eligible derivatives party

7. (1) A derivatives firm is exempt from this Instrument, other than the requirements set out in subsection (3), in relation to a transaction with a derivatives party, if the derivatives party

(a) is an eligible derivatives party, and

(b) is not an individual or eligible commercial hedger.

(2) A derivatives firm is exempt from this Instrument, other than the requirements set out in subsection (3), in relation to a transaction with a derivatives party, if the derivatives party

(a) is an eligible derivatives party,

(b) is an individual or eligible commercial hedger, and

(c) has waived, upon written notice to the derivatives firm, the protections provided in this Instrument.

(3) Despite subsection (1) and (2), the following requirements apply:

(a) Division 1 [*General obligations towards all derivatives parties*] of Part 3 [*Dealing with or advising derivatives parties*];

(b) sections 23 [*Interaction with other Instruments*] and 24 [*Segregating derivatives party assets*];

(c) subsection 27(1) [*Content and delivery of transaction information*];

(d) Part 5 [*Compliance and recordkeeping*].

Part 6 [Exemptions] of this Instrument provides exemptions from the requirements of this Instrument to persons or companies, subject to certain terms and conditions:

- *Foreign derivatives dealers that trade with derivatives dealers (s. 36)*
- *Certain derivatives end-users (s. 37)*

- *Foreign derivatives dealers (s. 38)*
- *Investment dealers (s. 39)*
- *Canadian financial institutions (s. 40)*
- *Derivatives traded on a derivatives trading facility where the identity of the derivatives party is unknown (s. 41)*
- *Advising generally (s. 42)*
- *Foreign derivatives advisers (s. 43)*
- *Foreign derivatives sub-advisers (s. 44)*
- *Registered advisers under securities or commodity futures legislation (s. 45)*

The text boxes in this Instrument do not form part of this Instrument and have no official status.

PART 3
DEALING WITH OR ADVISING DERIVATIVES PARTIES

DIVISION 1 – GENERAL OBLIGATIONS TOWARDS ALL DERIVATIVES PARTIES

Fair dealing

8. (1) A derivatives firm must act fairly, honestly and in good faith with a derivatives party.

(2) An individual acting on behalf of a derivatives firm must act fairly, honestly and in good faith with a derivatives party.

Conflicts of interest

9. (1) A derivatives firm must establish, maintain and apply reasonable policies and procedures to identify existing material conflicts of interest, and material conflicts of interest that the derivatives firm in its reasonable opinion would expect to arise, between the derivatives firm, including each individual acting on behalf of the derivatives firm, and a derivatives party.

(2) A derivatives firm must respond to an existing or potential conflict of interest identified under subsection (1).

(3) If a reasonable derivatives party would expect to be informed of a conflict of interest identified under subsection (1), the derivatives firm must disclose, in a timely manner, the nature and extent of the conflict of interest to a derivatives party whose interest conflicts with the interest identified.

Know your derivatives party

10. (1) For the purpose of paragraph (2)(c) in Ontario, "insider" has the same meaning as in the *Securities Act* except that "reporting issuer", as it appears in the definition of "insider", is to be read as "reporting issuer or any other issuer whose securities are publicly traded".

(2) A derivatives firm must establish, maintain and apply reasonable policies and procedures to

(a) obtain facts necessary to comply with applicable legislation relating to the verification of a derivatives party's identity,

(b) establish the identity of a derivatives party and, if the derivatives firm has cause for concern, make reasonable inquiries as to the reputation of the derivatives party,

(c) if transacting with, for or on behalf of, or advising a derivatives party in respect of a derivative that has one or more securities as an underlying interest, establish whether either of the following applies:

(i) the derivatives party is an insider of a reporting issuer or any other issuer whose securities are publicly traded;

(ii) the derivatives party would reasonably be expected to have access to material non-public information relating to any interest underlying the derivative;

(d) if the derivatives firm will, as a result of its relationship with the derivatives party have any credit risk in relation to the derivatives party, establish the creditworthiness of the derivatives party.

(3) For the purpose of establishing the identity of a derivatives party that is a corporation, partnership or trust, a derivatives firm must establish the following:

(a) the nature of the derivatives party's business;

(b) the identity of any individual if either of the following applies:

(i) in the case of a corporation, is a beneficial owner of, or exercises direct or indirect control or direction over, more than 25% of the voting rights attached to the outstanding voting securities of the corporation;

(ii) in the case of a partnership or trust, exercises control over the affairs of the partnership or trust.

(4) A derivatives firm must take reasonable steps to keep the information required under this section current.

(5) This section does not apply if the derivatives party is a registered firm or a Canadian financial institution.

Handling complaints

11. (1) In Quebec, a derivatives firm is deemed to comply with this section if it complies with sections 74 to 76 of the Derivatives Act (R.S.Q., chapter I-14.01) (Québec).

(2) A derivatives firm must document and, in a manner that a reasonable person would consider fair and effective, promptly respond to each complaint made to the derivatives firm about any product or service offered by the derivatives firm or an individual acting on behalf of the derivatives firm.

Tied selling

12. A derivatives firm, or an individual acting on behalf of the derivatives firm, must not impose undue pressure on or coerce a person or company to obtain a derivatives-related product or service from a particular person or company, including the derivatives firm and any of its affiliated entities, as a condition of obtaining another product or service from the derivatives firm.

DIVISION 2 – ADDITIONAL OBLIGATIONS WHEN DEALING WITH OR ADVISING CERTAIN DERIVATIVES PARTIES

The obligations in this Division 2 apply if a derivatives firm is dealing with (i) a non-eligible derivatives party or (ii) an eligible derivatives party who is either an individual or eligible commercial hedger that has not waived these protections – see section 7.

Derivatives-party-specific needs and objectives

13.(1) A derivatives firm must take reasonable steps to ensure that, before it makes a recommendation to or accepts an instruction from a derivatives party to transact in a derivative, or transacts in a derivative for a derivatives party's managed account, it has sufficient information regarding all of the following to enable it to meet its obligations under section 14[*Suitability*]:

(a) the derivatives party's needs and objectives with respect to its transacting in derivatives;

(b) the derivatives party's financial circumstances;

(c) the derivatives party's risk tolerance;

(d) if applicable, the nature of the derivatives party's business and the operational risks it wants to manage.

(2) A derivatives firm must take reasonable steps to keep the information required under this section current.

Suitability

14. (1) A derivatives firm, or an individual acting on behalf of a derivatives firm, must take reasonable steps to ensure that, before it makes a recommendation to or accepts an instruction from a derivatives party to transact in a derivative, or transacts in a derivative for a derivatives party's managed account, both the derivative and the transaction are suitable for the derivatives party.

(2) If a derivatives party instructs a derivatives firm, or an individual acting on behalf of a derivatives firm, to transact in a derivative and, in the derivatives firm's reasonable opinion, following the instruction would result in a transaction or derivative that is not suitable for the derivatives party, the derivatives firm must inform the derivatives party in writing of

the derivatives firm's opinion and must not transact in the derivative unless the derivatives party instructs the derivatives firm to proceed anyway.

Permitted referral arrangements

15. A derivatives firm, or an individual acting on behalf of a derivatives firm, must not participate in a referral arrangement in respect of a derivative with another person or company unless all of the following apply:

(a) before a derivatives party is referred by or to the derivatives firm, the terms of the referral arrangement are set out in a written agreement between the derivatives firm and the person or company;

(b) the derivatives firm records all referral fees;

(c) the derivatives firm, or the individual acting on behalf of the derivatives firm, ensures that the information prescribed by subsection 17(1) [*Disclosing referral arrangements to a derivatives party*] is provided to the derivatives party in writing before the derivatives firm or the individual receiving the referral either opens an account for the derivatives party or provides services to the derivatives party.

Verifying the qualifications of the person or company receiving the referral

16. A derivatives firm, or an individual acting on behalf of a derivatives firm, must not refer a derivatives party to another person or company unless the derivatives firm first takes reasonable steps to verify and conclude that the person or company has the appropriate qualifications to provide the services, and, if applicable, is registered to provide those services.

Disclosing referral arrangements to a derivatives party

17. (1) The written disclosure of the referral arrangement required by paragraph 15(c) [*Permitted referral arrangements*] must include all of the following:

(a) the name of each party to the referral arrangement referred to in paragraph 15(a) [*Permitted referral arrangements*];

(b) the purpose and material terms of the referral arrangement, including the nature of the services to be provided by each party;

(c) any conflicts of interest resulting from the relationship between the parties to the referral arrangement and from any other element of the referral arrangement;

(d) the method of calculating the referral fee and, to the extent possible, the amount of the fee;

(e) the category of registration, or exemption from registration relied upon, of each derivatives firm and individual acting on behalf of the derivatives firm that is a party to the referral arrangement with a description of the activities that the derivatives firm or individual is authorized to engage in under that category or exemption and, giving consideration to the nature of the referral, the activities that the derivatives firm or individual is not permitted to engage in;

(f) any other information that a reasonable derivatives party would consider important in evaluating the referral arrangement.

(2) If there is a change to the information set out in subsection (1), the derivatives firm must ensure that written disclosure of that change is provided to each derivatives party affected by the change as soon as possible and no later than the 30th day before the date on which a referral fee is next paid or received.

PART 4
DERIVATIVES PARTY ACCOUNTS

DIVISION 1 – DISCLOSURE TO DERIVATIVES PARTIES

The obligations in this Division 1 of Part 4 apply if a derivatives firm is dealing with (i) a non-eligible derivatives party or (ii) an eligible derivatives party who is either an individual or eligible commercial hedger that has not waived these protections – see section 7.

Relationship disclosure information

18. (1) Before transacting with, for or on behalf of a derivatives party for the first time, or advising a derivatives party for the first time, a derivatives firm must deliver to the derivatives party all information that a reasonable person would consider important about the derivatives party's relationship with the derivatives firm, and each individual acting on behalf of the derivatives firm, that is providing derivatives-related services to the derivatives party.

(2) Without limiting subsection (1), the information delivered to a derivatives party under that subsection must include all of the following:

(a) a description of the nature or type of the derivatives party's account;

(b) a description of the conflicts of interest that the derivatives firm is required to disclose to a derivatives party under securities legislation;

(c) disclosure of the fees or other charges the derivatives party might be required to pay related to the derivatives party's account;

(d) a general description of the types of transaction fees or other charges the derivatives party might be required to pay in relation to derivatives;

(e) a general description of any compensation paid to the derivatives firm by any other party in relation to the different types of derivatives that a derivatives party may transact in through the derivatives firm;

(f) a description of the content and frequency of reporting for each account or portfolio of a derivatives party;

(g) disclosure of the derivatives firm's obligations if a derivatives party has a complaint contemplated under section 11 [*Handling complaints*];

(h) a statement that the derivatives firm has an obligation to assess whether a derivative is suitable for a derivatives party prior to executing a transaction or at any other time or a statement identifying the exemption the derivatives firm is relying on in respect of this obligation;

(i) the information a derivatives firm must collect about the derivatives party under sections 10 [*Know your derivatives party*] and 13 [*Derivatives-party-specific needs and objectives*]

(j) a general explanation of how performance benchmarks might be used to assess the performance of a derivatives party's derivatives and any options for benchmark information that might be available to the derivatives party from the derivatives firm;

(k) in the case of a derivatives firm that holds or has access to derivatives party assets, a general description of the manner in which the assets are held, used or are invested by the derivatives firm and a description of the risks and benefits to the counterparty arising from the derivatives firm holding or having access to use or invest the derivatives party assets in that manner.

(3) A derivatives firm must deliver the information required under subsection (1) to the derivatives party in writing before the derivatives firm does either of the following:

(a) transacts in a derivative with, for or on behalf of the derivatives party;

(b) advises the derivatives party in respect of a derivative.

(4) If there is a significant change in respect of the information delivered to a derivatives party under subsections (2), the derivatives firm must take reasonable steps to notify the derivatives party of the change in a timely manner and, if possible, before the derivatives firm next does either of the following:

(a) transacts in a derivative with, for or on behalf of the derivatives party;

(b) advises the derivatives party in respect of a derivative.

(5) A derivatives firm must not impose any new fee or other charge in respect of an account of a derivatives party, or increase the amount of any fee or other charge in respect of an account of a derivatives party, unless written notice of the new or increased fee or charge is provided to the derivatives party at least 60 days before the date on which the imposition or increase becomes effective.

(6) Subsections (1) to (4) do not apply to a derivatives dealer in respect of a derivatives party for whom the derivatives dealer transacts in a derivative only as directed by a derivatives adviser acting for the derivatives party.

(7) A derivatives dealer referred to in subsection (6) must deliver the information required under paragraphs (2)(a) to (g) to the derivatives party in writing before the derivatives dealer first transacts in a derivative for the derivatives party.

Pre-transaction disclosure

19. (1) Before transacting in a type of derivative with, for or on behalf of a derivatives party for the first time, a derivatives dealer must deliver each of the following to the derivatives party:

(a) a general description of the type of derivatives and services related to derivatives that the derivatives firm offers;

(b) a document designed to reasonably enable the derivatives party to assess each of the following:

(i) the types of risks that a derivatives party should consider when making a decision relating to types of derivatives that the derivatives dealer offers, including the material risks relating to the type of derivatives transacted and the derivatives party's potential exposure under the type of derivatives;

(ii) the material characteristics of the type of derivative, including the material economic terms and the rights and obligations of the counterparties to the type of derivative;

(c) a statement in writing that is substantially similar to the following:

"A characteristic of many derivatives is that you are only required to deposit funds that correspond to a portion of your total potential obligations when entering into the derivative. However, your profits or losses from the derivative are based on changes in the total value of the derivative. This means the leverage characteristic magnifies the profit or loss under a derivative, and losses can greatly exceed the amount of funds deposited. We may require you to deposit additional funds to cover your obligations under a derivative as the value of the derivative changes. If you fail to deposit these funds, we may close out your position without warning. You should understand all of your obligations under a derivative, including your obligations where the value of the derivative declines.

Using borrowed money to finance a derivatives transaction involves greater risk than using cash resources only. If you borrow money, your responsibility to repay the loan and pay interest as required by its terms remains the same even if the value of the derivative declines."

(2) Before transacting in a derivative with, for or on behalf of a derivatives party, a derivatives dealer must advise the derivatives party of all of the following:

(a) any material risks or material characteristics that are materially different from those described in the disclosure required under subsection (1);

(b) if applicable, the price of the derivative to be transacted and the most recent valuation;

(c) any compensation or other incentive payable by the derivatives party relating to the derivative or the transaction.

Daily reporting

20. (1) On each business day, a derivatives dealer must make available to a derivatives party a valuation for each derivative that it has transacted with, for or on behalf of the derivatives party and with respect to which contractual obligations remain outstanding on that day.

(2) On a monthly basis, a derivatives adviser must make available to a derivatives party a valuation for each derivative that it has transacted for or on behalf of the derivatives party, unless a derivatives adviser and a derivatives party agree otherwise.

Notice to derivatives parties by non-resident derivatives dealers

21. A derivatives dealer whose head office or principal place of business is not in Canada must not transact in a derivative with a derivatives party in the local jurisdiction unless it has delivered to the derivatives party a statement in writing disclosing all of the following:

(a) the foreign jurisdiction in which the head office or the principal place of business of the derivatives dealer is located;

(b) that all or substantially all of the assets of the derivatives dealer may be situated outside the local jurisdiction;

(c) that there may be difficulty enforcing legal rights against the derivatives dealer because of the above;

(d) the name and address of the agent for service of process of the derivatives dealer in the local jurisdiction.

DIVISION 2 – DERIVATIVES PARTY ASSETS

Sections 23 and 24 apply when a derivatives firm is dealing with any derivatives party; the remaining sections in this Division only apply if a derivatives firm is dealing with (i) a non-eligible derivatives party or (ii) an eligible derivatives party who is either an individual or eligible commercial hedger that has not waived these protections – see section 7.

Definition – initial margin

22. In this Division, "initial margin" means any derivatives party assets delivered by a derivatives party to a derivatives firm as collateral to cover potential changes in the value of a derivative over an appropriate close-out period in the event of a default.

Application and interaction with other instruments

23. A derivatives firm is exempt from the provisions in this Division if any of the following apply:

(a) the derivatives firm is subject to and complies with or is exempt from sections 3 to 8 of National Instrument 94-102 Derivatives: Customer Clearing and Protection of Customer Collateral and Positions in respect of derivatives party assets;

(b) the derivatives firm is subject to and complies with Guideline E-22 *Margin Requirements for Non-Centrally Cleared Derivatives* issued by the federal Office of the Superintendent of Financial Institutions (OSFI);

(c) the derivatives firm is subject to and complies with a regulation as may be prescribed by the securities regulatory authority in respect of derivatives party assets;

(d) the derivatives firm is subject to and complies with National Instrument 81-102 *Investment Funds* in respect of derivatives party assets.

Segregating derivatives party assets

24. A derivatives firm must segregate derivatives party assets and derivatives positions from the property and derivatives positions of the derivatives firm and other persons or companies.

Holding initial margin

25. A derivatives firm must hold initial margin in an account at a permitted depository.

Investment or use of initial margin

26. (1) A derivatives firm must not use or invest initial margin without receiving written consent from the derivatives party.

(2) A derivatives firm must not use or invest, for any purpose, the initial margin of a derivatives party unless the derivatives firm has entered into a written agreement with the derivatives party to assume all losses resulting from the investment or use of initial margin by the derivatives firm.

DIVISION 3 – REPORTING TO DERIVATIVES PARTIES

This Division, other than subsection 27(1), applies if a derivatives firm is dealing with (i) a non-eligible derivatives party or (ii) an eligible derivatives party who is either an individual or eligible commercial hedger that has not waived these protections – see section 7.

Content and delivery of transaction information

27. (1) A derivatives dealer that transacts with, for or on behalf of a derivatives party must promptly deliver a written confirmation of the transaction to the following, as applicable:

(a) the derivatives party;

(b) if the derivatives party has consented in writing, a derivatives adviser acting for the derivatives party.

(2) If a derivatives dealer has transacted with, for or on behalf of a non-eligible derivatives party, the written confirmation required under subsection (1) must include all of the following, if applicable:

(a) a description of the derivative;

(b) a description of the agreement that governs the transaction;

(c) the notional amount, quantity or volume of the underlying asset of the derivative;

(d) the number of units of the derivative;

(e) the total price paid for the derivative and the per unit price of the derivative;

(f) the commission, sales charge, service charge and any other amount charged in respect of the transaction;

(g) whether the derivatives dealer acted as principal or agent in relation to the derivative;

(h) the date and the name of the trading facility on which the transaction took place;

(i) the name of each individual acting on behalf of the derivatives firm that provided advice relating to the derivative or the transaction;

(j) the date of the transaction;

(k) the name of the qualifying clearing agency where the derivative was cleared.

Derivatives party statements

28. (1) A derivatives firm must deliver a statement to a derivatives party referred to in subsection (2), at the end of each quarterly period, if either of the following applies:

(a) within the quarterly period the derivatives firm transacted a derivative with, for or on behalf of the derivatives party;

(b) the derivatives party has an outstanding derivatives position resulting from a transaction where the derivatives firm acted as a derivatives dealer.

(2) A statement delivered under this section must include all of the following information for each transaction made with, for or on behalf of the derivatives party by the derivatives firm during the period covered by the statement, if applicable:

(a) the date of the transaction;

(b) a description of the transaction, including the notional amount, the number of units of the transaction, the per unit price and the total price;

(c) information sufficient to identify the agreement that governs the transaction.

(3) A statement delivered under this section must include all of the following information as at the date of the statement, if applicable:

(a) a description of each outstanding derivative to which the derivatives party is a party;

(b) the valuation, as at the statement date, of each outstanding derivative referred to in paragraph (a);

(c) the final valuation, as at the expiry or termination date, of each derivative that expired or terminated during the period covered by the statement;

(d) a description of all derivatives party assets held or received by the derivatives firm as collateral;

(e) any cash balance in the derivatives party's account;

(f) a description of any other assets of a derivatives party held or received by the derivatives firm;

(g) the total market value of all cash, outstanding derivatives and other derivatives party assets in the derivatives party's account, other than assets held or received as collateral.

PART 5
COMPLIANCE AND RECORDKEEPING

DIVISION 1 – COMPLIANCE

Definitions

29. In this Division,

"chief compliance officer" means the officer or partner of a derivatives firm who is responsible for establishing, maintaining and applying written policies and procedures to monitor and assess compliance, by the derivatives firm and individuals acting on its behalf, with securities legislation relating to derivatives;

"derivatives business unit" means, in respect of a derivatives firm, a division or other organizational unit that transacts in, or provides advice in relation to, a type of derivative, or a class of derivatives, on behalf of the derivatives firm;

"senior derivatives manager" means, in respect of a derivatives business unit of a derivatives firm, an individual designated by the derivatives dealer under subsection 31(1).

Policies and procedures

30. A derivatives firm must establish, maintain and apply policies, procedures, controls and supervision sufficient to provide reasonable assurance that all of the following are satisfied:

(a) the derivatives firm and each individual acting on its behalf in relation to transacting in, or providing advice in relation to, a derivative, comply with securities legislation relating to trading and advising in derivatives;

(b) the risks relating to its derivatives activities within the derivatives business unit are managed appropriately and in accordance with the derivatives firm's risk management policies and procedures;

(c) each individual who performs an activity on behalf of the derivatives firm relating to transacting in, or providing advice in relation to, a derivative, prior to commencing the activity and on an ongoing basis,

(i) has the experience, education and training that a reasonable person would consider necessary to perform the activity competently,

(ii) without limiting subparagraph (i), understands the structure, features and risks of each derivative that the individual transacts in or advises in relation to, and

(iii) has acted with and continues to act with integrity.

31. (1) A derivatives dealer must do the following:

(a) designate an individual as a senior derivatives manager in respect of each derivatives business unit;

(b) identify to the regulator or, in Québec, the securities regulatory authority, upon request, each individual designated as the senior derivatives manager in respect of each derivatives business unit.

(2) A senior derivatives manager must do the following:

(a) supervise the derivatives-related activities conducted in the derivatives business unit directed towards ensuring compliance by the derivatives business unit, and each individual working in the derivatives business unit, with this Instrument, applicable securities legislation and the policies and procedures required under section 30 [*Policies and procedures*];

(b) respond by addressing, in a timely manner, any material non-compliance by an individual working in the derivatives business unit with this Instrument, applicable securities legislation or the policies and procedures required under section 30 [*Policies and procedures*], including reporting to the chief compliance officer.

(3) At least once every calendar year, the senior derivatives manager in respect of each derivatives business unit must,

(a) prepare a report containing the following, as applicable:

(i) a description of

(A) each incident of material non-compliance with this Instrument, securities legislation relating to trading in derivatives or the policies and procedures required under section 30 [*Policies and procedures*] by the derivatives business unit or an individual in the derivatives business unit, and

(B) the steps taken to respond to each incidence of material non-compliance;

(ii) a statement to the effect that the derivatives business unit is in material compliance with this Instrument, securities legislation relating to trading and advising in derivatives and the policies and procedures required under section 30 [*Policies and procedures*]; and

(b) submit the report referred to in paragraph (a) to the board of directors of the derivatives firm.

(4) The obligation of the senior derivatives manager under paragraph (3)(b) may be fulfilled by the derivatives firm's chief compliance officer.

Exemptions from the designation and responsibilities of a senior derivatives manager

31.1 (1) A derivatives dealer is exempt from subsection 31(1) and a senior derivatives manager is exempt from subsections 31(2) to 31(4) if all of the following apply:

(a) the derivatives dealer does not solicit or otherwise transact a derivative with, for or on behalf of, a non-eligible derivatives party;

(b) the derivatives dealer does not, in respect of derivatives or transactions, advise a non-eligible derivatives party, other than in accordance with section 42 [*Advising generally*];

(c) either of the following applies:

(i) the derivatives dealer has its head office or principal place of business in a jurisdiction of Canada and the derivatives dealer, together with each affiliated entity of the derivatives dealer, excluding investment funds, and excluding derivatives between these affiliated entities, has not had, in any of the previous 24 calendar months, an aggregate month-end gross notional amount under outstanding derivatives, exceeding $250 000 000;

(ii) the derivatives dealer has its head office and principal place of business in a foreign jurisdiction and the derivatives dealer, together with each affiliated entity of the derivatives dealer, excluding investment funds, and excluding derivatives between these affiliated entities, has not had, in any of the previous 24 calendar months, an aggregate month-end gross notional amount under outstanding derivatives with one or more Canadian counterparties that have a head office or principal place of business in Canada, exceeding $250 000 000.

(2) A derivatives dealer is exempt from subsection 31(1) and a senior derivatives manager is exempt from subsections 31(2) to 31(4) if all of the following apply:

(a) the derivatives dealer does not solicit or otherwise transact a derivative with, for or on behalf of, a non-eligible derivatives party;

(b) the derivatives dealer does not, in respect of derivatives or transactions, advise a non-eligible derivatives party, other than in accordance with section 42 [*Advising generally*];

(c) the derivatives dealer, and each affiliated entity of the derivatives dealer that is also a derivatives dealer, is a derivative dealer solely as a result of transactions in respect of commodity derivatives;

(d) either of the following applies:

(i) the derivatives dealer has its head office or principal place of business in a jurisdiction of Canada and the derivatives dealer, together with each affiliated entity of the derivatives dealer, excluding investment funds, and excluding derivatives between these affiliated entities, has not had, in any of the previous 24 calendar months, an aggregate month-end gross notional amount under outstanding commodity derivatives, exceeding $3 000 000 000;

(ii) the derivatives dealer has its head office and principal place of business in a foreign jurisdiction and the derivatives dealer, together with each affiliated entity of the derivatives dealer, excluding

investment funds, and excluding derivatives between these affiliated entities, has not had, in any of the previous 24 calendar months, an aggregate month-end gross notional amount under outstanding commodity derivatives with one or more Canadian counterparties that have a head office or principal place of business in Canada, exceeding $3 000 000 000.

Responsibility of a derivatives dealer to report to the regulator or the securities regulatory authority

32. A derivatives dealer must report to the regulator or, in Québec, the securities regulatory authority in a timely manner any circumstance in which a derivatives dealer is not or was not in compliance with this Instrument or other securities legislation relating to trading in derivatives if any of the following applies:

(a) the non-compliance creates or created, in the opinion of a reasonable person, a risk of material harm to a derivatives party;

(b) the non-compliance creates or created, in the opinion of a reasonable person, a risk of material harm to capital markets;

(c) the non-compliance is part of a pattern of material non-compliance.

DIVISION 2 – RECORDKEEPING

Derivatives party agreement

33. (1) A derivatives firm must ensure that the derivatives firm, before transacting in a derivative with, for or on behalf of a derivatives party, enters into an agreement with the derivatives party.

(2) The agreement referred to in subsection (1) must establish all of the material terms governing the relationship between the derivatives firm and the derivatives party including the rights and obligations of the derivatives firm and the derivatives party.

Records

34. A derivatives firm must keep records of its derivatives transactions and advising activities, including all of the following, as applicable:

(a) records containing a general description of its derivatives business and activities conducted with, for or on behalf of, derivatives parties, and compliance with applicable provisions of securities legislation, including

(i) records of derivatives party assets, and

(ii) records documenting the derivatives firm's compliance with internal policies and procedures;

(b) for each derivative, records demonstrating the existence and nature of the derivative, including

(i) records of communications with the derivatives party relating to transacting in the derivative,

(ii) documents provided to the derivatives party to confirm the derivative, the terms of the derivative and each transaction relating to the derivative,

(iii) correspondence relating to the derivative and each transaction relating to the derivative,

(iv) records made by staff relating to the derivative and each transaction relating to the derivative, including notes, memos and journals;

(v) records relating to pre-execution activity for each transaction including all communications relating to quotes, solicitations, instructions, transactions and prices, however they may be communicated,

(vi) reliable timing data for the execution of each transaction relating to the derivative,

(vii) records relating to the execution of the transaction, including

(A) information obtained to determine whether the counterparty qualifies as an eligible derivatives party,

(B) fees or commissions charged,

(C) any other information relevant to the transaction, and

(D) information used in calculating the derivative's valuation;

(viii) an itemized record of post-transaction processing and events, including a record in relation to the calculation of margin and exchange of collateral; and

(ix) the price and valuation of the derivative.

Form, accessibility and retention of records

35. (1) The records required to be maintained in this Instrument must be kept in a safe location, readily accessible and in a durable form for a period of,

(a) except in British Columbia and Manitoba, 7 years following the date on which the derivative expires or is terminated, and

(b) in British Columbia and Manitoba, 8 years following the date on which the derivative expires or is terminated.

(2) A record required to be provided to the regulator or, in Québec, the securities regulatory authority must be provided in a format that is capable of being read by the regulator or, in Québec, the securities regulatory authority.

PART 6
EXEMPTIONS

DIVISION 1 – EXEMPTION FROM THIS INSTRUMENT

Exemption for foreign liquidity providers – transactions with derivatives dealers

36. A person or company is exempt from the provisions of this Instrument in respect of a transaction if all of the following apply:

(a) the transaction is made with either an investment dealer registered in accordance with National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* or a derivatives dealer, that, in each case, is transacting as principal for its own account;

(b) the person or company is registered, licensed or authorized, or otherwise operates under an exemption or exclusion from a requirement to be registered, licensed or authorized under the securities, commodity futures or derivatives legislation of a foreign jurisdiction in which its head office or principal place of business is located to carry on the activities in that jurisdiction that registration as a derivatives dealer would permit it to carry on in the local jurisdiction;

(c) the person or company is not any of the following:

(i) a derivatives dealer whose head office or principal place of business is in Canada**;**

(ii) a derivatives dealer that is a Canadian financial institution.

Exemption for certain derivatives end-users

37. (1) A person or company is exempt from the provisions of this Instrument if all of the following apply:

(a) the person or company does not solicit or otherwise transact a derivative with, for or on behalf of, a non-eligible derivatives party;

(b) the person or company does not, in respect of any derivative or transaction, advise a non-eligible derivatives party, other than general advice that is provided in accordance with the conditions of section 42 [*Advising generally*];

(c) the person or company does not regularly make or offer to make a market in a derivative with a derivatives party;

(d) the person or company does not regularly facilitate or otherwise intermediate transactions for another person or

company;

(e) the person or company does not facilitate the clearing of a derivative through the facilities of a qualifying clearing agency for another person or company.

(2) The exemption in subsection (1) is not available to a person or company if either of the following applies:

(a) the person or company is a registered derivatives firm or a registered securities firm in any jurisdiction of Canada or is registered under the commodity futures legislation of any jurisdiction of Canada;

(b) the person or company is registered under the securities, commodity futures or derivatives legislation of a foreign jurisdiction in which its head office or principal place of business is located in a category of registration to carry on the activities in that jurisdiction that registration as a derivatives dealer or derivatives adviser would permit it to carry on in the local jurisdiction.

Exemption for foreign derivatives dealers

38. (1) A derivatives dealer whose head office or principal place of business is in a foreign jurisdiction specified in Appendix A is exempt from the provisions in this Instrument if all of the following apply:

(a) the derivatives dealer transacts only with, for or on behalf of, a person or company in the local jurisdiction that is an eligible derivatives party;

(b) the derivatives dealer is registered, licensed or authorized under the securities, commodity futures or derivatives legislation of a foreign jurisdiction specified in Appendix A to conduct the derivatives activities in the foreign jurisdiction that it proposes to conduct with the derivatives party;

(c) the derivatives dealer is subject to and complies with the laws of the foreign jurisdiction applicable to the derivatives dealer relating to the activities being conducted with a derivatives party whose head office or principal place of business is in Canada;

(d) the derivatives dealer reports to the regulator or, in Québec, the securities regulatory authority in a timely manner any circumstance in which the derivatives dealer is not or was not in compliance with the laws of the foreign jurisdiction relating to trading in derivatives to which the derivatives dealer is subject, if any of the following apply:

(i) the non-compliance creates or created, in the opinion of a reasonable person, a risk of material harm to a derivatives party whose head office or principal place of business is located in Canada;

(ii) the non-compliance creates or created, in the opinion of a reasonable person, a risk of material harm to capital markets in Canada;

(iii) the non-compliance is part of a pattern of material non-compliance relating to the activities being conducted with one or more derivatives parties whose head office or principal place of business is in Canada.

(e) the derivatives dealer provides the regulator or, in Québec, the securities regulatory authority with prompt access to its books and records upon request with respect to any matter relating to the activities being conducted with a derivatives party whose head office or principal place of business is located in Canada.

(2) The exemption in subsection (1) is not available unless all of the following apply:

(a) the derivatives dealer engages in the business of a derivatives dealer in the foreign jurisdiction in which its head office or principal place of business is located;

(b) the derivatives dealer has delivered to the derivatives party a statement in writing disclosing all of the following:

(i) the foreign jurisdiction in which the derivatives dealer's head office or principal place of business is located;

(ii) that all or substantially all of the assets of the derivatives dealer may be situated outside of the local jurisdiction;

(iii) that there may be difficulty enforcing legal rights against the derivatives dealer because of the above;

(iv) the name and address of the agent for service of process of the derivatives dealer in the local

jurisdiction;

(c) the derivatives dealer has submitted to the regulator or, in Québec, the securities regulatory authority a completed Form 93-101F1 *Submission to Jurisdiction and Appointment of Agent for Service of Process.*

(3) Paragraphs (1) (a) to (e) do not apply in respect of an affiliated entity of the person or company unless the affiliated entity is an investment fund.

(4) Paragraph (2)(b) does not apply if the derivatives party is an affiliated entity unless the affiliated entity is an investment fund.

DIVISION 2 – EXEMPTIONS FROM SPECIFIC PROVISIONS IN THIS INSTRUMENT

Investment dealers

39. A derivatives dealer that is a dealer member of IIROC is exempt from the provisions set out in Appendix B if both of the following apply:

(a) the derivatives dealer is subject to and complies with the corresponding conduct and other regulatory provisions of IIROC in connection with a transaction or other related activity;

(b) the derivatives dealer promptly notifies the regulator or, in Québec, the securities regulatory authority of each instance of material non-compliance with a provision that is set out in Appendix B.

Canadian financial institutions

40. A derivatives dealer that is a Canadian financial institution is exempt from the provisions set out in Appendix C if both of the following apply:

(a) the derivatives dealer is subject to and complies with the corresponding conduct and other regulatory provisions of its prudential regulator in connection with a transaction or other related activity;

(b) the derivatives dealer promptly notifies the regulator or, in Québec, the securities regulatory authority of each instance of material non-compliance with a provision that is set out in Appendix C.

Derivatives transacted on a derivatives trading facility where the identity of the derivatives party is unknown

41. A derivatives dealer is exempt from the provisions in this Instrument, except for section 8 [*Fair dealing*], section 11 [*Handling complaints*], and Part 5 [*Compliance and recordkeeping*], in respect of a transaction to which all of the following apply:

(a) the execution of the transaction is on and subject to the rules of a derivatives trading facility;

(b) the derivatives dealer does not know the identity of the derivatives party prior to and at the time of execution of the transaction.

DIVISION 3 – EXEMPTIONS FOR DERIVATIVES ADVISERS

Advising generally

42. (1) For the purpose of subsection (3), “financial or other interest” in relation to a derivative or a transaction includes the following:

(a) ownership of, beneficial or otherwise, an underlying interest or underlying interests of the derivative;

(b) ownership of, beneficial or otherwise, or another interest in, a derivative that has the same underlying interest as the derivative;

(c) a commission or other compensation received or expected to be received from any person or company in relation to a transaction, an underlying interest in the derivative or a derivative that has the same underlying interest as the derivative;

(d) a financial arrangement in relation to the derivative, an underlying interest in the derivative or a derivative that has the same underlying interest as the derivative;

(e) any other interest that relates to the transaction.

(2) A person or company that acts as a derivatives adviser is exempt from the provisions of this Instrument applicable to a derivatives adviser if the advice that the person or company provides does not purport to be tailored to the needs of the person or company receiving the advice.

(3) If the person or company referred to in subsection (2) recommends a transaction involving a derivative, a class of derivatives or the underlying interest of a derivative or class of derivatives in which any of the following has a financial or other interest, the person or company must disclose the interest, including a description of the nature of the interest, concurrently with providing the advice:

(a) the person or company;

(b) any partner, director or officer of the person or company;

(c) if the person is an individual, the spouse or child of the individual;

(d) any other person or company that would be an insider of the first mentioned person or company if the first mentioned person or company were a reporting issuer.

Foreign derivatives advisers

43. (1) A derivatives adviser whose head office or principal place of business is in a foreign jurisdiction specified in Appendix D is exempt from the provisions of this Instrument in respect of advice provided to a derivatives party if all of the following apply:

(a) the derivatives party to whom the advice is being provided is an eligible derivatives party;

(b) the derivatives adviser is registered, licensed or authorized, or otherwise operates under an exemption from registration, under the securities, commodity futures or derivatives legislation of a foreign jurisdiction specified in Appendix D to conduct the derivatives activities in the foreign jurisdiction that it proposes to conduct with the derivatives party;

(c) the derivatives adviser is subject to and complies with the laws of the foreign jurisdiction applicable to the derivatives adviser relating to the activities being conducted with a derivatives party whose head office or principal place of business is in Canada;

(d) the derivatives adviser provides the regulator or, in Québec, the securities regulatory authority with prompt access to its books and records upon request with respect to any matter relating to the activities being conducted with a derivatives party whose head office or principal place of business is in Canada.

(2) The exemption under subsection (1) is not available unless all of the following apply:

(a) the derivatives adviser engages in the business of a derivatives adviser in the foreign jurisdiction in which its head office or principal place of business is located;

(b) the derivatives adviser has delivered to the derivatives party a statement in writing disclosing the following:

(i) the foreign jurisdiction in which the derivatives adviser's head office or principal place of business is located;

(ii) that all or substantially all of the assets of the derivatives adviser may be situated outside of the local jurisdiction;

(iii) that there may be difficulty enforcing legal rights against the derivatives adviser because of the above;

(iv) the name and address of the agent for service of process of the derivatives adviser in the local jurisdiction;

(c) the derivatives adviser has submitted to the regulator or, in Québec, the securities regulatory authority a completed Form 93-101F1 *Submission to Jurisdiction and Appointment of Agent for Service of Process*;

(3) A derivatives adviser that relied on the exemption under subsection (1) during the 12-month period preceding December 1 of a year must notify the regulator or, in, in Québec, the securities regulatory authority of that fact by December 1 of that year.

(4) In Ontario, subsection (3) does not apply to a derivatives adviser that complies with the filing and fee payment provisions

applicable to an unregistered exempt international firm under Ontario Securities Commission Rule 13-502 *Fees*.

(5) A person or company is exempt from subsections (2) and (3) if the person or company is registered as a derivatives adviser in the local jurisdiction.

(6) Paragraphs (1) (a) to (d) do not apply in respect of an affiliated entity of the person or company unless the affiliated entity is an investment fund.

(7) Paragraph (2)(b) does not apply if the derivatives party is an affiliated entity unless the affiliated entity is an investment fund.

Foreign derivatives sub-advisers

44. (1) A derivatives sub-adviser whose head office or principal place of business is in a foreign jurisdiction specified in Appendix E is exempt from the provisions of this Instrument if all of the following apply:

(a) the obligations and duties of the sub-adviser are set out in a written agreement with the derivatives adviser or derivatives dealer;

(b) the derivatives adviser or derivatives dealer has entered into a written agreement with its derivatives parties on whose behalf derivatives advice is or portfolio management services are to be provided, agreeing to be responsible for any loss that arises out of the failure of the derivatives sub-adviser to do any of the following:

(i) exercise the powers and discharge the duties of its office honestly, in good faith and in the best interests of the derivatives firm and each derivatives party of the derivatives firm for whose benefit the derivatives advice is, or portfolio management services are, to be provided;

(ii) exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.

(2) The exemption under subsection (1) is not available unless all of the following apply:

(a) the derivatives sub-adviser's head office or principal place of business is in a foreign jurisdiction;

(b) the derivatives sub-adviser is registered in a category of registration, or operates under an exemption from registration, under the securities, commodity futures or derivatives legislation of the foreign jurisdiction in which its head office or principal place of business is located;

(c) the legislation of the foreign jurisdiction referred to in paragraph (b) permits the derivatives sub-adviser to carry on the activities in that jurisdiction that registration as a derivatives adviser would permit it to carry on in the local jurisdiction;

(d) the derivatives sub-adviser engages in the business of a derivatives adviser in the foreign jurisdiction in which its head office or principal place of business is located.

Registered advisers under securities or commodity futures legislation

45. A derivatives adviser that is registered as an adviser under securities legislation or, in Ontario and Manitoba commodity futures legislation, is exempt from the provisions set out in Appendix F if the derivatives adviser complies with the corresponding business conduct provisions of securities or commodity futures legislation in connection with a transaction or other related derivatives activity with a derivatives party.[2]

PART 7
GRANTING AN EXEMPTION

Granting an exemption

46. (1) The regulator or, in Québec, the securities regulatory authority may grant an exemption from this Instrument, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.

[2] For final publication, Appendix F will list the specific corresponding provisions found in NI 31-103.

(2) Despite subsection (1), in Ontario, only the regulator may grant such an exemption.

(3) Except in Alberta and Ontario, an exemption referred to in subsection (1) is granted under the statute referred to in Appendix B of National Instrument 14-101 *Definitions* opposite the name of the local jurisdiction.

PART 8
TRANSITION AND EFFECTIVE DATE

Transition for existing non-individual derivatives parties

47. (1) In this section "transition period" means the period commencing on [*insert effective date*] and expiring on [*insert effective date + 5 years*]

(2) During the transition period, for the purposes of this Instrument, an "eligible derivatives party", as defined in section 1(1) [*Definitions and interpretation*], includes a person or company, other than an individual, that is any of the following:

(a) a permitted client, as that term is defined in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*;

(b) in Quebec, an accredited counterparty, as that term is defined in the *Derivatives Act* (Québec);

(c) a qualified party, as that term is defined in any of the following:

(A) in Alberta, Blanket Order 91-507 *Over-the-Counter Derivatives*;

(B) in British Columbia, Blanket Order 91-501 *Over-the-Counter Derivatives*;

(C) in Manitoba, Blanket Order 91-501 *Over-the-Counter Trades in Derivatives*;

(D) in New Brunswick, Local Rule 91-501 *Derivatives*;

(E) in Nova Scotia, Blanket Order 91-501 *Over-the-Counter Trades in Derivatives*;

(F) in Saskatchewan, General Order 91-908 *Over-the-Counter Derivatives*;

(d) an eligible contract participant as that term is defined under Section 1(a)(18) of the United States *Commodity Exchange Act*.

(3) Despite subsection (2), if either of the following circumstances apply, the definition of "eligible derivatives party", as set out in subsection 1(1), applies to that circumstance:

(a) the derivatives firm has obtained a representation from the derivatives party in writing, that the derivatives party is considered to be an eligible derivatives party on the basis of any of paragraphs (2)(a) to (d);

(b) the representation referred to in paragraph (a) was made prior to the effective date of this Instrument.

Transition for existing transactions

48. Other than section 8 [*Fair dealing*], the provisions of this Instrument do not apply in respect of a transaction if both of the following apply:

(a) the transaction was entered into before the effective date of this Instrument;

(b) the derivatives firm has taken reasonable steps to determine that the derivatives party is one or more of the following, as applicable:

(i) a permitted client, as that term is defined in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*;

(ii) in Quebec, an accredited counterparty, as that term is defined in the *Derivatives Act* (Quebec);

(iii) a qualified party, as that term is defined in any of the following:

(i) in Alberta Blanket Order 91-507 *Over-the-Counter Derivatives*;

(ii) in British Columbia Blanket Order 91-501 *Over-the-Counter Derivatives*;

(iii) in Manitoba Blanket Order 91-501 *Over-the-Counter Trades in Derivatives*;

(iv) in New Brunswick Local Rule 91-501 *Derivatives*;

(v) in Nova Scotia Blanket Order 91-501 *Over-the-Counter Trades in Derivatives*;

(vi) in Saskatchewan General Order 91-908 *Over-the-Counter Derivatives*;

(iv) an "eligible contract participant" as that term is defined in Section 1(a)(18) of the United States Commodity Exchange Act.

Effective date

49. (1) This Instrument comes into force on [*insert date of final publication + one year*].

(2) In Saskatchewan, despite subsection (1), if this Instrument is filed with the Registrar of Regulations after [*insert date of final publication + one year*], this Instrument comes into force on the day on which it is filed with the Registrar of Regulations.

APPENDIX A
TO NATIONAL INSTRUMENT 93-101 *DERIVATIVES: BUSINESS CONDUCT*

FOREIGN DERIVATIVES DEALERS
(Section 38)

LIST OF SPECIFIED FOREIGN JURISDICTIONS

Australia

Brazil

Hong Kong

Japan

Republic of Korea

New Zealand

Singapore

Switzerland

United States of America

United Kingdom of Great Britain and Northern Ireland

Any member country of the European Union

Any other jurisdiction that is recognized or designated by the securities regulatory authority or, except in Ontario and Quebec, the regulator

APPENDIX B
TO NATIONAL INSTRUMENT 93-101 *DERIVATIVES: BUSINESS CONDUCT*

DEALER MEMBERS
(Section 39)

Section 10, Know your derivatives party

Section 11, Handling complaints

Section 13, Derivatives-party-specific needs and objectives

Section 14, Suitability

Section 18(2)(a)-(k) to (4), Relationship disclosure information

Section 19, Pre-transaction disclosure

Section 20, Daily reporting

Section 24, Segregating derivatives party assets

Section 25, Holding initial margin

Section 26, Investment or use of initial margin

Section 27, Content and delivery of transaction information

Section 28, Derivatives party statements

Section 31, Designation and responsibilities of senior derivatives managers

Section 32, Responsibility of derivatives dealer to report to the regulator or the securities regulatory authority

APPENDIX C
TO NATIONAL INSTRUMENT 93-101 DERIVATIVES: *BUSINESS CONDUCT*

CANADIAN FINANCIAL INSTITUTIONS
(Section 40)

Section 10, Know your derivatives party

Section 12, Tied selling

Section 24, Segregating derivatives party assets

Section 25, Holding initial margin

Section 26, Investment or use of initial margin

Section 33, Derivatives party agreement

APPENDIX D
TO NATIONAL INSTRUMENT 93-101 *DERIVATIVES: BUSINESS CONDUCT*

FOREIGN DERIVATIVES ADVISERS
(Section 43)

LIST OF SPECIFIED FOREIGN JURISDICTIONS

Australia

Brazil

Hong Kong

Japan

Republic of Korea

New Zealand

Singapore

Switzerland

United States of America

United Kingdom of Great Britain and Northern Ireland

Any member country of the European Union

Any other jurisdiction that is recognized or designated by the securities regulatory authority or, except in Ontario and Quebec, the regulator

APPENDIX E
TO NATIONAL INSTRUMENT 93-101 *DERIVATIVES: BUSINESS CONDUCT*

FOREIGN DERIVATIVES SUB-ADVISERS
(Section 44)

LIST OF SPECIFIED FOREIGN JURISDICTIONS

Australia

Brazil

Hong Kong

Japan

Republic of Korea

New Zealand

Singapore

Switzerland

United States of America

United Kingdom of Great Britain and Northern Ireland

Any member country of the European Union

Any other jurisdiction that is recognized or designated by the securities regulatory authority or, except in Ontario and Quebec, the regulator

APPENDIX F
TO NATIONAL INSTRUMENT 93-101 *DERIVATIVES: BUSINESS CONDUCT*

REGISTERED ADVISERS UNDER SECURITIES AND COMMODITY FUTURES LEGISLATION
(Section 45)

Section 11, Handling complaints

Section 12, Tied-selling

Division 2 [*Additional obligations when dealing with or advising certain derivatives parties*] of Part 3 [*Dealing with or advising derivatives parties*];

Part 4 [*Derivatives party accounts*]

Part 5 [*Compliance and recordkeeping*], other than section 30 [*Policies and procedures]*

FORM 91-101F1
SUBMISSION TO JURISDICTION AND APPOINTMENT OF AGENT FOR SERVICE OF PROCESS

(sections [X] [*foreign derivatives dealer*] and [X] [*foreign derivatives adviser*])

1. Name of person or company ("**Foreign Firm**"):

2. If the Foreign Firm was previously assigned an NRD number as a registered firm or an unregistered exempt international firm, provide the NRD number of the firm.

3. Jurisdiction of incorporation of the Foreign Firm:

4. Head office address of the Foreign Firm:

5. The name, email address, phone number and fax number of the Foreign Firm's chief compliance officer, or equivalent.

   Name:

   Email address:

   Phone:

   Fax:

6. Section of National Instrument 93-101 *Derivatives: Business Conduct* the Foreign Firm is relying on:

   ☐ Section **[X]** [*foreign derivatives dealer*]

   ☐ Section **[X]** [*foreign derivatives adviser*]

   ☐ Other [specify] [e.g *exemptive relief decision – please explain]*

7. Name of agent for service of process (the "**Agent for Service**"):

8. Address for service of process on the Agent for Service:

9. The Foreign Firm designates and appoints the Agent for Service at the address stated above as its agent upon whom may be served a notice, pleading, subpoena, summons or other process in any action, investigation or administrative, criminal, quasi-criminal or other proceeding (a "**Proceeding**") arising out of or relating to or concerning the Foreign Firm's activities in the local jurisdiction and irrevocably waives any right to raise as a defence in any such Proceeding any alleged lack of jurisdiction to bring such Proceeding.

10. The Foreign Firm irrevocably and unconditionally submits to the non-exclusive jurisdiction of the judicial, quasi-judicial and administrative tribunals of the local jurisdiction in any Proceeding arising out of or related to or concerning the Foreign Firm's activities in the local jurisdiction.

11. Until 7 years after the Foreign Firm ceases to rely on section **[X]** [*foreign derivatives dealer*] or section **[X]** [*foreign derivatives adviser*], the Foreign Firm must submit to the securities regulatory authority

    a. a new Submission to Jurisdiction and Appointment of Agent for Service in this form no later than the 30th day before the date this Submission to Jurisdiction and Appointment of Agent for Service is terminated;

    b. an amended Submission to Jurisdiction and Appointment of Agent for Service no later than the 30th day before any change in the name or above address of the Agent for Service; and

    c. a notice detailing a change to any information submitted in this form, other than the name or above address of the Agent for Service, no later than the 20th day after the change.

12. This Submission to Jurisdiction and Appointment of Agent for Service is governed by and construed in accordance with the laws of the local jurisdiction

Dated:

(Signature of the Foreign Firm or authorized signatory)

(Name of signatory)

(Title of signatory)

Acceptance

The undersigned accepts the appointment as Agent for Service of _____ [*Insert name of Foreign Firm*] under the terms and conditions of the foregoing Submission to Jurisdiction and Appointment of Agent for Service.

Dated:

(Signature of the Agent for Service or authorized signatory)

(Name of signatory)

(Title of signatory)