

Citation: **Blanket Order (Over-the Counter Derivatives Transactions and Commodity Contracts), 2008 ABASC 180** **Date 20080331**

ALBERTA SECURITIES COMMISSION

BLANKET ORDER 91-503

Over-the-Counter Derivatives Transactions and Commodity Contracts

Definitions

1. Terms defined in the *Securities Act*, R.S.A. 2000, c. S-4 (the **Act**) have the same meaning in this Order. In addition:
 - (a) **“acceptable clearing corporation”** means a clearing agency that:
 - (i) operates a central system for clearing of derivatives transactions;
 - (ii) is subject to enabling legislation and oversight by a central or regional government authority in an eligible country of operation that provides for compliance and powers of enforcement over its members or participants; and
 - (iii) is named in a schedule from to time published for the purpose of this Order with the approval of the Executive Director.
 - (b) **“commodity contract”** means a contract that contains an obligation to make or take future delivery of a commodity, which contract is not an OTC derivative and which contract may include an option for cash settlement.
 - (c) **“eligible country of operation”** means a country that is a member of the Basle Accord and a country that has adopted the banking and supervisory rules set out in the Basle Accord.
 - (d) **“OTC derivative”** means an agreement in respect of an option, forward contract, contract for differences or other instrument of a type commonly considered to be a derivative, or any combination of any of them, if:
 - (i) the material economic terms of the agreement have been customized to the purposes of the parties to the agreement and the agreement is not part of a fungible class of agreements that are standardized as to their material economic terms;

- (ii) the creditworthiness of a party to the agreement would be a material consideration in entering into or determining the terms of the agreement,
 - (iii) the agreement is not entered into or traded on or through an organized market, stock exchange or futures exchange; and
 - (iv) the agreement, if cleared, is cleared through an acceptable clearing corporation.
- (e) **“Qualified Party”** means any of the entities listed in the Appendix to this Order, where each is acting as principal, or alternatively as an agent or trustee for accounts that are fully managed by it. For the purposes of this order, a party is a Qualified Party for the purpose of any OTC derivative transaction or commodity contract if that party is a Qualified Party at the time the party enters into the transaction or contract.

Background

2. The Act requires registration of certain persons who deal in securities or exchange contracts, unless such persons are expressly exempted from such registration.
3. The Act also prohibits the distribution of securities unless a preliminary and a final prospectus have been filed with the Commission and the Executive Director has issued receipts for each of the preliminary and the final prospectus, unless such distribution is expressly exempted from the prospectus requirement.
4. The Act does not provide for regulation of OTC derivatives. However, the definition of "security" in the Act includes futures contracts and options that are not exchange contracts. As a result, certain parties and their clients who contract with one another for such futures contracts and options (including certain OTC derivatives) are subject to registration and prospectus requirements, unless exempted.
5. Similarly, parties who wish to contract with one another for certain commodity contracts, are also subject to registration and prospectus requirements, unless exempted.
6. Blanket Order 91-502 *Over-the-Counter Derivatives Transactions and Commodity Contracts* 9 A.S.C.S. 2995 (**Blanket Order 91-502**) was issued on 4 August 2000. It cannot be relied upon for OTC derivative transactions cleared through the facilities of a clearing agency.
7. Clearing agencies have come increasingly to act as central counterparties for the clearing of OTC derivative transactions since Blanket Order 91-502 was issued.
8. Section 10(1)(b) of the Act allows the Commission to make an order designating a futures contract or a class of futures contracts, not to be a futures contract, provided that such order is not prejudicial to the public interest

Order

9. The Commission, considering that it would not be prejudicial to the public interest to replace Blanket Order 91-502 to expand the scope of the relief thereby granted to include OTC derivative transactions cleared through clearing agencies, orders under sections 10(1)(b) and 214 of the Act as follows:
- (a) the following OTC derivatives transactions and commodity contracts are not futures contracts as defined in subsection 1(x) of the Act:
 - (i) an OTC derivatives transaction of which the underlying interest consists of an interest rate, Canadian or foreign currency, a foreign exchange rate, a commodity, a security, an index, a benchmark, or other variable, or another OTC derivative, or some relationship between, or combination of, one or more of any of them;
 - (ii) a commodity contract; or
 - (iii) a contract for the sale or exchange of a commodity that provides for the physical delivery only of the subject matter of the contract;
- provided, in the case of the OTC derivatives transactions and commodity contracts referred to in paragraphs (i) and (ii) are made between Qualified Parties who each act as principal except in respect of Qualified Parties described in paragraphs (BB) and (CC) of the Appendix to this Order;
- (b) Blanket Order 91-502 is revoked, and this Order comes into effect, concurrently on 31 March 2008.

“original signed by”

Glenda A. Campbell, QC, Vice-Chair

“original signed by”

Stephen R. Murison, Vice-Chair

APPENDIX QUALIFIED PARTIES

Banks

- (A) a bank to which the *Bank Act* (Canada) applies;
- (B) Business Development Bank of Canada continued under *the Business Development Bank of Canada Act* (Canada);
- (C) a bank subject to the regulatory regime of a country that is a member of the Basle Accord (the "Accord") or a country that is not an initial signatory to the Accord but has adopted the regulatory and supervisory rules set out in the Accord if the bank has a minimum paid up capital and surplus, as shown on the last audited balance sheet, in excess of \$100 million (or its equivalent in another currency);

Commercial User

- (D) a person or company that sells, buys, trades, produces, markets, brokers or otherwise uses in its business a commodity and as a consequence enters into an OTC derivatives transaction or a commodity contract;

Credit Unions and Caisses Populaires

- (E) a credit union central or a federation of caisses populaires or any credit union or regional caisse populaire located, in each case, in Canada;

Loans and Trust Companies

- (F) a loan or trust corporation registered under the loan and trust corporations legislation of a province or territory of Canada or under the *Trust and Loan Companies Act* (Canada);
- (G) a loan or trust company subject to the regulatory regime of a country that is a member of the Basle Accord or a country that is not an initial signatory to the Accord but has adopted the regulatory and supervisory rules set out in the Accord if the loan company or trust company has a minimum paid up capital and surplus, as shown on the last audited balance sheet, in excess of \$100 million (or its equivalent in another currency);

Insurance Companies

- (H) an insurance company licensed to do business in Canada or a province or territory of Canada if the insurance company has a minimum paid up

capital and surplus, as shown on the last audited balance sheet, in excess of \$100 million (or its equivalent in another currency);

- (I) an insurance company subject to the regulatory regime of a country that is a member of the Basle Accord or a country that is not an initial signatory to the Accord but has adopted the regulatory and supervisory rules set out in the Accord if the insurance company has a minimum paid up capital and surplus, as shown on the last audited balance sheet, in excess of \$100 million (or its equivalent in another currency);

Sophisticated Entities

- (J) a person or company that
 - (i) together with its affiliates has entered into one or more transactions involving OTC derivatives or commodity contracts with counterparties that are not its affiliates, if
 - (a) the transactions had a total gross dollar value of or equivalent to at least \$1 billion in notional principal amount; and
 - (b) any of the contracts relating to one of these transactions were outstanding on any day during the previous 15 month period, or
 - (ii) together with its affiliates had total gross marked-to-market positions of or equivalent to at least \$100 million aggregated across counterparties, with counterparties that are not its affiliates in one or more transactions involving OTC derivatives or commodity contracts on any day during the previous 15 month period;

Individuals

- (K) an individual who has a net worth of at least \$5 million (or its equivalent in another currency) excluding the value of his or her principal residence, and any holding company of which such individual owns all of the shares;

Governments/Agencies

- (L) Her Majesty in right of Canada or any province or territory of Canada and all crown corporations, instrumentalities and agencies of the Canadian federal or provincial or territorial governments or the Alberta Treasury Branch;

- (M) a national government of a country that is a member of the Basle Accord or a country that is not an initial signatory to the Accord but has adopted the regulatory and supervisory rules set out in the Accord and any instrumentality or agency of that government or corporation wholly-owned by that government;
- (N) a Canadian municipality with a population in excess of 50,000 and any Canadian provincial or territorial capital city;

Corporations and other Entities

- (O) a company, partnership, unincorporated association, organization or trust, other than an entity referred to in (A), (B), (C), (D) (E), (F), (G), (H), (I) and (J) with total assets, as shown on the last audited balance sheet, in excess of \$25 million (or its equivalent in another currency);

Pension Plan or Fund

- (P) a pension fund that is regulated by either the Office of the Superintendent of Financial Institutions (Canada) or a provincial or territorial pension commission, if the pension fund has total net assets, as shown on the last audited balance sheet, in excess of \$50 million, provided that, in determining net assets, the liability of a fund for future pension payments shall not be included;

Mutual Funds and Investment Funds

- (Q) a mutual fund or non-redeemable investment fund if each investor in the fund is a Qualified Party;
- (R) a mutual fund if the investments of the fund are managed by a company that is registered under the Act or securities legislation of another province or territory in Canada as a portfolio manager;
- (S) a non-redeemable investment fund if the person responsible for providing investment advice to the fund is registered under the Act or securities legislation of another province or territory in Canada as an adviser, other than a securities adviser;

Brokers/Investment Dealers

- (T) a person or company registered under the Act or securities legislation of another province or territory in Canada as a broker or an investment dealer or both;
- (U) a person or company registered under the Securities Act (Ontario) as an international dealer if the person or company has total assets, as shown on

its last audited balance sheet, in excess of \$100 million or its equivalent in another currency;

- (V) a person or company whose account is fully managed by a registered portfolio manager or broker or investment dealer acting as a trustee or agent for such person or company;
- (W) a direct or indirect wholly-owned subsidiary of any of the entities described in paragraphs (A), (B), (C), (D), (E), (F), (G), (H), (I), (J), (L), (M), (N), (O), (P), (T) and (U);
- (X) a holding body corporate of which any of the entities described in paragraphs (A), (B), (C), (D), (E), (F), (G), (H), (I), (J), (L), (M), (N), (O), (T) and (U) is a direct or indirect wholly-owned subsidiary;
- (Y) a direct or indirect wholly owned subsidiary of a holding body corporate described in paragraph (X);
- (Z) a firm, partnership or joint venture or other form of unincorporated association in which one or more of the entities described in paragraphs (W), (X) or (Y) have a direct or indirect controlling interest;
- (AA) a party whose obligations in respect of the OTC derivatives transaction or commodity contract for which the determination is made are fully guaranteed by another Qualified Party;
- (BB) a portfolio manager or a financial intermediary referred to in paragraphs (A), (E), (F), (H), (L), (T) or (U) above, while acting as manager of accounts of a person, company, pension fund or pooled fund trust, which accounts are fully managed by such portfolio manager or financial intermediary; and
- (CC) a broker or investment dealer acting as a trustee or agent for the person, company, pension fund or pooled fund trust under section 65 of Commission rules.