

Note: [30 Sep 2016] – The following is a consolidation of MI 91-101. It incorporates the amendments to this document that came into effect on September 30, 2016 and local amendments in British Columbia as described in CSA Staff Notice 11-342. This consolidation is provided for your convenience and should not be relied on as authoritative.

MULTILATERAL INSTRUMENT 91-101
DERIVATIVES: PRODUCT DETERMINATION

Definitions and interpretation

1. (1) This Instrument applies to Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting*.
- (2) In this Instrument, a person or company is an affiliated entity of another person or company if one of them controls the other or if each of them is controlled by the same person or company.
- (3) 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) the second party is a limited partnership and the general partner of the limited partnership is the first party;
 - (d) the second party is a trust and a trustee of the trust is the first party.
- (4) In Newfoundland and Labrador, Northwest Territories, Nunavut, Prince Edward Island and Yukon, in this Instrument, “derivative” means a contract or instrument if each of the following apply:
 - (a) it is an option, swap, future, forward, or other financial or commodity contract or instrument whose market price, value, or delivery, payment or settlement obligations are derived from, referenced to or based on an underlying interest including a value, price, index, event, probability or thing;
 - (b) it is a “security”, as defined in securities legislation, solely by reason of it being one or more of the following:
 - (i) a document evidencing an option, subscription or other interest in a security;

- (ii) in Newfoundland and Labrador, a futures contract;
- (iii) an investment contract;
- (iv) in Newfoundland and Labrador, an option;
- (v) in Northwest Territories, Nunavut, Prince Edward Island and Yukon, a derivative.

(5) In this Instrument, subject to subsection 2(1), “specified derivative” means

- (a) in Alberta, British Columbia, New Brunswick, Nova Scotia and Saskatchewan, a “derivative” as defined in the securities legislation of the local jurisdiction, and
- (b) in Newfoundland and Labrador, Northwest Territories, Nunavut, Prince Edward Island and Yukon, a “derivative” as defined in subsection 1(4).

Excluded contracts and instruments

2. (1) Despite subsection 1(5), in this Instrument, “specified derivative” does not include any of the following:

- (a) a contract or instrument that is regulated by any of the following:
 - (i) gaming control legislation of Canada or of a jurisdiction of Canada;
 - (ii) gaming control legislation of a foreign jurisdiction, if each of the following apply to the contract or instrument:
 - (A) it is entered into outside of Canada;
 - (B) it would be regulated under gaming control legislation of Canada or the local jurisdiction if it had been entered into in the local jurisdiction;
- (b) an insurance contract or an income or annuity contract or instrument, 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 of the local jurisdiction if it had been entered into in the local jurisdiction;
- (c) a contract or instrument for the purchase and sale of currency if all of the following apply:

- (i) except if all or part of the delivery of the currency referenced in the contract or instrument is rendered impossible or commercially unreasonable by an intervening event or occurrence not reasonably within the control of the counterparties to the contract or instrument, their affiliated entities or their agents, the contract or instrument requires settlement by the delivery of the currency referenced in the contract or instrument on or before either of the following:
 - (A) the 2nd business day after the date of execution of the transaction;
 - (B) if the contract or instrument was entered into concurrently with a related trade in a security, the settlement date for the related trade in the security;
- (ii) the counterparties intended, at the time of the execution of the contract or instrument, that the contract or instrument would be settled by the delivery of the currency referenced in the contract or instrument within the time periods set out in subparagraph (i);
- (iii) the counterparties to the contract or instrument do not enter into an arrangement or practice that would permit the settlement date of the contract or instrument to be extended or that has the effect of extending the settlement date of the contract or instrument, whether by simultaneously terminating the contract or instrument and entering into another contract or instrument with similar terms or otherwise;
- (d) a contract or instrument for delivery of a commodity, other than currency, to which each of the following apply:
 - (i) the counterparties intended, at the time of execution of the transaction, that the contract or instrument would be settled by delivery of the commodity;
 - (ii) the contract or instrument does not permit cash settlement in place of delivery of the commodity except if all or part of the delivery is rendered impossible or commercially unreasonable by an intervening event or occurrence not reasonably within the control of the counterparties, their affiliated entities or their agents;
- (e) a contract or instrument that is evidence of a deposit issued by a bank listed in Schedule I, II or III to the *Bank Act* (Canada), by an association to which the *Cooperative Credit Associations Act* (Canada) applies or by a company to which the *Trust and Loan Companies Act* (Canada) applies;
- (f) a contract or instrument that is evidence of a deposit issued by a credit union, league, caisse populaire, loan corporation, treasury branch or trust company operated under legislation in a jurisdiction of Canada;

- (g) a contract or instrument that is traded on an exchange if that exchange is any of the following:
 - (i) recognized by a securities regulatory authority in a jurisdiction of Canada;
 - (ii) exempt from recognition by a securities regulatory authority in a jurisdiction of Canada;
 - (iii) an exchange in a foreign jurisdiction that is a signatory to the International Organization of Securities Commissions' Multilateral Memorandum of Understanding;
 - (iv) in Northwest Territories, Nunavut, Prince Edward Island and Yukon, designated under the securities legislation of the local jurisdiction;
- (h) in New Brunswick, Nova Scotia and Saskatchewan, a contract or instrument that would be a security but for the exclusion of derivatives from the definition of security, unless the contract or instrument would be a security solely by reason of it being an investment contract;
- (h.1) in Alberta, a contract or instrument that is a derivative and is a security unless the contract or instrument is a security only by reason of it being an investment contract or an option;
- (i) in Alberta, British Columbia, Newfoundland and Labrador, Northwest Territories, Nunavut, Prince Edward Island and Yukon, a contract or instrument to which all of the following apply:
 - (i) the contract or instrument is issued by any of the following:
 - (A) an issuer;
 - (B) a control person of an issuer;
 - (C) an insider of an issuer;
 - (ii) the underlying interest of the contract or instrument is a security of the issuer or of an affiliated entity of the issuer;
 - (iii) the contract or instrument is used for either or both of the following purposes:
 - (A) to compensate or incent the performance of a director, employee or service provider of the issuer or an affiliated entity of the issuer;

- (B) as a financing instrument in connection with the raising of capital for the issuer or an affiliated entity of the issuer or for the acquisition of a business or property by the issuer or an affiliated entity of the issuer.

<p>In the securities legislation of New Brunswick, Nova Scotia and Saskatchewan, contracts or instruments referred to in paragraph 2(1)(i) are securities and do not fall within the definition of “derivative” and, as a result, these contracts or instruments are not subject to the requirements in the specified instrument.</p>

- (2) For the purposes of paragraph (1)(g), a reference to “exchange” does not include the following:
 - (a) a swap execution facility as that term is defined in the Commodity Exchange Act, 7 U.S.C. §1a(50) (United States);
 - (b) a security-based swap execution facility as that term is defined in the 1934 Act;
 - (c) a multilateral trading facility as that term is defined in Directive 2014/65/EU Article 4(1)(22) of the European Parliament;
 - (d) an organized trading facility as that term is defined in Directive 2014/65/EU Article 4(1)(23) of the European Parliament;
 - (e) an entity organised in a foreign jurisdiction that is similar to an entity described in any of paragraphs (a) to (d).

Effective date

- 3. (1) This Instrument comes into force on May 1, 2016.
- (2) In British Columbia and Saskatchewan, despite subsection (1), if these regulations are filed with the Registrar of Regulations after May 1, 2016, these regulations come into force on the day on which they are filed with the Registrar of Regulations.

[as amended on September 30, 2016 and local amendments in British Columbia as described in CSA Staff Notice 11-342]