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Canadian Securities Administrators | Autorités canadiennes en valeurs mobilières

CSA Notice and Request for Comment

Proposed National Instrument 93-102 *Derivatives: Registration*

Proposed Companion Policy 93-102 *Derivatives: Registration*

April 19, 2018

Introduction

We, the Canadian Securities Administrators (the **CSA** or **we**), are publishing the following for a 150-day comment period, expiring on September 17, 2018:

- Proposed National Instrument 93-102 *Derivatives: Registration* (the **Instrument**);
- Proposed Companion Policy 93-102 *Derivatives: Registration* (the **CP**).

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

We are issuing this Notice to solicit comments on the Proposed Instrument. We welcome all comments on this publication and have also included specific questions in the Comments section.

On April 4, 2017, we published for comment Proposed National Instrument 93-101 *Derivatives: Business Conduct* and Proposed Companion Policy 93-101 *Derivatives: Business Conduct* (the instrument and the companion policy are collectively referred to as the **Business Conduct Instrument**). The comment period for the Business Conduct Instrument published in 2017 closed on September 1, 2017. We have considered the comments made on that publication to develop the Proposed Instrument, whenever appropriate.

The Proposed Instrument together with the Business Conduct Instrument are intended to implement a comprehensive regime for the regulation of persons or companies that are in the business of trading derivatives and in the business of advising on derivatives. We expect that a future version of the Business Conduct Instrument will be published for a second comment period shortly after the publication of the Proposed Instrument so that there will be considerable overlap of each instrument's comment period. This will allow commenters to consider the Proposed Instrument and the revised Business Conduct Instrument together when making their comments.

In developing the Proposed Instrument, the CSA has 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 through the development of the Proposed Instrument.

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This version of the Proposed Instrument does not include provisions that will facilitate the transition to the new regulatory requirements applicable to derivatives firms. Appropriate provisions relating to transition will be included in a future version of the Proposed Instrument and may include, for example, transitional relief from proficiency requirements in section 18.

We intend to consider amendments to other instruments and policies that establish the existing operational infrastructure for registration, including National Instrument 33-109 *Registration Information*.

Background

In April 2013, the CSA published for comment a consultation paper, CSA Consultation Paper 91-407 *Derivatives: Registration* (the **Consultation Paper**), that outlined a proposed registration and business conduct regime for derivatives market participants.

After considering the comments received on the Consultation Paper and reviewing developments internationally, we have developed the Proposed Instrument.

As we indicated in the CSA Notice that accompanied the 2017 publication of the Business Conduct Instrument, we have chosen to split the proposed derivatives registration and business conduct regimes into two separate rules. This approach simplifies each rule and is intended to ensure that all derivatives firms remain subject to certain minimum standards in all Canadian jurisdictions.

Staff from certain jurisdictions will consider whether modifications to securities legislation, including act amendments, are needed to implement the Proposed Instrument. In particular, it is known that accredited counterparties are exempt by law from the registration requirement under the Québec Derivatives Act when transacting with each other. The implementation of the Proposed Instrument is therefore subject to the Québec National Assembly's decision to revoke this exemption.

While the registration regime contemplated by the Proposed Instrument would apply in all CSA jurisdictions, Ontario's Securities Act provides that certain specified financial institutions are exempt from registration. As a result, the Ontario Securities Commission (the **OSC**) will not register those specified financial institutions when they act as derivatives dealers or advisers in the Ontario market.

OSC staff note that to the extent these financial institutions are acting as derivatives dealers or advisers, they will be subject to the Business Conduct Instrument, other relevant requirements and prohibitions under Ontario securities law, and various powers that are available to the OSC to promote compliance with the law. These specified financial institutions are also subject to certain prudential obligations and oversight. OSC staff would expect to employ all of the available tools, as appropriate, to attempt to achieve outcomes that are as closely aligned as possible to the outcomes of the Proposed Instrument.

Even with the regulatory tools discussed above, the OSC has identified a gap that relates to the registration of individual representatives of specified financial institutions and is currently assessing potential regulatory solutions that are available to address this gap.

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Substance and Purpose of the Proposed Instrument

The CSA have developed the Proposed Instrument to help protect investors, reduce risk and, improve transparency and accountability in the over-the-counter (**OTC**) derivatives[1] markets.

During the financial crisis of 2008, some firms dealing in derivatives contributed to the crisis by not effectively managing their own derivatives related risks. The International Organization of Securities Commissions (**IOSCO**) noted in 2012 that "historically, market participants in OTC derivatives markets have, in many cases not been subject to the same level of regulation as participants in the traditional securities market. This lack of sufficient 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]

The Proposed Instrument includes requirements

- designed to mitigate risks to market participants,
- designed to ensure that key staff members of derivatives dealers and derivatives advisers have the necessary education, training and experience needed to carry out their obligations, and
- for derivatives firms and individual representatives to register with applicable securities regulators in Canada and allow those regulators to deny registration to a firm or an individual or suspend registration of a firm or an individual in appropriate circumstances.

The Proposed Instrument, together with the Business Conduct Instrument, is intended to establish a robust investor protection regime that meets IOSCO's international standards. The resulting proposed regime is consistent with the regulatory approach taken by most IOSCO jurisdictions with active derivatives markets.[3]

A person or company is subject to the Proposed Instrument only if it must register as a derivatives adviser or a derivatives dealer under securities legislation. The Proposed Instrument also provides exclusions and exemptions for certain persons or companies from the requirements to register as a derivatives dealer or as a derivatives adviser. Persons or companies that are excluded or exempted from the requirement to register are not subject to any obligations under the Proposed Instrument other than the conditions relating to the exclusion or exemption.

This version of the Proposed Instrument does not include registration requirements for persons that have very large gross notional amounts under derivatives but would not otherwise be required to be registered. After additional analysis relating to Canadian derivatives markets, a future version of the Proposed Instrument, that will be published for comment, may include an additional registration category for these large non-dealer derivatives participants.

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

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Section 31 refers to minimum capital requirements that will be described in Appendix C. Appendix C is currently blank but we will propose capital requirements and seek comments on its content in a future version of the Proposed Instrument that will be published for comment. We expect that the minimum capital requirements will be consistent with capital requirements proposed by regulatory authorities in other jurisdictions, including the U.S. We also intend to include a conditional exemption from these capital requirements for derivatives dealers that are already subject to equivalent capital requirements imposed by other authorities, including prudential authorities.

Conditional exemptions from the requirement to register

The Instrument includes a number of exemptions from the requirement to register. These exemptions include an exemption from registration for derivatives dealers that have a limited notional amount of derivatives. Notional amount is determined based on the derivatives dealer's aggregate month-end gross notional amount under outstanding derivatives. Additional discussion of these exemptions, including a discussion of how notional amount is to be calculated for the purpose of these exemptions, is included later in the notice.

The Instrument also includes exemptions from the requirement to register for certain derivatives dealers and derivatives advisers that have their head office or principal place of business outside of Canada.

Each of the exemptions from the requirement to register is subject to specific terms and conditions.

Conditional exemptions from specific registration requirements

The Instrument provides an exemption from specific registration requirements in certain circumstances. Additional discussion of these exemptions is included later in this notice.

One exemption from specific registration requirements is for registered derivatives dealers that are dealer members of the Investment Industry Regulatory Organization of Canada (**IIROC**). This exemption is subject to the condition that they comply with the equivalent requirements imposed by IIROC. These requirements will be listed in Appendix E. We will consult with IIROC staff to complete Appendix E and publish it for comment in a future version of the Proposed Instrument that will be published for comment.

The Instrument contains a similar exemption for Canadian financial institutions where they are subject to and comply with equivalent requirements imposed by a federal or provincial prudential authority. We have completed an analysis of the requirements that apply to financial institutions that are regulated by OSFI and by the Autorité des marchés financiers (**AMF**). Appendix F lists specific requirements from which financial institutions that are regulated by OSFI and the AMF will, subject to specific conditions, be exempted. We will work to complete the analysis for other provincial prudential authorities and intend to publish for comment a full version of Appendix F in a future version of the Proposed Instrument that will be published for comment.

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Finally, the Instrument includes certain exemptions from the requirement to register and from specific registration requirements under the Instrument for persons or companies that have their head office or principal place of business outside of Canada. Exemptions from specific requirements may be available where these persons or companies are subject to and comply with equivalent requirements in the jurisdiction where their head office or principal place of business is located. We intend to publish for comment full versions of each of Appendix B, D, G and H in a future version of the Proposed Instrument that will be published for comment.

Summary of the Instrument

Part 1 – Definitions

Part 1 of the Instrument sets out relevant definitions and principles of interpretation. Some of the most important definitions in the Instrument are as follows.

Commercial Hedger
The term "commercial hedger" is referenced in the definition of "eligible derivatives party". Commercial hedgers are subject to a lower financial threshold to qualify as eligible derivatives parties when compared to other, non-individual, persons or companies.

Derivatives party
In the Proposed Instrument, the term "derivatives party" refers to a derivatives firm's counterparties, customers, and other persons or companies that the derivatives firm may deal with or advise. It is not necessary that the parties consider a client relationship to exist in order for one party to be a derivatives party to the other.

Eligible derivatives party
The term "eligible derivatives party" refers 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 to be sophisticated or because they have sufficient financial resources to obtain professional advice or otherwise protect themselves through contractual negotiation with the derivatives firm. The concept is important because firm and individual registration exemptions are not available if the firm or individual deals with or advises non-eligible derivatives parties.

As currently drafted, the definition of "eligible derivatives party" is consistent with the anticipated definition of that term in the future version of the Business Conduct Instrument, with modifications made to address comments received. The definition is also generally consistent with the current regulatory regimes in the U.S. and Canada in relation to OTC derivatives.[4] In addition, the eligible

[4] See, for example, the definition of "eligible contract participant" under the U.S. *Commodity Exchange Act* and the *Securities Exchange Act of 1934* applicable to CFTC and SEC swap dealers and major swap participants, the definition of "qualified party" in Alberta Blanket Order 91-507 *Over-the-Counter Derivatives*, the definition of "qualified party" in British Columbia Blanket Order 91-501 *Over-the-Counter Derivatives*, the definition of "qualified party" in Manitoba Blanket Order 91-501 *Over The Counter Trades in Derivatives,* the definition of "qualified party" in New Brunswick Local Rule 91-501 *Derivatives*, the definition of "qualified party" in Nova Scotia Blanket Order 91-501 *Over The Counter Trades in Derivatives,* the definition of "accredited counterparty" in section 3 of the Quebec *Derivatives Act*, and the definition of "qualified party" in Saskatchewan General Order 91-908 *Over-the-Counter Derivatives*.

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derivatives party concept is similar to the definition of "permitted client" in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**), with a few modifications intended to reflect the different nature of derivatives markets.[5]

Notional amount
Notional amount is used in section 50 and in section 51 of the Instrument. These sections establish exemptions from registration for certain derivatives dealers that have a monetary notional amount below a prescribed threshold ($250 million in section 50 and $1 billion under commodities derivatives in section 51). Notional amount refers to the monetary amount or the amount of the underlying asset that is used to calculate a settlement payment or delivery obligation under a derivative.

For derivatives negotiated in monetary amounts, the methodology for determining the notional amount for the purpose of section 50 and section 51 should be in accordance with CPMI-IOSCO's Technical Guidance on Harmonisation of critical OTC derivatives data elements (other than UTI and UPI) (the **CDE Guidance**), published on April 9, 2018.[6,7]

In other cases, the derivatives contract will reference a non-monetary amount, such as a notional quantity (or volume) of an underlying asset. This is the case for commodity derivatives that reference a quantity of a commodity and equity derivatives that reference a number of a type of securities. Accordingly, expressing a threshold as a monetary amount requires converting the notional quantity of an underlying asset into a monetary amount. In general, the formula for converting a notional quantity of an underlying asset into a notional amount, expressed in monetary terms, is the following:

$$\textit{notional amount} = \textit{price} \times \textit{quantity}$$

Annex I to this Notice sets out two proposed methodologies for determining, for the purpose of regulatory thresholds, the notional amount expressed in monetary terms for derivatives that are negotiated in non-monetary amounts. Column 1 sets out a methodology that is based on the CDE Guidance. The $250 million threshold in section 50 and the $1 billion threshold in the section 51 commodity derivatives exemption were determined using the methodology based on the CDE Guidance. Specifically, with respect to the "quantity" element for derivatives that reference a non-monetary amount, particularly commodity derivatives, the CDE Guidance calls for the use of "total notional quantity". The total notional quantity is determined by aggregating the notional quantity of the underlying asset for each settlement period in the derivatives contract. See Column 1 of Annex I for more details. We are seeking comment on the methodology, that is based on the CDE Guidance, set out in Column 1 of Annex I.

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[5] CSA Notice and Request for Comment - *Proposed National Instrument 93-101 Derivatives: Business Conduct Proposed Companion Policy 93-101CP Derivatives: Business Conduct*, dated April 4, 2017, particularly questions 1 through 4 on pages 13 and 14.
[6] http://www.iosco.org/library/pubdocs/pdf/IOSCOPD598.pdf
[7] Where the notional amount is a monetary amount based in a currency other than Canadian dollars, the notional amount must be converted to Canadian dollars.

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We are also considering, and seeking comment on, an alternative methodology (the **Regulatory Notional Methodology**) set out in Column 2 of Annex I. With respect to "quantity", the Regulatory Notional Methodology employs a concept of "monthly notional amount approximation" rather than aggregated total notional quantity. The monthly notional quantity approximation is aimed at equalizing different settlement period durations and quantities to facilitate comparability of notional amounts expressed in monetary terms. For derivatives (negotiated in non-monetary amounts) that have multiple settlement periods, for example a swap, the Regulatory Notional Methodology calls for the notional amount to be determined using the monthly notional quantity approximation. Similarly, for derivatives (negotiated in non-monetary amounts) that have a notional amount schedule, the notional amount for the purpose of regulatory thresholds would be determined using the monthly notional amount approximation, and would apply for the duration of the derivative. See Column 2 of Annex I for more details.

If the Regulatory Notional Methodology is adopted, we expect that we would implement a notional amount threshold in section 51 that is smaller than the proposed $1 billion threshold. Based on our analysis of trade reporting data, we anticipate that the threshold in section 51 would be in the range of $250 million to $500 million but note that this threshold may be significantly lower following further analysis.

The CSA will continue to monitor international work and to consult with foreign regulators relating to methodologies for determining a monetary notional amount for a derivative that references a notional quantity or volume.

The CSA is seeking specific comment on both the methodology that is based on the CDE Guidance, as set out in Column 1 of Annex I, and the Regulatory Notional Methodology, as set out in Column 2 of Annex I, for determining monetary notional amount for the purpose of regulatory thresholds. We are also interested in general comments on potential issues relating to the implementation of either methodology.

Affiliated entity

Subsection 1(3) establishes that persons or companies will be considered to be affiliated entities if one controls the other or if the same person or company controls both. Subsection 1(4) establishes when one person or company is considered to control another person or company for the purpose of the Instrument. We are seeking specific comment on the proposed definition of "affiliated entity" and the tests set out for "control".

In the context of other instruments relating to OTC derivatives, we are also considering a definition of "affiliated entity" that is based on the concept of "consolidation" under accounting principles. A draft of an alternative version of a definition of "affiliated entity" is included as Annex II of this CSA Notice. We intend to consider comments we receive on the two approaches as we further develop the OTC derivatives regulatory regime. Either of these proposed definitions may be used in the final version of the Proposed Instrument.

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Principal regulator
To adapt the proposed registration regime to the Canadian context and to reduce the regulatory burden, section 2 allows registered derivatives firms and individuals that are required to notify or to deliver documents under the Instrument to a Canadian securities regulator to comply with these obligations by notifying or by delivering the document to their principal regulator, as defined in subsection 1(1).

For a derivatives firm that has its head office outside of Canada, the "principal regulator" will be the regulator or the securities regulatory authority in the jurisdiction of Canada where the derivatives firm has its primary business office in Canada or, if the derivatives firm has no business office in Canada, the jurisdiction of Canada where the firm expects to conduct the most of its activities that require registration as a derivatives firm as at the end of its current financial year or conducted most of its activities that require registration as a derivatives firm as at the end of its most recently completed financial year.

For a derivatives firm that has its head office located in a Canadian jurisdiction that exempts the firm from the requirement to register as a derivatives dealer or a derivatives adviser, including the exemption for certain financial institutions in Ontario, the "principal regulator" will be the regulator or the securities regulatory authority in the jurisdiction of Canada where the firm expects to conduct most of its activities that require registration as a derivatives firm as at the end of its current financial year or conducted most of its activities that require registration as a derivatives firm as at the end of its most recently completed financial year.

We intend to consider amendments to other instruments and policies that establish the existing operational infrastructure for registration, including National Instrument 33-109 *Registration Information* and National Policy 11-204 *Process for Registration in Multiple Jurisdictions.* Any such amendments will be published for comment.

Subsection 2(2) establishes the documents that must be provided to all applicable regulatory authorities rather than just the principal regulator. This section is similar in effect to subsection 1.3(5) of NI 31-103.

Part 2 – Application

Part 2 of the Instrument sets out a number of provisions relating to the application and scope of the Instrument.

Section 3 is a scope provision intended to ensure that the Instrument applies in respect of the same contracts and instruments in all jurisdictions of Canada. Each jurisdiction has adopted a Product Determination Rule that excludes certain types of contracts and instruments from being derivatives for the purpose of the Instrument.

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Section 5 provides that the Instrument does not apply to:

- certain governments;
- central banks;
- certain crown corporations of Canada or a jurisdiction of Canada;
- certain international organizations;
- qualifying clearing agencies.

Part 3 – Requirement to register and categories of registration for derivatives firms

In all jurisdictions, unless an exclusion or an exemption applies, derivatives dealers and derivatives advisers are required to register under securities legislation. Section 6 establishes additional triggers for registration as a derivatives dealer where a person conducts certain specified activities.

Section 7 establishes the categories of registration for derivatives dealers and section 8 establishes the categories of registration for derivatives advisers.

Section 9 prohibits a derivatives dealer from transacting with an individual that is not an eligible derivatives party unless the derivatives dealer is a dealer member of IIROC. This prohibition applies even if most of the derivatives dealer's transactions involve derivatives parties that are either individuals that qualify as eligible derivatives parties or derivatives parties that are not individuals. Derivatives firms that are required to be a dealer member of IIROC will also be required to be registered with the CSA.

Division 2 of Part 3 establishes requirements relating to the suspension and revocation of registration for derivatives firms. The provisions in this Division are similar to the provisions in Part 10 of NI 31-103.

Part 4 – Categories of registration for individuals

Part 4 establishes registration categories for individual registrants and outlines the activities that each type of individual registrant may perform. The individual registration categories are:

- derivatives dealing representative;
- derivatives advising representative;
- derivatives ultimate designated person;
- derivatives chief compliance officer;
- derivatives chief risk officer.

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Subsection 16(3) sets out two exemptions from the requirement to register as a derivatives dealing representative. The first exemption will apply where the individual is required to register solely because they transact with, or on behalf of, an affiliated entity of the individual's sponsoring derivatives firm, other than an affiliated entity that is an investment fund. The second exemption will apply where the individual does not solicit or transact with, or on behalf of, a derivatives party that is not an eligible derivatives party.

Subsection 16(4) sets out an exemption from the requirement to register as a derivatives advising representative that is comparable to the exemptions for derivatives dealing representatives in subsection 16(3). This exemption does not apply where the individual acts as an adviser for a managed account.

Part 5 – Registration requirements for individuals

Division 1 of Part 5 sets out proficiency requirements for individuals that are required to be registered under securities legislation. Subsection 18(1) establishes general proficiency requirements for all individuals that perform an activity that requires registration.

Subsections 18(2) to (6) establish a requirement that registered derivatives firms not designate or allow an individual to act in any role that requires individual registration unless the individual meets the proficiency requirements applicable to their individual registration category. These requirements are intended to ensure that each registered individual has the education, training and experience to carry out the responsibilities of their role. These specific requirements were developed after considering existing proficiency requirements under NI 31-103,[8] the Québec *Derivatives Regulation*,[9] and the dealer members rules of IIROC.[10] The proposals focus more on experience requirements than the proficiency requirements under NI 31-103 as there are few designations and courses that are tailored to the OTC derivatives markets. We anticipate amending the proficiency requirements in the future as OTC derivatives' specific designations or courses are offered.

Division 2 of Part 5 sets out requirements relating to suspension and revocation of registration for individual registrants. This Division is similar to the provisions in Part 6 of NI 31-103.

Part 6 – Derivatives ultimate designated persons, derivatives chief compliance officers and derivatives chief risk officers

Part 6 establishes specific obligations for persons registered as derivatives ultimate designated persons, derivatives chief compliance officers and derivatives chief risk officers. In developing these requirements, we considered comparable requirements in NI 31-103 as well as requirements under U.S. Commodities Futures Trading Commission rules relating to swap dealers.

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[8] See Part 3, Division 2 of NI 31-103.

[9] https://lautorite.qc.ca/en/professionals/regulations-and-obligations/derivatives/derivatives-regulation/, sections 11.6, 11.6.1, 11.13 and 11.13.1.

[10] http://www.iiroc.ca/Rulebook/Pages/default.aspx, see IIROC dealer member rule 2900.

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Section 26 establishes a requirement that each registered derivatives firm designate individuals to act as a derivatives ultimate designated person, as a derivatives chief compliance officer and as a derivatives chief risk officer.

Sections 27 through 29 establish, for each registered individual, their requirements, roles, and responsibilities. These include requirements for the derivatives ultimate designated person to escalate issues to the registered derivatives firm's board of directors and, in specified circumstances, report instances of non-compliance with the Instrument or with other securities legislation to the applicable regulator or the securities regulatory authority. Sections 28 and 29 establish requirements for the derivatives chief compliance officer and derivatives chief risk officer to escalate issues to the derivatives ultimate designated person.

Section 27 establishes a requirement that the ultimate designated person report certain material incidents of non-compliance with securities legislation to the applicable regulator or the securities regulatory authority.

Sections 28 and 29 also establish requirements for the chief compliance officer and chief risk officer to submit annual reports to the derivatives firm's board of directors. We may periodically request a copy of these reports, upon the entry into force of the Instrument and thereafter, to monitor the compliance and implementation of the Instrument and, from a broader perspective, of the OTC derivatives regulations. We may also periodically review the reports of the chief compliance officer to monitor the compliance of derivatives dealers with the conditions of the exemptions available under the Instrument.

These requirements in Part 6 are in addition to the requirements imposed on senior derivatives managers in the Business Conduct Instrument.

Part 7 – Financial requirements

Section 31 sets out a requirement that registered derivatives firms maintain capital in accordance with the requirements in Appendix C. Appendix C is blank in this version of the Instrument. As mentioned above, we intend to publish proposed capital requirements in a future version of the Instrument that will be published for comment.

Under section 32, a regulator or securities regulatory authority may require a registered derivatives firm to direct its independent auditor to conduct an audit or review and deliver a copy of the direction to the regulator or the securities regulatory authority. This is comparable to section 12.8 of NI 31-103.

Sections 34 and 35 describe the information to be included in the annual and interim financial statements that must be delivered by a registered derivatives firm to the applicable Canadian securities regulator under subsections 36(1) and 36(2), respectively. We expect that these financial statements comply with the requirements in National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards* (NI 52-107). If any consequential amendments to NI 52-107 are needed, they will be published for comment. These requirements are comparable to the requirements in sections 12.10 and 12.11 of NI 31-103.

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Part 8 – Compliance and risk management

Part 8 establishes requirements relating to compliance and risk management policies and procedures.

Section 38 establishes a general requirement that registered derivatives firms establish, maintain and apply policies and procedures reasonably designed to ensure that the firm, and each individual acting on its behalf, complies with securities legislation in relation to its derivatives dealing or advising activities.

Section 39 requires registered derivatives firms to adopt written risk management policies and procedures that will allow the firm to monitor and manage risks associated with the firm's derivatives business. In particular, paragraph 39(3)(g) specifies that these policies and procedures must require the reporting of a material change to the registered derivatives firm's risk exposures or a material breach of a risk limit to the firm's derivatives ultimate designated person and board of directors. Also, subsection 39(4) requires a registered derivatives firm to conduct an independent review of its risk management systems at least every two years. Staff of the registered derivatives firm may conduct the review if they are sufficiently independent from the firm's derivatives business.

Sections 40, 41 and 42 are based on IOSCO standards for risk mitigation.[11] These standards "promote legal certainty, reduce risk and improve efficiency"[12] in the OTC derivatives market. These three sections set out minimum standards for (i) the confirmation of the material terms of each derivative transacted with or for a derivatives party, (ii) a written agreement with the derivatives party that establishes a process for determining the value of the derivative unless the transaction is cleared through a qualifying clearing agency, and (iii) a written agreement that establishes a process for resolving a dispute when there is a discrepancy about the material terms of the derivative or the value of the derivative. Subsection 42(3) establishes a requirement to report a dispute that has not been resolved within a reasonable period of time to the firm's board of directors. Subsection 42(4) establishes a requirement for the firm to report, to the regulator or the securities regulatory authority, a dispute that has not been resolved within 30 days of reporting the dispute to its board of directors.

Section 43 imposes an obligation for a registered derivatives firm to establish and maintain business continuity and disaster recovery plans, and to review these plans at least annually. Staff of the registered derivatives firm may conduct these reviews if they are sufficiently independent from staff responsible for the business continuity and disaster recovery plans.

[11] https://www.iosco.org/library/pubdocs/pdf/IOSCOPD469.pdf (Risk Mitigation Standards for Non-centrally Cleared OTC Derivatives)
[12] https://www.iosco.org/library/pubdocs/pdf/IOSCOPD469.pdf (Risk Mitigation Standards for Non-centrally Cleared OTC Derivatives)

Section 44 sets out requirements for a registered derivatives firm to conduct portfolio reconciliation for all derivatives to which the firm is a counterparty except derivatives cleared through a qualifying clearing agency. The section also requires registered derivatives firms to resolve material discrepancies in terms or valuations identified through the portfolio reconciliation process as soon as possible.

Section 45 imposes an obligation on a registered derivatives firm to establish, maintain and apply policies and procedures to terminate offsetting derivatives and conduct portfolio compression exercises.

Part 9 – Records

Part 9 establishes record keeping requirements for registered derivatives firms.

Section 46 establishes a requirement that registered derivatives firms must keep complete records of derivatives, derivatives transactions and advice provided in relation to derivatives. Section 47 establishes requirements about the form, accessibility and retention of the records referred to in section 46.

Part 10 - Exemptions from the requirement to register and exemptions from specific requirements in this instrument

Divisions 1 and 3 of Part 10 provide firms, local and foreign, with exemptions from the requirement to register. These exemptions are subject to a number of terms and conditions.

Divisions 2 and 4 of Part 10 provide registered derivatives firms, local and foreign, with exemptions from specific registration requirements when a registered derivatives firm is already subject to and compliant with equivalent requirements imposed by another (local or foreign) regulatory authority. The requirements for which these exemptions apply, and the corresponding equivalent requirements, are listed in an appendix of the Instrument.

We have tailored the exemptions from the requirement to register and the exemptions from specific requirements to the nature of the Canadian OTC derivatives market.

At the time of this publication, Appendices B, D, E, G and H are not yet completed. Appendix F contains the information related to the equivalent requirements under the guidelines of OSFI and AMF; the information relating to requirements from other provincial prudential authorities has not yet been included. The CSA will solicit comments on all appendices in a future version of the Proposed Instrument that will be published for comment.

Division 1 and Division 3 – Exemptions from the requirement to register

Division 1 and Division 3 of Part 10 provide exemptions from the requirement to register. Firms that meet the conditions for the exemptions in the Division will not be required to register.

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Section 48 provides an exemption in British Columbia, Manitoba and New Brunswick from the requirement to register as a derivatives dealer for a person or company that meets the criteria in that section. Section 48 is necessary as securities legislation in these provinces has a registration requirement for dealers based on "trading" rather than "being in the business of trading". The exemption in this section results in the registration trigger being consistent in all jurisdictions in Canada.

Section 49 provides that a derivatives end-user (e.g., an entity that trades derivatives for its own account for commercial purposes) is exempt from the requirement to register as a derivatives dealer subject to specific terms and conditions set out in the Instrument.

Sections 50 and 51 also provide exemptions from the requirement to register as a derivatives dealer where a dealer's gross notional amount under derivatives does not exceed a prescribed threshold. Section 50 provides an exemption from the requirement to register for a derivatives dealer with a notional amount that does not exceed $250 million. Section 51 provides a similar exemption for a person or company that is a derivatives dealer only in respect of commodity derivatives (as defined in subsection 51(1) of the Instrument) if the dealer's gross notional amount of commodity derivatives does not exceed $1 billion.

For a derivatives dealer whose head office or principal place of business is in Canada, the gross notional amount must be calculated using all derivatives to which the derivatives dealer is a counterparty. For a derivatives dealer whose head office or principal place of business is not in Canada, the gross notional amount will be calculated using only derivatives where the counterparty to the derivatives dealer is a Canadian counterparty. Canadian counterparty is defined in section 1 of the Instrument.

Each of these exemptions is only available if certain conditions are met, including that the derivatives dealer does not solicit or transact with, or on behalf of, a derivatives party that is not an eligible derivatives party. These sections are intended to reduce the regulatory burden on firms that only transact with, or on behalf of, eligible derivatives parties and that, because of their limited exposure, represent a small risk to our markets.

Section 52 establishes an exemption from the requirement to register as a derivatives dealer for a person or company whose head office or principal place of business is in a foreign jurisdiction and that is subject to regulatory requirements that are equivalent to the requirements in the Instrument. Amongst other conditions, the exemption applies only where the person or company

- does not solicit or transact a derivative with a person or company that is not an eligible derivatives party,
- is authorized to deal in derivatives in the jurisdiction where their head office or principal place of business is located and this jurisdiction is specified in Appendix B to the Instrument, and
- complies with all laws of that jurisdiction applicable to it as a derivatives dealer.

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Appendix B will list the foreign jurisdictions that have regulatory requirements that are equivalent to the requirements in the Instrument.

In Division 3, section 57 provides an exemption for persons and companies that provide general advice in relation to derivatives, where the advice is not tailored to the needs of the person or company receiving the advice (e.g., analysis published in mass media), and the person or company discloses all financial or other interests in relation to the advice.

Section 59 provides an exemption from the requirement to register as a derivatives adviser for a person or company whose head office or principal place of business is in a foreign jurisdiction and that is subject to regulatory requirements that are equivalent to the requirements in the Instrument. The conditions under this exemption are similar to the conditions applicable to a derivatives dealer under the exemption in section 52. Appendix G will list the foreign jurisdictions that have regulatory requirements that are equivalent to the requirements in the Instrument for the purpose of section 59.

Division 2 and Division 4 – Exemptions from specific registration requirements

The exemptions provided in Division 2 and Division 4 aim to reduce the regulatory burden on firms already subject to requirements imposed by other regulatory bodies that are equivalent to the specific requirements of the Instrument. These exemptions are subject to some conditions, including the condition that the registered derivatives firm that benefits from the exemption remain subject to and in compliance with the equivalent requirement imposed by the other regulatory body.

The exemptions in these divisions do not provide an exemption from the requirement to register but instead exempts a person or company from specific registration requirements if they meet the specific conditions. Persons or companies that benefit from these exemptions will still be required to register as a derivatives dealer or a derivatives adviser, as applicable.

IIROC dealer members and Canadian Financial Institutions

Division 2 of Part 10 provides an exemption from specific requirements for registered derivatives dealers that are IIROC dealer members or for financial institutions that are regulated by a federal or provincial prudential authority. Sections 55 and 56 provide, under certain conditions, an exemption from the requirements in the Instrument listed in Appendix E, for IIROC dealer members, or in Appendix F, for Canadian financial institutions, where the requirement imposed by IIROC or the prudential authority achieves a substantially equivalent outcome as the Proposed Instrument.

Foreign derivatives dealers and foreign derivatives advisers

In Division 2, section 54 provides, under certain conditions, an exemption from certain requirements under the Instrument for a registered derivatives dealer whose head office or principal place of business is in a foreign jurisdiction and that is regulated under the laws of a foreign jurisdiction. In Division 4, section 61 provides a similar exemption for a registered

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derivatives adviser whose head office or principal place of business is in a foreign jurisdiction. These exemptions from requirements under the Instrument are available when the registered derivatives dealer or registered derivatives adviser is in compliance with equivalent requirements under the laws of the foreign jurisdiction. Derivatives firms that benefit from these exemptions will still be required to register with the CSA.

These exemptions apply to the provisions of the Instrument where the registered derivatives dealer or the registered derivatives adviser meets all of the conditions in each section, including the condition that the firm is subject to and in compliance with the laws of a foreign jurisdiction set out in Appendix D, for registered derivatives dealers, and in Appendix H, for foreign derivatives advisers, opposite the name of the relevant foreign jurisdiction.

Anticipated Costs and Benefits

As mentioned above, we have developed the Proposed Instrument to help protect investors and counterparties, reduce risk and improve transparency and accountability in the OTC derivatives markets. Moreover, the registration requirement under the Instrument prevents persons from dealing in or advising on derivatives where they do not have the education, training and experience to carry out their responsibilities or their past behavior makes their registration contrary to the public interest.

The Proposed Instrument aims to provide participants in the Canadian OTC derivatives markets with protections that are equivalent to protections offered to participants in other major international markets.

There will be compliance costs for derivatives firms that may increase the cost of trading or receiving advice for market participants. In the CSA’s view, the compliance costs to market participants are proportionate to the benefits to the Canadian market of implementing the Proposed Instrument. The major benefits and costs of the Proposed Instrument are described below.

(a) *Benefits*

The Proposed Instrument will protect participants in the Canadian OTC derivatives market by imposing requirements on key market participants, including requirements to provide Canadian securities regulators with information that will increase transparency into the finances of persons or companies dealing in or advising on derivatives. In addition, the Instrument imposes compliance and risk management requirements that require those derivatives dealers and derivatives advisers to take steps to identify and manage their derivatives related risks.

Securities legislation requires firms that are derivatives dealers and derivatives advisers, and key individuals acting on behalf of those dealers and advisers, to register. Registration allows us to assess the suitability of these firms before they are allowed to carry on the business of dealing or advising in our jurisdictions. In addition, registration allows us to review key individuals’ suitability to act based on their education, training and experience as well as past incidents involving insolvency or inappropriate activity.

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The registration of ultimate designated persons, chief compliance officers and chief risk officers allows us to identify key persons that will be points of contact for compliance and risk management issues. These requirements also allow us to impose specific obligations on these key persons who will be responsible for a failure of a firm to meet its regulatory obligations.

As mentioned above, the registration of individuals constitutes an important gatekeeping responsibility of a market regulator, by which individuals that do not satisfy minimum standards of integrity and proficiency or that have records of financial judgments or convictions for financial crimes, are not authorized to occupy important compliance and risk management-related functions in a derivatives firm.

Registration also allows securities regulatory authorities to suspend or revoke the registration of the firm or any individual registrants, as appropriate. It is worth noting that suspension or revocation of registration under securities legislation has historically only been used in extreme circumstances where the registered firm's ongoing operations would not be in the public interest. This would include where the firm has an ongoing history of material non-compliance, usually after sanctions have been imposed, or where the ongoing operation of the firm has the potential to harm investors.

The capital requirements, that will be introduced in a future version of the Proposed Instrument that will be published for comment, are an important tool for managing default risk by registered derivatives firms by ensuring the firms have sufficient assets to meet their derivatives obligations and by providing authorities with adequate information to identify and address potential risks.

Furthermore, requirements relating to compliance and risk management systems protect the derivatives firm's derivatives parties and the market as a whole by mitigating the risk that the derivatives firm experiences an event that could have an outcome that is contrary to the interest of its derivatives parties, such as a default on its derivatives obligations. Appropriately designed and applied compliance systems allow derivatives firms to identify, address and escalate issues at an early stage and provide securities regulatory authorities with appropriate information relating to those issues.

In summary, the Proposed Instrument is intended to foster confidence in the Canadian derivatives market by creating a regime that meets international standards and is, where appropriate, equivalent to the regimes in major trading jurisdictions. Currently, OTC derivatives are regulated differently across Canadian jurisdictions. The Proposed Instrument aims to reduce compliance costs for derivatives firms to the degree possible, by harmonizing the rules across Canadian jurisdictions and establishing a regime that is tailored for the derivatives market. This tailored regime will replace the existing securities registration regime that is inconsistent across jurisdictions and that is not tailored to the OTC derivatives markets.

(b) *Costs*

Generally, firms will incur costs from analyzing the requirements and establishing policies and procedures for compliance. Increased costs may also result from the introduction of financial requirements for registered derivatives firms that are not already subject to equivalent financial

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requirements. Any costs associated with complying with the Proposed Instrument are expected to be borne by registered derivatives firms and in certain circumstances may be passed on to derivatives parties.

There is also a possibility that foreign derivatives firms may be dissuaded from entering or remaining in the Canadian market due to the costs of complying with the Proposed Instrument, which would reduce Canadian derivatives parties' options for derivatives services. However, the Instrument contemplates a number of exemptions, including exemptions for smaller derivatives dealers that only deal with eligible derivatives parties and for derivatives firms located in foreign jurisdictions, which are subject to and in compliance with equivalent requirements under foreign laws. These exemptions could significantly reduce compliance costs associated with the Proposed Instrument for derivatives firms located in and complying with the laws of approved foreign jurisdictions.

Finally, jurisdictions impose registration fees for registrants. These fees are established under the laws of each Canadian jurisdiction.

(c) *Conclusion*

The CSA are of the view that the impact of the Proposed Instrument, including anticipated compliance costs for derivatives firms, is proportional to the benefits sought.

Protection of derivatives parties and the integrity of the Canadian derivatives market are the fundamental principles of the Proposed Instrument. The Proposed Instrument aims to provide a level of protection similar to that offered to derivatives parties in other jurisdictions with significant OTC derivatives markets, while being tailored to the nature of the Canadian market. To achieve a balance of interests, the Proposed Instrument is designed to promote a safer environment in the Canadian derivatives market while offering exemptions to derivatives firms that represent a small risk to our markets, that only deal with eligible derivatives parties or that are already subject to and compliant with equivalent requirements.

Contents of Annexes

The following annexes form part of this CSA Notice:

- Annex I – Description of Proposed Methodologies for Determining Notional Amount
- Annex II – Alternative version of the definition of "affiliated entity"
- Annex III – Proposed National Instrument 93-102 *Derivatives: Registration*
- Annex IV – Proposed Companion Policy 93-102 *Derivatives: Registration*
- Annex V – Local Matters

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Comments

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

1) Methodology for determining "notional amount"

Annex I describes two different methodologies for determining notional amount for derivatives that reference a notional quantity (or volume) of an underlying asset: (i) the methodology based on the CDE Guidance, set out in Column 1 of Annex I, and (ii) the Regulatory Notional Amount methodology set out in Column 2 of Annex I.

(a) Please provide any comments relating to the constituent elements (price, quantity, etc.) of the proposed methodologies.

(b) Please provide comments on the most appropriate approach to determining the notional amount, for the purpose of regulatory thresholds, of a derivative with a notional amount schedule, including a schedule with notional amounts not denominated in Canadian dollars.

(c) Please provide comments on the most appropriate approach to determining notional amount for a multi-leg derivative.

For example, in a multi-leg derivative with multiple legs that are exercisable, deliverable or otherwise actionable and that are not mutually exclusive, is it appropriate to determine the notional amount for the derivative by summing the notional amount for each such leg that is exercisable, deliverable or otherwise actionable and that is not mutually exclusive?

Other multi-leg derivatives may have multiple legs that are not exercisable, deliverable or otherwise actionable or that are mutually exclusive. For these types of multi-leg derivatives, is it appropriate to determine the notional amount for the derivative by using a weighted average of the notional amount of each such leg that is not exercisable, deliverable or otherwise actionable or that is mutually exclusive?

(d) Please provide any general comments on determining notional amount for the purpose of regulatory thresholds, including relating to implementation of the proposed methodologies.

2) 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 II). Please provide any comments you may have on (i) the definition in the Instrument, (ii) a definition in Annex II, and (iii) the appropriate balance between harmonization across related rules and using different definitions to more precisely target specific entities under different rules.

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3) Definition of "eligible derivatives party"

Paragraphs (m), (n) and (o) provide that certain persons and companies are eligible derivatives parties if they meet certain criteria, including meeting certain financial thresholds. Are these criteria appropriate? Please explain your response.

4) Application of the derivatives adviser registration requirement to registered advisers/portfolio managers under securities legislation

Under the Proposed Instrument, a person or company engaging in or holding himself, herself or itself out as engaging in the business of advising others in derivatives will be required to register as a derivatives adviser unless an exemption from registration is available.

We understand that a registered adviser under securities or commodity futures legislation may provide advice in relation to derivatives or strategies involving derivatives, or may manage an account for a client and make trading decisions for the client in relation to derivatives or strategies involving derivatives. If the performance of these activities in relation to derivatives is limited in nature so that it could reasonably be considered incidental to the performance of their activities as a registered adviser for securities, we may consider the registered adviser/portfolio manager to not be "in the business of advising others in relation to derivatives".

(a) Do you agree with this approach? If not, why not? Alternatively, should we consider including an express exemption from the derivatives adviser registration requirement for a registered adviser under securities or commodity futures legislation? If yes, what if any conditions should apply to this exemption?

(b) When should the provision of advice by a registered adviser/portfolio manager in relation to derivatives be considered incidental to the performance of their activities as a registered adviser/portfolio manager? What factors should we consider in distinguishing between registered advisers who need to register as derivatives advisers from registered advisers that do not need to register as derivatives advisers?

5) IIROC membership for certain derivatives dealers

Section 9 prohibits a derivatives dealer from transacting with an individual that is not an eligible derivatives party unless the derivatives dealer is a dealer member of IIROC. Should a derivatives dealer that deals with an individual that is not an eligible derivatives party be required to become an IIROC dealer member? Are there any other circumstances where a derivatives dealer should be required to be an IIROC dealer member?

6) Exemption from the individual registration requirements for derivatives dealing representatives and derivatives advising representatives

Subsection 16(3) and subsection 16(4) provide an exemption from the requirement to register an individual as a derivatives dealing representative or as a derivatives advising representative in certain circumstances. Are the exemptions appropriate? In subparagraph 16(4)(b)(iii), individuals

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that act as an adviser for a managed account are not eligible for the exemption from the requirement to register as a derivatives advising representative. Is this carve out appropriate where an individual has discretionary authority over the account of an eligible derivatives party?

7) Specific proficiency requirements for individual registrants

Subsections 18(2) through (6) of the Instrument establish specific proficiency requirements for each individual registration category. Are these specific requirements appropriate? If not, what specific exams, designations or experience are appropriate?

8) Derivatives ultimate designated person

Subparagraph 27(3)(c)(i) requires a derivatives firm's ultimate designated person to report any instance of non-compliance with securities legislation, including the Instrument, relating to derivatives or the firm's risk management policies if the non-compliance creates a risk of material harm to any derivatives party. Is this requirement appropriate?

9) Requirements, roles and responsibilities of ultimate designated persons, chief compliance officers and chief risk officers

Sections 27 through 29 of the Instrument establish requirements, roles, and responsibilities of individuals registered as the ultimate designated person, the chief compliance officer and the chief risk officer for each registered firm. Considering the obligations imposed on senior derivatives managers in the Business Conduct Instrument, are the requirements, roles and responsibilities in sections 27 through 29 of the Instrument appropriate?

10) Minimum requirements for risk management policies and procedures

Section 39 sets out the minimum requirements for risk management policies and procedures. Are any of the requirements inappropriate? Are the requirements for an independent review of risk management systems appropriate?

11) Exemptions from the requirement to register for derivatives dealers with limited derivatives

Sections 50 and 51 establish exemptions from the requirement to register for derivatives dealers that have a gross notional amount that does not exceed prescribed thresholds. These exemptions provide that derivatives dealers that have their head office or principal place of business in Canada must calculate their gross notional amount based on outstanding derivatives with any counterparty, regardless of where the counterparty resides. Derivatives dealers that have their head office and principal place of business outside of Canada would calculate their gross notional amount based on outstanding derivatives where the counterparty is a Canadian resident. Would this result in Canadian resident derivatives dealers being placed at a competitive disadvantage, particularly where foreign derivatives dealers may be exempt from regulatory requirements in their home jurisdiction?

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12) Exemptions from specific requirements in this Instrument for investment dealers

Section 55 exempts IIROC dealer members from specific requirements under the Instrument where those dealer members are subject to equivalent IIROC requirements. The IIROC dealer members will also be required to register in each CSA jurisdiction where their activities result in an obligation to register as a derivatives dealer or derivatives adviser. Does this obligation to register result in an excessive regulatory burden for the firms? Please provide specific information relating to this burden.

Please provide your comments in writing by **September 17, 2018**.

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:

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
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Montréal (Québec) H4Z 1G3
Fax: 514-864-6381
consultation-en-cours@lautorite.qc.ca

Grace Knakowski
Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8
Fax: 416-593-2318
comments@osc.gov.on.ca

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Questions

Please refer your questions to any of the following:

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ANNEX I

Description of the Proposed Methodologies for Determining Notional Amount Derivatives Negotiated in Non-Monetary Amounts

	Column 1	Column 2
Product	**Notional Amount based on the CDE Guidance**	**Notional Amount under the Regulatory Notional Methodology**
Equity Derivatives		
Equity options and similar products	Product of the strike price specified in the contract and the number of shares or index units	Product of the delta-adjusted spot price at the time of the transaction and the number of shares or index units
Equity forwards and similar products	Product of the forward price specified in the contract and the number of shares or index units	Product of the forward price specified in the contract and the number of shares or index units
Equity dividend swaps and similar products	Product of the period fixed strike specified in the contract and the number of shares or index units	Product of the period fixed strike specified in the contract and the number of shares or index units
Equity swaps, portfolio swaps and similar products	Product of the initial price and the number of shares or index units	Product of the initial price and the number of shares or index units
Equity variance swaps and similar products	Variance amount	Variance amount
Equity volatility swaps and similar products	Vega notional amount	Vega notional amount
Equity CFDs and similar products	Product of the initial price and the number of shares or index units	Product of the initial price and the number of shares or index units
Commodity Derivatives		
Commodity options and similar products	Product of the strike price specified in the contract and the total notional quantity	Product of the delta-adjusted spot price specified in the contract and the notional quantity

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	Commodity forwards and similar products	Product of the forward price specified in the contract and the total notional quantity	Product of the forward price specified in the contract and the monthly notional quantity approximation
	Commodity fixed/float swaps and similar products	Product of the fixed price specified in the contract and the total notional quantity	Product of the fixed price specified in the contract and the monthly notional quantity approximation
	Commodity basis swaps and similar products	Product of the last available spot price at the time of the transaction of the underlying asset of the leg with no spread and the total notional quantity of the leg with no spread	The greater of (i) the product of the last available spot price at the time of the transaction of the underlying asset of leg 1 and the monthly notional quantity approximation of leg 1, and (ii) the product of the last available spot price at the time of the transaction of the underlying asset of leg 2 and the monthly notional quantity approximation of leg 2
	Commodity swaptions and similar products	Notional amount of the underlying transaction	Notional amount of the underlying transaction
	Commodity CFDs and similar products	Product of the initial price and the total notional quantity	Product of the initial price and the notional quantity

Notes applicable to all derivatives	
	All conversions to monetary notional amounts, including all conversions to Canadian dollars, must be made at the time of the transaction.
	For all derivatives with exercise optionality (e.g., swaptions) or volumetric optionality, the optionality must be assumed to be exercised and the regulatory notional amount would be determined as above.
	For derivatives with multiple settlement periods, which settlement periods are not monthly, "monthly notional quantity approximation" is calculated as: $\left(\frac{\text{total notional quantity}}{\text{total number of days between effective date and maturity}}\right) \times \left(\frac{365}{12}\right)$
	If applicable to the derivative, the notional amount must reflect any multipliers and option entitlements.
	For derivatives whereby the quantity unit of measure differs from the price unit of measure, the price or total quantity must be converted to a unified unit of measure.

	For basket-type derivatives, the notional amount of the derivative is the sum of the notional amounts of each constituent of the basket.
	Any reference to a price, including a spot price, means the absolute value of the price. For example, a negative price must be treated as the absolute value of that negative price.
	Any reference to "spot price" means the quoted price in an active market for the underlying asset or, if no quoted price in an active market is available, the fair value of the underlying asset, as determined in accordance with the *Fair value hierarchy* set out in IFRS 13 *Fair Value Measurement*.
	Information relating to certain terms, including "delta adjusted-spot price" and "initial price" will be established in Appendix A of local and multilateral instruments relating to Trade Repositories and Derivatives Data Reporting.[13]

[13] These instruments are Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting,* Manitoba Securities Commission Rule 91-507 *Trade Repositories and Derivatives Data Reporting,* Ontario Securities Commission Rule 91-507 *Trade Repositories and Derivatives Data Reporting* and, in Québec, Regulation 91-507 respecting trade repositories and derivatives data reporting.

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ANNEX II

Alternative version of the definition of “affiliated entity”

In this Instrument, a person or company (the first party) is an affiliated entity of another person or company (the second party) if any of the following apply:

(a) the first party and the second party are consolidated in consolidated financial statements prepared in accordance with

(i) IFRS, or

(ii) generally accepted accounting principles in the United States of America;

(b) all of the following apply:

(i) neither the first party's nor the second party's financial statements, nor the financial statements of another person or company, were prepared in accordance with the principles or standards specified in subparagraphs (a)(i) or (ii);

(ii) the first party and the second party would have been, at the relevant time, required to be consolidated in consolidated financial statements prepared by the first party, the second party or the other person or company, if the consolidated financial statements were prepared in accordance with the principles or standards specified in subparagraphs (a)(i) or (ii);

(c) both parties are prudentially regulated entities that are supervised on a consolidated basis.

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ANNEX III

PROPOSED NATIONAL INSTRUMENT 93-102
DERIVATIVES: REGISTRATION

PART 1 DEFINITIONS AND INTERPRETATION

Definitions and interpretation

1.(1) In this Instrument,

"Canadian counterparty" means a derivatives party to which either of the following applies:

(a) the derivatives party is a person or company, other than an individual, organized under the laws of Canada or a jurisdiction of Canada or that has its head office or principal place of business in Canada;

(b) the derivatives party is an affiliated entity of a person or company described in paragraph (a) and the person or company is responsible for the liabilities of that affiliated entity;

"Canadian financial institution" means any of the following:

(a) an association governed by the *Cooperative Credit Associations Act* (Canada) or a central cooperative credit society for which an order has been made under section 473(1) of that Act;

(b) a bank, loan corporation, trust company, trust corporation, insurance company, treasury branch, credit union, caisse populaire, financial services cooperative, or league that, in each case, is authorized by an enactment of Canada or a jurisdiction of Canada to carry on business in Canada or a jurisdiction of Canada;

"commercial hedger" means a person or company that carries on a business and that transacts a derivative that is intended to hedge risks relating to that business if those risks arise from potential changes in value of one or more of the following:

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

(b) a liability that the person or company incurs or anticipates incurring;

(c) a service which the person or company provides, purchases, or anticipates providing or purchasing;

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"derivatives adviser" means

(a) a person or company engaging in or holding himself, herself or itself 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 himself, herself or itself 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;

"derivatives party" means

(a) in relation to a derivatives dealer, one 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;

"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 incorporated 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;

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(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) the 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;

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

(l) an investment fund that is advised by an adviser registered or exempted from registration under securities legislation or under commodity futures legislation in Canada;

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(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 about derivatives that has been provided to the person or company 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, the suitability of the derivatives for that 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;

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

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

(ii) he or she 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 under paragraph (o);

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(q) a person or company, other than an individual, that has represented to the derivatives firm, in writing, that all of the following apply:

(i) the person or company is a commercial hedger in relation to the derivatives that it transacts with the derivatives firm;

(ii) the obligations of the person or company, 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 (o);

(r) a qualifying clearing agency;

"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 a 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;

"notional amount" has the meaning set out in Appendix A;

"principal regulator" means

(a) for a registered derivatives firm that has its head office in Canada, the securities regulatory authority or regulator in the jurisdiction in which the firm's head office is located,

(b) for a registered derivatives firm that has its head office in a jurisdiction of Canada where the firm is exempt from the requirement to register as a derivatives dealer or as a derivatives adviser, the securities regulatory authority or regulator in the jurisdiction of Canada where the firm is required to register as a derivatives firm and where the firm expects to conduct most of its activities that require registration as a derivatives firm as at the end of its current financial year, or conducted most of its activities that require registration as a derivatives firm as at the end of its most recently completed financial year, and

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(c) for a derivatives firm that has its head office in a foreign jurisdiction, the securities regulatory authority or regulator in the jurisdiction of Canada the firm identified in one of the following:

(i) item 2.2(b) of its most recently submitted Form 33-109F6 *Firm Registration* under National Instrument 33-109 *Registration Information;*

(ii) its most recently submitted Form 33-109F5 *Change of Registration Information* under National Instrument 33-109 *Registration Information*, if the change noted in that form relates to item 2.2(b) of Form 33-109F6 *Firm Registration;*

"qualifying clearing agency" means a person or company if either of the following applies:

(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 market infrastructures* applicable to central counterparties and published by the Bank for International Settlements' Committee on Payments and Market Infrastructures and the International Organization of Securities Commissions in April 2012, as amended from time to time;

"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 derivatives individual" means an individual who is registered on behalf of a derivatives firm as any of the following:

(a) a derivatives dealing representative;

(b) a derivatives advising representative;

(c) a derivatives ultimate designated person;

(d) a derivatives chief compliance officer;

(e) a derivatives chief risk officer;

"registered securities firm" is 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*;

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"sponsoring derivatives firm" means the registered derivatives firm in a jurisdiction of Canada on whose behalf an individual acts as a derivatives advising representative, a derivatives dealing representative, a derivatives ultimate designed person, a derivatives chief compliance officer or a derivatives chief risk officer;

"transaction" means any 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 current value of a derivative determined in accordance with applicable accounting standards for fair value measurement using a methodology that is consistent with 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);

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

(b) it 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 an adviser acting on behalf of a managed account owned by another person or company.

(7) For the purpose of determining whether a derivatives party is an eligible derivatives party, a derivatives firm must not rely on a written representation if reliance on that representation would be unreasonable.

(8) 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*.

Information may be given to the principal regulator

2. (1) For the purpose of a requirement in this Instrument to report or notify the regulator or the securities regulatory authority or to deliver or submit a document to the regulator or the

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securities regulatory authority, a person or company may report or notify or deliver or submit the document to the person or company's principal regulator.

(2) Subsection (1) does not apply to a derivatives firm relying on the exemptions in either of the following:

(a) section 52 [*Foreign derivatives dealers – exemption from registration*];

(b) section 59 [*Foreign derivatives advisers – exemption from registration*].

PART 2 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.

In each other local jurisdiction, this Instrument applies to a derivative as defined in subsection 1(8) of this Instrument. This text box does not form part of this Instrument and has no official status.

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Qualifying clearing agencies

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

Governments, central banks and international organizations

5. 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) a crown corporation or agency, the accounts of which are consolidated for accounting purposes with those of the Government of Canada or with the government of a jurisdiction of Canada;

(d) the Bank for International Settlements;

(e) the International Monetary Fund.

PART 3 REQUIREMENT TO REGISTER AND CATEGORIES OF REGISTRATION FOR DERIVATIVES FIRMS

Division 1 – Firm Registration and Categories of Registration

Derivatives dealer registration – additional registration triggers

6. In addition to the registration requirement that applies under other provisions of securities legislation, a person or company must register as a derivatives dealer if one or more of the following applies:

(a) the person or company transacts with, for or on behalf of a non-eligible derivatives party;

(b) the person or company solicits or initiates contact with a non-eligible derivatives party for the purpose of encouraging that person or company to transact in a derivative or to offer a service relating to a transaction or transactions;

(c) the person or company, on behalf of another person or company, other than an affiliated entity, facilitates the clearing of one or more derivatives through a clearing agency or a clearing house, as applicable.

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Derivatives dealer registration categories

7. (1) The following are the categories of registration for a person or company that is required to be registered under securities legislation as a derivatives dealer:

(a) derivatives dealer;

(b) restricted derivatives dealer.

(2) A person or company registered in the category of

(a) derivatives dealer may act as a derivatives dealer in respect of any derivative, and

(b) restricted derivatives dealer may act as a derivatives dealer in accordance with the terms, conditions, restrictions and requirements applied to its registration.

Derivatives adviser registration categories

8. (1) The following are the registration categories for a person or company that is required to be registered under securities legislation as a derivatives adviser:

(a) derivatives adviser;

(b) restricted derivatives adviser.

(2) A person or company registered in the category of

(a) derivatives adviser may act as a derivatives adviser in respect of any derivative, and

(b) restricted derivatives adviser may act as a derivatives adviser, in respect of any derivatives, in accordance with the terms, conditions, restrictions and requirements applied to its registration.

IIROC membership for certain derivatives dealers

9. A registered derivatives dealer must not transact derivatives with a derivatives party who is an individual and who is not an eligible derivatives party unless the derivatives dealer is a dealer member of IIROC, as defined under the rules of IIROC.

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Division 2 – Suspension and revocation of registration – derivatives firms

Failure to pay fees

10. (1) In this section, "annual fees" means

(a) in Alberta, the fees required under section 5 of ASC Rule 13-501 Fees,

(b) in British Columbia, the annual fees required under section 22 of the Securities Regulation, B.C. Reg. 196/97,

(c) in Manitoba, the fees required under paragraph 1.(2)(a) of the Manitoba Fee Regulation, M.R 491\88R,

(d) in New Brunswick, the fees required under section 2.2 (c) of Local Rule 11-501 *Fees*,

(e) in Newfoundland and Labrador, the fees required under section 143 of the *Securities Act*,

(f) in Nova Scotia, the fees required under Part XIV of the regulations made pursuant to the *Securities Act*,

(g) in the Northwest Territories, the fees required under sections 1(c) and 1(e) of the Securities Fee regulations, R-066-2008;

(h) in Nunavut, the fees required under section 1(a) of the Schedule to R-003-2003 to the Securities Fee regulation, R.R.N.W.T. 1990, c.20,

(i) in Prince Edward Island, the fees required under section 175 of the *Securities Act* R.S.P.E.I., Cap. S-3.1,

(j) in Québec, section 5 of the Tariffs for Costs and Fees Payable in respect of Derivatives,

(k) in Saskatchewan, the annual registration fees required to be paid by a registrant under section 176 of The Securities Regulations (Saskatchewan), and

(l) in Yukon, the fees required under O.I.C. 2009\66, pursuant to section 168 of the *Securities Act*.

(2) If a registered derivatives firm has not paid the annual fees by the 30th day after the date the annual fees were due, the registration of the registered derivatives firm is suspended until reinstated or revoked under securities legislation.

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If IIROC membership is revoked or suspended

11. If IIROC revokes or suspends a registered derivatives firm's membership, the registered derivatives firm's registration is suspended until reinstated or revoked under securities legislation.

Activities not permitted while a firm's registration is suspended

12. If a registered derivatives firm's registration in a category is suspended, the registered derivatives firm must not act as a derivatives dealer or a derivatives adviser, as the case may be, under that category.

Revocation of a suspended registration – firm

13. If a registration has been suspended under this Division and it has not been reinstated, the registration is revoked on the 2nd anniversary of the suspension.

Exception for firms involved in a hearing or proceeding

14. Despite section 13 [*Revocation of a suspended registration – firm*], if a hearing or proceeding concerning a suspended registered derivatives firm is commenced under securities legislation or under the rules of IIROC, the firm's registration remains suspended.

Application of Division 2 in Ontario

15. Other than section 12 [*Activities not permitted while a firm's registration is suspended*], this Division does not apply in Ontario.

In Ontario, measures governing suspension are in section 29 of the Securities Act (Ontario) and are similar to those in Division 2 of Part 3.

PART 4 CATEGORIES OF REGISTRATION FOR INDIVIDUALS

Individual registration categories

16. (1) The following are the categories of registration for an individual who is required, under securities legislation, to be registered to act on behalf of a registered derivatives firm:

(a) derivatives dealing representative;

(b) derivatives advising representative;

(c) derivatives ultimate designated person;

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(d) derivatives chief compliance officer;

(e) derivatives chief risk officer.

(2) An individual registered in the category of

(a) derivatives dealing representative may act as a dealer in respect of any derivative that the individual's sponsoring derivatives firm is permitted to transact,

(b) derivatives advising representative may act as an adviser in respect of any derivative that the individual's sponsoring derivatives firm is permitted to advise on,

(c) derivatives ultimate designated person must perform the functions set out in section 27 [*Derivatives ultimate designated person*],

(d) derivatives chief compliance officer must perform the functions set out in section 28 [*Derivatives chief compliance officer*], and

(e) derivatives chief risk officer must perform the functions set out in section 29 [*Derivatives chief risk officer*].

(3) An individual is exempt from the requirement to register as a derivatives dealing representative of a registered derivatives dealer if either of the following applies:

(a) the individual would otherwise only be required to register as a derivatives dealing representative as a result of transacting with or on behalf of an affiliated entity, other than an affiliated entity that is an investment fund, of the registered derivatives dealer;

(b) the individual does not solicit or transact with, for or on behalf of, a non-eligible derivatives party.

(4) An individual is exempt from the requirement to register as a derivatives advising representative of a registered derivatives adviser if either of the following applies:

(a) the individual would otherwise only be required to register as a derivatives advising representative as a result of advising an affiliated entity, other than an affiliated entity that is an investment fund, of the registered derivatives adviser;

(b) if both of the following apply:

(i) the individual does not advise a non-eligible derivatives party;

(ii) the individual does not act as an adviser for a managed account of any derivatives party.

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PART 5 REGISTRATION REQUIREMENTS FOR INDIVIDUALS

Division 1 – Individual proficiency requirements

Definitions

17. In this Part,

"Canadian Investment Manager designation" means the designation earned through the Canadian investment manager program prepared and administered by CSI Global Education Inc. and so named on the day this Instrument comes into force, and every program that preceded that program, or succeeded that program, that does not have a significantly reduced scope and content when compared to the scope and content of the first-mentioned program;

"CPH Course Exam" means the examination prepared and administered by CSI Global Education Inc. and so named on the day this Instrument comes into force, and every examination that preceded that examination, or succeeded that examination, that does not have a significantly reduced scope and content when compared to the scope and content of the first-mentioned examination;

"Chief Compliance Officers Qualifying Exam" means the examination prepared and administered by CSI Global Education Inc. and so named on the day this Instrument comes into force, and every examination that preceded that examination, or succeeded that examination, that does not have a significantly reduced scope and content when compared to the scope and content of the first-mentioned examination;

"CFA Charter" means the charter earned through the Chartered Financial Analyst program prepared and administered by the CFA Institute and so named on the day this Instrument comes into force, and every program that preceded that program, or succeeded that program, that does not have a significantly reduced scope and content when compared to the scope and content of the first-mentioned program;

"Derivatives Fundamentals Course Exam" means the examination prepared and administered by CSI Global Education Inc. and so named on the day this Instrument comes into force, and every examination that preceded that examination, or succeeded that examination, that does not have a significantly reduced scope and content when compared to the scope and content of the first-mentioned examination;

"Risk Manager Designation" means a designation qualifying an individual as a financial risk manager by the Global Association of Risk Managers or professional risk manager by The Professional Risk Managers' International Association, each so named on the day this Instrument comes into force, and every designation that preceded that designation, or succeeded that designation, that does not have a significantly reduced scope and content when compared to the scope and content of the first-mentioned designation;

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"Futures Licensing Course Exam" means the examination prepared and administered by CSI Global Education Inc. and so named on the day this Instrument comes into force, and every examination that preceded that examination, or succeeded that examination, that does not have a significantly reduced scope and content when compared to the scope and content of the first-mentioned examination;

"National Commodity Futures Exam" means the examination prepared and administered by the Financial Industry Regulatory Authority in the United States of America and so named on the day this Instrument comes into force, and every examination that preceded that examination, or succeeded that examination, that does not have a significantly reduced scope and content when compared to the scope and content of the first-mentioned examination;

"PDO Exam" means any of the following:

(a) the Officers', Partners' and Directors' Exam prepared and administered by the IFSE Institute and so named on the day this Instrument comes into force, and every examination that preceded that examination, or succeeded that examination, that does not have a significantly reduced scope and content when compared to the scope and content of the first-mentioned examination;

(b) the Partners, Directors and Senior Officers Course Exam prepared and administered by CSI Global Education Inc. and so named on the day this Instrument comes into force, and every examination that preceded that examination, or succeeded that examination, that does not have a significantly reduced scope and content when compared to the scope and content of the first-mentioned examination.

Initial and ongoing proficiency requirements

18. (1) A registered derivatives firm must not allow an individual to perform an activity on its behalf that requires registration unless the individual has the education, training and experience that a reasonable person would consider necessary to perform the activity competently, including understanding the structure, features and risks of each derivative that the individual transacts or recommends.

(2) In addition to the requirement in subsection (1), a registered derivatives firm must not designate an individual to act as its derivatives chief compliance officer unless either of the following applies:

(a) all of the following apply:

(i) the individual has earned a CFA Charter or a professional designation as a lawyer or a Chartered Professional Accountant in a jurisdiction of Canada, a notary in Québec, or the equivalent in a foreign jurisdiction;

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(ii) the individual has passed the PDO Exam or the Chief Compliance Officers Qualifying Exam;

(iii) the individual has either

(A) gained at least 36 months of relevant derivatives experience while working at a registered securities firm, a derivatives dealer, a derivatives adviser, or a person or company that conducts the activities of a derivatives dealer or derivatives adviser in a foreign jurisdiction;

(B) provided professional services related to derivatives for at least 36 months and also worked at a derivatives dealer or a derivatives adviser for 12 months;

(b) the individual has passed either the PDO Exam or the Chief Compliance Officers Qualifying Exam and one or more of the following applies:

(i) the individual has worked at a registered securities firm, at a derivatives dealer, at a derivatives adviser or at a person or company that conducts the activities of a derivatives dealer or derivatives adviser in a foreign jurisdiction specified in Column 1 of Appendix B, for 5 years, including for 36 months in a compliance capacity;

(ii) the individual has worked for 5 years at a Canadian financial institution in a compliance capacity relating to derivatives.

(3) In addition to the requirement in subsection (1), a registered derivatives firm must not designate an individual to act as its derivatives chief risk officer, unless one or more of the following applies:

(a) the individual has earned a CFA Charter, has received a Risk Manager Designation or has received equivalent certification as a risk manager;

(b) the individual has passed the CPH Course Exam, and one or more of the following applies:

(i) the individual has gained 36 months of relevant derivatives experience while working at a registered securities firm, a derivatives dealer, a derivatives adviser or at a person or company that conducts the activities of a derivatives dealer or derivatives adviser in a foreign jurisdiction specified in Column 1 of Appendix B;

(ii) the individual has provided professional services related to derivatives for 36 months and also worked at a registered securities firm, a derivatives dealer or a derivatives adviser for 12 months;

(c) the individual has passed the PDO Exam and either of the following applies:

(i) the individual has worked at a derivatives dealer or a derivatives adviser for 5 years, including for 36 months in a risk management capacity;

(ii) the individual has worked for 5 years at a Canadian financial institution in a risk management capacity relating to derivatives.

(4) In addition to the requirement in subsection (1), a registered derivatives firm must not allow an individual to act, on its behalf, as a derivatives dealing representative unless either of the following applies:

(a) the individual has passed the Derivatives Fundamentals Course Exam;

(b) the individual has passed the Futures Licensing Course Exam and the National Commodity Futures Exam.

(5) Despite subsection (4), a registered derivatives firm may allow an individual to act on its behalf as a derivatives dealing representative without meeting the requirements in that subsection if the individual is exempt from the requirement to register under subsection 16(3).

(6) In addition to the requirement in subsection (1), a registered derivatives firm must not allow an individual to act on its behalf as a derivatives advising representative unless one or more of the following applies:

(a) the individual has earned a CFA Charter and has gained 12 months of relevant investment management experience, including experience relating to derivatives, in the 36-month period before applying for registration;

(b) all of the following apply:

(i) the individual has received the Canadian Investment Manager Designation;

(ii) the individual has passed the Derivatives Fundamentals Course Exam;

(iii) the individual has gained 48 months of relevant investment management experience, including experience relating to derivatives, at least 12 months of which was gained in the 36-month period before applying for registration.

(7) Despite subsection (6), a registered derivatives firm may allow an individual to act on its behalf as a derivatives advising representative without meeting the requirements in that subsection if the individual is exempt from the requirement to register under subsection 16(4).

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(8) For the purpose of this section, an individual is deemed to have not passed an examination unless the individual passed the examination not more than 36 months before the date of his or her application for registration.

(9) Subsection (8) does not apply if the individual passed the examination more than 36 months before the date of his or her application and has met one of the following conditions:

(a) the individual was registered in the same category in any jurisdiction of Canada at any time during the 36-month period before the date of his or her application;

(b) the individual has gained 12 months of relevant industry experience during the 36-month period before the date of his or her application.

(10) For the purpose of paragraph (9)(a), an individual is not considered to have been registered during any period in which the individual's registration was suspended.

Division 2 – Suspension and revocation of registration **–** *individuals*

If individual ceases to have authority to act for the derivatives firm

19. If a registered derivatives individual ceases to have authority to act as a registered derivatives individual on behalf of his or her sponsoring derivatives firm because of the end of, or change in, the individual's employment, partnership, or agency relationship with the firm, the individual's registration with the firm is suspended until reinstated or revoked under securities legislation.

If IIROC approval is revoked or suspended

20. If IIROC revokes or suspends a registered individual's approval in respect of a registered derivatives dealer, the individual's registration as a derivatives dealing representative of the registered derivatives dealer is suspended until reinstated or revoked under securities legislation.

If sponsoring derivatives firm is suspended

21. If a registered derivatives firm's registration in a category is suspended, the registration of each registered derivatives dealing representative or derivatives advising representative acting on behalf of the firm in that category is suspended until reinstated or revoked under securities legislation.

Dealing and advising activities suspended

22. If an individual's registration in a category is suspended, the individual must not act as a derivatives dealer or a derivatives adviser, as the case may be, under that category.

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Revocation of a suspended registration – individual

23. If a registration of an individual has been suspended under this Division and it has not been reinstated, the registration is revoked on the 2nd anniversary of the suspension.

Exception for individuals involved in a hearing or proceeding

24. Despite section 23 [R*evocation of a suspended registration – individual*], if a hearing or proceeding concerning a suspended individual is commenced under securities legislation or under the rules of IIROC, the individual's registration remains suspended.

Application of this Division in Ontario

25. Other than section 22 [*Dealing and advising activities suspended*] this Division does not apply in Ontario.

In Ontario, measures governing suspension are in section 29 of the Securities Act (Ontario) and are similar to those in Division 2 of Part 5.

PART 6 DERIVATIVES ULTIMATE DESIGNATED PERSON, DERIVATIVES CHIEF COMPLIANCE OFFICER AND DERIVATIVES CHIEF RISK OFFICER

Requirement to designate a derivatives ultimate designated person, a derivatives chief compliance officer and a derivatives chief risk officer

26. Each registered derivatives firm must designate an individual who is registered under securities legislation in the applicable category as

(a) a derivatives ultimate designated person responsible for performing the functions set out in section 27 [D*erivatives ultimate designated person*],

(b) a derivatives chief compliance officer responsible for performing the functions set out in section 28 [D*erivatives chief compliance officer*], and

(c) a derivatives chief risk officer responsible for performing the functions set out in section 29 [D*erivatives chief risk officer*].

Derivatives ultimate designated person

27. (1) The derivatives ultimate designated person must be one of the following:

(a) the chief executive officer of the registered derivatives firm, or if the registered derivatives firm does not have a chief executive officer, an individual acting in a capacity similar to that of a chief executive officer;

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(b) a partner or the sole proprietor of the registered derivatives firm;

(c) if the registered derivatives firm has other significant business activities, the officer in charge of the division of the registered derivatives firm that conducts the activities that require the firm to be registered as a derivatives dealer or as a derivatives adviser.

(2) If the individual registered as a registered derivatives firm's derivatives ultimate designated person ceases to meet the conditions specified in subsection (1), the registered derivatives firm must designate an individual who does meet these conditions to act as its derivatives ultimate designated person.

(3) The derivatives ultimate designated person of a registered derivatives firm must do all of the following:

(a) supervise the activities of the registered derivatives firm that are directed towards ensuring compliance with securities legislation relating to derivatives by the registered derivatives firm and each individual acting on the registered derivatives firm's behalf;

(b) promote compliance with securities legislation relating to derivatives by the registered derivatives firm and individuals acting on its behalf;

(c) report, on a timely basis, to the board of directors, or individuals acting in a similar capacity for the registered derivatives firm, any circumstance that the derivatives ultimate designated person becomes aware of, indicating that the registered derivatives firm, or any individual acting on its behalf, may be in non-compliance with this Instrument, securities legislation relating to derivatives or the firm's risk management policies and procedures required under section 39 [*Risk management policies and procedures*] and any of the following apply:

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

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

(iii) the non-compliance is part of a pattern of non-compliance;

(d) report, on a timely basis, to the regulator or, in Québec, the securities regulatory authority any circumstances where, with respect to the derivatives activities of the registered derivatives firm, the registered derivatives firm is not or was not in compliance with this Instrument or securities legislation relating to derivatives and one or more of the following applies:

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

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

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

Derivatives chief compliance officer

28. (1) The derivatives chief compliance officer must be one of the following:

(a) an officer or partner of the registered derivatives firm;

(b) the sole proprietor of the registered derivatives firm.

(2) If the individual registered as a registered derivatives firm's derivatives chief compliance officer ceases to meet the conditions specified in subsection (1), the registered derivatives firm must designate an individual who does meet these conditions to act as its derivatives chief compliance officer.

(3) The derivatives chief compliance officer of a registered derivatives firm must do all of the following:

(a) establish, maintain and apply written policies and procedures reasonably designed to assess compliance, by the registered derivatives firm and individuals acting on its behalf, with securities legislation relating to derivatives;

(b) monitor and assess compliance, by the registered derivatives firm and individuals acting on its behalf, with securities legislation relating to derivatives;

(c) report to the derivatives ultimate designated person of the registered derivatives firm, as soon as possible after the derivatives chief compliance officer becomes aware of any circumstances indicating that the registered derivatives firm, or any individual acting on its behalf, may be in non-compliance with securities legislation relating to derivatives and one or more of the following applies:

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

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

(iii) the non-compliance is part of a pattern of non-compliance;

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(d) submit an annual report to the registered derivatives firm's board of directors, or individuals acting in the same capacity for the registered derivatives firm, for the purpose of assessing compliance, by the registered derivatives firm and individuals acting on its behalf, with securities legislation relating to derivatives that must, at a minimum

(i) identify the policies and procedures referenced in paragraph (a),

(ii) provide an assessment of the effectiveness of the policies and procedures referenced in paragraph (a),

(iii) discuss where the policies and procedures referenced in paragraph (a) need to be improved and identify potential changes to address the needs for improvement,

(iv) list any material changes to the policies and procedures referenced in paragraph (a) during the coverage period of the report, and

(v) describe any circumstance reported to the derivatives ultimate designated person under paragraph (c) and the corresponding action taken.

Derivatives chief risk officer

29. (1) The derivatives chief risk officer must be one of the following:

(a) an officer or partner of the registered derivatives firm;

(b) the sole proprietor of the registered derivatives firm.

(2) If the individual registered as the registered derivatives firm's derivatives chief risk officer ceases to meet the conditions specified in subsection (1), the registered derivatives firm must designate an individual who does meet these conditions to act as its derivatives chief risk officer.

(3) The derivatives chief risk officer of a registered derivatives firm must do all of the following:

(a) establish, maintain and apply the policies and procedures for assessing and managing risks related to the registered derivatives firm, including policies and procedures reasonably designed to ensure compliance with section 39 [R*isk management policies and procedures*];

(b) monitor and assess compliance, by the registered derivatives firm and individuals acting on its behalf, with the firm's risk management policies and procedures;

INCLUDES COMMENT LETTERS

(c) report to the derivatives ultimate designated person of the registered derivatives firm, as soon as possible after the derivatives chief risk officer becomes aware of any circumstances indicating that the registered derivatives firm, or any individual acting on its behalf, may be in material non-compliance with the registered derivatives firm's risk management policies and procedures required under section 39 [*Risk management policies and procedures*];

(d) submit an annual report to the registered derivatives firm's board of directors, or individuals acting in a similar capacity for the registered derivatives firm, for the purpose of assessing compliance with the firm's risk management policies and procedures, identifying the firm's material risks and assessing the effectiveness of the firm's risk management policies and procedures.

Providing access to the board of directors

30. A registered derivatives firm must ensure that its derivatives ultimate designated person, its derivatives chief compliance officer and its derivatives chief risk officer have reasonable access to the firm's board of directors, or individuals acting in a similar capacity for the firm, at such times as the derivatives ultimate designated person, the derivatives chief compliance officer or the derivatives chief risk officer may consider necessary or advisable in view of his or her responsibilities.

PART 7 FINANCIAL REQUIREMENTS

Division 1 – Capital requirements

Capital requirements

31. A registered derivatives firm must maintain excess working capital in accordance with the requirements set out in Appendix C.

Division 2 – Audits

Direction by the regulator or securities regulatory authority to conduct an audit or review

32. A registered derivatives firm must direct its independent auditor in writing to conduct any audit or review required by the regulator or, in Québec, the securities regulatory authority during its registration and must deliver a copy of the direction to the regulator or the securities regulatory authority

(a) with its application for registration, and

(b) no later than the 10th business day after the registered derivatives firm changes its auditor.

INCLUDES COMMENT LETTERS

Co-operating with the auditor

33. A registered derivatives firm must not withhold, destroy or conceal any information or documents or otherwise fail to cooperate with a reasonable request made by an auditor of the registered derivatives firm in the course of an audit.

Division 3 – Financial reporting

Annual financial statements

34. (1) Annual financial statements delivered to the regulator or, in Québec, the securities regulatory authority under this Division must include the following:

(a) a statement of comprehensive income, a statement of changes in equity and a statement of cash flows, each prepared for the most recently completed financial year and the financial year immediately preceding the most recently completed financial year, if any;

(b) a statement of financial position, signed by at least one director of the registered derivatives firm, as at the end of the most recently completed financial year and the financial year immediately preceding the most recently completed financial year, if any;

(c) notes to the financial statements.

(2) The annual financial statements delivered to the regulator or, in Québec, the securities regulatory authority under this Division must be audited.

Interim financial statements

35. (1) Interim financial statements delivered to the regulator or, in Québec, the securities regulatory authority under this Division for interim periods may be limited to the following:

(a) a statement of comprehensive income for the 3-month period ending on the last day of the interim period and for the same period of the immediately preceding financial year, if any;

(b) a statement of financial position, signed by at least one director of the registered derivatives firm, as at the end of the interim period and as at the end of the same interim period of the immediately preceding financial year, if any.

(2) The interim financial statements delivered to the regulator or, in Québec, the securities regulatory authority under this Division must be prepared using the same accounting principles that the registered derivatives firm uses to prepare its annual financial statements.

INCLUDES COMMENT LETTERS

Delivering financial statements

36. (1) A registered derivatives firm must deliver its audited annual financial statements to the regulator or, in Québec, the securities regulatory authority no later than the 90th day after the end of its financial year.

(2) A registered derivatives firm must deliver its interim financial statements to the regulator or, in Québec, the securities regulatory authority no later than the 30th day after the end of the first, second and third interim period of its financial year.

(3) Despite subsection (1), a registered derivatives firm is not required to deliver its audited annual financial statements if the registered derivatives firm has filed its annual financial statements in compliance with section 4.1 of National Instrument 51-102 – *Continuous Disclosure Obligations*.

(4) Despite subsection (2), a registered derivatives firm is not required to deliver its interim financial statements if the registered derivatives firm has filed its interim financial statements in compliance with section 4.3 of National Instrument 51-102 – *Continuous Disclosure Obligations*.

Delivering financial information

37. (1) A registered derivatives firm must deliver to the regulator or, in Québec, the securities regulatory authority, no later than the 90th day after the end of its financial year, a completed Form 93-102F1 *Calculation of Excess Working Capital*, showing the calculation of the registered derivatives firm's excess working capital as at the end of the financial year and as at the end of the immediately preceding financial year, if any.

(2) A registered derivatives dealer must deliver, to the regulator or, in Québec, the securities regulatory authority, no later than the 30th day after the end of the first, second and third interim periods of its financial year, a completed Form 93-102F1 *Calculation of Excess Working Capital*, showing the calculation of the dealer's excess working capital as at the end of the interim period and as at the end of the immediately preceding interim period, if any.

PART 8 COMPLIANCE AND RISK MANAGEMENT

Compliance policies and procedures

38. A registered derivatives firm must 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 respect of its activities relating to transacting in or advising on derivatives complies with applicable securities legislation.

INCLUDES COMMENT LETTERS

Risk management policies and procedures

39.(1) A registered derivatives firm must establish, maintain, and apply written policies and procedures that are reasonably designed to establish a system of controls and supervision to monitor and manage the risks associated with its derivatives related activity.

(2) The policies and procedures referred to in subsection (1) must be approved by the registered derivatives firm's board of directors, or individuals acting in a similar capacity for the firm.

(3) The risk management policies and procedures referred to in subsection (1) must, at a minimum

(a) identify material risks to the registered derivatives firm, including risks from affiliated entities and from specific derivatives or types of derivatives,

(b) establish risk tolerance limits,

(c) establish requirements for the registered derivatives firm to appropriately manage risks,

(d) provide for the periodic review of the registered derivatives firm's risks and risk tolerance limits to ensure they reflect the firm's derivatives related activity,

(e) permit the derivatives chief risk officer and other senior management to monitor compliance with risk management requirements and risk tolerance limits in order to detect and address non-compliance,

(f) provide for periodic reports to the registered derivatives firm's derivatives ultimate designated person and its board of directors, or individuals acting in a similar capacity for the firm, on the registered derivatives firm's material risks, risk tolerance limits, compliance with risk management requirements, compliance with risk tolerance levels and recommendations for changing risk management policies and risk tolerance limits, and

(g) when there is a material change to the registered derivatives firm's risk exposures or a material breach of a risk limit, require an immediate report to the firm's

(i) derivatives ultimate designated person,

(ii) the chief executive officer, or if the registered derivatives firm does not have a chief executive officer, an individual acting in a similar capacity, if different from the derivatives ultimate designated person, and

(iii) its board of directors, or individuals acting in a similar capacity for the firm.

INCLUDES COMMENT LETTERS

(4) A registered derivatives firm must conduct an independent review of its risk management systems on a reasonably frequent basis and not less than once every two calendar years.

Confirmation of material terms

40. A registered derivatives firm must confirm the material terms of each derivative transacted with or for a derivatives party as soon as feasible after completion of the transaction.

Agreement for process of determining the value of a derivative

41. A registered derivatives firm must, in relation to each transaction with a derivatives party, enter into a written agreement with the derivatives party that establishes a process for determining the value of the derivative.

Agreement for process relating to disputes

42. (1) A registered derivatives firm must, in relation to each derivative transacted with a derivatives party, enter into a written agreement with the derivatives party that establishes

(a) when a discrepancy relating to material terms or valuations between the registered derivatives firm and the derivatives party is a dispute, and

(b) a process for resolving a dispute as soon as possible.

(2) A registered derivatives firm must establish, maintain and apply written policies and procedures that are reasonably designed to, within a reasonable period of time, resolve a dispute with a derivatives party relating to the material terms or valuation of a derivative.

(3) A registered derivatives firm must report a dispute referred to in subsection (1), that has not been resolved within a reasonable period of time, to its board of directors, or individuals acting in a similar capacity for the firm.

(4) If a dispute has not been resolved within 30 days of reporting the dispute to its board of directors, or individuals acting in a similar capacity for the firm, as required under subsection (3), the derivatives firm must report the dispute to the regulator or, in Québec, the securities regulatory authority.

Business continuity and disaster recovery

43. (1) A registered derivatives firm must establish, maintain and apply a written business continuity and disaster recovery plan that is reasonably designed to allow the registered derivatives firm to minimize disruption and allow the registered derivatives firm to continue its business operations.

INCLUDES COMMENT LETTERS

(2) The business continuity and disaster recovery plan must outline the procedures to be followed in the event of an emergency or other disruption of the registered derivatives firm's normal business activities.

(3) A registered derivatives firm must conduct independent tests of its business continuity and disaster recovery plan on a reasonably frequent basis and not less than annually.

Portfolio reconciliation

44. (1) A registered derivatives firm must conduct portfolio reconciliation for all derivatives to which the registered derivatives firm is a counterparty.

(2) The portfolio reconciliation required under subsection (1) must be conducted for each portfolio of the registered derivatives firm at least once each calendar year.

(3) A registered derivatives firm must establish, maintain and apply written policies and procedures to resolve discrepancies in materials terms and valuations identified as a result of the portfolio reconciliation as soon as possible after they are identified.

(4) A registered derivatives firm must enter into a written agreement with each derivatives party that describes the terms of the portfolio reconciliation required to be conducted under subsection (1).

Portfolio compression

45. (1) A registered derivatives firm must establish, maintain and apply written policies and procedures that are reasonably designed to do all of the following:

(a) terminate fully offsetting derivatives with a derivatives party that is a derivatives firm in a timely fashion;

(b) terminate fully offsetting derivatives with a derivatives party that is not a derivatives firm, at the request of that derivatives party, in a timely fashion;

(c) engage in bilateral portfolio compression exercises with each of its derivatives parties that is a derivatives firm, when appropriate;

(d) engage in a multilateral portfolio compression exercise with each of its derivatives parties that is a derivatives firm, when appropriate;

(e) evaluate portfolio compression exercises involving the registered derivatives firm that were initiated by a third-party.

(2) Despite subsection (1), the policies and procedures required in that subsection do not need to apply to a derivative that is cleared through a qualifying clearing agency.

INCLUDES COMMENT LETTERS

PART 9 RECORDS

Records

46. (1) A registered derivatives firm must keep complete records of all its derivatives, transactions and derivatives advising activities, including, as applicable, all of the following:

(a) general records of its derivatives business and activities, financial affairs and compliance with applicable provisions of this Instrument, including

(i) financial statements,

(ii) calculation of its excess working capital, and

(iii) evidence of its compliance with policies and procedures required under this Instrument;

(b) an itemized record of post-transaction processing and events, including

(i) derivatives portfolio reconciliation including records of reconciliation discrepancies and valuation disputes and the name of the third party that performed the portfolio reconciliation,

(ii) derivatives portfolio compressions including the derivatives included in the compression, the identity of the counterparties participating in the compression, results of the compression and the name of the third party performing the compression,

(iii) valuation of each derivative,

(iv) central clearing of each derivative,

(v) the name of any third-party responsible for sending trade data to a designated trade repository, and

(vi) matching and confirmation of each derivative.

(2) A registered derivatives firm must keep complete records of all business activities relating to transacting in or advising in respect of derivatives, including

(a) minutes of meetings of its board of directors, or of meetings of individuals acting in a similar capacity for the firm,

(b) records of its organizational structure,

(c) audit, compliance and risk management reports,

INCLUDES COMMENT LETTERS

(d) business and strategic plans, and

(e) financial records.

Form, accessibility and retention of records

47. (1) A registered derivatives firm must keep all records required under section 46 [*Records*],

(a) in a readily accessible and safe location and in a durable form,

(b) in the case of a record or supporting documentation that relates to a derivative, for a period of 7 years following the date on which the derivative expires or is terminated, and

(c) if paragraph (b) does not apply, for a period of 7 years following the date on which the record was created.

(2) Despite subsection (1), in Manitoba, with respect to a registered derivatives firm or a derivatives party located in Manitoba, the time period applicable to records and supporting documentation kept pursuant to subsection (1) is 8 years.

PART 10 EXEMPTIONS FROM THE REQUIREMENT TO REGISTER AND EXEMPTIONS FROM SPECIFIC REQUIREMENTS IN THIS INSTRUMENT

Division 1 – Exemptions from the requirement to register as a derivatives dealer

Persons or companies not in the business of trading in British Columbia, Manitoba and New Brunswick

48. In British Columbia, Manitoba and New Brunswick, a person or company is exempt from the requirement to register as a derivatives dealer if all of the following apply:

(a) the person or company is not engaged in the business of trading derivatives, as principal or agent;

(b) the person or company does not solicit or otherwise transact a derivative with, for or on behalf of a non-eligible derivatives party;

(c) the person or company does not regularly quote prices at which they would be willing to transact a derivative or otherwise make or offer to make a market in a derivative;

(d) the person or company does not regularly facilitate or otherwise intermediate transactions for another person or company;

INCLUDES COMMENT LETTERS

(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, other than an affiliated entity.

Exemption for certain derivatives end-users

49. (1) The exemption in subsection (2) 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.

(2) A person or company is exempt from the requirement to register as a derivatives dealer 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 non-eligible derivatives parties, other than general advice that is provided in accordance with the conditions of section 57 [*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 clearing of a derivative through the facilities of a qualifying clearing agency for another person or company, other than an affiliated entity.

INCLUDES COMMENT LETTERS

Derivatives dealers with a limited notional amount under derivatives

50.(1) The exemption in subsection (2) 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 registered under the commodities 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 specified in Column 1 of Appendix B, 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;

(2) A person or company is exempt from the requirement to register as a derivatives dealer 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 derivatives or transactions, advise non-eligible derivatives parties, other than general advice that is provided in accordance with the conditions of section 57 [*Advising generally*];

(c) either of the following applies:

(i) if the person or company has its head office or principal place of business in a jurisdiction of Canada, the person or company, together with each affiliated entity of the person or company, and excluding derivatives between these affiliated entities, has not had, in the previous 24 calendar months, an aggregate month-end gross notional amount under outstanding derivatives, exceeding $250 000 000;

(ii) if the person or company has its head office and principal place of business in a foreign jurisdiction, the person or company, together with each affiliated entity of the person or company, and excluding derivatives between these affiliated entities, has not had, in the previous 24 calendar months, an aggregate month-end gross notional amount under outstanding derivatives that have a Canadian counterparty, exceeding $250 000 000.

INCLUDES COMMENT LETTERS

Commodity derivatives dealers with a limited notional amount under commodity derivatives

51. (1) In this section:

"commodity" means

(a) any good, article, service, right or interest of which any unit is, from its nature or by mercantile custom, treated as the equal of any other unit, except

(i) the currency of Canada or of any foreign jurisdiction or a right to or interest in the currency of Canada or any foreign jurisdiction,

(ii) a cryptocurrency, and

(iii) a security, and

(b) any other prescribed good, article, service, right or interest or any class of those;

"commodity derivative" means a derivative that has, as its only underlying asset, a commodity.

(2) The exemption in subsection (3) 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 registered under the commodities 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 specified in Column 1 of Appendix B, 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;

(3) A person or company is exempt from the requirement to register as a derivatives dealer 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 derivatives or transactions, advise non-eligible derivatives parties, other than general advice that is provided in accordance with the conditions of section 57 [*Advising generally*];

INCLUDES COMMENT LETTERS

(c) the person or company, and each affiliated entity of the person or company, is only a derivatives dealer in respect of commodity derivatives;

(d) either of the following applies:

(i) if the person or company has its head office or principal place of business in a jurisdiction of Canada, the person or company, together with each affiliated entity of the person or company, and excluding derivatives between affiliated entities, has not had, in the previous 24 calendar months, an aggregate month-end gross notional amount under outstanding commodity derivatives, exceeding $1 000 000 000;

(ii) if the person or company has its head office and principal place of business in a foreign jurisdiction, the person or company, together with each affiliated entity of the person or company, and excluding derivatives between affiliated entities, has not had, in the previous 24 calendar months, an aggregate month-end gross notional amount under outstanding commodity derivatives that have a Canadian counterparty, exceeding $1 000 000 000.

Foreign derivatives dealers – exemption from registration

52. (1) A person or company whose head office or principal place of business is in a foreign jurisdiction specified in Column 1 of Appendix B is exempt from the requirement to register as a derivatives dealer if all of the following apply:

(a) the person or company does not solicit or transact in a derivative with, for or on behalf of a non-eligible derivatives party;

(b) the person or company is registered, licensed or otherwise authorized under the securities, commodity futures or derivatives legislation of the foreign jurisdiction to conduct the derivatives activities in that foreign jurisdiction it proposes to conduct with a derivatives party;

(c) the person or company is subject to and complies with each of the requirements or guidelines of the foreign jurisdiction that are specified in Column 2 of Appendix B;

(d) the person or company promptly notifies the regulator or, in Québec, the securities regulatory authority of each instance of material non-compliance with a requirement or guideline of the foreign jurisdiction

(i) to which the person or company is subject and

(ii) that are specified in Column 2 of Appendix B.

INCLUDES COMMENT LETTERS

(2) The exemption under subsection (1) is not available unless all of the following apply:

(a) the person or company 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) one of the following applies in relation to each derivatives party of the person or company:

(i) the derivatives party is a registered derivatives dealer in any jurisdiction of Canada, a registered derivatives adviser in any jurisdiction of Canada or a derivatives dealer that is exempt from the requirement to register under section 50 [*Derivatives dealers with a limited notional amount under derivatives*] or section 51 [*Commodity derivatives dealers with a limited notional amount under derivatives*];

(ii) the person or company has delivered to the derivatives party a statement in writing disclosing the following:

(A) the foreign jurisdiction in which the person or company's head office or principal place of business is located;

(B) that all or substantially all of the assets of the person or company may be situated outside of the local jurisdiction;

(C) that there may be difficulty enforcing legal rights against the person or company because of the above;

(D) the name and address of the agent for service of the person or company in the local jurisdiction;

(c) the person or company has submitted to the securities regulatory authority a completed Form 93-102F2 *Submission to Jurisdiction and Appointment of Agent for Service*;

(d) the person or company undertakes to the securities regulatory authority to provide the securities regulatory authority with prompt access to its books and records upon request.

(3) A person or company that relied on the exemption in subsection (1) during the 12-month period preceding December 1 of a year must notify the regulator or, 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 person or company that complies with the filing and fee payment requirements applicable to an unregistered exempt international firm under Ontario Securities Commission Rule 13-502 *Fees*.

INCLUDES COMMENT LETTERS

Affiliated entities – exemption from registration as a derivatives dealer

53. (1) A person or company is exempt from the requirement to register as a derivatives dealer if the person or company would only be required to register as a derivatives dealer as a result of dealing with an affiliated entity.

(2) The exemption in subsection (1) is not available if the person or company is required to register as a derivatives dealer as a result of dealing with an affiliated entity that is an investment fund.

Division 2 – Exemptions from specific requirements for derivatives dealers

Foreign derivatives dealers – exemption from specific requirements that apply to registered derivatives dealers

54. (1) A registered derivatives dealer whose head office or principal place of business is in a foreign jurisdiction specified in Column 1 of Appendix D is exempt from a requirement specified in Column 2 of that appendix if all of the following apply:

(a) it is registered, licensed or otherwise authorized under the securities, commodity futures or derivatives legislation of the foreign jurisdiction to conduct the derivatives activities in that jurisdiction that it proposes to conduct with the derivatives party;

(b) it is subject to and complies with the corresponding requirement or guideline of the foreign jurisdiction that is specified in Column 3 of Appendix D;

(c) it promptly notifies the regulator, in Québec, the securities regulatory authority of each instance of material non-compliance with a requirement or guideline of the foreign jurisdiction

(i) to which it is subject, and

(ii) that is specified in Column 3 of Appendix D.

(2) The exemption in subsection (1) is not available unless all of the following apply:

(a) the registered 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;

INCLUDES COMMENT LETTERS

(b) the registered derivatives dealer has delivered to each derivatives party a statement in writing disclosing all of the following:

(i) the foreign jurisdiction in which the registered derivatives dealer's head office or principal place of business is located;

(ii) that all or substantially all of the assets of the registered derivatives dealer may be situated outside of the local jurisdiction;

(iii) that there may be difficulty enforcing legal rights against the registered derivatives dealer because of the above;

(iv) the name and address of the agent for service of the registered derivatives dealer in the local jurisdiction.

Investment dealers

55. A registered derivatives dealer that is a dealer member of IIROC is exempt from the requirement specified in Column 1 of Appendix E if the registered derivatives dealer complies with the corresponding IIROC requirement specified in Column 2.

Canadian financial institutions

56. A registered derivatives dealer that is a Canadian financial institution regulated by a regulatory authority specified in Column 1 of Appendix F is exempt from a requirement specified in Column 2 of that appendix if all of the following apply:

(a) it is subject to and complies with the requirement and guideline specified in Column 3 of Appendix F that correspond to the applicable requirement in Column 2;

(b) it promptly notifies the regulator or, in Québec, the securities regulatory authority of each instance of material non-compliance with a requirement or guideline

(i) to which it is subject, and

(ii) that is specified in Column 3 of Appendix F.

Division 3 – Exemptions from the requirement to register as a derivatives adviser

Advising generally

57. (1) For the purposes of subsection (3), "financial or other interest" includes any of the following:

(a) ownership, beneficial or otherwise, of the underlying interest or underlying interests of the derivative;

INCLUDES COMMENT LETTERS

(b) ownership, beneficial or otherwise of, or other 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 is exempt from the requirement to register as 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 that is exempt under subsection (2) recommends a transaction for a derivative, for a class of derivatives or for 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 or company 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 persons or companies were a reporting issuer.

Derivatives dealer without discretionary authority

58. A registered derivatives dealer, or a registered derivatives dealing representative acting on behalf of the dealer, that provides advice to a derivatives party is exempt from the requirement to register as a derivatives adviser or a derivatives advising representative if the advice is

(a) in connection with a transaction for which the individual providing the advice has the necessary proficiency under section 18 [*Initial and ongoing proficiency*], and

(b) not in respect of a managed account of the derivatives party.

INCLUDES COMMENT LETTERS

Foreign derivatives advisers – exemption from registration

59. (1) A person or company whose head office or principal place of business is in a foreign jurisdiction specified in Column 1 of Appendix G is exempt from the requirement to register as a derivatives adviser if all of the following apply:

(a) the person or company does not, in respect of derivatives or transactions, advise non-eligible derivatives parties, other than general advice that is provided in accordance with the conditions of section 57 [*Advising generally*];

(b) the person or company is registered, licensed or otherwise authorized under the securities, commodity futures or derivatives legislation of the foreign jurisdiction to conduct the derivatives activities in the foreign jurisdiction that it proposes to conduct with a derivatives party;

(c) the person or company is subject to and complies with each of the requirements or guidelines of the foreign jurisdiction that are specified in Column 2 of Appendix G;

(d) the person or company promptly notifies the regulator or, in Québec, the securities regulatory authority of each instance of material non-compliance with a requirement or guideline of the foreign jurisdiction

(i) to which the person or company is subject, and

(ii) that are specified in Column 2 of Appendix G.

(2) The exemption under subsection (1) is not available unless all of the following apply:

(a) the person or company 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) one of the following applies in relation to each derivatives party of the person or company:

(i) the derivatives party is a registered derivatives dealer in any jurisdiction of Canada, a registered derivatives adviser in any jurisdiction of Canada or a derivatives dealer that is exempt from the requirement to register under section 50 [*Derivatives dealers with a limited notional amount under derivatives*] or section 51 [*Commodity derivatives dealers with a limited notional amount under derivatives*];

INCLUDES COMMENT LETTERS

(ii) the person or company has delivered to the derivatives party a statement in writing disclosing all of the following:

(A) the foreign jurisdiction in which the person or company's head office or principal place of business is located;

(B) that all or substantially all of the assets of the person or company may be situated outside of the local jurisdiction;

(C) that there may be difficulty enforcing legal rights against the person or company because of the above;

(D) the name and address of the agent for service of the person or company in the local jurisdiction;

(c) the person or company has submitted to the securities regulatory authority a completed Form 93-102F2 *Submission to Jurisdiction and Appointment of Agent for Service*;

(d) the person or company undertakes to the securities regulatory authority to provide the securities regulatory authority with prompt access to its books and records upon request.

(3) A person or company that relied on the exemption in subsection (1) during the 12-month period preceding December 1 of a year must notify the regulator or, 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 person or company that complies with the filing and fee payment requirements applicable to an unregistered exempt international firm under Ontario Securities Commission Rule 13-502 *Fees*.

Affiliated Entities – exemption from registration as a derivatives adviser

60.(1) A person or company is exempt from the requirement to register as a derivatives adviser if the person or company would only be required to register as a derivatives adviser as a result of advising an affiliated entity.

(2) The exemption in subsection (1) is not available if the person or company is required to register as a derivatives adviser as a result of advising an affiliated entity that is an investment fund.

INCLUDES COMMENT LETTERS

Division 4 – Exemptions from specific requirements for derivatives advisers

Foreign derivatives advisers – exemption from specific requirements that apply to registered derivatives advisers

61. (1) A registered derivatives adviser whose head office or principal place of business is in a foreign jurisdiction specified in Column 1 of Appendix H is exempt from a requirement specified in Column 2 of that appendix if all of the following apply:

(a) it is registered, licensed or otherwise authorized under the securities, commodity futures or derivatives legislation of the foreign jurisdiction to conduct the derivatives activities in that jurisdiction that it proposes to conduct with the derivatives party;

(b) it is subject to and complies with the corresponding requirement or guideline of the foreign jurisdiction that is specified in Column 3 of Appendix H;

(c) it promptly notifies the regulator or, in Québec, the securities regulatory authority of each instance of material non-compliance with a requirement or guideline of the foreign jurisdiction

(i) to which it is subject, and

(ii) that is specified in Column 3 of Appendix H.

(2) The exemption in subsection (1) is not available unless all of the following apply:

(a) the registered 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 registered derivatives adviser has delivered to each derivatives party a statement in writing disclosing all of the following:

(i) the foreign jurisdiction in which the registered derivatives adviser's head office or principal place of business is located;

(ii) that all or substantially all of the assets of the registered derivatives adviser may be situated outside of the local jurisdiction;

(iii) that there may be difficulty enforcing legal rights against the registered derivatives adviser because of the above;

(iv) the name and address of the agent for service of the registered derivatives adviser in the local jurisdiction.

INCLUDES COMMENT LETTERS

PART 11 GRANTING AN EXEMPTION

Granting an exemption

62. (1) The regulator or 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) 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 12 TRANSITION

(intentionally left blank)

Provisions relating to implementation will be included in a future version of the Instrument, as appropriate.

PART 13 EFFECTIVE DATE

Effective date

63. (1) This Instrument comes into force on [*insert date*].

(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.

INCLUDES COMMENT LETTERS

Appendix A

NOTIONAL AMOUNT

(intentionally left blank)

Please see the CSA Notice and Request for Comments for a discussion of the alternatives being considered for defining "Notional Amount" in this Appendix.

INCLUDES COMMENT LETTERS

Appendix B

FOREIGN DERIVATIVES DEALERS – EXEMPTION FROM REGISTRATION
(Section 52)

Column 1	Column 2
Foreign jurisdiction	Equivalent requirement(s) and guideline(s) of foreign regulatory authority

A completed version of Appendix B will be published for comment in a future version of the Instrument.

INCLUDES COMMENT LETTERS

Appendix C

CAPITAL REQUIREMENTS
(Section 37)

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A completed version of Appendix C will be published for comment in a future version of the Instrument.

INCLUDES COMMENT LETTERS

Appendix D

FOREIGN DERIVATIVES DEALERS – EXEMPTION FROM SPECIFIC REQUIREMENTS
(Section 54)

Column 1	Column 2	Column 3
Foreign regulatory authority	Requirements of National Instrument 93-102 – *Derivatives: Registration*	Equivalent requirement(s) and guideline(s) of foreign regulatory authority

A completed version of Appendix D will be published for comment in a future version of the Instrument.

Appendix E

EXEMPTIONS FOR IIROC DEALER MEMBERS
(Section 55)

Column 1	Column 2
Requirements of National Instrument 93-102 – *Derivatives: Registration*	Equivalent IIROC requirement(s)

A completed version of Appendix E will be published for comment in a future version of the Instrument.

INCLUDES COMMENT LETTERS

INCLUDES COMMENT LETTERS

Appendix F

EXEMPTIONS FOR CANADIAN FINANCIAL INSTITUTIONS
(Section 56)

Column 1	Column 2	Column 3
Regulatory authority	Requirements of National Instrument 93-102 – *Derivatives: Registration*	Equivalent requirement(s) and guideline(s) of regulatory authority
Office of the Superintendent of Financial Institutions	Section 31 – Capital requirements	(this section will be included once specific capital requirements are proposed in the Instrument)
	Section 33 – Co-operating with the auditor	1. OSFI Guideline – Corporate Governance, section V
	Section 37 – Delivering financial information	1. OSFI Reporting Requirements
	Section 38 – Compliance policies and procedures	1. OSFI Guideline E13 Regulatory Compliance Management, section IV(i) 2. OSFI Guideline B-7 Derivatives Sound Practices, section titled “Regulatory Compliance Risk”
	Section 39 – Risk management policies and procedures	1. OSFI Guideline – Corporate Governance, section IV 2. OSFI Guideline B-7 Derivatives Sound Practices
	Section 40 – Confirmation of material terms	1. OSFI Guideline B-7 Derivatives Sound Practices, section titled “Trade Confirmation”
	Subsection 42(1) – Agreement for process relating to disputes	1. OSFI Guideline E-22 Margin Requirements for Non-Centrally Cleared Derivatives, section 34
	Subsection 42(2) – Agreement for process relating to disputes	1. OSFI Guideline E-22 Margin Requirements for Non-Centrally Cleared Derivatives, section 28
	Section 43 – Business continuity and disaster recovery	1. OSFI Guideline B-7 Derivatives Sound Practices 2. OSFI Guideline B-10 Outsourcing of Business Activities, Functions and Processes, section 7.2.3
	Section 44 – Portfolio reconciliation	1. OSFI Guideline B-7 Derivatives Sound Practices, section titled “Portfolio Reconciliation”

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	Section 45 – Portfolio compression	1. OSFI Guideline B-7 Derivatives Sound Practices, section titled "Portfolio Compression"
	Section 46 – Records – as those records relate to compliance with sections 31, 33, 37, 38, 39, 42(1), 42(2), 43, 44 and 45.	1. OSFI Guideline E13 Regulatory Compliance Management, section IV(vii) 2. *Bank Act* (Canada), sections 238 and 597
Autorité des Marchés Financiers	Section 31 – Capital requirements	1. AMF Capital Management Guideline 2. AMF Liquidity Adequacy Guideline 3. AMF Adequacy of capital base
	Section 33 – Co-operating with the auditor	1. AMF Governance Guideline, sections 7.1 and 7.2
	Section 37 – Delivering financial information	1. AMF Instructions afférentes au formulaire de divulgation Ligne directrice sur les normes relatives à la suffisance du capital de base 2. Act respecting financial services cooperatives
	Section 38 – Compliance policies and procedures	1. AMF Compliance Guideline
	Section 39 – Risk management policies and procedures	1. AMF Integrated Risk Management Guideline 2. AMF Governance Guideline
	Section 43 – Business continuity and disaster recovery	1. AMF Business Continuity Management Guideline
	Section 46 – Records – as those records relate to compliance with sections 31, 33, 37, 38, 39, 42(1), 42(2), 43, 44 and 45.	1. Act respecting financial services cooperatives 2. AMF Derivatives Risk Management Guidelines

INCLUDES COMMENT LETTERS

Appendix G

FOREIGN DERIVATIVES ADVISERS – EXEMPTION FROM REGISTRATION
(Section 59)

Column 1	Column 2
Foreign jurisdiction	Equivalent requirement(s) and guideline(s) of foreign regulatory authority

A completed version of Appendix G will be published for comment in a future version of the Instrument.

INCLUDES COMMENT LETTERS

Appendix H

FOREIGN DERIVATIVES ADVISERS – EXEMPTION FROM SPECIFIC REQUIREMENTS
(Section 61)

Column 1	Column 2	Column 3
Foreign regulatory authority	Requirements of National Instrument 93-102 – *Derivatives: Registration*	Equivalent requirement(s) and guideline(s) of foreign regulatory authority

A completed version of Appendix H will be published for comment in a future version of the Instrument.

INCLUDES COMMENT LETTERS

Form 93-102F1

Calculation of Excess Working Capital

(intentionally left blank)

A completed version of Form 93-102F1 will be published for comment in a future version of the Instrument.

INCLUDES COMMENT LETTERS

Form 93-102F2

Submission to Jurisdiction and Appointment of Agent for Service

1. Name of person or company ("International Firm"):

2. Jurisdiction of incorporation of the International Firm:

3. Head office address of the International Firm:

4. The name, e-mail address, phone number and fax number of the International Firm's derivatives chief compliance officer.

   Name:

   E-mail address:

   Phone:

   Fax:

5. Section of National Instrument 93-102 *Derivatives: Registration* the International Firm is relying on:

   Section 52 [*Foreign derivatives dealers – exemption from registration*]

   Section 59 [*Foreign derivatives advisers– exemption from registration*]

6. Name of agent for service of process (the "Agent for Service"):

7. Address for service of process on the Agent for Service:

8. The International 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 International 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.

9. The International 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 International Firm's activities in the local jurisdiction.

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10. Until 6 years after the derivatives firm ceases to rely on section 52 [*Foreign derivatives dealers – exemption from registration*] or section 59 [*Foreign derivatives advisers– exemption from registration*], the derivatives 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; and

    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.

11. 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 International Firm or authorized signatory)

____
(Name and Title of authorized signatory)

INCLUDES COMMENT LETTERS

ANNEX IV

PROPOSED COMPANION POLICY 93-102
DERIVATIVES: REGISTRATION

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INCLUDES COMMENT LETTERS

PART 1 GENERAL COMMENTS

Introduction

This companion policy (the **Policy**) sets out the views of the Canadian Securities Administrators (the **CSA** or **we**) on various matters relating to National Instrument 93-102 *Derivatives: Registration* (the **Instrument**) and related securities legislation.

Except for Part 1, the numbering and headings of Parts, sections and subsections in this Policy correspond to the numbering and headings in the Instrument. Any general guidance for a Part or section appears immediately after the Part or section name. Any specific guidance on a section or subsection follows any general guidance. If there is no guidance for a Part or section, the numbering in this Policy will skip to the next provision that does have guidance.

Unless otherwise stated, any reference to a Part, section, subsection, paragraph, subparagraph or definition in this Policy is a reference to the corresponding Part, section, subsection, paragraph, subparagraph or definition in the Instrument.

Additional requirements applicable to registrants

In addition to the requirements in the Proposed Instrument, registrants must comply with additional requirements. These additional requirements include

- National Instrument 31-102 *National Registration Database* (**NI 31-102**) and the Companion Policy to NI 31-102, and

- National Instrument 33-109 *Registration Information* (**NI 33-109**) and the Companion Policy to NI 33-109.

Definitions and interpretation

Unless defined in the Instrument or this Policy, terms used in the Instrument and in this Policy have the meaning given to them in securities legislation, including in National Instrument 14-101 *Definitions* (**NI 14-101**). “Securities legislation” is defined in NI 14-101, and includes statutes and other instruments related to both securities and derivatives.

In this Policy,

“Product Determination Rule” 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*,

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- in Ontario, Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination*, and
- in Québec, *Regulation 91-506 respecting Derivatives Determination*;

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

Requirement to register

The requirement to register is found in securities legislation. A derivatives firm must register if it is

- in the business of trading derivatives,
- in the business of advising others on derivatives,
- holding itself out as being in the business of trading or advising, or
- otherwise required to be registered under section 6 of the Instrument.

Individuals must register if they trade or advise on behalf of a registered derivatives dealer or a registered derivatives adviser unless they are exempted from the requirement to register under subsection (3) or (4) of section 16 of the Instrument or under the securities legislation of a jurisdiction. Individuals are also required to register if they act as the derivatives ultimate designated person, derivatives chief compliance officer or derivatives chief risk officer of a registered derivatives firm.

All individual registrants and permitted individuals of any registered derivatives firm or firm that is applying to become a registered derivatives firm must file Form 33-109F4 *Registration of Individuals and Review of Permitted Individuals* (**Form 33-109F4**).

"Permitted individual" has the meaning given to the term in NI 33-109. It means, for a registered derivatives firm, an individual who

- is a member of the registered derivatives firms board of directors, or the chief executive officer, chief financial officer, or chief operating officer of the registered derivatives firm, or an individual that is the functional equivalent of any of those positions,
- has beneficial ownership of, or direct or indirect control or direction over, 10 percent or more of the voting securities of the registered derivatives firm, or
- is a trustee, executor, administrator or other personal or legal representative, that has direct or indirect control or direction over 10 percent or more of the voting securities of the registered derivatives firm.

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There is no renewal requirement for registration, but fees must be paid every year to maintain registration.

Factors in determining a business purpose

In determining whether a person or company is in the business of trading or advising in derivatives, a number of factors should be considered. Guidance relating to these factors is included in Part 3 of this Policy.

Exemptions from the requirement to register and exemptions from specific requirements applicable to registered firms

Divisions 1 and 3 of Part 10 provide exemptions from the derivatives dealer and the derivatives adviser registration requirement. There may be additional exemptions in securities legislation.

Where a person or company is exempted from the requirement to be registered as a derivatives dealer or derivatives adviser, it will not be subject to the requirements in the Instrument applicable to registered dealers or registered advisers. It is, however, subject to the terms and conditions of the exemption.

Divisions 2 and 4 of Part 10 establish exemptions from specific requirements under the Instrument applicable to persons or companies that are registered as derivatives dealers or derivatives advisers. A person or company is still required to register and comply with each registration requirement where an exemption does not apply.
The exemptions in Part 10 do not require an application if the conditions of the exemption are met.

In other cases, upon application, the relevant regulator may grant exemptions from the requirement to register as a derivatives dealer or a derivatives adviser or may grant exemptions from specific requirements in the Instrument.

Interpretation of terms defined in the Instrument

Section 1 – Definition of Canadian financial institution

The definition of "Canadian financial institution" in the Instrument is consistent with the definition of this term in National Instrument 45-106 *Prospectus Exemptions* (**NI 45-106**) with one exception. The definition of this term in NI 45-106 does not include a Schedule III bank (due to the separate definition of the term "bank" in NI 45-106), with the result that NI 45-106 contains certain references to "a Canadian financial institution or a Schedule III bank". The definition of this term in the Instrument includes a Schedule III bank.

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

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Section 1 – Definition of commercial hedger

The concept of “commercial hedger” is meant to apply to a business entering into a transaction for the purpose of managing risks inherent in its business. This could include, for example, a commodity producer managing risks associated with fluctuations in the price of the commodity it produces or a company entering into an interest rate swap to hedge its interest rate risks associated with a loan obligation. It is not intended to include a circumstance where the commercial enterprise enters into a transaction for speculative purposes; there has to be a significant link between the transaction and the business risks being hedged.

Paragraphs (n) and (q) of the definition of “eligible derivatives party” provide that a commercial hedger will qualify as an eligible derivatives party if it meets the conditions in those paragraphs, including the specified financial assets threshold.

Section 1 – Definition of derivatives party

The term “derivatives party is similar to the concept of a “client” in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registration Obligations* (**NI 31-103**). We have used the term “derivatives party” instead of “client” to reflect the circumstance where the derivatives firm may not regard its counterparty as its “client.”

Section 1 – Definition of eligible derivatives party

The term “eligible derivatives party” is intended to refer to a derivatives party that may not require the full set of protections that are provided to other derivatives parties that are not eligible derivatives parties.

Subsection 16(3) includes an exemption for an individual from the requirement to register as a derivatives dealing representative of a registered derivatives firm if the individual does not solicit or otherwise transact with a derivatives party that is a non-eligible derivatives party.

A similar exemption for derivatives advising representatives is included in subsection 16(4).

In addition, many of the exemptions in Part 10 are conditional on the derivatives firm not transacting with, soliciting or advising persons or companies that are not eligible derivatives parties.

A derivatives firm should take reasonable steps to determine if a derivatives party is an eligible derivatives party. In determining whether the person or company that it transacts with, solicits or advises is an eligible derivatives party, the derivatives firm may rely on factual representations made in writing by the derivatives party, unless a reasonable person would have grounds to believe that such statements are false or it is otherwise unreasonable to rely on the representations. Under subsection 46(1), a derivatives firm is required to keep records it uses in determining whether a derivatives party is an eligible derivatives party.

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Section 1 – Definition of eligible derivatives party – paragraphs (m) to (q)

Under paragraphs (m) through (q) of the definition of "eligible derivatives party", a person or company will only be considered to be an eligible derivatives party if it has made certain representations to the derivatives firm in writing.

If the derivatives firm has not received a written factual statement from a derivatives party, the derivatives firm should not consider the derivatives party to be an eligible derivatives party.

We expect that a derivatives firm would maintain a copy of each derivatives party's written representations that are relevant to its status as an eligible derivatives party and would have policies and procedures reasonably designed to ensure that the information relating to each derivatives party is up to date. Subsection 1(7) provides that a derivatives firm must not rely on such a written representation if reliance on that representation would be unreasonable. See subsection 1(7) of this Policy for further guidance.

For the purposes of paragraphs (m) and (n), net assets must have an aggregate realizable value, before taxes, but after deduction of the corresponding liabilities, that are more than the prescribed threshold ($25 000 000 in paragraph (m) and $10 000 000 in paragraph (n)) or an equivalent amount in another currency. Unlike in paragraph (o), assets considered for the purposes of paragraphs (m) and (n) are not limited to "financial assets".

A person or company is only an eligible derivative party under paragraphs (n) and (q) if the person or company is, at the time the transaction occurs, a commercial hedger. In determining that a derivatives party is a commercial hedger, the derivatives firm may rely on a written representation from the derivatives party that it is a commercial hedger for the derivatives it transacts with the derivatives firm unless a reasonable person would have grounds to believe that the statement is false or it is otherwise unreasonable to believe that the representation is accurate. This representation may be tailored by the eligible derivatives party and the derivatives firm to provide for specific derivatives or types of derivatives.

In the case of paragraph (o), the individual must beneficially own financial assets, as that term is defined in section 1.1 of NI 45-106, that have an aggregate realizable value before tax but net of any related liabilities of at least $5,000,000 (or an equivalent amount in another currency). "Financial assets" is defined to include cash, securities or a deposit, or an evidence of a deposit that is not a security for the purposes of securities legislation.

Paragraph (p) of the definition of "eligible derivatives party" provides that a derivatives firm may treat a derivatives party as an eligible derivatives party if the derivatives party represents to the derivatives firm that all of its obligations under a derivative are guaranteed or otherwise fully supported (under a letter of credit or credit support agreement) by one or more eligible derivatives parties, other than eligible derivatives parties that only qualify as eligible derivatives parties under paragraph (n).

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Subparagraph (q)(ii) of the definition of "eligible derivatives party" is similar to paragraph (p), but does not exclude qualifying guarantors or credit support providers that are eligible derivatives parties under paragraph (n).

Section 1 – Definition of notional amount

The term "notional amount" has the meaning set out in Appendix A to the Instrument. The term is used in sections 50 and 51, which provide for certain exemptions to persons or companies from the requirement to register as a derivatives dealer, on conditions including a condition that the person or company, together with its affiliated entities, have a notional amount under all outstanding derivatives below a specified threshold.

While, in most cases, the notional amount for a specific derivative will be the monetary amount specified in the derivative, in some cases, the derivative may reference a non-monetary amount, such as a notional quantity (or volume) of an underlying asset. In these latter cases, calculating the monetary notional amount outstanding will require converting the notional quantity of the underlying asset into a monetary value. Appendix A to the Instrument establishes how the monetary notional amount must be calculated for these derivatives.

Section 1 – Definition of valuation

The term "valuation" is defined to mean the current value of a derivative. The value should be determined in accordance with accounting principles for fair value measurement that are consistent with accepted methodologies within the derivatives firm's industry. Where market quotes or market-based valuations are unavailable, we expect the value to represent the current mid-market level derived from market-based metrics incorporating a fair value hierarchy. The mid-market level does not have to include adjustments incorporated into the value of a derivative to account for the characteristics of an individual counterparty.

Subsection 1(7)

Whether it is reasonable for a derivatives firm to rely on a derivatives party's written representation will depend on the particular facts and circumstances of the derivatives party and its relationship with the derivatives firm.

For example, in determining whether it is reasonable to rely on a derivatives party's representation that it has the requisite knowledge and experience, a derivatives firm may consider factors such as

- whether the derivatives party enters into transactions with frequency and regularity,
- whether the derivatives party has staff who have experience in derivatives and risk management,

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- whether the derivatives party has retained independent advice in relation to its derivatives, and

- publicly available financial information.

Section 2 – Information may be given to the principal regulator

Section 2 reduces the regulatory burden for registered derivatives firms and individuals acting for registered derivatives firms, by allowing the firm or individual that is subject to an obligation to report or notify, or to deliver or submit a document, to more than one regulator by providing the foregoing to its principal regulator. However, foreign derivatives dealers and foreign derivatives advisers relying on the exemptions in section 52 and section 59, respectively, must report in each jurisdiction where it is relying on the exemption and not only to the principal regulator.

The definition of “principal regulator” in subsection 1(1) establishes the criteria for determining the principal regulator for a derivatives firm.

PART 2 APPLICATION

Section 3 – Scope of instrument

Section 3 ensures that the Instrument applies to the same contracts and instruments in all jurisdictions of Canada. Each jurisdiction has adopted a Product Determination Rule that excludes certain types of contracts and instruments from being derivatives for the purpose of the Instrument.

Section 5 - Governments, central banks and international organizations

Section 5 provides that the Instrument does not apply to certain governments, central banks, international organizations and crown corporations that meet the conditions set out in the section, from the application of the Instrument. Section 5 does not, however, exclude derivatives firms that deal with or advise these entities from the application of the Instrument.

PART 3 REQUIREMENT TO REGISTER AND CATEGORIES OF REGISTRATION FOR DERIVATIVES FIRMS

Fitness for registration

We will only register a firm if it appears to be fit for registration. Following registration, a firm must maintain its 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 this Part for guidance on suspension and revocation of a registered derivatives firm’s registration.

Terms and conditions

We may impose terms and conditions on a registrant at the time of registration or at any time after registration. Terms and conditions imposed at the time of registration are generally permanent, for example, in the case of a restricted derivatives dealer who is limited to specific activities. Terms and conditions imposed after registration are generally temporary and are intended to address specific issues relating to the registrant. For example, if a registered derivatives dealer is having financial problems that lead to the firm struggling to maintain the required capital, we may impose a condition to its registration requiring the firm to file weekly financial statements and capital calculations until the concerns are addressed.

Opportunity to be heard

An applicant has an opportunity to be heard by the regulator before its application for registration is denied. It also has an opportunity to be heard before the regulator imposes terms and conditions on its registration if it disagrees with the terms and conditions.

Assessing fitness for registration – firms

We assess whether a firm is or remains fit for registration through the information that the firm is required to provide on forms and through compliance reviews. Based on this information, we consider whether the firm is able to carry out its obligations under securities legislation. For example, a firm that has a history of compliance issues may not be fit for registration.

In addition, when determining whether a registered derivatives firm whose head office is outside Canada is, and remains, fit for registration, we will consider whether the firm maintains registration or regulatory organization membership in the foreign jurisdiction that is appropriate for the derivatives related business that it carries out there.

Division 1 – Firm Registration and Categories of Registration

The categories of registration for registered derivatives firms have two main purposes:

- to specify the type of business that the firm may conduct, and
- to provide a framework for the requirements the firm must meet.

A firm may be required to register in more than one category. For example, a derivatives dealer that acts as a portfolio manager for a fund that holds derivatives must register both as a derivatives dealer and as a derivatives adviser. In addition, if a person or company acts as a securities dealer and as a derivatives dealer, it must register in the appropriate dealer category under NI 31-103 and as a derivatives dealer under the Instrument.

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Individual registered in a firm category

An individual can be registered in both a firm and individual category. For example, a sole proprietor who is registered in the firm category of derivatives adviser must, if required under the Instrument, also be registered in the individual category of derivatives advising representative.

Registration triggers

A person or company will be required to register as a derivatives dealer if it is

- in the business of trading derivatives, or
- required to register under section 6.

A person or company will be required to register as a derivatives adviser if it is in the business of advising others in respect of derivatives.

Factors in determining a business purpose – derivatives dealer

In determining whether a person or company is in the business of trading or in the business of advising in derivatives, a number of factors should be considered. Several factors that we consider relevant are described below. This is not a complete list and other factors may also be considered.

- *Acting as a market maker* – Market making is generally understood as the practice of routinely standing ready to transact derivatives by
    - responding to requests for bids or quotes on derivatives, or
    - making quotes available to other persons or companies that seek to transact derivatives, whether to hedge a risk or to speculate on changes in the market value of the derivative.

  Market makers are typically compensated for providing liquidity through spreads, fees or other compensation, including fees or compensation paid by an exchange or a trading facility that do not relate to the change in the market value of the derivative transacted. A person or company that contacts another person or company about a transaction to accommodate its own risk management needs or to speculate on the market value of a derivative will not, typically, be considered to be acting as a market maker.

  A person or company will be considered to be "routinely standing ready to transact derivatives" if it is responding to requests for bids or quotes or making quotes available with some frequency, even if it is not on a continuous basis. Persons or companies that respond to requests or make quotes available occasionally are not "routinely standing ready".

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A person or company would also typically be considered to be a market maker when it holds itself out as undertaking the activities of a market maker.

Engaging in bilateral discussions relating to the terms of a transaction will not, on its own, constitute market making activity.

- *Directly or indirectly carrying on the activity with repetition, regularity or continuity* – Frequent or regular transactions are a common indicator that a person or company may be engaged in trading or advising for a business purpose. The activity does not have to be its sole or even primary endeavour for it to be in the business. We consider regularly trading or advising in any way that produces, or is intended to produce, profits to be for a business purpose.

- *Facilitating or intermediating transactions* – The person or company provides services relating to the facilitation of trading or intermediation of transactions between third-party counterparties to derivatives contracts.

- *Transacting with the intention of being compensated* – The person or company receives, or expects to receive, any form of compensation for carrying on transaction activity. This would include any compensation that is transaction or value-based including compensation from spreads or built-in fees. It does not matter if the person or company actually receives compensation or what form the compensation takes. However, a person or company would not be considered to be a derivatives dealer solely by reason that it realizes a profit from changes in the market price for the derivative (or its underlying reference asset), regardless of whether the derivative is intended for the purpose of hedging or speculating.

- *Directly or indirectly soliciting in relation to transactions* – The person or company directly solicits transactions. Solicitation includes contacting someone by any means, including communication that offers (i) transactions, (ii) participation in transactions or (iii) services relating to transactions. This would include providing bids or quotes to derivatives parties or potential derivatives parties that are not provided in response to a request. This includes advertising on the internet with the intention of encouraging transacting in derivatives by local persons or companies. A person or company might not be considered to be soliciting solely because it contacts a potential counterparty, or a potential counterparty contacts them to enquire about a transaction, unless it is the person or company's intention or expectation to be compensated from the transaction. For example, a person or company that wishes to hedge a specific risk might not be considered to be soliciting for the purpose of the Instrument if it contacts multiple potential counterparties to enquire about potential transactions to hedge the risk.

- *Engaging in activities similar to a derivatives adviser or derivatives dealer* – The person or company carries out any activities related to transactions involving derivatives that would reasonably appear, to a third party, to be similar to the activities discussed above. This would not include the operator of an exchange or a clearing agency.

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- *Providing derivatives clearing services* – The person or company provides services to allow third parties, including counterparties to transactions involving the person or company, to clear derivatives through a clearing agency. These services are actions in furtherance of a trade conducted by a person or company that would typically play the role of an intermediary in the derivatives market.

In determining whether or not it is, for the purposes of the Instrument, a derivatives dealer, a 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.

Factors in determining a business purpose – derivatives adviser

Under securities legislation, a person or company engaging in or holding itself out as engaging in the business of advising others in relation to derivatives is generally required to register as a derivatives adviser unless an exemption is available.

As with the definition of "derivatives dealer", the definition of "derivatives adviser" (and the definition of "adviser" in securities legislation generally) requires an assessment of whether the person or company is "in the business" of conducting an activity. In the case of derivatives advisers, it is necessary to determine whether a person or company is "advising others" in relation to derivatives.

As with derivatives dealers, a person or company that is determining whether or not it is a derivatives adviser, for the purposes of the Instrument, 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.

The definition of "derivatives adviser" also contains an additional element that the derivatives adviser should be in the business of "advising others" in relation to derivatives. Examples of persons and companies that may be considered to be in the business of advising others in relation to derivatives include the following:

- a registered adviser under securities or commodity futures legislation that provides advice to an investment fund or another person or company in relation to derivatives or derivatives trading strategies;

- a registered adviser under securities or commodity futures legislation that manages an account for a client and makes trading decisions for the client in relation to derivatives or derivatives trading strategies;

- an investment dealer that provides advice to clients in relation to derivatives or derivatives trading strategies;

- a person or company that recommends a derivative or derivatives trading strategy to investors as part of a general solicitation by an online derivatives trading platform.

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In determining whether a person or company may be considered to be in the business of advising others in relation to derivatives, it may be helpful to consider certain exemptions from the derivatives adviser registration requirement including the following:

- Section 57 [*Advising generally*];
- Section 58 [*Derivatives dealer without discretionary authority*].

For example, a person or company that discusses the merits of a particular derivative or derivatives trading strategy in a newsletter or on a website may be considered to be advising others in relation to derivatives. However, so long as the conditions in section 57 [*Advising generally*] are satisfied, including the condition that the person or company discloses any financial or other interest, the person or company would be exempt from the adviser registration requirement.

Similarly, a derivatives dealer that recommends a particular derivative or derivatives trading strategy to a customer in connection with a proposed transaction may be considered to be advising the customer in relation to derivatives. However, so long as the derivatives dealer is appropriately registered and has the necessary proficiency to provide the advice (or is otherwise exempt from registration), the derivatives dealer does not need to also register as a derivatives adviser.

If the derivatives firm's trading or advising activity is incidental to the firm's primary business, we may not consider it to be for a business purpose. For example, appropriately licensed professionals, such as lawyers, accountants, engineers, geologists and teachers, may provide advice in relation to derivatives in the normal course of their professional activities. We would generally not consider them to be advising on derivatives for a business purpose if such activities are incidental to their bona fide professional activities.

Factors in determining a business purpose – general

Generally, we would consider a person or company that engages in the activities discussed above in an organized and repetitive manner to be a derivatives dealer or, depending on the context, a derivatives adviser. Ad hoc or isolated instances of the activities discussed above may not necessarily result in a person or company being a derivatives dealer or, depending on the context, a derivatives adviser. Similarly, organized and repetitive proprietary trading, in and of itself, absent other factors described above, may not result in a person or company being considered to be a derivatives dealer for the purpose of the Instrument.

A person or company does not need to have a physical location, staff or other presence in the local jurisdiction to be a derivatives dealer or derivatives adviser in that jurisdiction. A derivatives dealer or a derivatives adviser in a local jurisdiction is a person or company that conducts the described activities in that jurisdiction. For example, this would include a person or company that is located in a local jurisdiction and that conducts dealing or advising activities in that local jurisdiction or in a foreign jurisdiction. This would also include a person or company located in a foreign jurisdiction that conducts dealing or advising activities with a derivatives party located in the local jurisdiction.

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Section 6 – Derivatives dealer registration – additional registration triggers

In addition to the general requirement, under securities legislation, for a person or company to register if it is in the business of trading derivatives or in the business of advising others in relation to derivatives, section 6 describes other types of activity that will require a person or company to register as a derivatives dealer without the need for a general business trigger analysis.
If a person or company engages in an activity specified in paragraphs (a) to (c), it will be required to register as a derivatives dealer or rely on an exemption from the requirement to register.

Paragraphs (a) and (b) impose an obligation to register as a derivatives dealer if a person or company transacts a derivative with or solicits or initiates contact to encourage a derivatives party to enter into a transaction with a person or company that is not an eligible derivatives party.

Paragraph (b) imposes the obligation to register where a person or company "solicits or initiates contact" with a person or company that is not an eligible derivatives party. Examples of situations where a person or company is initiating contact include

- contacting a person or company directly through any means, including an in-person meeting, by telephone, through a seminar, including a seminar offered through the internet or by other similar medium, or by e-mail,

- advertising using a medium that is reasonably available to a person or company in the local jurisdiction that is not an eligible derivatives party, and

- operating a website that offers or purports to offer services in the local jurisdiction.

Paragraph (c) requires a person or company to register as a derivatives dealer if it facilitates clearing of one or more derivatives for another person or company, other than an affiliated entity, through a clearing agency or a clearing house, as applicable. A person or company that facilitates clearing for another person would be a "clearing intermediary" under National Instrument 94-102 *Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* and subject to applicable obligations under that instrument.

Paragraphs 7(1)(b) and 7(2)(b) – Restricted derivatives dealer

The restricted derivatives dealer category in paragraph 7(1)(b) allows a specialized dealer to carry on a limited trading business while being subject to requirements that are tailored to its business. If there is a compelling case for the proposed trading to take place outside of the general derivatives dealer category, the restricted derivatives dealer category may be used.

If a person or company registers in the restricted derivatives dealer category, we will impose terms and conditions that restrict the dealer's activities. The CSA will co-ordinate terms and conditions for restricted dealers that trigger registration in more than one Canadian jurisdiction.

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For example, a person or company that deals in a specific type of derivatives, such as certain commodity-based derivatives, may want staff to fill a role where the person does not meet the proficiency requirements in section 18 but that do have the necessary skills and experience to deal in the specific type of derivatives that the firm transacts. We may register such a firm with terms and conditions that will restrict dealing activity to the applicable commodities.

Paragraphs 8(1)(b) and 8(2)(b) – Restricted derivatives adviser

This is analogous to the restricted dealer category described above. The restricted derivatives adviser category in paragraph 8(1)(b) permits individuals or firms to advise in specific derivatives. The regulator will impose terms and conditions on a restricted derivatives adviser's registration that limit the adviser's activities. For example, a restricted derivatives adviser might be restricted to advising in respect of a specific type of derivatives, such as agricultural commodities.

Section 9 - IIROC membership for certain derivatives dealers

Under section 9, a derivatives firm that is registered as a derivatives dealer must also be a dealer-member of IIROC if the firm transacts or solicits transactions with a derivatives party

(i) who is an individual, and

(ii) who is not an eligible derivatives party.

This means that a registered derivatives dealer will not be required to be an IIROC member if it only transacts with or solicits transactions with either or both of the following:

(i) derivatives parties that are not individuals;

(ii) derivatives parties that are individuals who qualify as eligible derivatives parties.

However, the Instrument does not preclude such a dealer from seeking IIROC membership if it chooses to do so on a voluntary basis.

Under section 55 [*Investment dealers*], a registered derivatives dealer that is a dealer-member of IIROC is exempt from specific requirements in the Instrument applicable to registered derivatives dealers that are specified in Appendix E, if the registered derivatives dealer complies with the corresponding IIROC provisions that are identified in Appendix E.

Division 2 – Suspension and revocation of registration – derivatives firms

The requirements for surrendering registration and additional requirements for suspending and revoking registration are found in the securities legislation of each jurisdiction. The guidance for Division 2 of Part 3 relates to requirements under securities legislation which includes the Instrument.

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There is no renewal requirement for registration but a registered derivatives firm must pay fees every year to maintain its registration and the registration of individuals acting on its behalf. A registered derivatives firm may carry on the activities for which it is registered until its registration is

- suspended automatically under the Instrument
- suspended by the regulator under certain circumstances, or
- surrendered by the registered derivatives firm.

Suspension

A registered derivatives firm whose registration has been suspended must not carry on the activity for which it is registered. The derivatives firm remains a registrant, although it may not carry out activities that require registration and remains subject to the jurisdiction of the regulator. A suspension remains in effect until the regulator reinstates or revokes the firm's registration.

If a registered derivatives firm that is registered in more than one category is suspended in one of the categories, the regulator will consider whether to suspend the firm's registration in other categories or to impose terms and conditions, subject to an opportunity to be heard.

Automatic suspension

A registered derivatives firm's registration will automatically be suspended if

- it fails to pay its annual fees within 30 days of the due date, or
- it is a member of IIROC, IIROC revokes or suspends the firm's membership.

Registered derivatives firms do not have an opportunity to be heard by the regulator in the case of any automatic suspension. If a registered derivatives firm is voluntarily terminating its membership with IIROC but wishes to continue to be registered, it should consult with its principal regulator before it terminates it status as a dealer member of IIROC.

Suspension in the public interest

A registered derivatives firm's registration may be suspended if the regulator exercises its power under securities legislation and determines that it is no longer in the public interest for the firm to be registered. The regulator may do this if it has serious concerns about the ongoing fitness of the registered derivatives firm or any of its registered individuals. For example, this may be the case if a registered derivatives firm, or one or more of its registered individuals or permitted individuals, is charged with a crime, in particular fraud or theft.

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Reinstatement

"Reinstatement" means that a suspension on a registration has been lifted. Once reinstated, a derivatives firm may resume carrying on the activity it is registered for.

Section 13 – Revocation of a suspended registration – firm

Section 14 - Exception for firms involved in a hearing or proceeding

If a registered derivatives firm's registration has been suspended and has not been reinstated, section 13 results in it being revoked on the second anniversary of the suspension. Section 14 is an exception from section 13 and provides that if a hearing or proceeding concerning the suspended firm has commenced, the registration remains suspended.

"Revocation" means that the regulator has terminated the registered derivatives firm's registration. A firm whose registration has been revoked must submit a new application if it wants to be registered again.

Surrender

A registered derivatives firm may apply to surrender its registration in one or more categories at any time by filing an application with its principal regulator. There is no prescribed form for an application to surrender.

Before the regulator accepts a registered derivatives firm's application to surrender registration, the derivatives firm must provide the regulator with evidence that its existing derivatives parties have been dealt with appropriately.

The regulator does not have to accept a registered derivatives firm's application to surrender its registration. Instead, the regulator can act in the public interest by suspending, or imposing terms and conditions on the firm's registration.

When considering a registered derivatives firm's application to surrender its registration, the regulator typically considers the registered derivatives firm's actions, the completeness of the application and the supporting documentation.

The firm's actions
The regulator may consider whether the registered derivatives firm

- has stopped carrying on activity requiring registration,
- proposes an effective date to stop carrying on activity requiring registration that is within a reasonable period of the date of the application to surrender,
- has outstanding derivatives that will continue after the date of the application to surrender, and

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- has paid any outstanding fees and submitted any outstanding filings at the time of filing the application to surrender.

Completeness of the application

Among other things, the regulator may look for

- the registered derivatives firm's reasons for ceasing to carry on activity requiring registration,

- satisfactory evidence that the registered derivatives firm has given all of its derivatives parties reasonable notice of its intention to stop carrying on activity requiring registration, including an explanation of how it will affect its derivatives parties in practical terms,

- how the registered derivatives firm will manage derivatives that will expire after the date that the firm proposes to surrender its registration, and

- satisfactory evidence that the derivatives firm has given appropriate notice to other regulators of the firm, if applicable.

Supporting documentation

The regulator may look for

- evidence that the registered derivatives firm has resolved all outstanding complaints from derivatives parties, settled all litigation, satisfied all judgments or made reasonable arrangements to deal with and fund any payments relating to them, and any subsequent complaints, settlements or liabilities,

- confirmation that all money or securities owed to derivatives parties have been returned or transferred to another derivatives dealer, where possible, according to instructions,

- up-to-date audited financial statements with an auditor's comfort letter,

- evidence that the registered derivatives firm has satisfied any requirements imposed by IIROC for withdrawing as a dealer member, and

- an officer's or partner's certificate supporting these documents.

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PART 4 CATEGORIES OF REGISTRATION FOR INDIVIDUALS

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

Individual applicants must meet the applicable education, training and experience requirements prescribed in the Instrument and demonstrate knowledge of relevant regulatory requirements relating to derivatives and the derivatives they transact or recommend.

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Registered individuals should continually update their knowledge and training to keep pace with changes in derivatives markets and developments in the industry that are relevant to their business. See Part 5 of this Companion Policy for more specific guidance on 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.

(c) Solvency

We will assess the overall financial condition of an individual applicant or registrant. An individual that is insolvent or has a history of bankruptcy may not be fit for registration. Depending on the circumstances, the regulator may consider the individual's contingent liabilities. The regulator may take into account an individual's bankruptcy or insolvency when assessing their continuing fitness for registration.

Section 16 – Individual registration categories

Multiple individual categories

Individuals who carry on more than one activity requiring registration on behalf of a registered derivatives firm must

- register in all applicable categories, and
- meet the proficiency requirements of each category.

For example, a derivatives advising representative of a registered derivatives adviser who is also the derivatives firm's derivatives chief compliance officer must register in the categories of derivatives advising representative and derivatives chief compliance officer. They must meet the proficiency requirements of both categories.

Individual registered in a firm category

An individual can be registered in both a firm and individual category. For example, a sole proprietor who is registered in the firm category of derivatives adviser must also be registered in the individual category of derivatives advising representative.

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Exemption

Under subsection (3), an individual is, subject to certain conditions, exempt from the requirement to register as a derivatives dealing representative if they only transact with, for or on behalf of, or only solicit a transaction with, for or on behalf of, eligible derivatives parties or affiliated entities (other than certain affiliated entities that are investment funds).

Subsection (4) provides a similar exemption to derivatives advising representatives that only advise eligible derivatives parties. The exemption in subsection (4) does not apply to an individual that acts as an adviser for a managed account, even if the beneficiary of the managed account is an eligible derivatives party.

PART 5 REGISTRATION REQUIREMENTS FOR INDIVIDUALS

Division 1 – Individual proficiency requirements

Section 18 – Initial and ongoing proficiency requirements

Proficiency principle

Section 18 has two types of proficiency requirements that are applicable to individuals that are required to register: a general requirement in subsection (1) and specific requirements in subsections (2), (3), (4) and (6).

To meet the general requirement in subsection 18(1), derivatives dealing representatives and derivatives advising representatives must have the necessary education, training and experience to understand the structure, features and risks of each derivative that they recommend to a derivatives party (also referred to as know-your-product). This requirement is in addition to the suitability obligation in section 12 of National Instrument 93-101 *Derivatives: Business Conduct* (**NI 93-101**) and applies even where there is an exemption from the suitability obligation.

A registered derivatives firm should perform its own analysis of the derivatives its staff recommend to derivatives parties and provide product training to ensure its staff, including its registered derivatives dealing and registered derivatives advising representatives, have a sufficient understanding of those derivatives and their associated risks.

Derivatives chief compliance officers and derivatives chief risk officers must also not perform an activity that requires registration unless they have the education, training and experience that a reasonable person would consider necessary to perform their responsibilities competently. Derivatives chief compliance officers must have a good understanding of the regulatory requirements applicable to their sponsoring derivatives firm and individuals acting on its behalf and have the knowledge and ability to design and implement an effective compliance system. Similarly, derivatives chief risk officers must have an understanding of the risks applicable to their sponsoring derivatives firm and have the knowledge and ability to implement an effective risk management system.

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We will consider both the general and specific requirements in determining the individual's fitness for registration and may exercise discretion in making a determination.

Responsibility of the firm

Subsections (2), (3), (4) and (6) of section 18 preclude firms from designating individuals to act in roles that require individual registration unless the individual meets the applicable proficiency requirements. Section 38 requires a registered derivatives firm to have policies and procedures to ensure compliance with applicable securities legislation, including requirements that individuals acting on its behalf

- have, at all times, the proficiency necessary to do their derivatives related tasks, and
- are registered if they are required to be registered under securities legislation.

Exam based requirements

Where specific exams are referenced in section 18, individuals must pass the exams – not only take courses – to meet the education requirements in that section. For example, before an individual can be allowed to act as a derivatives dealing representative under paragraph 18(4)(a), they must pass the Derivatives Fundamentals Course Exam. Individuals are responsible for completing the necessary preparation to pass an exam and for having the necessary proficiency in all areas covered by the exam.

Time limits on examination requirements

Under subsection 18(8), there is a time limit on the validity of exams prescribed in section 18. Individuals must pass an exam within 36 months before they apply for registration. However, this time limit does not apply if the individual

- was registered in an active capacity (i.e., not suspended), in the same category in a jurisdiction of Canada at any time during the 36-month period before the date of their application, or
- has gained relevant securities or derivatives industry experience for a total of 12 months during the 36-month period before the date of their application. These months do not have to be consecutive, or with the same firm or organization.

These time limits do not apply to the CFA Charter or the Risk Manager Designation since we do not expect the holders of these designations to have to retake the courses or successfully retake the exams that form part of the requirements applicable to these designations. However, if the individual no longer has the right to use the CFA Charter or the Risk Manager Designation, by reason of revocation of the designation or otherwise, we may consider the reasons for such a revocation to be relevant in determining an individual's fitness for registration. Registered individuals are required to notify the regulator of any change in the status of their CFA Charter or

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their designations within 10 days of the change, by submitting Form 33-109F5 *Change of Registration Information* in accordance with NI 31-102.

When assessing an individual's fitness for registration, the regulator may consider

- the date on which the relevant examination was passed, and
- the length of time between any suspension and reinstatement of registration during the 36 -month period.

See guidance relating to Division 2 of this Part, below, for guidance on the meaning of "suspension" and "reinstatement".

Relevant industry experience

The relevant experience under paragraph 18(9)(b) should be relevant to the category applied for. It may include experience acquired in any of the following:

- during employment at a firm that is a derivatives dealer or derivatives adviser;
- in related fields, such as investment banking; securities or derivatives trading on behalf of a financial institution; securities, derivatives or commodities research; portfolio management; investment advisory services; or supervision of those related fields;
- in legal, accounting or consulting practices related to derivatives or the securities industry;
- in other professional service fields that relate to derivatives or the securities industry;
- in a derivatives or securities-related business in a foreign jurisdiction.

Granting exemptions

We may grant an exemption from any of the education and experience requirements if we are satisfied that an individual has qualifications or relevant experience that are equivalent to, or more appropriate in the circumstances than, the prescribed requirements.

Proficiency for representatives of restricted derivatives dealers and restricted derivatives advisers

We will decide on a case-by-case basis what education and experience are required for registration as

- a derivatives dealing representative, derivatives chief compliance officer or derivatives chief risk officer of a restricted derivatives dealer, and

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- a derivatives advising representative, derivatives chief compliance officer or derivatives chief risk officer of a restricted derivatives adviser.

The regulator will determine these requirements when it assesses the individual's fitness for registration.

Proficiency requirements for derivatives advising representatives

The 48 months of relevant investment management experience referred to in subparagraph 18(6)(b)(iii) does not have to be consecutive, or with the same firm or organization.

For individuals with a CFA Charter, the regulator will decide on a case-by-case basis whether the experience they gained to earn the CFA Charter qualifies as relevant experience.

What constitutes relevant experience may vary according to the level of specialization of the individual. It may include

- securities or derivatives research and analysis experience, demonstrating an ability in, and understanding of, portfolio analysis or portfolio security selection, or

- management of investment portfolios on a discretionary basis, including investment or risk management decision making, rebalancing and evaluating performance.

Derivatives advising representatives with discretionary authority

A derivatives advising representative may have discretionary authority over portfolios of others, including for a managed account. Accordingly, this category of registration involves the most extensive proficiency requirements. We expect an individual who seeks registration as a derivatives advising representative to demonstrate a high quality of experience that is clearly relevant to discretionary portfolio management. Such experience may include working at one or more of the following:

- a derivatives adviser registered or operating under an exemption from registration in a foreign jurisdiction;

- an insurance company;

- a pension fund;

- a derivatives dealer;

- an investment dealer.

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Restriction on acting for another registered firm

We will not usually allow registration for an individual if that same individual, regardless of the category of registration, acts on behalf of more than one sponsoring firm, whether it is a registered derivatives firm or a registered securities firm, unless the sponsoring firms are affiliated entities, and the scale and types of activities carried out make it reasonable for the same person to act for each firm. If sponsoring firms propose to permit an individual who is registered to act on behalf of another sponsoring firm, we will consider this on a case-by-case basis. When reviewing an application, we will consider if

- there are valid business reasons for the individual to be registered to act on behalf of both sponsoring firms,
- the individual will have sufficient time to adequately serve both sponsoring firms,
- the applicant's sponsoring firms have demonstrated that they have policies and procedures addressing any conflicts of interest that may arise due to the dual registration, and
- the sponsoring firms will be able to deal with these conflicts, including supervising how the individual will deal with these conflicts.

Division 2 – Suspension and revocation of registration – individuals

The requirements for surrendering registration and additional requirements for suspending and revoking registration are found in the securities legislation of each jurisdiction. The guidance for this Division relates to requirements under securities legislation, which includes the Instrument.

There is no renewal requirement for registration. A registered individual may carry on the activities for which they are registered until their registration is

- suspended automatically under the Instrument,
- suspended by the local regulator under certain circumstances, or
- surrendered by the individual.

An individual whose registration is suspended must not carry on the activity for which they are registered. The individual otherwise remains a registrant and is subject to the jurisdiction of the regulator. A suspension remains in effect until the individual's registration is reinstated or revoked.

If an individual who is registered in more than one category is suspended in one of the categories, the regulator will consider whether to suspend the individual's registration in other categories or to impose terms and conditions, subject to an opportunity to be heard.

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Automatic suspension

An individual's registration will automatically be suspended if

- they cease to have a working relationship with their sponsoring firm,
- the registration of their sponsoring firm is suspended or revoked, or
- the individual is an approved person of IIROC, and IIROC revokes or suspends the individual's approval.

An individual must have a sponsoring derivatives firm to be registered. If an individual leaves their sponsoring derivatives firm for any reason, their registration is automatically suspended. Automatic suspension is effective on the day that an individual no longer has authority to act on behalf of their sponsoring derivatives firm.

Individuals do not have an opportunity to be heard by the regulator in the case of any automatic suspension.

Suspension in the public interest

An individual's registration may be suspended if the regulator exercises its power under securities legislation and determines that it is no longer in the public interest for the individual to be registered. The regulator may do this if it has serious concerns about the ongoing fitness of the individual. For example, this may be the case if an individual is charged with a crime, in particular fraud or theft.

Reinstatement

"Reinstatement" means that a suspension on a registration has been lifted. Once reinstated, an individual may resume carrying on the activity they are registered for. If a suspended individual joins a new sponsoring derivatives firm, they will have to apply for reinstatement under the process set out in NI 33-109. Subject to certain conditions in NI 33-109, reinstatement or transfer to the new firm will be automatic if the individual

- transfers directly from one sponsoring derivatives firm to another registered derivatives firm in the same jurisdiction,
- joins the new sponsoring derivatives firm within 90 days of leaving their former sponsoring derivatives firm,
- seeks registration in the same category as the one previously held, and
- completes and files Form 33-109F7 *Reinstatement of Registered Individuals and Permitted Individuals* (**Form 33-109F7**).

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This allows individuals to engage in activities requiring registration from their first day with the new sponsoring derivatives firm.

Individuals are not eligible for an automatic reinstatement if they

- have new information to disclose regarding regulatory, criminal, civil or financial matters as described in Item 9 of Form 33-109F7, or
- as a result of allegations of criminal activity or breach of securities legislation,
  - were dismissed by their former sponsoring derivatives firm, or
  - were asked by their former sponsoring derivatives firm to resign.

In these cases, the individual must apply to have their registration reinstated under NI 33-109 using Form 33-109F4.

Section 19 - If individual ceases to have authority to act for the derivatives firm

Under section 19, if a registered individual ceases to have authority to act on behalf of their sponsoring derivatives firm because their working relationship with the firm ends or changes, the individual's registration with the registered derivatives firm is suspended until reinstated or revoked under securities legislation. This applies whether the individual or the firm ends the relationship.

If a registered derivatives firm terminates its working relationship with a registered individual for any reason, the firm must complete and file a notice of termination on Form 33-109F1 *Notice of Termination of Registered Individuals and Permitted Individuals* (**Form 33-109F1**) no later than ten days after the effective date of the individual's termination. This includes situations where an individual resigns, is dismissed or retires.

The registered derivatives firm must file additional information about the individual's termination prescribed in Part 5 of Form 33-109F1 (except where the individual is deceased), no later than 30 days after the date of termination. We use this information to determine if there are any concerns about the individual's conduct that may be relevant to their ongoing fitness for registration.

Section 20 - If IIROC approval is revoked or suspended

If IIROC suspends or revokes its approval of an individual, the individual's registration in the category requiring IIROC approval will be automatically suspended. If IIROC suspends an individual for reasons that do not involve significant regulatory concerns and subsequently reinstates the individual's approval, the individual's registration will usually be reinstated by the regulator as soon as possible.

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Section 23 - Revocation of a suspended registration – individual

"Revocation" means that the regulator has terminated the individual's registration. An individual whose registration has been revoked must submit a new application if they want to be registered again.

Surrender or termination of registration

If an individual wants to terminate their registration in one or more of the non-principal jurisdictions where the individual is registered, the individual may apply to surrender their registration at any time by completing Form 33-109F2 *Change or Surrender of Individual Categories* (**Form 33-109F2**) and having their sponsoring derivatives firm file it.

If an individual wants to terminate their registration in their principal jurisdiction, Form 33-109F1 must be filed by the individual's sponsoring derivatives firm. Once Form 33-109F1 is filed, the individual's termination of registration will be reflected in all jurisdictions.

PART 6 DERIVATIVES ULTIMATE DESIGNATED PERSON, DERIVATIVES CHIEF COMPLIANCE OFFICER AND DERIVATIVES CHIEF RISK OFFICER

Part 6 requires registered derivatives firms to designate a derivatives ultimate designated person, a derivatives chief compliance officer and a derivatives chief risk officer. While each of these individuals have specific functions for compliance and risk management, they are not solely responsible for compliance and risk management; it is the responsibility of the firm as a whole. Part 6 also imposes responsibilities on individuals that are designated as derivatives ultimate designated persons, derivatives chief compliance officers or derivatives chief risk officers by registered derivatives firms.

The obligations of the derivatives ultimate designated person in subsection 27(3) and the obligations of a derivatives chief compliance officer in subsection 28(3) only apply to compliance with securities legislation relating to derivatives.

The same person registered in more than one category

The same person may be registered in more than one category if they meet the requirements for each registration category. For example, one person may be designated as both the derivatives chief compliance officer and derivatives chief risk officer. We prefer firms to separate these functions, but we recognize that it might not be practical for some registered derivatives firms, particularly very small firms.

Section 27 – Derivatives ultimate designated person

The derivatives ultimate designated person is responsible for promoting a culture of compliance and overseeing the effectiveness of a registered derivatives firm's compliance system. They do not

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have to be involved in the day-to-day management of the compliance group. There are no specific education or experience requirements for the ultimate designated person. However, they are subject to the general proficiency principle in subsection 18(1).

Subparagraphs 27(3)(d)(i) and (ii) refer to a risk of material harm to a derivatives party or to capital markets. The registered derivatives firm should establish a standard for determining when there is a risk of material harm to a derivatives party of the firm or to the capital markets. Whether the harm is "material" is dependent on the specific circumstances. Material harm to a small, unsophisticated derivatives party may differ from material harm to a larger, more sophisticated derivatives party.

Section 28 – Derivatives chief compliance officer

The derivatives chief compliance officer is responsible for the monitoring and oversight of the registered derivatives firm's compliance system as it relates to derivatives. This includes

- establishing and updating policies and procedures for the firm's compliance system relating to derivatives, and

- managing the compliance monitoring and reporting, relating to derivatives, according to the firm's policies and procedures.

At the firm's discretion, the derivatives chief compliance officer may also have authority to take supervisory or other action to resolve compliance issues.

The derivatives chief compliance officer must meet the proficiency requirements set out in Part 5. No other compliance staff have to be registered unless they trigger registration in another category. The derivatives chief compliance officer may set the knowledge and skills necessary or desirable for individuals who report to them.

Registered derivatives firms must designate one derivatives chief compliance officer. However, in large firms, the scale and kinds of activities carried out by different operating divisions may warrant the designation of more than one derivatives chief compliance officer. We will consider applications, on a case-by-case basis, for different individuals to act as the derivatives chief compliance officer of a firm's operating divisions.

Paragraph 28(3)(c) requires the derivatives chief compliance officer to report to the ultimate designated person any instances of non-compliance with securities legislation relating to derivatives if any of the conditions in subparagraphs (i) through (iii) apply. The derivatives chief compliance officer should report non-compliance to the derivatives ultimate designated person even if it has been corrected.

Subparagraph 28(3)(d)(ii) requires, as an element of the chief compliance officer's annual report, an assessment of the effectiveness of the registered derivatives firm's policies and procedures to assess compliance with securities legislation relating to derivatives.

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Whether the harm is "material" is dependent on the specific circumstances. Material harm to a small unsophisticated derivatives party may differ from material harm to a larger, more sophisticated derivatives party.

Subparagraph 28(3)(d)(iii) requires, as an element of the chief compliance officer's annual report, that the report recommend potential changes to compliance policies and procedures to address needed improvements. Where a previous report discussed future improvements that were being planned, subsequent reports should discuss the outcomes of the changes that were implemented during the most recent scope period, any monitoring or testing of those changes, whether any compliance issues arose from the changes and, if there were any issues with how those issues were handled.

The description of circumstances of non-compliance required under subparagraph 28(3)(d)(v) should include a discussion of how the registered derivatives firm reached a decision on a course of remediation, how the implementation of the remediation was executed, any follow-up testing of the remediation and any noteworthy results from such testing.

While there is no requirement under paragraph 28(3)(d) to deliver to the regulator the annual report referred to in paragraph 28(3)(d), a regulator, may request this report from time to time.

Section 29 – Derivatives chief risk officer

The derivatives chief risk officer is responsible for the monitoring and oversight of the registered derivatives firm's risk management systems associated with the firm's derivatives related activities. This includes

- establishing and updating policies and procedures to implement and operate a risk management system that identifies and manages risk, particularly risk relating to derivatives, and

- managing and monitoring compliance with the registered derivatives firm's risk management system according to the firm's policies and procedures.

The derivatives chief risk officer must meet the proficiency requirements set out in Part 5. No other risk staff have to be registered unless they trigger registration in another category.

Registered derivatives firms must designate one derivatives chief risk officer. However, in large firms, the scale and type of activities carried out by different operating divisions and the variety of risks associated with these operating divisions may warrant the designation of more than one derivatives chief risk officer. We will consider applications, on a case-by-case basis, for different individuals to act as the derivatives chief risk officer of a firm's operating divisions.

Under paragraph 29(3)(c), the derivatives chief risk officer must report potential material non-compliance with the registered derivatives firm's risk management policies and procedures to the firm's derivatives ultimate designated person. Instances of non-compliance should be reported even if the non-compliance has been corrected.

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The registered derivatives firm should establish a standard for determining when there is material non-compliance with the firm's risk management policies and procedures. Whether non-compliance is "material" is dependent on the specific circumstances.

PART 7 FINANCIAL REQUIREMENTS

Section 34 - Annual financial statements

Section 35 - Interim financial statements

Accounting Principles

Registered derivatives firms are required to deliver annual financial statements and interim financial information that comply with National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards* (**NI 52-107**).

Part 3 of NI 52-107 refers to Canadian GAAP applicable to publicly accountable enterprises, which is IFRS as incorporated into the Handbook. Under Part 3 of NI 52-107, annual financial statements and interim financial information delivered by a registrant must be prepared in accordance with Canadian GAAP applicable to publicly accountable enterprises except that any investments in subsidiaries, jointly controlled entities and associates must be accounted for as specified for separate financial statements in International Accounting Standard 27 - Consolidated and Separate Financial Statements. Separate financial statements are sometimes referred to as non-consolidated financial statements.

Subsection 3.2(3) of NI 52-107 requires annual financial statements to include a statement and description about this required financial reporting framework. Section 2.7 of Companion Policy to National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards* (**52-107CP**) provides guidance on subsection 3.2(3). We remind registered derivatives firms to refer to these provisions in NI 52-107 and 52-107CP in preparing their annual financial statements and interim financial information.

Part 4 of NI 52-107 refers to Canadian GAAP for public enterprises, which is Canadian GAAP as it existed before the mandatory effective date for the adoption of IFRS, included in the Handbook as Part V. Under Part 4 of NI 52-107, annual financial statements and interim financial information delivered by a registered derivatives firm must be prepared in accordance with Canadian GAAP for public enterprises except that the financial statements and interim financial information must be prepared on a non-consolidated basis.

Section 36 - Delivering financial statements

Subsections 36(3) and (4) provide exclusions from the requirement to deliver annual and interim financial statements where the registered derivatives firm is a reporting issuer that is in compliance with its obligation to file its annual and interim financial statements. These exclusions will reduce the regulatory burden of registered derivatives firms that are already filing financial information.

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PART 8 COMPLIANCE AND RISK MANAGEMENT

Section 38 – Compliance policies and procedures

Section 38 requires a registered derivatives firm to establish, maintain and apply policies and procedures that establish a system of controls and supervision (i.e., a "compliance system") to ensure that the registered derivatives firm and each individual acting on its behalf, in relation to its activities relating to transacting in or advising on derivatives, complies with applicable securities legislation.

We expect that a compliance system that is sufficient to meet the requirements of this section will include internal controls and monitoring systems that are reasonably likely to identify non-compliance at an early stage and supervisory systems that allow the firm to correct non-compliant conduct in a timely manner.

As previously stated in Part 1, "securities legislation" is defined in NI 14-101, and includes statutes and other instruments related to both securities and derivatives. We do not expect that the compliance system established in accordance with the Instrument would be applicable to activities other than a derivatives firm's derivatives activities. For example, a registered derivatives dealer may also be a reporting issuer. The compliance system established to monitor compliance with the Instrument would not necessarily be concerned with matters related only to the registered derivatives firm's status as a reporting issuer, though it would be acceptable to have a single compliance system related to the registered derivatives firm's compliance with all applicable securities legislation. These policies and procedures should be reviewed periodically and updated as appropriate.

Section 39 – Risk management policies and procedures

We expect that risk management policies and procedures establish a risk management system that is sufficient to meet the requirements of section 39 and include internal controls and monitoring systems that are reasonably likely to identify potential risks relating to derivatives at an early stage and supervisory systems that allow the firm to mitigate risk in a timely manner. While section 39 is limited to risks associated with a registered derivatives firm's derivatives activities, the risk management system should take into account all sources of risk that could impact the registered derivatives firm's derivatives activities, including the firm's obligations under derivatives.

The risk management system of a registered derivatives firm should, at a minimum

- take into account market, credit, liquidity, foreign currency, legal, operational, settlement, and any other applicable risks,
- establish risk tolerance limits and allow for the detection of breaches of those limits, and
- take into account risks relating to derivatives posed by affiliated entities.

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Paragraph 39(3)(f) requires that the risk management policies and procedures provide for periodic reports to the registered derivatives firm's ultimate designated person and board of directors. We expect these reports to include

- a description of all applicable risk exposures including market, credit, liquidity, foreign currency, legal, operational, and settlement exposures,
- any recommended or completed changes to the policies and procedures or the risk management system,
- the recommended time frame for implementing changes, and
- the status of any incomplete implementation of previously recommended changes.

The policies and procedures should also allow the registered derivatives firm to assess the risks of any derivative, including a novel type of derivative that the registered derivatives firm transacts. In doing the assessment for a novel type of derivative, a registered derivatives firm may consider

- the type of derivatives party with which the new derivative will be transacted,
- the new derivative's characteristics and economic function,
- whether the derivative requires a novel pricing methodology or presents novel legal and regulatory issues,
- all relevant risks associated with the new derivative and how the risks will be managed,
- whether the new derivative would materially alter the overall risk profile of the registered derivatives firm, and
- whether the registered derivatives firm needs to make any changes to the policies and procedures prior to engaging in transactions involving the new derivative.

Subsection 39(4) requires an independent review of the registered derivatives firm's risk management systems on a reasonably frequent basis (at least once every two years). These reviews should be conducted by a party that is independent and at arm's length from the derivatives business unit. This could include a review conducted by the registered derivatives firm's internal audit group (or a comparable unit within the firm) if that group has the appropriate expertise and has sufficient independence from the derivatives business unit.

In addition to the independent review required under subsection 39(4), we expect that a registered derivatives firm's risk management policies and procedures will provide for more frequent internal reviews of its effectiveness, as appropriate.

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Section 40 – Confirmation of material terms

Where the derivatives party is an individual or a firm that is not an eligible derivatives party, the registered derivatives firm complies with the requirements of subsection 40(1) by delivering the written confirmation required in section 29 of NI 93-101.

Subsection 43(3) – Business continuity and disaster recovery

Subsection 43(3) requires a registered derivatives firm to conduct independent tests of its business continuity and disaster recovery plans. Staff of the registered derivatives firm may conduct these tests if the firm has the necessary expertise and are sufficiently independent from the business unit responsible for business continuity and disaster recovery.

Section 44 – Portfolio reconciliation

Section 44 requires a registered derivatives firm to conduct a portfolio reconciliation for all derivatives to which the firm is a counterparty. Portfolio reconciliation entails verifying the existence of all outstanding transactions with a counterparty, comparing principal economic terms, ensuring that the records of each counterparty relating to the derivative or a portfolio of derivatives are consistent, and identifying and remediating any inconsistencies. When a registered derivatives firm is developing its policies and procedures for conducting portfolio reconciliations, it should consider industry practices such as the practices published by the International Swaps and Derivatives Association.[14]

Section 45 – Portfolio compression

Portfolio compression is a risk reduction process by which two or more counterparties wholly or partially terminate some or all of the derivatives between them, and replace the terminated derivatives with another derivative whose combined notional amount is less than the combined notional amount of the terminated derivatives. The process reduces the market exposure of derivatives in a portfolio by eliminating matched derivatives or derivatives that do not contribute risk to the portfolio. Compression may be done bilaterally, (i.e., with just one other counterparty), or multilaterally (i.e., between several counterparties).

The process to simplify the management of the portfolio by aggregating positions into fewer contracts without reduction of the notional value (with a view, for instance, to standardise the terms of derivatives, to make them eligible for clearing or to facilitate the management of the contract) is not included in the scope of portfolio compression.

Section 45 does not impose specific timelines for conducting portfolio compression. When establishing written policies and procedures relating to portfolio compression, a registered derivatives firm should consider a number of factors, including the size of the firm’s portfolio in relation to each of its counterparties. Smaller derivatives firms that have relatively small derivatives positions may apply for exemptive relief from any or all of the requirements in section 45.

[14] See the ISDA website located at http://www2.isda.org/ for further information relating to portfolio reconciliation practices.

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PART 9 RECORDS

Section 47 – Form, accessibility and retention of records

Paragraph 47(1)(a) requires a registered derivatives firm to keep its records in a safe location. This includes ensuring that no one has unauthorized access to information, particularly confidential derivatives party and counterparty information. We would expect a registered derivatives firm to be particularly vigilant if it maintains books and records in a location that may be accessible by a third party. In this case, we would expect the registered derivatives firm to have a confidentiality agreement with the third party.

PART 10 EXEMPTIONS FROM THE REQUIREMENT TO REGISTER AND EXEMPTIONS FROM SPECIFIC REQUIREMENTS IN THIS INSTRUMENT

The Instrument provides several exemptions from the registration requirement as well as several exemptions from certain requirements in the Instrument. We also note that there may be additional exemptions in securities legislation.

If a firm is exempt from the requirement to register, the individuals acting on its behalf under that exemption are likewise exempt.

Sections 52, 54, 56, 59 and 61 require persons or companies that rely on those exemptions to promptly notify the regulator of any material non-compliance with specific regulatory requirements of another regulatory authority. The specific regulatory requirements are listed in the applicable Appendix referenced in the section. Sections 27 and 28 of this Policy provide guidance about when non-compliance with applicable requirements is material.

Division 1 – Exemptions from the requirement to register as a derivatives dealer

This Division provides a derivatives dealer with exemptions from the requirement to register as a derivatives dealer if it complies with the conditions of the exemption. A derivatives dealer that is exempt from the derivatives dealer registration requirement will not be subject to other requirements in the Instrument that would be applicable to it if it was registered as a derivatives dealer.

Section 49 – Exemption for certain derivatives end-users

Section 49 provides an exemption from the requirement to register as a derivatives dealer for a person or company that does not have the status described in subsection (1) and does not engage in the activities described in subsection (2).

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For example, a person or company that frequently and regularly transacts in derivatives to hedge business risk but that does not undertake any of the activities in subsection (2) may qualify for this exemption. Typically, such a person or company would transact with a derivatives dealer who itself may be subject to some or all of the requirements of the Instrument.
Under paragraph 49(2)(c), this exemption is not available to a person or company that regularly makes a market in derivatives.

Section 50 – Derivatives dealers with a limited notional amount under derivatives

Section 51 – Commodity derivatives dealers with a limited notional amount under derivatives

Section 50 provides an exemption from the requirement to register for derivatives dealers that do not have more than $250 million in aggregate gross notional amount outstanding, whose derivatives parties are all eligible derivatives parties and that meet the other conditions in paragraphs 50(a) to (d).

Section 51 provides an exemption from the requirement to register for derivatives dealers that are only in the business of trading derivatives that have commodities as their only underlying asset and that meet the other conditions in paragraphs 51(2)(a) to (e).

To comply with the condition in paragraph 51(2)(e), a person or company cannot conduct any activity that would require it to register as a derivatives dealer for a derivative that is not a commodity derivative.

Determination of notional amount

Appendix A establishes requirements for determining the notional amount for a derivative for the purpose of both sections 50 and 51. To determine the aggregate gross notional amount outstanding, a derivatives dealer must aggregate the notional amount of each outstanding derivative to which the derivatives dealer or its affiliated entities are a party, without netting. The notional amounts for derivatives between affiliated entities are not included when aggregating notional amount outstanding for the purpose of the thresholds in sections 50 and 51.

Under sections 50 and 51, a derivatives dealer that has its head office or principal place of business outside of Canada is only required to aggregate its notional amounts under outstanding derivatives with a Canadian counterparty. A derivatives dealer that has its head office or principal place of business in Canada is required to aggregate the notional exposure of all derivatives to which it is a counterparty regardless of whether the derivatives party is a Canadian counterparty.

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Section 52 – Foreign derivatives dealers– exemption from registration

General principle

Section 52 allows a derivatives dealer with its head office or principal place of business in a foreign jurisdiction listed in Appendix B to transact with, or on behalf of derivatives parties, without being registered as a derivative dealer, if,

- each of the firm's derivatives parties are eligible derivatives parties, and
- the derivatives dealer satisfies the other conditions specified in section 52.

The exemption in section 52 is only available where a foreign derivatives dealer is subject to and in compliance with the requirements of the laws of the applicable foreign jurisdiction specified in Column 1 of Appendix B. Where a foreign derivatives dealer is not subject to the requirements in a foreign jurisdiction listed in Appendix B, including where it relies on an exclusion or an exemption (including discretionary relief) from those requirements in the foreign jurisdiction, the exemption in section 52 will not be available.

Notice requirement

If the foreign derivatives dealer is relying on the exemption, it must provide an initial notice by submitting a Form 93-102F2 *Submission to Jurisdiction and Appointment of Agent for Service* (**Form 93-102F2**) with the regulator in each jurisdiction where it relies on the exemption. If there is any change to the information in the foreign derivatives dealer's Form 93-102F2, it must update it by filing a replacement Form 93-102F2 with those jurisdictions.

So long as the foreign derivatives dealer continues to rely on the exemption, it must file an annual notice with the corresponding regulators in accordance with subsection 52(3). Subsection 52(3) does not prescribe a form of annual notice; an email or letter will be acceptable.

In Ontario, compliance with the filing and fee payment requirements applicable to an unregistered exempt foreign dealer under Ontario Securities Commission Rule 13-502 *Fees* satisfies the annual notification requirement in subsection 52(3).

Division 2 – Exemptions from specific requirements for derivatives dealers

The exemptions in Division 2 provide registered derivatives dealers with exemptive relief from the requirements to comply with specific requirements in the Instrument that are applicable to registered derivatives dealers.

Section 54 - Foreign derivatives dealers – exemption from specific requirements

Section 54 provides to registered derivatives dealers, whose head office or principal place of business is in a foreign jurisdiction specified in Column 1 of Appendix D, exemptions from certain

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requirements in the Instrument specified in Column 2 of Appendix D, on the terms set out in section 54.

Paragraph 54(1)(b) requires that the foreign registered derivatives dealer be subject to and in compliance with the corresponding requirements or guidelines of the foreign jurisdiction specified in Column 3 of Appendix D.

Column 3 of Appendix D does not incorporate any exemption or discretionary relief granted to the foreign derivatives dealer under the laws of the foreign jurisdiction. Where a foreign registered derivatives dealer proposes to rely upon any such exemption or discretionary relief, it will need to address this through an application for exemptive relief in the applicable local Canadian jurisdictions.

Division 3 – Exemptions from the requirement to register as a derivatives adviser

This Division provides a derivatives adviser with an exemption from the requirement to register as a derivatives adviser if it complies with the conditions of the exemption.

A derivatives adviser that is exempt from the derivatives adviser registration requirement will not be subject to other requirements in the Instrument that would be applicable to it if it was registered as a derivatives adviser.

Section 57 - Advising generally

Section 57 contains an exemption from the requirement to register as a derivatives adviser if advice is not tailored to the needs of the recipient.

In general, we would not consider advice to be tailored to the needs of the recipient if it

- is a general discussion of the merits and risks of a derivative or class of derivatives,
- is delivered through newsletters, articles in general circulation newspapers or magazines, websites, e-mail, internet chat rooms, bulletin boards, television or radio, and
- does not claim to be tailored to the needs and circumstances of any recipient.

This type of general advice can also be given at conferences. However, if a purpose of the conference is to solicit the audience and generate specific transactions in specific derivatives or class of derivatives, we may consider the advice to be tailored or we may consider the individual or firm giving the advice to be engaged in trading activity.

Under subsection 57(3), if an individual or a firm relying on the exemption has a financial or other interest in the derivative or class of derivatives it recommends, or in an underlying interest of the derivative, it must disclose the interest to the recipient when it makes the recommendation.

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Section 59 – Foreign derivatives advisers – exemption from registration

Section 59 allows a derivatives adviser with its head office or principal place of business in a foreign jurisdiction listed in Appendix G to act as an adviser to derivatives parties, without being registered as a derivative adviser, if

- each of the firm's derivatives parties are eligible derivatives parties, and

- the derivatives adviser satisfies the other conditions specified in section 59.

The exemption in section 59 is only available where a foreign derivatives adviser is subject to and in compliance with the requirements of the laws of the applicable foreign jurisdiction specified in Column 1 of Appendix G. If a foreign derivatives adviser is not subject to the requirements in a foreign jurisdiction listed in Appendix G, including where it relies on an exclusion or an exemption (including discretionary relief) from those requirements in the foreign jurisdiction, the exemption in section 59 will not be available.

Division 4 – Exemptions from specific requirements in this Instrument for derivatives advisers

Section 61 - Foreign derivatives advisers – exemption from specific requirements
Section 61 provides to registered derivatives advisers, whose head office or principal place of business is in a foreign jurisdiction specified in Column 1 of Appendix H, exemptions from certain requirements in the Instrument specified in Column 2 of Appendix H, on the terms set out in section 61.

Paragraph 61(1)(b) requires that the foreign registered derivatives adviser be subject to and comply with the corresponding requirements or guidelines of the foreign jurisdiction specified in Column 3 of Appendix H.

Column 3 of Appendix H does not incorporate any exemption or discretionary relief granted to the foreign derivatives adviser under the laws of the foreign jurisdiction. Where a foreign registered derivatives adviser proposes to rely upon any such exemption or discretionary relief, it will need to address this through an application for exemptive relief in the applicable local Canadian jurisdictions.

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ANNEX V

LOCAL MATTERS

There are no local matters in Alberta to consider at this time.

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August 2, 2018

VIA ELECTRONIC MAIL

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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

c/o:
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Re: Comments on Proposed National Instrument 93-102 *Derivatives: Registration* and Proposed Companion Policy 93-102

Dear Sir or Madam:

I. INTRODUCTION

On behalf of The Canadian Commercial Energy Working Group (the "**Working Group**"), Eversheds Sutherland (US) LLP submits this letter in response to the request for public comment from the Canadian Securities Administrators ("**CSA**") on Proposed National Instrument 93-102 *Derivatives: Registration* ("**Proposed NI 93-102**") and the related Proposed Companion Policy 93-102 ("**Proposed Registration Companion Policy**") (collectively, the "**Proposed Instrument**").[1] The Working Group appreciates the CSA's

[1] *See* CSA Notice and Request for Comment on Proposed National Instrument 93-102 *Derivatives: Registration* and Proposed Companion Policy (Apr. 19, 2018) ("**CSA Notice**"), http://www.albertasecurities.com/Regulatory%20Instruments/5399899%20_%20CSA%20Notice%2093-102.pdf.

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ongoing hard work throughout the derivatives regulatory reform process and offers these comments to further advance that process.

The Working Group is a diverse group of commercial firms that are active in the Canadian energy industry whose primary business activity is the physical delivery of one or more energy commodities to others, including industrial, commercial, and residential consumers. Members of the Working Group are producers, processors, merchandisers, and owners of energy commodities. The Working Group considers and responds to requests for comment regarding developments with respect to the trading of energy commodities, including derivatives, in Canada.

II. COMMENTS OF THE WORKING GROUP

A. The Scope of the General De Minimis Exemption (Section 50) and the Commodity De Minimis Exemption (Section 51) Should Be Modified to Reflect the Likely Intent

The Working Group greatly appreciates that the CSA included the General De Minimis Exemption and the Commodity De Minimis Exemption in the Proposed Instrument.[2] Their inclusion in any final rule, with the modifications suggested below, will provide a much needed bright line to allow participants in the commodity derivatives markets to operate with a meaningful degree of regulatory certainty that they will not unexpectedly be required to register as a derivatives dealer. However, with respect to both de minimis exemptions, there are issues regarding the following that should be addressed: (i) treatment of affiliated entities; (ii) the type of transactions that are counted toward the threshold; and (iii) the relationship between the General De Minimis Exemption and the Commodity De Minimis Exemption.

i. Treatment of Affiliated Entities

Under one reading of the de minimis exemptions, Canadian companies could be at a material disadvantage with respect to the treatment of their affiliates as compared to non-Canadian companies. Specifically, both de minimis exemptions state that an entity "that has its head office or principal place of business in a jurisdiction of Canada" must include not only all outstanding derivatives to which it is a counterparty, but also all outstanding derivatives positions of "each affiliated entity" of the company when determining whether it has exceeded either de minimis exemption threshold.[3] If an entity "has its head office and principal place of business in a foreign jurisdiction," it must include all outstanding derivatives that have a Canadian counterparty as well as the derivatives positions of "each affiliated entity" of the company when determining whether it has exceeded either de minimis exemption threshold.[4]

It is clear that Canadian entities must include all of their derivatives in the de minimis analysis and foreign entities need only include their derivatives with Canadian counterparties.

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[2] The Proposed Instrument provides an exemption from the requirement to register as a derivatives dealer for a company that does not have more than $250 million in aggregate gross notional amount outstanding and meets certain conditions (the "**General De Minimis Exemption**") and an exemption from the requirement to register as a derivatives dealer for a company that: only engages in the business of trading "commodity derivatives"; does not have more than $1 billion in aggregate gross notional amount outstanding; and meets certain conditions (the "**Commodity De Minimis Exemption**"). *See* Proposed NI 93-102 at Sections 50 and 51.

[3] *See* Proposed NI 93-102 at Sections 50(2)(c)(i) and 51(3)(d)(i). For the Commodity De Minimis Exemption, this would apply to "outstanding commodity derivatives."

[4] *See* Proposed NI 93-102 at Sections 50(2)(c)(ii) and 51(3)(d)(ii). For the Commodity De Minimis Exemption, this would apply to "outstanding commodity derivatives."

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What is not clear is the extent to which affiliate derivatives are included in the de minimis analysis.

The Working Group believes that the CSA intended that affiliates be treated like the entities under analysis so that an affiliate located outside of Canada would only include transactions with Canadian counterparties included in the de minimis analysis and an affiliate located in Canada would have all its transactions included in the de minimis analysis of the relevant entity regardless of where that entity is located.

However, Sections 50 and 51 of the Proposed Instrument could be read to require a Canadian entity to include all of its affiliates' market facing derivatives in its analysis regardless of where those affiliates are domiciled while a non-Canadian entity would only include the market facing transactions of its affiliates with Canadian counterparties, regardless of where such affiliates are domiciled. If this approach to the de minimis exemptions was the intended approach, it would put Canadian entities at a material disadvantage as they would be more likely to lose the availability of the de minimis exemptions based on their affiliates' activity outside of Canada.

Therefore, the Working Group requests that the CSA clarify that all of a Canadian domiciled affiliate's transactions would be included in an entity's de minimis analysis and, with respect to a non-Canadian affiliate, only the affiliate's transactions with Canadian counterparties would be included in an entity's de minimis analysis, regardless of where the entity conducting the de minimis analysis is domiciled.

ii. Only Dealing Activity Should Be Counted Towards the Threshold for Both De Minimis Exemptions

Only dealing activity should be counted towards the threshold for both the General De Minimis Exemption and the Commodity De Minimis Exemption. Under the Proposed Instrument, both de minimis exemptions disadvantage corporate families with large non-dealing derivatives portfolios. The two de minimis exemptions use a notional amount threshold that is based on, with certain limitations, an entity and its affiliates' overall derivatives activity – not just their derivatives dealing activity. Basing the de minimis exemption thresholds on all of an entity's derivatives activity rather than the activity relevant to the exemptions (*e.g.,* dealing activity) may make the exemptive relief unavailable or limit its efficacy for companies with large hedging portfolios. A properly calibrated de minimis exemption would look only at the dealing activity of the relevant market participants, and the Working Group suggests that the CSA amend the Proposed Instrument to reflect this.

At a minimum, the Working Group respectfully requests that the CSA expressly exclude transactions that are intended to hedge or mitigate commercial risk from the determination of whether an entity exceeds either de minimis exemption. Doing so would make both of those exemptions available to larger corporate families that hedge financial risks (*e.g.*, interest rate risk from variable rate financings) or physical commodity risks (*e.g.*, the cost of natural gas needed to run a power plant).

Further, excluding transactions intended to hedge or mitigate commercial risk would provide cross-border consistency with the approach taken in the United States by the Commodity Futures Trading Commission (the "**CFTC**") as well as in the European Union. For example, under the CFTC Regulations, transactions that hedge physical commodity risk are not considered swap dealing activity and do not factor into the CFTC's swap dealer de minimis

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exception analysis.[5] In the European Union, under EMIR,[6] OTC transactions intended to hedge or mitigate commercial risk are excluded from the determination of whether an entity is subject to heightened regulatory requirements.[7]

To provide clarity to market participants and regulators alike, the CFTC and the EU regulators have provided guidance in a number of circumstances on what constitutes a qualifying hedge, and the CSA could do so as well.[8] Further, to confirm that market participants are applying the relevant guidance properly, the CFTC has the "special call" authority, which allows it to request information from market participants.[9] In this respect, the Proposed Instrument could be revised so that any de minimis exemption that excludes transactions intended to hedge or mitigate commercial risk would be conditioned on the market participant demonstrating, upon specific request from the relevant provincial regulator, a reasonable basis for its characterization of a transaction as a hedge.

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[5] Specifically, in the United States:

- CFTC Regulation 1.3 (swap dealer definition ¶(6)(iii)) excludes from the swap dealer analysis swaps entered into for the purpose of hedging physical positions.
- The CFTC has also proposed rules intended to clarify that swaps that hedge physical or financial positions are excluded from the swap dealer de minimis exception threshold. *See* CFTC Notice of Proposed Rulemaking, *De Minimis Exception to the Swap Dealer Definition*, 83. Fed. Reg. 27,444 (June 12, 2018), https://www.cftc.gov/sites/default/files/2018-06/2018-12362a.pdf (proposing CFTC Regulation 1.3 (swap dealer definition ¶(4)(i)(D)).
- In addition, "Congress incorporated a de minimis exception to the swap dealer definition to ensure that smaller institutions that are responsibly managing their commercial risk are not inadvertently pulled into additional regulations." 156 Cong. Rec. S6192 (July 22, 2010) (letter from Senators Dodd and Lincoln to Representatives Frank and Paterson), https://www.congress.gov/crec/2010/07/22/CREC-2010-07-22-txt-PgS6192.pdf.
- CFTC Regulation 1.3 (major swap participant definition ¶(1)(ii)) excludes from the major swap participant analysis positions held for hedging or mitigating commercial risk.

[6] Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC Derivatives, Central Counterparties and Trade Repositories ("**EMIR**"), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ%3AL%3A2012%3A201%3A0001%3A0059%3AEN%3APDF.

[7] Specifically, in the European Union, under EMIR, the determination of whether a non-financial counterparty exceeds a threshold (*i.e.*, an "**NFC+**") that would subject it to a number of regulatory requirements (*e.g.*, mandatory clearing and margin requirements) excludes from the calculation OTC derivatives transactions that are objectively measurable as reducing risks directly relating to commercial activity or the treasury activity of an NFC or its group. EMIR Article 10 Section 3.

[8] For example:

- CFTC Regulation 1.3 defines "hedging or mitigating commercial risk" for use in certain contexts.
- CFTC Regulation 50.50(c) discusses when a swap is used to hedge or mitigate commercial risk for purposes of the end-user exception from mandatory clearing and mandatory exchange execution.
- European Commission Delegated Regulation (EU) No. 149/2013 of 19 December 2012, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0149&from=EN (discussing hedging).

[9] *See, e.g.*, CFTC Regulations Part 21.

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iii. Relationship Between the General De Minimis Exemption and the Commodity De Minimis Exemption

The Working Group is seeking clarification regarding the relationship between the General De Minimis Exemption and the Commodity De Minimis Exemption. It is the Working Group's understanding that the Commodity De Minimis Exemption would be available to an entity that:

- has non-commodity derivatives (*e.g.*, interest rate swaps) with a gross notional amount over $250 million;
- would not be considered a derivatives dealer with respect to its activities regarding any of its non-commodity derivatives; and
- has commodity derivatives with a gross notional amount that is less than $1 billion.

In the above example, it is the Working Group's understanding that the entity would be eligible for the Commodity De Minimis Exemption even though it would not be eligible for the General De Minimis Exemption. The Working Group requests that the CSA confirm that the Working Group has correctly interpreted the application of the General De Minimis Exemption and the Commodity De Minimis Exemption in the example above.

B. The Definition of "Eligible Derivatives Party" Should Be Broadened so That It Is Consistent with Existing Derivatives Regulations

As the CSA is aware, the Proposed Instrument imposes different regulatory requirements on market participants based on the types of counterparties with whom they transact. It does so by importing a concept from the 2017 Proposed Business Conduct Instrument, which separates the derivatives market into two main groups – (i) market participants who are sophisticated or have adequate financial resources (*i.e.*, eligible derivatives parties ("**EDPs**") and (ii) market participants who are less sophisticated or lack adequate financial resources (*i.e.*, non-eligible derivatives parties ("**Non-EDPs**")) – under the theory that the latter group requires extra customer protections.

The Proposed Instrument imports the EDP concept in the context of (i) its registration requirements, which, among other things, are triggered by certain interactions with Non-EDPs; and (ii) certain registration exemptions, which are not available if a derivatives firm deals with or advises a Non-EDP.[10] Accordingly, the scope of the definition of EDP is an integral part of the regulatory regime contemplated in the Proposed Instrument and the Proposed Business Conduct Instrument. As such, the Working Group appreciates that the CSA revised the EDP definition in the Proposed Instrument based on comments submitted on the EDP definition in the 2017 Proposed Business Conduct Instrument. The EDP definition in the Proposed Instrument is an improvement as it considers a separate threshold for commercial hedgers and the ability to rely upon a guarantee from certain affiliated EDPs. However, the proposed EDP definition still presents several issues, as further discussed below.

The primary issue with the current proposed definition of EDP is that the asset thresholds for certain types of entities remain too high. The Working Group understands that the general $25 million net asset threshold for companies[11] is based on the "permitted client" definition in National Instrument 31-103 and that the proposed $10 million net asset threshold

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[10] *See* CSA Notice at 5.

[11] *See* Proposed NI 93-102 at Section 1(1) (EDP definition ¶(m)).

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for commercial hedgers[12] reflects an important difference between securities markets and derivatives markets, which are widely used to hedge commercial risk, while securities markets are not.[13]

However, the $10 million commercial hedger threshold, while an improvement, is still too high. There are material benefits to providing an EDP threshold lower than $10 million in net assets for commercial hedgers. At a conceptual level, a lower threshold will encourage risk management through the use of derivatives, which is desirable. A lower threshold may also ensure that smaller commercial market participants continue to have access to a liquid and competitive market as they have more available counterparties who are able to rely upon the exemptive relief in the Proposed Instrument that is available to market participants that transact only with EDPs. As the Working Group has previously highlighted, in the United States, imposing registration obligations on market participants that engage in limited dealing activity with certain types of entities may not protect such entities and may, in fact, harm them by limiting the number of available counterparties and reducing market liquidity.[14]

Commercial hedgers with less than $10 million in net assets generally do not need retail-level customer protections. The policy rationale underlying the decision to provide commercial hedgers a $10 million rather than $25 million net asset threshold is based on the degree of sophistication that smaller market participants have with respect to the risks faced in their day-to-day business. That policy rationale also underlies regulatory paradigms similar to the EDP paradigm that apply a lower (*e.g.,* less than $10 million*)* or no threshold to commercial hedgers. For example, various provinces' existing blanket orders (collectively, the "**Exemption Blanket Orders**"),[15] among other things, effectively exempt market participants from the obligation to register as a derivative dealer if they limit their derivatives counterparties to "qualified parties," and Section 7 of the Québec Derivatives Act takes a similar approach by excluding transactions between "accredited counterparties"[16] from consideration when determining whether an entity must register as a derivatives dealer. Both the various definitions of "qualified party" and the definition of "accredited counterparty" allow commercial hedgers to qualify as such without satisfying an asset threshold of any kind. Further, in the United States, the Commodity Exchange Act ("**CEA**") allows commercial hedgers to qualify as "eligible contract participants" (allowing them to enter into swaps) with

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12 *See* Proposed NI 93-102 at Section 1(1) (EDP definition ¶(n)).

13 *See* CSA Notice at 5-6.

14 *See* The Canadian Commercial Energy Working Group White Paper (Attached to the Comment Letter on the 2017 Proposed Business Conduct Instrument) at (Aug. 15, 2017), https://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20170815_93-101_canadian-commercial-energy.pdf (discussing issues related to "special entities").

15 *See* Alberta Securities Commission Blanket Order 91-507 *Over-the-Counter Derivatives* (Jan. 23, 2017), http://www.albertasecurities.com/Regulatory%20Instruments/5330057%20_%2091-507_OTC_Trades_in_Derivatives.pdf; British Columbia Securities Commission Blanket Order 91-501 *Over-the-Counter Derivatives* (Nov. 24, 1999), https://www.bcsc.bc.ca/Securities_Law/Policies/Policy9/PDF/91-501__BCI_/; Manitoba Securities Commission Blanket Order 91-501 *Over-the-Counter Trades in Derivatives* (Oct. 26, 2015) https://docs.mbsecurities.ca/msc/notices/en/120617/1/document.do; Financial and Consumer Services Commission (New Brunswick) Local Rule 91-501 *Derivatives* (consolidated up to Jan. 11, 2015), http://www.nbsc-cvmnb.ca/nbsc/uploaded_topic_files/91-501-LR-CONS-2015-01-11-E.pdf; Nova Scotia Securities Commission Blanket Order 91-501 *Over the Counter Trades in Derivatives* (Feb. 17, 2016), https://nssc.novascotia.ca/sites/default/files/docs/Blanket%20Order%2091-501%20Feb%2017%202016%20OTC%20Derivaties.pdf.

16 *See* Québec Derivatives Act at Section 3 (defining "accredited counterparty"), https://www.canlii.org/en/qc/laws/stat/cqlr-c-i-14.01/latest/cqlr-c-i-14.01.html#sec3_smooth.

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only $1 million in net worth.[17] In each of these circumstances, regulators appear to have weighed the benefits and risks associated with treating smaller commercial hedgers in a manner similar to or the same as other sophisticated, but larger, market participants and determined that low or no "qualifying thresholds" are justified. The Working Group respectfully urges the CSA to follow that reasoning and lower the commercial hedger EDP threshold[18] to $1 million in net assets.

To the extent the CSA decides to retain the proposed $25 million general and $10 million commercial hedger EDP thresholds, the Working Group suggests for the CSA to make those thresholds based on total assets rather than net assets. If the intent of the asset thresholds is to serve as a proxy for the size and degree of sophistication of market participants, then total assets is a better metric. Total assets is a measure of the "size" of a business, while net assets is effectively a proxy for shareholders' equity. In fact, with respect to the general asset thresholds for entities in the definitions of "qualified party" and "eligible contract participant," the focus is on total assets rather than net assets, and the CSA should do the same in the Proposed Instrument.[19]

C. The Approach to the Calculation of Notional Amount Should Be Revised

i. Overview

The Working Group appreciates the CSA including two forms of potential guidance on the calculation of notional amount in the Proposed Instrument.[20] For commodity derivatives market participants, the approach to the calculation of notional amount is key to evaluating the usefulness of the two de minimis thresholds in the Proposed Instrument as well as the utility of existing regulatory exemptive relief.[21]

As the Working Group has noted to the CSA previously, market participants often think of the notional amount of commodity derivatives in terms of the volume of the underlying commodity, not in a dollar amount.[22] This is different than how the notional amount of other

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[17] *See* CEA Section 1a(18).

[18] *See* Proposed NI 93-102 at Section 1(1) (EDP definition ¶(n)).

[19] *See* Alberta Securities Commission Blanket Order 91-507 *Over-the-Counter Derivatives* (Jan. 23, 2017); British Columbia Securities Commission Blanket Order 91-501 *Over-the-Counter Derivatives* (Nov. 24, 1999); Manitoba Securities Commission Blanket Order 91-501 *Over-the-Counter Trades in Derivatives* (Oct. 26, 2015); Financial and Consumer Services Commission (New Brunswick) Local Rule 91-501 *Derivatives* (consolidated up to Jan. 11, 2015); Nova Scotia Securities Commission Blanket Order 91-501 *Over the Counter Trades in Derivatives* (Feb. 17, 2016); Financial and Consumer Affairs Authority of Saskatchewan General Order 91-908 *Over-the-Counter Derivatives* (Feb. 29, 2016).

[20] *See* CSA Notice at Annex I (CSA Notice at 24-25).

[21] For example, each Canadian jurisdiction's derivatives reporting rule provides a limited exclusion from the reporting requirements if the transaction relates to a derivative the asset class of which is a commodity other than cash or currency and certain conditions are met, including aspects related to the calculation of notional amount. *See, e.g.*, Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* (the "**MI Reporting Instrument**") at Section 40. In addition, the calculation of notional amount is relevant for purposes of determining whether transactions with certain counterparties are subject to the mandatory central clearing requirement. *See* National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* at Section 3(1)(c).

[22] *See* The Canadian Commercial Energy Working Group Comments on CPMI-IOSCO Batch Three Report at 16 (Sept. 2017), https://www.bis.org/cpmi/publ/comments/d160/tccewg.pdf (noting that "[c]ommodity derivative market participants typically do not measure their derivatives activity in terms of notional amounts denominated in an amount of a particular currency. Notional amount, if measured

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derivatives is determined, such as interest rate derivatives which is a dollar amount set in the terms of the contract. The difficulty with commodity derivatives is determining how to convert that volume-based notional amount to a dollar amount-based notional amount.

Of the two proposed approaches to the calculation of notional, the approach based on the CPMI-IOSCO Batch Three Report ("**CPMI-IOSCO Methodology**")[23] largely does not reflect market participants' understanding of the notional amount of commodity derivatives. The Regulatory Notional Methodology does a better job of reflecting market participants' understanding of the notional amount of commodity derivatives, but still requires a few changes.

ii. Comparison of the CPMI-IOSCO Methodology and the Regulatory Notional Methodology

As the Working Group stated in response to the request for comments on the CPMI-IOSCO Methodology, that methodology does not properly reflect the common practice in commodity derivatives markets with respect to the calculation of notional amount.[24] The CPMI-IOSCO Methodology is one small part of a larger effort to standardized derivatives reporting across jurisdictions. The CSA should not feel bound to adopt the CPMI-IOSCO Methodology for the purposes of Canada's domestic regulatory requirements such as the General De Minimis Exemption and the Commodity De Minimis Exemption. Doing so would be consistent with the approach taken by the CFTC, which stated that the CPMI-IOSCO Methodology "does not necessarily address how notional amounts should be calculated for purposes of the de minimis exception under CFTC regulations."[25]

The Regulatory Notional Methodology is more workable than the CPMI-IOSCO Methodology and, in some circumstances, properly reflects the market's view. For example, under the CPMI-IOSCO Methodology, the notional amount of an option would be calculated by multiplying the volume underlying the option and the strike price of the option. That approach does not account for the likelihood of the option being struck and can grossly overstate the notional amount of the option. Under the Regulatory Notional Methodology, the notional amount would be the delta adjusted spot price of the commodity underlying the option multiplied by the notional volume of the option. By using delta,[26] this approach does account for the likelihood of the option being struck. Further, the Regulatory Notional Methodology's use of a monthly equivalent amount for the volume in the Regulatory Notional Methodology is a meaningful step in making the notional amount of commodity derivatives comparable to that of other asset classes and is consistent with market participants' approach to the issue.

The one part of the Regulatory Notional Methodology that is not consistent with common market practice is with respect to its treatment of float-for-float swaps. Specifically,

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at all, is thought of in terms of the measure of the underlying volume of the relevant commodity (*i.e.*, barrels for crude oil)).

[23] *See* CPMI-IOSCO Consultative Report, Harmonisation of Critical OTC Derivatives Data Elements (Other Than UTI and UPI) – Third Batch (June 2017) ("**CPMI-IOSCO Batch Three Report**"), https://www.bis.org/cpmi/publ/d160.pdf.

[24] *See* The Canadian Commercial Energy Working Group Comments on CPMI-IOSCO Batch Three Report at 16.

[25] CFTC De Minimis Exception Proposal at 27,464.

[26] It is unclear what would be acceptable sources for the deltas used to calculate the notional amount of options. Market participants should be able to use: (i) deltas published by exchanges, when available; or (ii) their own deltas calculated using reasonable assumptions, when no exchange delta is available.

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the Regulatory Notional Methodology would multiply the higher of the two floating prices by the relevant volume. However, market participants view the price of a float-for-float transaction as the difference between the two floating prices since this type of swap is entered into to gain exposure to the relationship between the two prices (*e.g.,* the price difference between natural gas at two locations or the price difference between crude oil and gasoline). As such, the Working Group requests for the CSA to adopt the Regulatory Notional Methodology modified to use the difference between the two floating prices as the price when calculating the notional amount of float-for-float swaps.

In the Proposed Instrument, the CSA requests comment on the "most appropriate approach to determining notional amount for a multi-leg derivative."[27] Structured multi-leg transactions should be viewed as one transaction if they are assembled to create one net exposure by combining different instruments executed in conjunction with one another. For example, a natural gas producer might buy a put option at $2.50 and sell a call option at $3.50. Those two transactions are inextricably linked. The premiums paid for the downside protection of the put option would be offset by the premiums generated by limiting the producer's upside by selling the call option and the producer would have a limited band in which the price of its natural gas could move. As such, the Working Group recommends treating collars and similar transactions as having a single notional amount – not a notional amount for each leg. This is also consistent with the CFTC's stated approach for the calculation of notional amount.[28]

In addition, the CSA states:

> If the Regulatory Notional Methodology is adopted, we expect that we would implement a notional amount threshold in section 51 that is smaller than the proposed $1 billion threshold. Based on our analysis of trade reporting data, we anticipate that the threshold in [S]ection 51 would be in the range of $250 million to $500 million but note that this threshold may be significantly lower following further analysis.[29]

However, the Working Group believes that until the CSA has clear data on the various levels of derivatives dealing activity in the various markets, $1 billion is an appropriate threshold under the Regulatory Notional Methodology, if that methodology and the scope of the Commodity De Minimis Exemption are amended as proposed herein. Only once the CSA has a clear picture on how any final derivatives dealer registration rule might impact the Canadian commodity derivatives markets should the CSA consider dropping the Commodity De Minimis Exemption threshold below $1 billion.

D. The Relationship Between the Proposed Instrument and Other Regulatory Instruments Should Be Clarified

As set out in the Proposed Instrument, the so-called "business trigger" is used to determine whether an entity must register as a derivatives dealer, unless an exemption applies. However, the relationship between the registration requirement in the Proposed Instrument and other regulatory instruments, such as the MI Reporting Instrument and the Proposed Business Conduct Instrument, is unclear. In particular, both the MI Reporting Instrument and the Proposed Business Conduct Instrument do not rely on the registration status of an entity for purposes of the requirements in those instruments – they rely on the

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27 *See* CSA Notice at 19.

28 *See* CFTC Frequently Asked Questions, Division of Swap Dealer and Intermediary Oversight Responds to FAQs About Swap Entities (Oct. 12, 2012), https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/swapentities_faq_final.pdf.

29 *See* CSA Notice at 7.

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business trigger analysis. Further, the MI Reporting Instrument and the Proposed Business Conduct Instrument provide different exemptions than the Proposed Instrument.

This construct could result in an entity that would be exempt from registration under the Proposed Instrument being subjected to requirements imposed on derivatives dealers under other instruments. For example, an entity might be exempt from registration under the Commodity De Minimis Exemption, but required to report as a derivatives dealer, and might not qualify for any exemptive relief available in the Proposed Business Conduct Instrument. This is an incongruous result. To avoid this outcome, the Working Group strongly suggests that the CSA amend existing derivatives regulations and revise the Proposed Business Conduct Instrument to define a derivatives dealer as an entity that is either (i) registered as such in a Canadian jurisdiction or (ii) exempt from registration under Section 52 of the Proposed Instrument.

E. An Alternative Path for Derivatives Chief Compliance Officer and Derivatives Chief Risk Officer Qualification Is Needed

The Working Group understands the CSA's motivation in proposing qualification requirements for Derivatives Chief Compliance Officers ("**CCOs**") and Derivatives Chief Risk Officers ("**CROs**"). Having experienced and qualified personnel in risk and compliance positions with important market participants should be beneficial to the market generally. However, there may not be many candidates that meet the strict requirements set out in the Proposed Instrument. As such, the Working Group suggests that the CSA amend the Proposed Instrument to allow individuals that pass the required competency exam to petition the relevant regulator to qualify for a position as a CCO or CRO if they do not meet the other requirements set out in the Proposed Instrument.

F. The Foreign Dealer Exemption Will Support Liquidity in Canadian Markets

As the CSA is aware, the Proposed Instrument contemplates an exemption from the requirement to register as a derivatives dealer for a company with its head office or principal place of business in a foreign jurisdiction that has equivalent regulatory requirements, subject to certain conditions (the "**Foreign Derivatives Dealer Exemption**").[30] Among other things, an entity utilizing the Foreign Derivatives Dealer Exemption must be registered in the relevant foreign jurisdiction to conduct the derivatives activities in that foreign jurisdiction it proposes to conduct with Canadian counterparties and the entity must be subject to and comply with relevant regulatory requirements in the foreign jurisdiction.[31]

The Working Group believes that this exemption strikes the proper balance between ensuring that foreign dealers are subject to an appropriate level of regulation while allowing access to Canadian derivatives markets with minimal additional regulatory burden. This exemption will allow foreign dealers to provide Canadian market participants with valuable liquidity.

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30 *See* Proposed NI 93-102 at Section 52.

31 *See* Proposed NI 93-102 at Section 52.

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III. CONCLUSION

The Working Group appreciates this opportunity to provide input on the Proposed Instrument and respectfully requests that the comments set forth herein are considered.

If you have any questions, please contact the undersigned.

Respectfully submitted,
/s/ Alexander S. Holtan
Alexander S. Holtan
Blair Paige Scott

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September 11, 2018

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Authorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
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Nunavut Securities Commission
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
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Dear Sirs/Mesdames:

RE: Comments on Proposed National Instruments 93-101 *Derivatives: Business Conduct* and its proposed companion policy (the "Proposed Business Conduct Instrument"), and 93-102 *Derivatives: Registration* and its proposed companion policy (the "Proposed Registration Instrument", and collectively with the Proposed Business Conduct Instrument, the "Proposed Instruments")

Capital Power Corporation, together with its affiliates and subsidiaries (collectively, "**Capital Power**"), makes this submission in response to the Canadian Securities Administrators' April 19, 2018 request for comments on the Proposed Registration Instrument and June 14, 2018 second request for comments on the Proposed Business Conduct Instrument. Capital Power appreciates the opportunity to comment on

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and commends the Canadian Securities Administrators ("**CSA**") not only for seeking public input on the Proposed Instruments but also for aligning the comment periods for the Proposed Instruments. Capital Power believes that the subject matter of the Proposed Instruments is so closely inter-related and inter-dependent that it is logical to develop them and move them forward together.

Capital Power is a growth-oriented North America power producer headquartered in Edmonton, Alberta. Capital Power develops, acquires, operates and optimizes power generation from a variety of energy sources, including coal, natural gas, biomass, solar and wind. Capital Power owns approximately 4500 megawatts of power generation capacity across 24 facilities in Canada and the United States and pursues contracted generation capacity throughout North America.

Capital Power hedges and optimizes its commodity portfolio using physical forward contracts for electricity, natural gas, environmental commodities (e.g. renewable energy certificates, carbon offsets and carbon credits), USD/CDN currency exchange, and financial derivative transactions based on those same commodities. Capital Power's trading counterparties include other power producers, utility companies, banks, hedge funds and other energy industry market participants. Trading activities take place primarily through electronic exchanges, such as ICE (Intercontinental Exchange) and NGX (Natural Gas Exchange), but also through third-party brokered transactions and directly with counterparties. Capital Power is a registered "market participant" in the Alberta wholesale electricity market constituted as the Alberta "Power Pool" under the *Electric Utilities Act* of Alberta (the "**EUA**") and is also a licensed "retailer" (as defined in the EUA) of electricity services to large commercial and industrial customers in the Alberta retail electricity market.

Capital Power generally supports the efforts of the CSA to establish a regulatory regime for the Canadian over-the-counter ("**OTC**") derivatives market, in order to address Canada's G-20 commitments. To that end, Capital Power respectfully urges the CSA to develop regulations that strike a balance between not unduly burdening derivatives market participants while at the same time addressing the need to introduce effective regulatory oversight of derivatives and derivatives market activities.

Capital Power is a member of the International Energy Credit Association ("**IECA**") and participated in drafting the IECA's comment letter to the Proposed Instruments. As such, Capital Power supports and recommends all of the IECA's comments with respect to the Proposed Instruments.

Capital Power is also aware of the comments submitted by Eversheds Sutherland (US) LLP, on behalf of The Canadian Commercial Energy Working Group, in a letter dated August 2, 2018 (the "**Sutherland Letter**"). Although Capital Power is not associated with The Canadian Commercial Energy Working Group, Capital Power supports the comments in the Sutherland Letter and respectfully urges the CSA to adopt the proposed revisions to the Proposed Registration Instrument set forth in the Sutherland Letter.

COMMENTS:

In addition to supporting the comments in the IECA's letter and the Sutherland Letter, Capital Power has the following specific and general comments regarding the Proposed Instruments:

Specific Comments:

1. Definition of "affiliated entity" (CSA Question 2 in Proprosed Registration Instrument).

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In the Proposed Registration Instrument the CSA has defined “affiliated entity” on the basis of “control” and has set out certain tests for control. Additionally, the CSA has proposed an alternative definition of “affiliated entity”, in Annex II of the Proposed Registration Instrument, based on the accounting concept of “consolidation”. The CSA has asked for comments with respect to these two proposed definitions and Capital Power offers the comments below.

Capital Power believes that the definition of “affiliated entity” based on “control” is the preferable definition not only for both Proposed Instruments but also across all present and future instruments that the CSA may implement with respect to derivatives regulation. We prefer a control based definition of affiliation 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.

Capital Power believes that clarity and consistency among statutes, regulations and regulatory instruments, such as the Proposed Instruments, fosters compliance because it lessens the complexity and therefore the business costs and efforts required for compliance. For these reasons, Capital Power submits that the Proposed Instruments should be as consistent with other existing legal concepts as much as possible, unless deviation is warranted and justified for specific purposes. Capital Power does not believe that such deviation is warranted or justified within the Proposed Instruments for the “affiliated entity” definition, given that the legal concept of affiliation is already well and consistently established under Canadian business corporations’ law.

General Comments:

1. Transition/implementation periods and effective dates for the Proposed Instruments.

Capital Power notes that the proposed transition/implementation period in Section 12 and the proposed effective date in Section 13 of the Proposed Registration Instrument are currently blank. Also, the italicized language in Section 45(1) of the Proposed Business Conduct Instrument suggests that it will become effective one year after the date of final publication. Capital Power supports the principle that each Proposed Instrument should have at least a one year implementation period, after date of final publication, before becoming effective.

Capital Power believes that a transition/implementation period of at least one year is reasonable and necessary given the complex and heavy compliance burden that will be placed on derivatives market participants who may be deemed to be derivatives dealers and therefore subject to both Proposed Instruments. Unless market participants are already registered as securities and/or swap dealers (or similar designations) under other Canadian or foreign laws, the compliance efforts required under the Proposed Instruments will be entirely new to most derivatives market participants.

Capital Power submits that most North American energy commodity derivatives market participants are not already registered dealers of any sort. Accordingly, any such market participants that become required to register as a result of the Proposed Instruments will not already have the required technological and human resources, and internal and external business processes, in place to comply with the Proposed Instruments. Putting those resources and process in place will take considerable time, effort and capital. Capital Power believes that a one-year transition/implementation period for the Proposed Instruments will allow newly deemed dealers the time necessary to ensure that they can be compliant with the Proposed Instruments.

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2. Scaling-back dealing activity and avoiding registration.

According to the CSA's guidance, in the companion policies to both Proposed Instruments, a party should determine whether or not it is a derivatives dealer based on a "holistic analysis" considering, among other things, a list of "factors in determining a business purpose" (i.e. the "registration or business triggers"), discussed at length at pgs. 92-96 of the Proposed Registration Instrument companion policy and pgs. 100-103 of the Proposed Business Conduct Instrument companion policy. Both the IECA's comment letter and the Sutherland Letter address various aspects of the registration or business triggers and the need for further clarification concerning them.

In addition to supporting the call for further clarification, Capital Power submits that if an entity has conducted a holistic analysis of its derivatives-related activities and concluded that it is a derivatives dealer under the Proposed Instruments, and the level of its dealing activities exceeds any applicable de minimis threshold, such entity should not have to register as a dealer unless it materially (e.g. more than 20% over) exceeds the threshold for at least 3 consecutive months. Additionally, if the conditions in the preceding sentence are met, such entity should have the option of either: (i) having to register as a dealer within some reasonable time period (no earlier than 2 months) after having materially exceeded the threshold for such 3 month period; or (ii) scaling back its dealing activity such that it no longer materially exceeds the threshold in the following 3 consecutive month period.

Capital Power believes that this flexible approach to either requiring registration, or allowing dealers to reduce their dealing activities, would promote the regulatory goals of increased derivatives market oversight, risk mitigation, and robust investor protection, while at the same time avoid placing significant compliance burdens on market participants who may inadvertently exceed the de minimis dealing thresholds for limited periods of time and/or to an immaterial extent.

Conclusion:

Capital Power respectfully requests that the CSA consider its comments and again expresses its gratitude for the opportunity to provide comments. If you have any questions please contact Mr. Zoltan Nagy-Kovacs, Senior Counsel, at 403-717-4622 (znagy-kovacs@capitalpower.com).

Yours Truly,

"***CAPITAL POWER***"

Per: *"Zoltan Nagy-Kovacs"*

Zoltan Nagy-Kovacs
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September 12, 2018

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Dear Sirs/Mesdames:

The Canadian Bankers Association (**CBA**)[1] appreciates the opportunity to comment on the Canadian Securities Administrators' (**CSA**) Proposed National Instrument 93-102 *Derivatives: Registration*, which sets out a proposal for the regulation of key derivatives market participants through the implementation of a registration regime (the **Proposed Rule**).

The CBA strongly urges the CSA to exclude Canadian banks from the Proposed Rule, such that Canadian banks and their counterparties would not need to satisfy the conditions in, or be subject to the obligations under, the Proposed Rule. This exclusion would mitigate considerable negative implications for liquidity in Canadian over-the-counter (**OTC**) derivatives markets and preserve the ability of the Office of the Superintendent of Financial Institutions (**OSFI**) and other key policy-makers and regulators to oversee and manage prudential and systemic risks posed by banks' OTC derivatives activities. This exclusion is consistent with principles adopted by the International Organization of Securities Commissions (**IOSCO**) to encourage mutual recognition and cooperation among regulators. Further, this exclusion would align with Ontario's current approach to the Proposed Rule, thereby ensuring a measured, consistent and national approach to the regulation of the OTC derivatives market in Canada. Finally, as banks are already subject to comprehensive regulatory oversight with respect to each requirement under the Proposed Rule, this exclusion would not result in any gap in regulating banks' OTC derivatives activities.

<u>Negative Implications for Liquidity in Canadian Markets and End Users</u>

The OTC derivatives market plays a critical role in the financial services system and, more broadly, in economic growth across Canada. Small and large businesses, investment funds, and all levels of government and public sector entities require OTC derivatives to effectively manage risks in their operations. Pension funds also rely heavily on OTC derivatives to help meet their obligations to pensioners. OTC derivatives are also integral to the capacity of banks to hedge risk, perform treasury functions and carry out intermediary services, including supplying credit to businesses and individuals to support the economy.

While Canada represents only 4% of the global derivatives market, in excess of 80% of all trades with Canadian banks involve foreign counterparties, based on the notional amount. Put simply, Canadian markets require access to foreign dealers, but foreign dealers do not require access to Canadian markets. Bespoke requirements in the Proposed Rule and its broad territorial scope[2] will deter foreign dealers from participating in Canadian OTC derivatives markets. Even the most comprehensive substituted compliance regime would require foreign dealers to provide the CSA

[1] The CBA is the voice of more than 60 domestic and foreign banks that help drive Canada's economic growth and prosperity. The CBA advocates for public policies that contribute to a sound, thriving banking system to ensure Canadians can succeed in their financial goals. www.cba.ca.

[2] See the Canadian Market Infrastructure Committee (**CMIC**) letter, Schedule B. In addition to bespoke requirements, we note that as a result of the territorial scope of the Proposed Rule, a foreign bank that is dealing with a Canadian bank would be required to register and thereby be subject to these bespoke requirements in respect of all of its global trading. This expanded territorial scope will act as an additional deterrent to trading with Canadian banks.

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with unfettered access to their books and records, which will be a considerable incentive for them to exit the market. Costs and liquidity premiums will be borne by clients, negatively impacting their earnings and diminishing returns to investors and pensioners. This will ultimately have a negative effect on the Canadian economy.

Moreover, because derivatives dealer registration will be separately imposed and enforced by each province and territory, if a market participant has only a few trades in a particular Canadian province or territory, the cost and increased regulatory risks associated with doing business in that jurisdiction will increase exponentially, such that it may not make commercial sense to do business in that jurisdiction. The result could be a highly fragmented marketplace where the availability and pricing of OTC derivatives products varies from one area of Canada to another, to the overall detriment of end users and the economies of smaller provinces and territories.

Excluding Canadian banks and their counterparties would mitigate the effect of these negative implications and ensure continued access to liquidity in OTC derivatives markets across Canada.

Fragmented Prudential Oversight

We are concerned that the Proposed Rule will undermine the capacity of OSFI and other bank regulators to manage prudential and systemic risks posed by Canadian banks. This will impede financial stability and thereby undermine the goal of global OTC derivatives reforms.

OSFI's supervisory mandate is housed within a broader regulatory framework that includes the Financial Institutions Supervisory Committee (**FISC**) and the Senior Advisory Committee (**SAC**). These committees ensure a coordinated and comprehensive approach among all the authorities at the federal level with responsibility for banks (e.g. Department of Finance, OSFI, Bank of Canada, Financial Consumer Agency of Canada and the Canada Deposit Insurance Corporation (**CDIC**)) to monitor and effectively respond to any prudential or systemic risks that may arise, with a view to ensuring that bank risks are identified and contained, and to promoting market stability and confidence. As illustrated during the financial crisis, this level of coordination was a significant Canadian advantage that was lacking in other jurisdictions.

As currently proposed, the Proposed Rule would allow the independent application of enforcement tools available to each securities regulator, including public disclosure of material prudential information regarding a bank and suspension and revocation of the bank's registration (which we believe could shut down the bank's global OTC derivatives trading if applied by the regulator in the bank's head office or principal place of business). Unlike OSFI initiatives, these steps would occur outside the FISC and SAC frameworks, would be uncoordinated with other Canadian OTC derivatives regulators, and could be taken by a single provincial regulator without regard to prudential or systemic risk implications.

In particular, we highlight the fundamental conflict between the obligation in certain circumstances to publicly disclose information under the mandates of provincial securities commissions and the

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requirements under the federal framework with respect to the confidentiality of bank supervisory information. The *Bank Act* and the *Supervisory Information (Banks) Regulations* provide that information relating to OSFI's supervision of banks is confidential in OSFI's hands and prescribed supervisory information is non-disclosable by banks. It is an offence to be in non-compliance with these rules. This conflict is exemplified by the very limited substituted compliance framework available to Canadian banks. This framework is unworkable, not only because it does not fully represent existing comparable OSFI standards, but also because it would require banks to disclose information to provincial regulators with no exception for supervisory information. Indeed, the information that banks may be required to disclose to the CSA go far beyond OTC derivatives trading data and include such sensitive prudential items as bank capital, minutes of board meetings and bank strategic planning.

The above concerns would be exacerbated during a bank recovery or resolution scenario. Bank recovery and resolution strategies mandated by OSFI and the CDIC assume continued access to OTC derivatives markets. Banks rely on these markets to hedge their risks in other bank activities and to maintain a balanced trading book. In addition, banks have taken great care to plan for continued access to these markets, including financial market infrastructure access and stays of termination rights during resolution. During a period of financial stress, a bank may experience capital or other stress that triggers provincial enforcement under the registration rule. A partial or global suspension of OTC derivatives trading would impede the ability of a bank to stabilize and restore financial strength and viability and frustrate efforts to unwind portfolios in an orderly manner, thereby increasing the potential risk of spreading contagion to Canadian and global markets. The Proposed Rule could also undermine CDIC's role as the resolution authority for banks and necessitate changes to OSFI's *Guide to Intervention for Federally Regulated Deposit-Taking Institutions* to reflect the role of the CSA.

Excluding Canadian banks from the Proposed Rule would avoid these dangerous risks and preserve the ability of banks' regulatory authorities to ensure effective prudential supervision.

Restrictions on Trading with Individuals

The Proposed Rule requires registered dealers who trade OTC derivatives with individuals who are not eligible derivatives parties (**EDPs**) to be Investment Industry Regulatory Organization of Canada (**IIROC**) dealers. This would effectively prohibit banks from trading OTC derivatives with individuals who are not EDPs. While trades with individuals represent a very small portion of banks' OTC derivatives trades, these trades are significant to certain businesses. For example, Canadian banks transact OTC derivatives with private banking clients in foreign jurisdictions through foreign branches. One CBA member estimates that half of the individuals that trade with it through this division would likely not meet the EDP threshold. In addition to OSFI oversight, these transactions are subject to and comply with local laws, which include requirements that individuals meet minimum financial thresholds and suitability assessments. This restriction would require Canadian banks in this situation to trade through a bank subsidiary that is an IIROC dealer member, which may not otherwise plan to register under the rules given that OTC derivatives are

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primarily traded through parent banks. The IIROC member would then be required to become licensed under local laws in the foreign jurisdiction. This places Canadian banks at a serious competitive disadvantage relative to our global peers. Excluding Canadian banks from the Proposed Rule would avoid this situation and ensure that banks can continue to provide these services.

Comprehensive Oversight of Banks' OTC Derivatives Activities

The Proposed Rule duplicates OSFI's robust regulatory regime which addresses all risks arising from banks' OTC derivatives activities. This regime has been effective in its oversight and has not been challenged as deficient. Schedule A to the CMIC letter details the breadth and depth of the current federal regulatory framework, and demonstrates that existing requirements that apply to Canadian banks meet the same objectives as the Proposed Rule on an outcomes-based analysis. In addition, the data in Annex A to this letter on a bank's OTC derivatives portfolio shows that the bank's client base is overwhelmingly institutional. This data, which is broadly representative of those Canadian banks that are global derivatives market participants, alleviates any policy concerns that individuals are not being adequately protected in the OTC derivatives market. As a result, excluding banks from the application of the Proposed Rule would not result in any gap compared to other market participants.

Context and Benefits of a Harmonized Approach

Exclusion of the Canadian banks from the Proposed Rule is consistent with principles adopted by IOSCO, which expressly recognizes that, where a designated market intermediary is subject to equivalent requirements by its prudential regulator, it should not be subject to registration or licensing.[3] In Hong Kong, for example, we understand that the Hong Kong Securities and Futures Commission's proposed licensing regime for OTC derivatives will exempt firms prudentially regulated by the Hong Kong Monetary Authority. In the US, CFTC Chairman Giancarlo has advocated that the CFTC operate on the basis of comity, rather than uniformity, with regulators that oversee comparable regimes.[4] Our proposal is grounded in a similar approach.

In the Canadian context, our proposed exclusion also aligns with historical efforts to achieve similar goals in Canada, including through various accords and memoranda of understanding between the provinces and OSFI, and through the Securities Dealing Restrictions in the *Bank Act*. Moreover, we note that Ontario has proposed to broaden the application of Section 35.1 of the *Securities Act* (Ontario) to exclude federally regulated financial institutions from derivatives dealer and adviser registration requirements. If an exemption comparable to Section 35.1 could be adopted as part of the Proposed Rule, it would result in a harmonized approach to derivatives regulation in Canada. A key benefit of the harmonized approach is that it has proven to be a highly effective model and has resulted in rationalization of scarce regulatory resources. In effect, this approach takes into account the fact that an institution that is already subject to an appropriate

[3] *International Standards for Derivatives Market Intermediary Regulation,* Final Report of the Technical Committee of the International Organization of Securities Commissions, June 2012 at page 13.
[4] https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo52?utm_source=govdelivery

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level of regulatory oversight does not need to be subject to a duplicative second set of rules. As discussed in detail above, the application of a second set of rules gives rise to significant risks and complexities, without additional benefits. To our knowledge, the existing exemption approach has worked very well in Ontario for many years and would be a constructive model to replicate in the area of OTC derivatives regulation on a national basis.

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In closing, we reiterate our view that the Proposed Rule poses significant systemic and market risks for the Canadian OTC derivatives market, end users, and for the economy as a whole. To address these concerns, we are recommending a complete exclusion for Canadian banks. This exclusion would represent a harmonized approach to Canadian OTC derivatives regulation that is aligned with the current framework in Ontario. This approach would clarify regulatory responsibilities, minimize the risk of conflicts and complexities, avoid the costs and negative implications associated with imposing the rule, meet the public policy objectives of the CSA, and would result in a functional and consistent approach in this area.

In addition to these views, we endorse the submissions provided by CMIC and the International Swaps and Derivatives Association on the Proposed Rule and on Proposed National Instrument 93-101 *Derivatives: Business Conduct*. Thank you for considering our views on this important issue. Please do not hesitate to contact me with any questions you may have.

Sincerely,

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Annex A
OTC Derivatives Portfolio Data

As of May 31, 2018	**In Canada**		**Outside Canada**	
Counterparty Type	**# Trades**	**Notional in USD**	**# Trades**	**Notional in USD**
Banks	4.46%	6.22%	13.95%	5.07%
Sovereigns	1.42%	3.04%	3.05%	1.66%
Investment Funds	6.46%	2.22%	9.66%	3.15%
Insurers	0.88%	0.73%	2.32%	1.12%
Pension Funds	1.10%	0.75%	1.78%	0.62%
Other Financials	3.06%	1.15%	29.09%	65.01%
Large and Small Corporates	10.44%	2.10%	12.28%	7.11%
Individuals	0.04%	0.00%	0.02%	0.04%
Totals	27.85%	16.22%	72.15%	83.78%

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Via e-mail to: consultation-en-cours@lautorite.gc.ca
comments@osc.gov.on.ca

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

September 12, 2018

Dear Sirs/Mesdames:

Re: Proposed National Instrument 93-102 *Derivatives: Registration* ("NI 93-102") and Related Proposed Companion Policy (the "Companion Policy", and together with NI 93-102, the "Proposed Rules")

INTRODUCTION

The Canadian Market Infrastructure Committee ("**CMIC**") is pleased to provide this comment letter on the Proposed Rules.

CMIC was established in response to a request from Canadian public authorities,[1] to represent the consolidated views of certain Canadian market participants on proposed regulatory and legislative changes in relation to over-the-counter ("**OTC**") derivatives. CMIC brings a unique voice to the dialogue regarding the appropriate framework for regulating the Canadian OTC derivatives market. The membership of CMIC has been intentionally designed to present the views of both the 'buy' side and the 'sell' side of the Canadian OTC derivatives market, including, but not limited to, both domestic and foreign owned banks operating in Canada as well as major Canadian institutional market participants (including a number of major pension funds) in the Canadian derivatives market. This letter reflects the consensus of views within CMIC's membership about the proper Canadian regulatory and legislative regime applicable to the OTC derivatives market.

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[1] "Canadian public authorities" means representatives from Bank of Canada, Canadian Securities Administrators, Department of Finance and The Office of the Superintendent of Financial Institutions ("OSFI").

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Our comments in this letter should be read in conjunction with CMIC's comment letter (our "**Business Conduct Response Letter**") submitted concurrently with this letter in response to the second publication of Proposed National Instrument 93-101 *Derivatives: Business Conduct* and Proposed Companion Policy 93-101CP *Derivatives: Business Conduct* (the "**Proposed Business Conduct Rule**"). We refer the Canadian Securities Administrators ("**CSA**") to Schedule D of this letter for our responses to the specific questions posed by the CSA in the notice accompanying the Proposed Rules.

EXECUTIVE SUMMARY

The following is a summary of our primary recommendations:

1. Canadian federally regulated financial institutions ("**FRFIs**") and their counterparties should be excluded from the application of the Proposed Rules.

2. Foreign derivatives dealers, if transacting only with eligible derivatives parties ("**EDPs**"), should be exempted from the application of the Proposed Rules as long as such foreign derivatives dealers are registered, exempt from registration or otherwise permitted to carry on the business of dealing in derivatives in their home jurisdiction, regardless of the location of such home jurisdiction.

3. The EDP definition should be amended to

   (i) remove the financial threshold for commercial hedgers under paragraph (n);

   (ii) remove the knowledge and experience requirements under paragraphs (m), (n) and (o); and

   (ii) lower the financial threshold in paragraph (m) for a non-individual from <u>net</u> assets of $25 million to <u>total</u> assets of $10 million.

4. A number of important recommendations with respect to derivatives advisory services.

EXCLUSIONS

A derivatives registration regime that is as expansive and inclusive as the regime that is contemplated by the Proposed Rules is not appropriate for the Canadian market. The OTC derivatives market is a global market[2] with Canada representing only approximately 4% of that global market[3]. CMIC supports the following view of ISDA, one of the largest international financial markets industry associations, in its public comment letter[4] on Consultation Paper 94-107 *Derivatives: Registration*:

> As noted in our January 2011 Comment Letter, we urge the Committee to consider the global nature of the markets when creating regulations for OTC derivatives to ensure that such

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[2] In other words, a large majority of transactions entered into by Canadian market participants will be with a non-Canadian counterparty.

[3] Total notional amount of global OTC derivatives contracts at the end of June 2016 was USD 544 trillion. See "Statistical release OTC derivatives statistics at end-June 2016", Bank for International Settlements, November 2016 at pg. 11, available here, converted to CAD 701.76 trillion using the June 30, 2016 exchange rate of 1.29 found here. The Canadian OTC derivatives market is estimated at CAD 30 trillion for Q2 2016. See "Toward More Resilient Markets: Over-the-Counter Derivatives Reform in Canada", Bank of Canada Financial System Review, December 2016 at page 54, available here.

[4] Letter dated June 17, 2013 from Katherine Darras, General Counsel, Americas, International Swaps and Derivatives Association, Inc. ("**ISDA**"), page 4. Available here.

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> regulations do not restrict the ability of Canada market participants to continue participating in, and remaining competitive in, the global OTC derivatives market. To this end, ISDA cautions regulators against adopting duplicative, overlapping or incremental requirements and/or infrastructure where sufficient alternatives exist. For example, regulators should consider whether it is appropriate to establish a Canadian registration requirement when there is no requirement to register under the European Market Infrastructure Regulation ("EMIR")[5] and registration is not a G20 obligation. Moreover, regulators should bear in mind the more limited number and types of counterparties participating in the Canadian market, as well as products traded, when compared to other foreign markets. The only other country with an OTC registration requirement comparable to [the] Committee's proposal is the United States, which is a market of a size, diversity and liquidity that does not compare to that of the Canadian market. Furthermore, the United States' OTC derivatives registration regime includes a number of exemptions and thresholds that have not been incorporated, in whole or in part, in the Committee's proposal. We further note that other jurisdictions of comparable size and participating counterparty types, such as Australia, have not imposed local registration requirements for the OTC derivatives market. In addition, none of the Asian jurisdictions have adopted derivatives registration regimes similar to, or as fulsome as, the Committee's proposal.
>
> Many Canadian counterparties have, therefore, expressed concerns that a registration regime may make participation in the Canadian market too burdensome or expensive in particular for foreign derivatives dealers, with the result that Canadian market participants may face a dwindling number of counterparties willing to transact in Canada. [Emphasis added.]

Any registration regime for Canada needs to take into account the global nature of the OTC derivatives market and preserve liquidity and access while protecting smaller market participants. Otherwise, the registration regime, as currently drafted, will disrupt the OTC derivatives market in Canada and will create systemic and economic risk instead of reducing it. CMIC urges that the following approach be adopted: (1) exclude Canadian financial institutions that are prudentially regulated by the Office of the Superintendent of Financial Institutions ("**OSFI**") from the application of the Proposed Rules, and (2) exclude all foreign dealers and advisers from any jurisdiction from the Proposed Rules subject to the conditions set out below.

Canadian Financial Institutions

CMIC strongly urges the CSA to exclude FRFIs from the application of the Proposed Rules, without needing to satisfy any conditions, other than to be prudentially regulated by OSFI. For clarity, this exclusion means that FRFIs would not have any obligations under the Proposed Rules nor would any of the obligations under the Proposed Rules apply to derivatives dealer counterparties of a FRFI including, without limitation, the requirement to provide access to a FRFI's books and records. This exclusion (i) is appropriate and supported by IOSCO principles, (ii) is consistent with investor protection goals, (iii) is necessary for ongoing effective prudential regulation and (iv) is necessary to ensure the stability and proper functioning of provincial and national economies, and the Canadian OTC derivatives market as a whole. These four aspects are discussed in greater detail below. In addition, following this discussion, we describe a particular issue with respect to FRFIs and the

[5] Since the date of the ISDA letter, other jurisdictions, including Europe and Hong Kong, have implemented a registration or licensing regime, however, with the exception of the U.S., they are all general regimes that capture a range of financial activities and are not specific to OTC derivatives products. *Review of Implementation Progress in Regulation of Derivative Market Intermediaries,* Report of the Board of the International Organization of Securities Commissions. July 2015, page 13-16, available here.

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proposed requirement to provide prescribed supervisory information to provincial securities regulators.

(i) Exclusion is appropriate and consistent with IOSCO principles

The IOSCO DMI Report expressly recognizes that, where a designated market intermediary is subject to equivalent requirements by its prudential regulator, it should not be subject to registration or licensing.[6] IOSCO has asserted that the regulation of derivatives market intermediaries "should be primarily focused on areas where capital, counterparty or client money and public confidence may be most at risk."[7] These three objectives are already addressed by existing regulation of FRFIs. Any risk associated with OTC derivatives transactions by FRFIs is addressed by OSFI's capital guidelines; and any concerns relating to counterparty or client money delivered to a FRFI are addressed under OSFI Guideline E-22 Margin Requirements for Non-Centrally Cleared Derivatives and the CSA rules under National Instrument 94-102: *Derivatives: Customer Clearing and Protection of Customer Collateral and Positions.* We further note that OSFI prudentially supervises the business of a FRFI, including its foreign branch activity. Finally, with existing OSFI guidelines, there has been no loss of public confidence with respect to a FRFI, nor an inability of OSFI to enforce the proper conduct, in the Canadian OTC derivatives market. The existing framework is appropriate to ensure that public confidence is maintained in the future. Even beyond these three areas of primary focus, OSFI's standards are consistent with IOSCO standards and recommendations that support the CSA's objectives in the Proposed Rules.

(ii) Investor protection goals satisfied

Existing OSFI guidelines and legislation provide a comprehensive compliance and protection regime for counterparties facing FRFIs in OTC derivatives transactions. We refer you to Schedule A to this letter which indicates how, on an outcomes basis, the existing regulatory regime for FRFIs achieves the same objectives as the Proposed Rules. We have also considered the issue of whether OSFI's statutory powers include the ability to penalize individuals for failure to comply with OSFI requirements. It is clear that OSFI does have such powers. This insight places prudential regulation on a similar enforcement footing with CSA rules, further supporting our conclusion that compliance by a FRFI subject to OSFI guidelines is equivalent to compliance by a FRFI with the applicable Proposed Rules. Accordingly, the CSA's investor protection goals are not compromised if FRFIs are excluded from the scope of the Proposed Rules. We further note that the CFTC determined that OSFI's standards are generally identical in intent to certain similar CFTC requirements and, on that basis, determined that they were comparable to and as comprehensive as those CFTC requirements. This further demonstrates that OSFI's comprehensive and robust framework, which has not been challenged as deficient, is sufficient and effective. It would be perverse if a foreign regulator, such as the CFTC, accepts OSFI standards as sufficient, but provincial regulators did not.

(iii) Exclusion is necessary for effective prudential regulation

The current formulation of the Proposed Rules will impede the mandate of prudential authorities, whether they be provincial or federal, by providing a securities regulator in one province with authority to make decisions that could have a profound impact on the economy in another province. The

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[6] *International Standards for Derivatives Market Intermediary Regulation,* Final Report of the Technical Committee of the International Organization of Securities Commissions ("**IOSCO**"). June 2012 at page 13, available here (the "**IOSCO DMI Report**"), page 13.
[7] *Ibid,* page 1.

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concern is that securities regulators do not have a mandate to consider those decisions from a micro prudential or systemic perspective. For example, if an institution that is important to the Quebec economy were not in full compliance with securities laws, a securities regulator such as the Alberta or British Columbia Securities Commission would not have the mandate to consider the broader impact of its enforcement action on the Quebec economy. If a regulator suspends the institution's registration in those provinces or notifies the public of enforcement action[8], this could precipitate a crisis of confidence in that important Quebec institution by publicizing issues that OSFI or the AMF, as prudential regulators, may be attempting to resolve privately in order to retain confidence and achieve recovery of the institution. Such action would also have knock-on contractual effects. For example, section 5(d) of LCH Limited's ("**LCH**") default rules provides that suspension of registration (even one that is not material to the institution) is a default trigger.[9] If an institution does not have access to LCH, this will certainly derail resolution plans. In addition, suspension of registration could be an event of default under that institution's ISDA master agreements. This will make it more difficult, if not impossible, for the institution to hedge its banking book and continue to provide banking services. The institution would not even be able to hedge as an end user wherever the suspension has effect because the end-user exemption is not available to registered dealers. The crucial point is that efforts by prudential regulators to bring about a recovery of the institution or to engage in an orderly wind-down are placed at risk under current formulation of the Proposed Rules. While passporting will make this regime more efficient, it will not solve this fundamental problem because each province (being sovereign) will always retain an opt-out right from a passporting regime and could then take independent enforcement action. While what is outlined above is a worse-case scenario, FRFIs engage in extensive efforts to preclude it from happening by engaging in extensive recovery and resolution planning, as mandated by OSFI and Canada Deposit Insurance Corporation. This includes efforts to ensure continued access to the OTC derivatives market in such situations. Therefore, it is prudent for the Proposed Rules to consider all scenarios and their potential impact. Excluding FRFIs from the application of the Proposed Rules will address these crucial issues.

(iv) Exclusion is necessary to avoid detrimental effect on the Canadian OTC derivatives market

Granting an exclusion to FRFIs is beneficial to the Canadian OTC derivatives market in four ways: it (a) places FRFIs on a more level playing field with foreign banks, (b) harmonizes the Canadian registration regime with the regimes in other jurisdictions with an OTC derivatives market that is similar in size to Canada, (c) avoids material risk that domestic liquidity will be reduced in certain jurisdictions if a FRFI is required to register in every province and territory of Canada and (d) reduces the material risk that foreign dealers will exit the Canadian market because they will not want to be exposed to the knock-on contractual effects facing FRFIs as described immediately above under paragraph (iii) "*Exclusion is necessary for effective prudential regulation*".

(a) As currently drafted, we understand that the Proposed Rules are intended to apply to a foreign dealer transacting with a foreign branch of a Canadian bank.[10] This means that, for example, a Japanese bank trading with the UK branch of a Canadian bank would be subject to the Canadian registration rules, even though neither the booking locations nor the location of the traders are in Canada. Even more problematic, once a Japanese bank is registered, there is nothing in the Proposed Rules that would then preclude the Proposed Rules from applying in respect of all the Japanese bank's global trading, for example, registration of individuals, Canadian specific exams, and

[8] A securities regulator may take such action based on the determination that it would be in the public interest to do so in that particular province.
[9] Available here.
[10] We discuss the implications of this broad jurisdictional reach below under the section, "Extraterritorial Scope" on page 8.

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requirement for a written agreement, even if they are only trading with Japanese counterparties. Even if the Japanese bank qualified for an exemption from registration under the Proposed Rules, it would still need to satisfy the conditions to such exemption, including providing Canadian regulators unfettered access to its books and records, even information that does not relate to trades with Canadian counterparties. In such circumstances, it is very difficult to see why the Japanese bank would choose to transact with the Canadian bank and accept legal and regulatory liability when it could, instead, choose another counterparty that is not subject to the Proposed Rules.

(b) Excluding FRFIs from the application of the Proposed Rules will promote harmonization with global rules. As mentioned above, the only other jurisdiction with such a widespread registration regime is that of the United States under the CFTC regime. Given the dramatic difference between the size of the Canadian OTC derivatives market relative to the U.S. market, a more appropriate comparison for derivatives dealer registration purposes is to the Australian market. In Australia, CMIC understands that there is no derivatives dealer registration regime, nor is one proposed. Even a larger market, such as the Hong Kong OTC derivatives market is proposing a more balanced regime. CMIC understands that the Hong Kong Securities and Futures Commission (**SFC**) proposes a "Type 11" licensing regime for OTC derivatives which will exempt Hong Kong Monetary Authority (HKMA) regulated firms. Specifically, HKMA regulated Authorized Institutions (AI, firms licensed to carry on the business of taking deposits) and Approved Money Brokers (AMB, persons in the business of arranging agreements between AIs and other entities for making deposits and the purchase/sale of financial instruments) will be exempt from the requirement to be licensed.[11]

The CSA has consistently articulated that the Canadian OTC derivatives regulatory regime should be harmonized with global standards. Yet, with respect to the issue of registration, the proposed regime is not harmonized with markets of similar size. By excluding FRFIs from the application of the Proposed Rules, as long as such FRFIs are prudentially regulated by OSFI, the Canadian regime will be harmonized with appropriate foreign derivatives markets.

(c) In CMIC's view, there is a material risk that domestic liquidity will be reduced if FRFIs are required to register in every single province and territory of Canada. Based on an anonymized survey (aggregated by counsel) of the majority of sell-side CMIC members to determine the number of counterparties each such member has in each province and territory, there are a number of banks that have fewer than 40 counterparties in some provinces and territories, and in some of them, fewer than 10 counterparties. Accordingly, it will become disproportionately more expensive to do business in those jurisdictions which may translate into a market access issue if the cost of hedging transactions increases for end-users in those jurisdictions. Excluding FRFIs from the application of the Proposed Rules would mean that there would be no significant reduction in domestic liquidity. We discuss this issue further under the heading "De Minimis Threshold Exemption".

(d) As described in the previous section (*Exclusion is necessary for effective prudential regulation)*, under the proposed regime, provincial securities regulators would be empowered to issue cease trading orders in respect of a FRFI's OTC derivatives trading business even though provincial

[11] 2012 HKMA and SFC joint consultation paper, at para 54, available here. See also 2015 circular to OTC derivatives market participants on new derivatives regulation, available here: "When the OTC derivatives licensing regime commences, corporations intending to engage in a business in Hong Kong in dealing in or advising on OTC derivative products, providing client clearing services for OTC derivatives transactions, managing portfolios of OTC derivative products, and/or providing automated trading services (ATS) for OTC derivatives transactions, will need to be licensed or registered for the new and/or expanded RA(s) unless exempted. [6] Authorized institutions (AIs) and approved money brokers [7] will be exempted under certain circumstances, and their OTC derivatives activities will be overseen and regulated by the HKMA."

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securities regulators do not have jurisdiction to consider decisions from a prudential perspective. The concern is that action might be taken by a provincial securities regulator that has a detrimental effect from a prudential and systemic risk perspective, as well as from the perspective of the overall regulation of the FRFI. As noted above, such an action would have very serious knock-on effects, such as the ability of LCH to trigger an event of default under its rules, even if such cease trading order is not material to the FRFI.[12] Further, the standard ISDA master agreement includes an agreement to maintain all governmental consents which are required in order to perform its obligations under such agreement, as well as an agreement to comply in all material respects with applicable laws and orders where failure to so comply will impair its ability to perform its obligations under such agreement. Some ISDA agreements have been amended to include a cross-default to any derivatives transaction. A cease trading order could therefore give any counterparty, including a foreign counterparty a right to trigger an event of default against a FRFI. While terminating its ISDA against a FRFI is optional in such circumstances, the concern is the uncertainty of what other foreign dealers will do and the effects on the creditworthiness of the FRFI if one other foreign dealer triggers a default under its ISDA agreement. Liquidity in the Canadian OTC derivatives market will be substantially reduced if foreign dealers decide that they do not wish to assume the legal risk and liability of trading with a counterparty that is subject to these knock-on effects.

Information Given to Regulator: The CSA should not have access to a FRFI's books and records as a condition of excluding FRFIs from the application of the Proposed Rules. The concern is that effective prudential regulation is achieved through an understanding of the Canadian approach to financial institution regulation, the specific industry issues that are faced by the financial institutions and the individual financial institution's history within that framework. Isolating specific risk or reporting to a securities regulator is contrary to the established view that an appropriate regulatory system is already in place for the activities of FRFIs, and runs the risk that the unconsolidated complete information provided to the securities regulator is misinterpreted. In addition, if the CSA were to have unfettered access to a FRFIs books and records, such access might mean providing the provincial regulators with prescribed supervisory information (**PSI**), depending on the specific circumstances. For example, Section 27(3)(d) provides that the derivatives ultimate designated person is required to report on a timely basis to the provincial regulator where the derivatives firm is not, or was not, in compliance with NI 93-102 or securities laws. There are other similar requirements under NI 93-102, such as: Section 56(b) (requires a FRFI to notify the regulator of each instance of material non-compliance with a requirement or guidance to which it is subject), Section 42(4) (unresolved disputes that continue for 30 days to be reported to the regulator), Division 2 of Part 7 (audits) and Part 9 (records). Information provided to the CSA under these sections could well include PSI depending on the specific circumstances. Some of these record keeping provisions relate to the prudential aspect of record keeping (e.g. business and strategic planning; audit, compliance and risk management; minutes of meetings with Board of Directors). The reason for the concern is that PSI is protected under federal law and FRFIs are prohibited from sharing such information with anyone, including provincial regulators.[13] It would be an offence under federal law for an FRFI to do so. FRFIs can only provide this information to OSFI and it is OSFI's decision as to what information may be shared with provincial regulators. This strict federal prohibition on disclosure of PSI is a long standing feature of federal law that is designed to allow federal prudential and systemic regulators to mitigate and manage systemic risk. Accordingly, access to a FRFI's books and records cannot be a condition of excluding FRFIs from the application of the Proposed Rules as it would be a contravention of federal law.

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[12] Supra, note 9.

[13] Supervisory Information (Banks) Regulations, SOR-2001-59 under *Bank Act* (Canada). There are equivalent regulations under federal legislation applicable to other types of FRFIs.

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Harmonized Implementation: One simple way to implement our proposal to have a complete exclusion for FRFIs would be to replicate in the derivatives registration rule for all CSA members an exemption from the derivatives dealer and adviser registration requirements that is comparable to the exemption from the registration requirements of securities legislation that is found in Section 35.1 of the *Securities Act* (Ontario). Exemptive relief that is similar to the exemption that has been granted by Section 35.1 has also been granted by a number of other provincial jurisdictions pursuant to blanket orders and derivatives legislation for the express purpose of exempting OTC derivatives transactions entered into between certain institutional investors, including FRFIs, from applicable dealer registration requirements.

Ontario proposes to broaden the application of Section 35.1 pursuant to amendments to the *Securities Act* (Ontario) that have already been passed, but have not yet been proclaimed in force. Once proclaimed in force, these amendments to the definitions of "dealer" and "adviser" would serve to exempt FRFIs from derivatives dealer and adviser registration requirements as well as the registration requirements of securities legislation. If an exemption comparable to Section 35.1 could be adopted as part of the derivatives registration rule, it would serve to establish an exclusion for FRFIs that would be harmonized throughout all jurisdictions of Canada.

Foreign Dealers

The main source of liquidity in the Canadian OTC derivatives market comes from foreign dealers. It is therefore imperative that the Proposed Rules and the Proposed Business Conduct Rule do not increase legal and regulatory compliance risk to foreign dealers, such that the commercial opportunities in the Canadian OTC derivatives market outweigh the costs and compliance burden. Further, additional costs and legal burden should not be imposed on foreign derivatives dealers if the Proposed Rules and Proposed Business Conduct Rule are not necessary to achieve the goal of protection of investors. CMIC proposes the following approach, which is a modified version of the international dealer exemption in the securities market and which will minimize foreign dealers exiting the Canadian OTC derivatives market: (1) exclude the application of the Proposed Rules to foreign dealers if they only transact with a FRFI, and (2) provide an exemption from registration for foreign dealers with certain conditions, in each case, regardless of where such derivatives dealer's head office or principal place of business is located. Although the securities market and the OTC derivatives market are different, this recommendation has precedence in the securities market[14] and accordingly, the CSA should be comfortable taking this approach. We note, however, that even though the approach taken in the securities market includes certain conditions, it is imperative that there are no conditions imposed with respect to foreign derivatives dealers other than, in the case of (2) only, the requirement that (i) the foreign derivatives dealer is registered, exempt from registration or otherwise permitted to carry on the business of a derivatives dealer in its home jurisdiction and it engages in the business of a derivatives dealer in such jurisdiction, (ii) the foreign derivatives dealer only transacts and deals with EDPs (subject to our comments below on page 13 regarding the definition of EDPs and specifically, the fact that every eligible contract participant must be an EDP), and (iii) the foreign derivatives dealer must, subject to bank secrecy, privacy, data confidentiality and other similar laws, provide the applicable regulator access to its books and records only with respect to OTC derivatives transactions entered into with Canadian counterparties in such regulator's jurisdiction, and only if such regulator has reasonable grounds for believing that such foreign dealer has violated applicable Canadian laws.

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[14] See Section 8.18 of National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("**NI 31-103**").

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While such a condition to provide unfettered access to books and records might be commonplace in the securities market, this is another area where the derivatives market is significantly different. The business of trading securities is generally conducted through a special purpose subsidiary. As a result, access to the books and records of a securities dealer is generally limited to books and records in relation to the securities dealing business that is conducted by the subsidiary. In the case of OTC derivatives transactions, it is currently proposed that access to the books and records of derivatives dealers would be much more broadly cast and would not be limited to books and records in relation to such transactions. In addition, unlike OTC derivatives transactions, the business of trading securities involves the intermediation of client trading activity on both a principal and agency basis. Access to a securities dealer's books and records is therefore intended to afford securities regulators with a means of monitoring the relationship that exists between a securities dealer and its clients. This access rationale is not applicable to OTC derivatives transactions between EDPs because such transactions are the product of arm's length negotiations between sophisticated parties. Furthermore, given the importance of addressing the credit risk inherent in OTC derivatives transactions, and also to take advantage of close-out netting, derivatives dealers generally enter into OTC derivatives transactions through their parent bank (where applicable). Accordingly, submitting to the jurisdiction of CSA members and allowing the CSA complete access to books and records of the parent bank would, in CMIC's view, be unprecedented and seen as a large deterrent to foreign banks entering into transactions in the Canadian OTC derivatives market. We note that even though CFTC regulations provide for access to books and records of swap dealers, our understanding is that, through discussions with OSFI, this access in practice may be subject to certain informal limitations, particularly in relation to non-US related records. For these reasons, the proposed reformulated foreign derivatives dealer exemption should not allow the CSA to have unfettered access to the books and records of the foreign derivatives dealer.

Exempting all foreign derivatives dealers is critical to maintaining liquidity in the Canadian OTC derivatives market. There will be costs as well as legal and regulatory compliance risk to foreign derivatives dealers which will be disproportionate to the benefits to those foreign derivatives dealers of remaining in the Canadian OTC derivatives market given the relatively small size of the market. In fact, it has been the recent experience of CMIC members that certain foreign market participants have been willing to voluntarily remove access by Canadian market participants because of the complicated Canadian regulatory landscape. With this reformulated foreign derivatives dealer exemption, disruption caused by the Proposed Rules to the Canadian OTC derivatives market will be reduced somewhat. Non-EDPs will be protected since the exemption won't be available to foreign derivatives dealers when transacting with non-EDPs. Accordingly, this recommendation strikes the balance between retaining a liquid Canadian OTC derivatives market and protecting market participants that the CSA are concerned about protecting.

EXTRATERRITORIAL SCOPE

International regulators have recognized the global inter-connectedness of the derivatives market and the necessity that regulators consider the impact of their choices on market efficiency and competition, which are vital to a well-functioning global derivatives market[15]. These considerations are particularly acute for a smaller derivatives market such as Canada. We must avoid an unintended negative impact on the market. Even larger derivatives markets such as Hong Kong and Singapore have been careful to avoid duplicative regulatory regimes as described below.

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[15] Commodity Futures Trading Commission, "Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants – Cross-Border Application of the Margin Requirements", 17 CFR Part 23 at 34820. Available here.

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The Proposed Rules provide that registration is required if an entity carries on business as a derivatives dealer or derivatives adviser "in a local jurisdiction". It is CMIC's understanding that the CSA interprets the phrase "in a local jurisdiction" to include the jurisdiction(s) in which a party's head office and principal place of business are located. With respect to a non-derivatives dealer, CMIC agrees with that interpretation.[16] However, it would be consistent with international regulators' approach to extraterritoriality, principles of comity and minimizing market disruption if the CSA also confirm that when a derivatives dealer (whether or not organized in Canada) transacts through an office or branch outside of Canada with a counterparty that is not organized in Canada, neither counterparty would be subject to the Proposed Rules in respect of those transactions. "Transacting" in this context, with respect to a derivatives dealer, would refer to the location of front-office sales and trading personnel who are interacting with the counterparty. This would give the Canadian derivatives market the certainty and predictability it needs to function well.

Further, it is CMIC's understanding that the CSA may interpret the phrase, "in a local jurisdiction" differently depending on whether the phrase is being used in the context of the Proposed Rules or the Proposed Business Conduct Rule. The interpretation of this wording should be consistent among all derivatives rules. Otherwise, it would be confusing for market participants and such confusion could lead to increased costs of doing business in Canada and, if the uncertainty is too high, it will likely cause participants to exit the OTC derivatives market in Canada.

A derivatives dealer's head office and principal place of business should not be determining factors in identifying in which jurisdiction to register and which province's rules apply. Otherwise, Canadian banks and other domestic derivatives dealers trading from non-Canadian jurisdictions, will be placed at a disadvantage vis-à-vis its global competitors. Liquidity for sell-side Canadian counterparties will significantly decrease if jurisdiction under Canadian rules is determined solely by the location of a party's head office or principal place of business. [17] It would be unfortunate (and particularly damaging to the Canadian OTC derivatives market) if the CSA were to repeat the extraterritorial mistakes made by, and now acknowledged as such, by the CFTC.[18] In such circumstances, local laws should govern any registration and business conduct requirement as those are the laws with the closest nexus to the transaction. It cannot be overstated that the current formulation of the foreign dealer and foreign adviser exemptions under sections 52 and 59 will not address these issues. The conditions attached to such exemptions are not appropriate in the global OTC derivatives market. Given the bespoke nature of certain provisions contained in both the Proposed Rules and the Proposed Business Conduct Rule, such as the senior manager and fair dealing obligations, as well as the derivatives ultimate designated person ("**UDP**"), chief risk officer ("**CRO**") and chief compliance officer ("**CCO**") provisions, CMIC is not confident that the CSA will find, on an outcomes basis, that the rules of a particular jurisdiction are equivalent. In fact, we note that the CSA does not even view OSFI's guidelines as being sufficient based on the way Appendix F of the Proposed Rules is currently populated; a view with which CMIC firmly disagrees.[19]

Another example of how an interpretation of the jurisdiction of a derivatives dealer under the Proposed Rules based on head office or principal place of business would be disruptive can be seen

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[16] If a derivatives dealer trades only with unknown counterparties, the head office or principal place of business will also be unknown and therefore, the Proposed Rules and the Proposed Business Conduct Rule would not apply.

[17] CMIC notes that even the CFTC has acknowledged that US banks' non-US branches do not have to adhere to the Dodd-Frank business conduct standards when transacting with non-US counterparties as long as the notional amount of such trades don't exceed 5% of the swap dealer's aggregate notional derivatives activity (although this cap doesn't apply to trades with clients in Canada, Australia, HK, Japan, Switzerland and the EU). Given the size of the U.S. market compared with the Canadian market, CMIC does not support the CFTC interpretation of jurisdictional reach, however, we note this one aspect of CFTC rules just to demonstrate that even the CFTC has implemented some restriction on its extraterritorial jurisdiction.

[18] See CFTC Chairman Giancarlo's September 4, 2018 speech to the City of London (available here).

[19] See Schedule A to this letter for CMIC's view on how existing legislation and OSFI guidelines are equivalent to the requirements under the Proposed Rules.

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by looking at Canadian banks' private banking client business. Currently, Canadian banks transact OTC derivatives with private banking clients in foreign jurisdictions through foreign branches and are subject to, and comply with, local laws. For example, clients in Hong Kong and Singapore where individuals in those jurisdictions are subject to minimum thresholds of financial assets of SGD $2 million (roughly CAD 2 million) and HKD $8 million (roughly CAD 1.3 million). Local law also requires that clients have derivatives knowledge and that the bank perform suitability assessments by considering the client's risk profile, investment needs and relative product features. In addition, risk disclosures are provided to the clients. Local regulators are in the best position to determine the appropriate standards in the markets that they regulate. Further, local prudential laws and bankruptcy laws would also apply to such foreign branch and its activity in such jurisdictions. Based on information currently available to one CMIC Canadian bank member, it estimates that approximately half of the individuals that trade with it through its private banking client division would likely not meet the EDP threshold. However, that bank may not necessarily have information regarding financial assets that are not managed by it and therefore would need to perform a client outreach to determine whether clients are EDPs. Obtaining responses from clients to an outreach request is very difficult, especially from non-Canadian clients as it relates to Canadian regulatory matters. In particular, it has been the experience of CMIC members that it has been problematic obtaining representations from private banking clients (indeed, any client) if other private banks and other counterparties have not requested similar information, as such clients often transact with multiple banks. Canadian counterparties will be placed at a competitive disadvantage in foreign markets, which is particularly concerning given the global nature of OTC derivatives market. Accordingly, the Proposed Rules should not be applicable in circumstances where a derivatives firm is transacting or advising from a non-Canadian jurisdiction with a derivatives party located in a non-Canadian jurisdiction because, as it relates to the derivatives transactions of that derivatives party, there is no meaningful nexus to Canada. In such circumstances, the derivatives dealer, and the individual acting on behalf of the derivatives dealer, would need to comply with the local laws of the jurisdiction in which it and the derivatives party are located. In addition, if the derivatives dealer is subject to OSFI oversight, the foreign branch will fall under OSFI's jurisdiction even though the foreign branch is located in a foreign jurisdiction and the counterparty is a non-Canadian. In CMIC's view, there would be no benefit of imposing the Proposed Rules and the Proposed Business Conduct Rule, and the associated administrative burden of a client outreach, on derivatives parties in jurisdictions where local laws already provide sufficient protection.

If a foreign derivatives dealer wishes to avoid registration, it could enter into OTC derivatives out of its Schedule III bank with counterparties "located in" Ontario. If the location of the head office or principal place of business (the "**Home Jurisdiction**") will always be applicable when facing a counterparty, such Schedule III bank will only choose Canadian banks whose head office and principal place of business are located in Ontario. Otherwise it would be subject to registration. Accordingly, such an interpretation of whether a person or company is "in a local jurisdiction" will place FRFIs who have their head office or principal place of business in Ontario at an advantage. This would not be a 'level playing field'. This interpretation should not prevail and, instead, the only jurisdiction(s) that should be relevant in determining whether a derivatives dealer is "in a local jurisdiction" are the location(s) of the front-office sales and trading personnel of the derivatives dealer who are interacting with the counterparty.

We understand that the reason why the CSA has interpreted jurisdictional scope based on head office or principal place of business is that it is concerned about regulating activities undertaken in foreign jurisdictions by an entity incorporated under Canadian law, and protecting "investors" in those foreign jurisdictions. This is over-reaching by the Canadian regulators and inconsistent with the approach taken in the securities market. For example, OSC Rule 32-505 is an example of a rule where Canadian provincial regulators defer to the securities laws of a foreign jurisdiction. Sections 2.1(b) and 2.3(a) of OSC Rule 72-503 *Distributions Outside Canada* are additional examples, particularly Section 2.3 as it allows reporting issuers to make a distribution of their securities outside Canada so

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long as they materially comply with any applicable foreign disclosure obligations (without reference to any specific foreign jurisdiction). It is therefore unclear to CMIC why the CSA believes they are in a better position than foreign regulators to assess what protections foreign market participants need in the OTC derivatives market.

Finally, CMIC notes that if a foreign dealer is subject to the requirements under the Proposed Rules or the Proposed Business Conduct Rule, the obligations under the Proposed Rules should apply to its dealings with Canadian counterparties only, and not to the foreign dealer's entire organization or all transactions it enters into.

Significant impact on real-economy companies and significant uncertainty remains regarding the application of the Proposed Rules. Concentrating market risks, reducing market liquidity, and increasing costs associated with prudent risk management would unnecessarily hinder Canadian business growth and negatively affect the Canadian economy without any tangible reduction in systemic risk.

For the above reasons, CMIC urges the CSA to interpret the phrase "in a local jurisdiction" to mean, in respect of non-derivatives dealers, the head office or principal place of business is located in a local jurisdiction, and for derivatives dealers, the front office sales and trading personnel who are interacting with the counterparty and are located in the local jurisdiction.

LIQUIDITY/ACCESS

Bespoke Regulations

The Canadian derivatives market represents only a very small part (approximately 4%) of the global derivatives market, and in excess of 80% of all trades with Canadian banks involve foreign counterparties, based on the notional amount of such derivatives. These Canadian derivatives market characteristics mean that preserving liquidity and access to dealers and advisers is essential for Canadian businesses to be able to hedge the risks associated with their operations. Introducing bespoke regulatory requirements, such as the requirement to designate a derivatives ultimate designated person, a derivatives chief compliance officer and a derivatives chief risk officer, will compromise existing liquidity and access because the added regulatory burden will deter both foreign and domestic dealers and advisers from maintaining Canadian operations. Indeed, IOSCO[20] cautions against bespoke regulation by stating the following:

> Given the global nature of the market, the effectiveness of the risk mitigation requirements could be undermined if inconsistent requirements are adopted. Inconsistent or conflicting requirements also would add to the regulatory burden and costs of compliance for the industry. Authorities should cooperate and coordinate through bilateral or multilateral channels to reduce such issues to the extent possible.

Compromising liquidity and access will create systemic risk[21] and have economic consequences that are harmful and unnecessary. The Proposed Rules, especially when combined with the Proposed Business Conduct Rule, would result in serious and dangerous curtailment in domestic and cross-border liquidity in the Canadian derivatives market.

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[20] *Risk Mitigation Standards for Non-centrally Cleared OTC Derivatives,* Report to the Board of the International Organization of Securities Commissions, January 28, 2015 at page 17, available here.

[21] Note that the Supreme Court of Canada states in Reference Re: *Securities Act*, 2011 SCC 66 at [120] and [121] that systemic risk regulation is beyond the capacity of a specific province because it is a national matter that requires the national reach of federal authority.

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We have attached as Schedule B to this letter a comparison of the IOSCO recommendations with respect to the regulation of DMIs as set out in the IOSCO DMI Report against certain sections of the Proposed Rules to highlight areas where the Proposed Rules go beyond what is recommended by IOSCO. In addition, Schedule B contains a comparison of certain sections of the Proposed Rules with recommendations from IOSCO under its report relating to Risk Mitigation Standards for Non-centrally Cleared OTC Derivatives.[22] CMIC is very concerned that Canadian derivatives market liquidity and access will be significantly reduced if CMIC's recommendations regarding the exclusion of FRFIs and reformulation of the foreign dealer and adviser exemptions are not accepted and the Proposed Rules diverge from IOSCO recommendations. It has been the experience of CMIC members that certain foreign market participants do not find that the benefit of changing and expanding their systems and processes in order to accommodate unique Canadian rules outweighs the costs and burdens thereof. This leads to material liquidity and access compression.

In addition to the issues raised above under "Exclusions" and "Extraterritorial Scope", the following sections of the rule will also lead to decreased liquidity and access in the Canadian OTC derivatives market: (a) current definition of "eligible derivatives party", (b) current approach to the *de minimis* threshold exemption, (c) the lack of a passporting regime for derivatives dealer and adviser registration, (d) the listing of clearing intermediaries as an additional registration trigger, (e) requiring registered foreign derivatives dealers to report all their transactions globally under Ontario, Manitoba and Quebec trade reporting rules, (f) requiring signed written agreements for transactions with unknown counterparties and (g) the requirements relating to the registration of derivatives advisers. We will discuss each of these issues below.

(a) <u>Eligible Derivatives Party Definition</u>

As discussed in greater detail in our Business Conduct Response Letter CMIC urges the CSA to amend the definition of "eligible derivatives party" to:

- remove the financial threshold for commercial hedgers in paragraph (n);
- lower the financial threshold in paragraph (m) for a non-individual from net assets of $25 million to total assets of $10 million; and
- remove the knowledge and experience requirement under paragraphs (m), (n) and (o).

The definition of EDP is an even more crucial matter under the Proposed Rules than under the Proposed Business Conduct Rule since the exemption from registration for foreign dealers and advisers under Sections 52 and 59 is conditional upon the foreign dealer or adviser only dealing with or advising EDPs. If a derivatives party is not an EDP, foreign dealers and advisors will choose not to deal with such a derivatives party, instead of registering as a derivatives dealer or derivatives adviser under the Proposed Rules. Many foreign dealers are registered swap dealers under CFTC rules and therefore are currently required to only deal with eligible contract participants. Unless every eligible contract participant is an EDP, we believe that foreign dealers will withdraw from the Canadian OTC derivatives market, instead of changing their current compliance procedures and systems to determine whether existing derivatives parties are EDPs. The alternative of registering will not be acceptable to the foreign derivatives dealer. Accordingly, it is even more critical to the issue of liquidity and market disruption that every eligible contract participant satisfy the definition of an EDP.

This issue is also crucial for individuals acting on behalf of domestic derivatives dealers and advisers who wish to qualify for the exemption under Sections 16(3) and (4) of the Proposed Rules. Many of the derivatives parties that are currently trading with derivatives dealers, or being advised by

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[22] *Infra,* note 19.

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derivatives advisers, under the hedger category of the definition of accredited counterparty under the Quebec Derivatives Act and under the definition of qualified party under the rules of other provinces, such as BC and Saskatchewan, would not satisfy the definition of EDP as currently drafted. In fact, based on best available data and without the benefit of a client outreach, at least one Canadian bank member of CMIC estimates that approximately 90% of their existing mid-market OTC derivatives client base will not qualify as an EDP under the current formulation. Another Canadian bank member of CMIC estimates that almost all of its mid-market FX clients will not qualify as an EDP under the current formulation. If an individual wishes to continue trading with or advising such non-EDPs, he or she will need to be registered. Accordingly, individuals may no longer wish to deal with, or advise, such non-EDPs once the Proposed Rules comes into effect. Therefore, the threshold amount currently in the commercial hedger category should be removed.

(b) *De Minimis* Threshold Exemption

Threshold level:

It is not clear to CMIC why there are two different threshold levels – one only for commodity derivatives and another for all other derivatives. No explanation was provided in either the CSA notice or the Companion Policy. Canada would be offside other jurisdictions, such as the CFTC rules, with respect to this point.

CMIC is very concerned that the threshold level(s) could be too low, especially when compared with the U.S.$8 billion threshold under CFTC rules. It is not clear why such a low level was selected, in particular, the Canadian $250 million level. If that level was chosen in order to ensure that certain types of dealers do not fall under the threshold (and therefore qualify for the exemption), CMIC recommends that, instead, those types of entities should be listed under Section 6 of the Proposed Rules (Additional Registration Triggers). Clearly, only the CSA has comprehensive trade data in which to inform its decision as to this *de minimis* threshold level. However CMIC recommends that the CSA should be transparent in its process and analysis of the data and how it determined that these levels were appropriate. For example, CMIC strongly recommends that the CSA produce an analysis similar to what the CFTC has conducted whereby it discloses how many market participants would be required to register at certain threshold levels as compared with the additional trading volume captured if threshold levels were lowered.[23] Without having the benefit of the CSA's analysis or the trade data, CMIC recommends that the CSA reconsider the levels, bearing in mind the following points:

- the threshold level should not be too low, otherwise small and mid-sized market participants will exit the Canadian OTC derivatives market, driving business to the big banks, thereby concentrating increased systemic risk;

- low thresholds could impede the willingness of foreign banks to trade with Canadian banks, leading to a reduction in liquidity (note, however, that should the Inter-dealer Exemption strongly recommended above be granted, that exemption would address this concern); and

- while the calculation in the Proposed Rules has the benefit of being straight forward to calculate, it would be appropriate and more reflective of risk being undertaken if dealers would be able to exclude certain items from the determination of outstanding notional amount. For example, similar to the exemptions under the CFTC rules, exemptions from the calculation could be provided for loan hedging activity,

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[23] Swap Dealer *De Minimus* Exception Final Staff Report, a report by Staff of the U. S. Commodity Futures Trading Commission pursuant to Regulation 1.3(ggg), August 15, 2016, at page 23. Available here.

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transactions entered into to hedge physical or financial positions and transactions resulting from multilateral portfolio compression exercises. Therefore, even though the calculation would not be as simple, because many market participants are already performing this calculation for CFTC purposes, adding these exemptions would not be incrementally difficult to calculate.

Other factors in determining whether the de minimis threshold amount has been exceeded:

It is CMIC's strong view that the threshold levels should only take into account transactions to which either a derivatives dealer (whether a Canadian resident or otherwise) or a non-registered affiliate thereof is a party, on the one hand, and counterparties located in that specific province, on the other hand. Since derivatives dealer registration is done by province, the only relevant activity of a dealer would be activity within that province. Aggregated and anonymized data assembled by "sell" side members of CMIC shows that very few of their respective counterparties (i.e. under 40 in most cases, and in some cases, under 10 and in a couple of cases, currently the number is zero) are located in the smaller provinces and in the three territories (i.e. Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Northwest Territories, Nunavut, Prince Edward Island, Saskatchewan and Yukon Territory). This means that if a dealer needs to be registered in a province or territory where they have only a handful of clients in that jurisdiction, the cost and increased legal and regulatory risk of doing business in that jurisdiction will increase exponentially such that it will not make commercial sense to do business in that jurisdiction. This contraction of the OTC derivatives market in those jurisdictions only increases systemic risk and decreases liquidity in the market. CMIC therefore recommends that, for these smaller jurisdictions, an exemption should be available to a dealer (whether foreign or domestic) in respect of registration in that jurisdiction if the notional amount of transactions with counterparties located in that jurisdiction is below an appropriate *de minimis* threshold amount.

As noted, we are excluding from this calculation the trades of affiliates who are not registered as a dealer. If such affiliate is a registered dealer, its trades are already subject to regulatory supervision and therefore should be excluded from this calculation. Similarly, it is not clear why this exemption would not apply to a derivatives dealer that is already registered in a different jurisdiction of Canada, or registered under commodity futures legislation of any jurisdiction of Canada, or, in the case of a foreign dealer, if its head office or principal place of business is located in a jurisdiction that is listed in Column 1 of Appendix B. Therefore, these restrictions should not be included in the *de minimus* threshold exemption calculation.

(c) Passporting

As noted above, implementing a passporting regime will not resolve all the serious issues discussed in this letter, particularly the issue surrounding the independent right of a provincial regulator to initiate enforcement action against a registrant independent of other provincial securities regulators and independent of any prudential regulator (whether provincial or federal). Therefore, even though CMIC supports having a passporting regime in place, the comments below do not minimize the importance of its other recommendations, particularly those under the section headings "Exclusions" and "Extraterritorial Scope".

CMIC notes that the Proposed Rules do not explain how the registration process, exemptive relief process and the enforcement process would work among the CSA.[24] Given that the majority of OTC derivatives transactions are entered into with a foreign counterparty, CMIC recommends that the Companion Policy provide an explanation of these processes.

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[24] Note that when we refer to "provincial" regulators or "provinces", we are also referring to the territorial regulators and the territories, respectively.

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We understand that it is currently contemplated that a co-ordinated approach would be taken among the CSA which we understand to mean that a registered derivatives firm that enters into transactions, or advises, in all provinces will need to register in all provinces and pay fees to all of the provincial regulators. While the derivatives firm may be permitted to correspond with only its principal regulator for certain matters (but not all, such as the exception outlined in section 2(2) that is applicable to the foreign dealers and advisers exemption), such as providing notices, the derivatives firm would still be registered in all provinces and each provincial regulator would be entitled to separately bring enforcement action against the derivatives firm.

The co-ordinated approach is too cumbersome. CMIC is concerned that foreign derivatives firms will decide to cease doing business in a particular province in order to avoid registration in that province. The best approach would be to have a *de minimis* exemption in each province, as explained above. However, if the CSA does not accept this recommendation, CMIC strongly recommends that a passporting system be used such that there is only one regulator to deal with, and the payment of only one fee. We note that, to our knowledge, Canada will be the only jurisdiction which requires derivatives dealer and adviser registration in multiple jurisdictions in the same country. We are therefore very concerned that a multiple Canadian registration requirement will lead to serious reduction in liquidity and access, especially in the smaller provinces. This disruption of the Canadian OTC derivatives market will ultimately harm end-users who need to hedge commercial risks.

With respect to the definition of “principal regulator”, CMIC notes that it only refers to the head office of a registered derivatives firm, and not to the principal place of business. It is not clear why that definition would not refer to the “head office or principal place of business”. In fact, it would seem there would be a closer nexus to a jurisdiction if the principal place of business were located in that jurisdiction, as opposed to the head office (if they are not both in the same jurisdiction).

(d) Additional Registration Triggers

Section 6 of the Proposed Rules sets out additional registration triggers, one of which is if a person or company acts as a clearing intermediary on behalf of another person or company, other than an affiliated entity. In CMIC’s view, clearing does not automatically render a party a dealer or market-maker and in our view, this should not be an additional registration trigger. As drafted, Section 6(c) of the Proposed Rules imposes additional requirements for clearing participants and intermediaries, which would have a materially negative effect on liquidity. These additional requirements will dis-incentivize firms from acting as clearing intermediaries to their clients, contrary to Canada’s G20 commitments.[25] Clearing intermediaries are already sufficiently regulated under National Instrument 94-102 *Derivatives: Customer Clearing and Protection of Customer Collateral and Positions*. CMIC therefore recommends that Section 6(c) be deleted and if the intermediary is in fact a dealer or market-maker, such intermediary would be a “derivatives dealer” based on the definition of such term and the “business trigger” commentary in the Companion Policy.

[25] G20 Leaders Statement: The Pittsburgh Summit, September 24-25, 2009, Pittsburgh, at paragraph 13. Available here.

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(e) Trade Reporting and Foreign Derivatives Dealers

CMIC is concerned about the interaction between the derivatives trade reporting rules in Ontario, Manitoba and Quebec (collectively, the "**TR Rules**") and the registration of foreign derivatives dealers. If a foreign derivatives dealer has to register under NI 93-102, it will become a "local counterparty" under the TR Rules and accordingly, all of its OTC derivatives transactions globally will be in scope for reporting under the TR Rules. It is not appropriate, and is unprecedented, for a local regulator to require a foreign dealer to submit derivatives data relating to transactions where neither party is organized in, nor has a head office or principal place of business in, that local jurisdiction. This is in contrast with the treatment of foreign derivatives dealers under the trade reporting rules for the rest of the Canadian jurisdictions. Under Multilateral Instrument 96-101 ("**MI 96-101**"), all derivatives dealers, whether registered or not, are considered "local counterparties" under that rule, however, pursuant to Section 42 of MI 96-101, derivatives data is not required to be reported if the only reason why it is being reported is that one or both of the parties to a transaction is a "local counterparty" because it is a derivatives dealer. CMIC is very concerned that if a similar exemption is not included in the TR Rules and foreign dealers are required to be registered under NI 93-102, this will be yet another reason for foreign dealers to exit, or not enter, the Canadian OTC derivatives market. CMIC does not believe that foreign dealers will find it acceptable that Canadian regulators will be able to access their derivatives data relating to trades with non-Canadian counterparties. Therefore, the TR Rules should be amended to include an exemption similar to the exemption under Section 42 of MI 96-101 in order for the trade reporting rules to be harmonized across Canada and to ensure that liquidity is not further reduced in the Canadian OTC derivatives market.

CMIC understands that the CSA views the CFTC rules in the U.S. as being equivalent to NI 93-102 and CMIC expects that these rules will be listed as one of the jurisdictions in Appendix B to NI 93-102. CMIC supports that result as it will avoid materially reducing liquidity in the Canadian OTC derivatives market. However, CMIC notes that the exemption under Section 52 of NI 93-102 applies only if the dealer is a foreign dealer, i.e. a dealer with its head office outside of Canada. If the CSA is providing an exemption under Section 52 to a U.S. dealer on the basis that it is a registered swap dealer under CFTC rules, such exemption should be available to all CFTC registered swap dealers, regardless of where its head office or principal place of business is located, whether in Canada or elsewhere. Otherwise, an uneven playing field is created, given that Canadian banks are required to be registered as swap dealers under CFTC rules (provided they exceed the *de minimis* threshold). Accordingly, to ensure that all dealers are treated equally, CMIC recommends that if an exemption is permitted under Section 52 on the basis of a swap dealer registration under CFTC rules, that exemption should be available to any CFTC registered swap dealer, regardless of where its head office or principal place of business is located.[26] If the CSA is unwilling to adopt this recommendation, the implementation of NI 93-102 should be delayed until such time as Canadian banks receive a similar exemption from US registration rules.

(f) Written Agreement for each Transaction:

Section 41 of the Proposed Rules provides that, in relation to each transaction, registered derivatives firm must enter into a written agreement[27] for the process of determining the value of each transaction. This provision, as currently drafted, is problematic from a market standard perspective. If Canadian rules are not harmonized on this point with global requirements, foreign dealers will not be willing to change their current procedures to accommodate the bespoke Canadian rules. Again, this will result in reduced liquidity in the Canadian OTC derivatives market.

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[26] For FRFIs, this is an additional basis for granting an exclusion to FRFIs.

[27] We assume that this is in reference to the written agreement between two counterparties to a transaction, rather than an agreement between an adviser and the adviser's client. This section should therefore be revised to clarify that it does not apply to a registered derivatives adviser.

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Currently, it is not market practice to execute an ISDA Master Agreement for most FX transactions. In fact, for shorter term FX transactions (generally, for terms up to two years), it is market practice to only execute electronic confirmations, such as SWIFT confirmations, where there is no ability to add additional language, such as a provision that the transaction is governed by an ISDA Master Agreement or the process for determining the value of each transaction. As it relates to FX transactions, the requirement under Section 41 of the Proposed Rules creates a significant compliance issue for all derivatives dealers currently transacting in FX transactions which will contribute to decreased liquidity in the Canadian derivatives market. Please see the second paragraph of Schedule C to this letter (Comparison to IOSCO Risk Mitigation Standards Report) which outlines why written agreements are not necessary for FX transactions.

CMIC notes that CFTC rules have a similar requirement, however, in order to satisfy this requirement for FX transactions, the ISDA March 2013 DF Protocol (the "**Protocol**") recognizes that it is not market standard to enter into an ISDA Master Agreement for FX transactions and therefore allows parties that adhere to the Protocol to agree to a "deemed" ISDA Master Agreement. CMIC members' experience was that the Protocol was not well-received. Significant difficulties were encountered in signing up clients in order to comply with US rules, even though the US is a much larger and more lucrative market. Due to the relative small size of the Canadian OTC derivatives market, liquidity will be significantly reduced if global market participants are required to adhere to a Canada-only protocol. Based on past experience by CMIC members, market participants will not respond or adhere to such a protocol and it is CMIC's strong belief that global market participants will simply find non-Canadian counterparties with whom to transact.

As it relates to non-FX transactions, entering into an ISDA Master Agreement, which sets out a close-out valuation procedure, should be sufficient in order to satisfy this requirement under Section 41. If the CSA requires an agreement that is different than the ISDA Master Agreement for non-FX transactions, this will be a significant departure from current market practice which will disrupt the Canadian OTC derivatives market. CMIC therefore recommends that the companion policy be amended to clarify that this requirement under Section 41 can be satisfied by entering into an ISDA Master Agreement (or incorporating the terms of an ISDA Master Agreement into a confirmation).

(g) Adviser Registration

CMIC is concerned that the registration of derivatives advisers is not something that has been adopted globally and accordingly it will be unlikely that foreign jurisdictions will have equivalent regimes which would qualify them to be listed in Appendix G or Appendix H of the Proposed Rules. [28] As noted earlier, given the relatively small size of the Canadian OTC derivatives market, it is CMIC's view that Canada should not be establishing bespoke regulation with respect to OTC derivatives. To CMIC's knowledge, there are no other registration regimes specifically for advisers of OTC derivatives. Accordingly, it is CMIC's view that the derivatives adviser regime should be removed from NI 93-102 until such time as the larger derivatives market globally have adopted such a regime. If the CSA is unwilling to accept our recommendation, CMIC recommends that CSA adopt a foreign derivatives adviser exemption that reflects the approach taken in the international advisor exemption in Section 8.26(4)(b) of NI 31-103 such that any foreign adviser registered or exempt from registration in its home jurisdiction would qualify for an exemption under NI 93-102. Similar to Section 8.26, this would not be dependent on the foreign adviser having a head office in a specific jurisdiction, or require compliance with any specified corresponding requirements or guidelines in the foreign

[28] In fact, CMIC understands that under Dodd-Frank, there is no formal registration requirement for "Associated Persons", which definition includes traders and salespersons, but swap dealers are required to maintain an internal list of names of these persons. This internal list is then subject to examination by U.S. regulators. There are currently no registration requirements for individuals, nor any specific examination or qualification requirements, however, there will be an National Futures Association examination requirement commencing January 2020.

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jurisdiction. In addition, if the foreign adviser's home jurisdiction does not have legislation that specifically covers derivatives, then it should be sufficient for the foreign adviser to be registered or exempt from registration under its home jurisdiction's securities legislation. Taking this approach will allow market participants to continue to access expert advice from foreign advisers and will reduce the risk of foreign advisers withdrawing from the Canadian market.

In addition, CMIC is of the view that the Proposed Rules should include an exemption from derivatives dealer registration for registered derivatives advisers and their registered advising representatives that is similar to the adviser exemption for derivatives dealers and their representatives without discretionary authority in Section 58 of the Proposed Rules. If the derivatives dealing activity is in connection with a transaction for which the individual engaged in the dealing activity has the necessary proficiency under Section 18(1), then this should be sufficient, and the same rationale that applies to the inclusion of Section 58 in respect of derivatives advising activity should apply in the scenario of derivatives dealing activity.

The CSA should also consider the introduction of an exemption from derivatives dealer registration for derivatives advisers and their advising representatives, whether registered or not registered in the circumstances contemplated in CMIC's response to the CSA's Question #4 in Schedule D to this letter, that is similar to the adviser exemption for registered advisers and their advising representatives in Section 8.5.1 of NI 31-103, in that the exemption should be available where the dealing activities are "in connection with" the providing of advice to a client. While it is the case that the exemption in Section 8.5.1 is subject to the condition that the trade is made through a registered dealer or a dealer operating under an exemption from registration, it is CMIC's view that this condition is not appropriate for the derivatives market, since derivatives would not typically be transacted "through" a derivatives dealer.

Please also see CMIC's response to the CSA's Question #4 in Schedule D to this letter, in respect of advisers registered under Canadian securities legislation.

As you will have seen, CMIC has provided its comments and recommendations on the Proposed Rules by focussing on (i) necessary exclusions, (ii) extraterritorial scope comments and (iii) liquidity and access concerns. CMIC also re-iterates its very strong recommendation that a further, full comment period be afforded to market participants on both the registration rule and the business conduct rule (with all appendices filled in) so that they can both be analyzed together in order to determine their full effect on market participants and the Canadian OTC derivatives market.

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

Alberta Investment Management Corporation
Bank of America Merrill Lynch
Bank of Montreal
Bank of Tokyo-Mitsubishi UFJ, Ltd., Canada Branch
Caisse de dépôt et placement du Québec
Canada Pension Plan Investment Board
Canadian Imperial Bank of Commerce
Deutsche Bank A.G., Canada Branch
Fédération des Caisses Desjardins du Québec
Healthcare of Ontario Pension Plan Trust Fund
HSBC Bank Canada
Invesco Canada Ltd.

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JPMorgan Chase Bank, N.A., Toronto Branch
Manulife Financial Corporation
Morgan Stanley
National Bank of Canada
OMERS Administration Corporation
Ontario Teachers' Pension Plan Board
Public Sector Pension Investment Board
Royal Bank of Canada
Sun Life Financial
The Bank of Nova Scotia
The Toronto-Dominion Bank

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Schedule A to

CMIC RESPONSE LETTER TO PROPOSED NI 93-102

Comparison of NI 93-102 with Existing Canadian Bank Requirements

This analysis demonstrates that existing standards that apply to Canadian banks achieve a substantially equivalent outcome in respect of each specific proposed requirement under NI 93-102.[29] Moreover, the additional reference material below also demonstrates that OSFI's comprehensive, appropriate and robust framework for regulating over-the-counter derivatives, which has not been challenged as deficient, is also broadly consistent both with equivalent CFTC requirements and IOSCO recommendations, where applicable. Consequently, there are no benefits associated with requiring Canadian banks to register under 93-102, nor would there be any "gap" in regulation if Canadian banks were fully excluded in light of the significant risks associated with registration.

ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	**Existing Requirements for Canadian Banks**	**Conclusion**	**CFTC**	**IOSCO**	**G20[30]**
1. Derivatives Ultimate Designated Person *Sections 16, 18, 27, 30*	Section 157(1) of the *Bank Act* imposes a duty on the board of a bank to manage or supervise the management of the bank and affairs of the bank. Under the *OSFI Supervisory Framework*, the board and senior management are designated as ultimately accountable for the safety and soundness of the bank. Guideline E-17 (*Background Checks on Directors and Senior Management of FREs*) sets out OSFI's expectations regarding the bank's procedures for assessing the	**Substantially equivalent outcome: diligent supervision** OSFI's supervisory standards achieve a substantially equivalent outcome as the CSA's proposed Ultimate Designated Person requirements.	Under CFR Title 17, s. 23.602, swap dealers must (i) establish and maintain a system to diligently supervise its activities, (ii) designate at least one person with authority to carry out supervisory responsibilities and (iii) reasonably ensure that supervisors are qualified and meet appropriate standards. The CFTC determined that the OSFI's supervision standards are generally identical in intent to CFTC requirements because they seek to ensure strict	DMI Report[31]: Recommendation 5: The market authority of the host jurisdiction in which the DMI is carrying on business should ensure that there are appropriate supervisory arrangements in place for the OTC derivatives business carried on by that DMI. Recommendation 10: DMIs should be required to have effective corporate governance frameworks designed to ensure appropriate management of OTC derivatives	Not required.

[29] Both the CSA and the CFTC have adopted this "outcomes-based" approach. In its notice of 93-102, the CSA indicate that they determine equivalence "where the requirement imposed by … the prudential authority achieves a substantially equivalent outcome as the Proposed Instrument." Similarly, in its substituted compliance decision with respect to entity level requirements for Canadian banks, the CFTC noted that it "ultimately focuses on regulatory outcomes (i.e., the home jurisdiction's requirements do not have to be identical". This approach recognizes that although "regulatory systems differ and their approaches vary … regulatory requirements nonetheless achieve the regulatory outcome sought to be achieved." https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2013-30979a.pdf at p. 78841.

[30] G20 commitments relating to OTC derivatives: http://www.fsb.org/wp-content/uploads/g20_leaders_declaration_pittsburgh_2009.pdf

[31] Technical Committee of the International Organization of Securities Commissions, *International Standards for Derivatives Market Intermediary Regulation – Final Report* (June 2012): https://www.iosco.org/library/pubdocs/pdf/IOSCOPD381.pdf ("**DMI Report"**) With respect to prudential regulators, the Report notes: "The standards in this Report do not purport to prescribe what type of governmental regulator or combination of governmental regulators should be responsible for the regulation and oversight of DMIs in a particular jurisdiction. For example, where a market authority does not have jurisdiction over prudential oversight of DMIs, the market authority **can rely on the prudential authority to address the recommendations relevant to prudential rules**" [emphasis added] (at pp. 4-5). We note that this Report also adopts an outcomes based approach: "The form the requirements take is less important than the outcome of them" (at p. 13).

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ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	**Existing Requirements for Canadian Banks**	**Conclusion**	**CFTC**	**IOSCO**	**G20[30]**
	suitability and integrity of directors and senior management. Individuals who play a significant role in the management of the bank, including senior management (a "**Responsible Person**"), may be found unsuitable for a particular position because of a lack of qualifications. OSFI expects that persons who do not possess the required suitability and integrity for a particular Responsible Person position will not be appointed to that position. If OSFI determines that a bank has taken insufficient action to resolve a situation OSFI deems to be of material risk, it has legislative authority to take remedial action under the *Bank Act*, sections 617.2, 647.1 and 964 (including on the grounds of lack of competence or experience). The *Corporate Governance* Guideline sets out OSFI's expectations regarding the effective oversight of banks' activities by their boards and senior management. Guideline E-13 (*Regulatory Compliance Management*), Section IV(viii) sets out the responsibility of senior management to ensure compliance measures are adequate and to supervise and promote compliance, including ensuring that all staff understand their responsibilities for complying with		compliance with applicable law, policies and procedures that would lead to compliance with applicable law, and an effective system of internal oversight and enforcement of such policies and procedures On that basis, the **CFTC determined that OSFI's supervision standards are comparable to and as comprehensive as the above CFTC requirements**. If the CSA provides US swap dealers with an exemption under s. 52, it follows that OSFI's standards must also achieve a substantially equivalent outcome as 93-102.	activities within the DMI. Recommendation 11: DMIs should be required to design supervisory policies and procedures to manage their OTC derivatives operations and the activities of their representatives. **These recommendations are already addressed in relation to Canadian banks.**	

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ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	**Existing Requirements for Canadian Banks**	**Conclusion**	**CFTC**	**IOSCO**	**G20[30]**
	policies, procedures and processes and are held to account for performance of their responsibilities.				
2. Derivatives Chief Compliance Officer *Sections 16, 18, 28, 30*	Under OSFI's *Corporate Governance* Guideline, the board of each bank is responsible for the selection, performance, management, compensation and evaluation of a Chief Compliance Officer (**CCO**). OSFI recognizes that the skills, competence, integrity and experience of a CCO are critical factors in the safety and soundness of the bank. OSFI Guideline E-13 (*Regulatory Compliance Management*) provides that: • The CCO should be assigned overall responsibility for assessment and management of regulatory compliance risk, including assessing the adequacy of, adherence to and effectiveness of the bank's day-to-day controls, and for providing an opinion to the board whether, based on the independent monitoring and testing conducted, the compliance controls are sufficiently robust to achieve compliance with the applicable regulatory requirements enterprise-wide. • The CCO must be independent from operational management and have sufficient stature, authority, resources and support within the bank to influence the bank's activities. • Staff assigned to compliance	**Substantially equivalent outcome: compliance oversight** OSFI's compliance oversight standards achieve a substantially equivalent outcome as the CSA's proposed Derivatives Chief Compliance Officer requirements.	Under CFR Title 17, s. 3.3, swap dealers must designate a chief compliance officer to perform various oversight functions, including developing and administering policies and procedures to ensure compliance. The chief compliance officer must provide an annual report to the board or senior officer prior to furnishing it to the CFTC. The CFTC determined that OSFI's CCO standards are generally identical in intent to CFTC requirements by seeking to ensure firms have designated a qualified individual as the compliance officer that reports directly to a sufficiently senior function of the firm and that has the independence, responsibility, and authority to develop and administer compliance policies and procedures reasonably designed to ensure compliance resolve conflicts of interest, remediate noncompliance issues, and report annually on compliance of the firm. On that basis, the **CFTC determined that CCO requirements of the OSFI**	DMI Report: Recommendation 13: DMI's management should be required to establish, maintain and apply policies, procedures and systems of control sufficient to provide reasonable assurance that the DMI and each individual acting on its behalf are competent and comply with applicable regulatory standards and the DMI's internal policies and procedures. **This recommendation is already addressed in relation to Canadian banks.**	Not required.

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ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	**Existing Requirements for Canadian Banks**	**Conclusion**	**CFTC**	**IOSCO**	**G20**[30]
	responsibilities, including the CCO, should have the appropriate skills and knowledge of the business and regulatory environments that are essential to effective compliance. • The CCO should have a clearly defined and documented mandate, unfettered access, and for functional purposes, a direct reporting line to the board. • Normal course reports to the board should be made no less than annually, and contain discussion of material weaknesses, non-compliance issues, and remedial action plans. • The CCO should also provide an opinion to the board on a regular basis, but at least annually, on the adequacy of, adherence to and effectiveness of the day-to-day controls, and whether, based on the independent monitoring and testing conducted within the bank, the bank is in compliance with applicable regulatory requirements enterprise-wide. • OSFI expects the CCO to report to the board, on a timely basis, material instances of non-compliance, compliance issues and any measures to remediate issues or implement new or revised controls. The bank's management of regulatory compliance risk is monitored by OSFI in accordance with the *OSFI Supervisory Framework* and reported on annually to the		**standards are comparable to and as comprehensive as the above CFTC requirements**.[32] If the CSA provides US swap dealers with an exemption under s. 52, it follows that OSFI's standards must also achieve a substantially equivalent outcome as 93-102.		

[32] With the exception of the requirement to furnish an annual report to the CFTC. However, because 93-102 does not provide for an analogous requirement to furnish an annual report to each securities commission, this exception is not relevant in the context of 93-102.

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ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	**Existing Requirements for Canadian Banks**	**Conclusion**	**CFTC**	**IOSCO**	**G20[30]**
	Minister of Finance.				
3. Derivatives Chief Risk Officer *Sections 16, 18, 29, 30*	*Risk Appetite Framework* The *Corporate Governance* Guideline requires that each bank establish a risk appetite framework ("**RAF**") that: • guides risk-taking activities; • sets basic goals, benchmarks, parameters, and limits, and should consider material risks; and • contains certain required elements, including a risk appetite statement, risk limits, and an outline of roles and responsibilities for implementation of the RAF. The *Corporate Governance* Guideline requires that senior management (including the CRO) oversee regular reviews of risk management systems and practices to ensure that they remain appropriate and effective in light of changing circumstances and risks. The board should seek assurances from senior management (including the CRO) that risk management controls are operating effectively, and that risk positions are in compliance with the delegated authorities and limits. The board should also establish processes to periodically verify the assurances provided to it. *Risk Committee* The *Corporate Governance* Guideline directs DSIBs to establish a dedicated risk committee to oversee risk management on	**Substantially equivalent outcome: robust risk management** OSFI's risk management standards achieve a substantially equivalent outcome as the CSA's proposed Derivatives Chief Risk Officer requirements.	Under CFR Title 17, s. 23.600, swap dealer obligations include: (i) establish and enforce a risk management program through policies and procedures designed to monitor and manage risks, (ii) establish an independent risk management unit; (iii) provide for quarterly review by senior management and annual review by the governing body of risk tolerance limits and exceptions; (iv) provide senior management and the governing body with quarterly risk exposure reports and on detection of a material change in risk exposure; (v) furnish risk exposure reports to the CFTC; and (vi) review and test the risk management program annually and on any material change in business. The CFTC determined that OSFI's risk management standards are generally identical in intent to CFTC requirements by requiring a system of risk management that seeks to ensure that firms are adequately managing the risks of their swaps activities. On that basis, the **CFTC determined that risk management requirements of the OSFI standards are comparable to and**	DMI Report: Recommendation 12: DMIs should be required to maintain risk management systems and organization to properly identify and manage their OTC derivatives related business risks. **This recommendation is already addressed in relation to Canadian banks.**	Not required.

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ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	**Existing Requirements for Canadian Banks**	**Conclusion**	**CFTC**	**IOSCO**	**G20[30]**
	an enterprise-wide basis. The Risk Committee: • should have a sound understanding of the types of risks to which the bank may be exposed and of the techniques and systems used to identify, measure, monitor report and mitigate those risks; • should have a clear mandate and sufficient knowledge in the risk management of financial institutions (including individuals with technical knowledge in risk disciplines, where appropriate); • should seek assurances from the CRO that risk management activities of the bank are independent from operational management, are adequately resourced, and have appropriate status and visibility; • should receive timely and accurate reports on significant risks of the bank and exposures relative to the bank's risk appetite; • should provide input to the approval of material changes to the bank's strategy and corresponding risk appetite; and • should be satisfied with the manner in which material exceptions to policies and controls are identified, monitored, measured and controlled, as well as the remedial actions when exceptions/breaches are identified. *Chief Risk Officer* The *Corporate Governance* Guideline recommends that each bank have a		**as comprehensive as the above CFTC requirements**.[33] If the CSA provides US swap dealers with an exemption under s. 52, it follows that OSFI's standards must also achieve a substantially equivalent outcome as 93-102.		

[33] With the exception of the requirement to produce a quarterly risk exposure report and provide such report to senior management, the governing body, and the CFTC. However, because 93-102 does not provide for an analogous requirement in respect of a quarterly report, this exception is not relevant in the context of 93-102.

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ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	**Existing Requirements for Canadian Banks**	**Conclusion**	**CFTC**	**IOSCO**	**G20[30]**
	designated Chief Risk Officer (**CRO**), with sufficient stature and authority within the organization, and who is also independent from operational management. The Guideline also provides as follows: • The board is responsible for the selection, performance, management, compensation and evaluation of the CRO. OSFI recognizes that the skills, competence, integrity and experience of a CRO are critical factors in the safety and soundness of the bank. • The CRO should have unfettered access to the board or Risk Committee and (for functional purposes) a direct reporting line to the board or Risk Committee. • The CRO is the head of the bank's risk management function, responsible for identifying, measuirng, monitoring and reporting on risks of a bank, independent of business lines or operational management. • The CRO should not be involved in revenue-generation orin management and financial performance, nor should the CRO's compensation be linked to the performance of specific business lines. • The CRO's on-going assessment of risk-taking activities should remain objective • The CRO should provide regular reports to the board, the risk committee, and senior management, should provide an objective view, and should meet with the risk committee or				

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ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	**Existing Requirements for Canadian Banks**	**Conclusion**	**CFTC**	**IOSCO**	**G20[30]**
	the board on a regular basis. • The CRO and risk management function should have processes and controls in place to assess the accuracy of risk information or analysis to be in a position to offer objective reporting *Derivatives* Guideline B-7 (*Derivatives Sound Practices*) provides that the process of risk management for derivatives is integrated into a bank's overall risk management program. Banks should be in a position to identify the material risks they face with respect to derivatives activities, assess their potential impact and have policies and controls in place to manage risk effectively. A bank's derivatives activities should, consistent with the RAF, be subject to risk limits approved by the board. Effective control, monitoring and reporting systems and procedures should be in place to ensure on-going operational compliance with the RAF.				
4. Proficiency *Section 18* *Note: Proficiency in respect of*	Guideline B-7 (*Derivatives Sound Practices*) provides that staff who are involved in trading or providing advice in relation to derivatives trades should have the appropriate education, skills, experience and	**Substantially equivalent outcome: proficient staff** OSFI's proficiency standards achieve a substantially equivalent outcome as the CSA's proposed	No equivalent. Under CFR Title 17, only the CCO and supervisors are subject to a general proficiency requirement, and no individuals are subject to specific proficiency requirements.	DMI Report: Recommendation 13: DMI's management should be required to establish, maintain and apply policies, procedures and systems of control sufficient to provide reasonable	Not required.

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ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	**Existing Requirements for Canadian Banks**	**Conclusion**	**CFTC**	**IOSCO**	**G20[30]**
supervisory, compliance and risk management functions are also addressed above under items 1-3.	training to carry out their responsibilities. Guideline E-13 (*Regulatory Compliance Management*), Section IV(viii) sets out the responsibility of senior management to ensure that all staff understand their responsibilities for complying with policies, procedures and processes and are held to account for performance of their responsibilities. The *Corporate Governance* Guideline reflects OSFI's expectation for banks to have knowledgeable and competent individuals with a clear understanding of their role and a strong commitment to carrying out their respective responsibilities.	proficiency requirements.		assurance that the DMI and each individual acting on its behalf are competent and comply with applicable regulatory standards and the DMI's internal policies and procedures. **This recommendation is already addressed in relation to Canadian banks.**	
5. Registration of individuals *Section 16*	*Holding Staff to Account* OSFI's *Supervisory Framework* provides that a bank's board and senior management are responsible for the management of the bank and ultimately accountable for its safety and soundness and compliance with governing legislation. Guideline E-13 (*Regulatory Compliance Management*), Section IV(viii) sets out the responsibility of senior management to ensure that all staff understand their	**Substantially equivalent outcomes: holding individuals to account and disclosure of relevant information** OSFI's standards relating to individual accountability for performance, together with its ability to penalize individuals for failure to comply with OSFI requirements, achieves a substantially equivalent outcome as the CSA's proposed requirements relating to individual registration in relation to individual	No equivalent. Supervisors, CCOs, CROs and "associated persons" are not required to register with the CFTC.	DMI Report: Recommendation 4: Relevant material information on licensed or registered DMIs should be made publically available. This information may include the names of senior management and those acting on its behalf. **This recommendation is already addressed in relation to Canadian banks.**	Not required.

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ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	**Existing Requirements for Canadian Banks**	**Conclusion**	**CFTC**	**IOSCO**	**G20[30]**
	responsibilities for complying with policies, procedures and processes and are held to account for performance of their responsibilities. There are broad provisions for individual penalties under the *Bank Act*. In particular, Section 980 provides that every person who, without reasonable cause, contravenes any provision of this Act or the regulations is guilty of an offence. Section 980.1 further provides that every person who knowingly provides false or misleading information in relation to any matter under the Act or the regulations is guilty of an offence. Failing to provide information and/or making false statements can also constitute an offence under Sections 982 and 984, respectively. Section 986 extends the liability for an offence to any officer or director of the Bank who "directed, authorized, assented to, acquiesced in or participated in the commission of the offence…" Penalties for individuals include fines and/or imprisonment. Section 25(2) of the *Office of the Superintendent of Financial Institutions Act* ("**OSFI Act**") provides that OSFI may impose a maximum penalty on a natural person of $10,000 for a minor violation,	accountability. In addition, banks are also already subject to disclosure of relevant information through counterparty onboarding requirements and existing public issuer disclosure requirements. By providing counterparties with necessary information regarding banks and senior management, these requirements achieve a substantially equivalent outcome as the CSA's proposed requirements relating to individual registration.			

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ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	**Existing Requirements for Canadian Banks**	**Conclusion**	**CFTC**	**IOSCO**	**G20[30]**
	$50,000 for a serious violation and $100,000 for a very serious violation. The *Administrative Monetary Penalties (OSFI) Regulations* (the "**AMP Regulations**") provide that penalties can be imposed in connection with non-compliance with (i) an order made by OSFI under the *Bank Act*, (ii) a direction made under the *Bank Act* to cease or refrain from committing an act or pursuing a course of conduct that is an unsafe or unsound practice, or to perform a remedial act, (iii) terms and conditions imposed by OSFI or an undertaking given to OSFI under the *Bank Act*, or (iv) a prudential agreement entered into with OSFI under the *Bank Act*. *Disclosure to Counterparties* Banks routinely provide KYC, AML, Canadian Representation Letters, LEIs, authorized signing authority and other onboarding documentation to our counterparties. In this regard, Guideline B-7 (*Derivatives Sound Practices*) requires banks to "act honestly and in good faith when marketing, negotiating, entering into, executing and administering transactions with its clients or counterparties."				

INCLUDES COMMENT LETTERS

ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	**Existing Requirements for Canadian Banks**	**Conclusion**	**CFTC**	**IOSCO**	**G20[30]**
	Reporting Issuer Disclosures Canadian banks are reporting issuers and provide disclosures as required under NI 51-102, including the names of each director and officer as required by Item 10 on Form 51-102F2 *Annual Information Form*.				
6. Capital Requirements *Section 31*	Analysis not necessary	In Appendix F to 93-102, the **CSA has recognized that OSFI's standards achieve a substantially equivalent outcome**.	No equivalent.	DMI Report: Recommendation 6: Market authorities should consider imposing some form of capital or other financial resources requirements for DMIs that are not prudentially regulated that reflect the risks that these intermediaries undertake. **This recommendation is already addressed in relation to Canadian banks.**	Not required.
7. Direction to conduct audit *Section 32*	Section 308 of the *Bank Act* requires banks to conduct an annual audit on a consolidated basis.	**Substantially equivalent outcome: audit** The *Bank Act* audit requirement achieves a substantially equivalent outcome as the CSA's proposed audit requirement.	No equivalent.	No relevant recommendation.	Not required.
8. Co-operating with the auditor	Analysis not necessary	In Appendix F to 93-102, the **CSA has recognized that OSFI's standards achieve a substantially**	No equivalent.	No relevant recommendation.	Not required.

INCLUDES COMMENT LETTERS

ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	**Existing Requirements for Canadian Banks**	**Conclusion**	**CFTC**	**IOSCO**	**G20[30]**
Section 33		**equivalent outcome**.			
9. Financial statements *Sections 34-36*	*Bank Act* Sections 308 and 840 of the *Bank Act* require banks to prepare audited annual financial statements with certain prescribed disclosures set out in Guideline D1 (*Annual Disclosures*) and D6 (*Derivatives Disclosure*) and according to IFRS 9 (*Financial Instruments and Disclosures*). *Reporting Issuer Disclosures* As reporting issuers, banks are required to publicly file annual and quarterly financial statements. Part 4 of NI 51-102 sets out the filing requirements.	**Substantially equivalent outcome: financial disclosure** The *Bank Act* and reporting issuer obligations achieve a substantially equivalent outcome as the CSA's proposed financial statement requirements.	No equivalent.	No relevant recommendation.	Not required.
10. Delivering financial information *Section 37*	Analysis not necessary	In Appendix F to 93-102, the **CSA has recognized that OSFI's standards achieve a substantially equivalent outcome**.	No equivalent.	No relevant recommendation.	Not required.
11. Compliance policies and procedures *Section 38*	Analysis not necessary	In Appendix F to 93-102, the **CSA has recognized that OSFI's standards achieve a substantially equivalent outcome**.	CFR Title 17 Section 23.402(a) requires swap dealers to have written policies and procedures reasonably designed to ensure compliance.	DMI Report: Recommendation 11: DMIs should be required to design supervisory policies and procedures to manage their OTC derivatives operations and the activities of their	Not required.

INCLUDES COMMENT LETTERS

ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	**Existing Requirements for Canadian Banks**	**Conclusion**	**CFTC**	**IOSCO**	**G20[30]**
				representatives. Recommendation 13: DMI's management should be required to establish, maintain and apply policies, procedures and systems of control sufficient to provide reasonable assurance that the DMI and each individual acting on its behalf are competent and comply with applicable regulatory standards and the DMI's internal policies and procedures. **These recommendations are already addressed in relation to Canadian banks.**	
12. Risk management policies and procedures *Section 39*	Analysis not necessary	In Appendix F to 93-102, the **CSA has recognized that OSFI's standards achieve a substantially equivalent outcome**.	CFR Title 17 Section 23.600(b) requires swap dealers to establish risk management policies and procedures designed to monitor and manage the risks associated with the swaps activities of the swap dealer.	DMI Report: Recommendation 12: DMIs should be required to maintain risk management systems and organization to properly identify and manage their OTC derivatives related business risks. Recommendation 13: DMI's management should be required to establish, maintain and apply policies, procedures and systems of control sufficient to provide reasonable assurance that the DMI and each individual acting on its behalf are competent and comply with applicable regulatory standards and the DMI's internal policies and	Not required.

INCLUDES COMMENT LETTERS

ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	**Existing Requirements for Canadian Banks**	**Conclusion**	**CFTC**	**IOSCO**	**G20[30]**
				procedures. **These recommendations are already addressed in relation to Canadian banks.**	
13. Confirmation of material terms *Section 40*	Analysis not necessary	In Appendix F to 93-102, the **CSA has recognized that OSFI's standards achieve a substantially equivalent outcome**.	CFR Title 17, Section 23.501 requires a swap dealer to execute a written transaction confirmation when trading with a swap dealer, major swap participant or financial institution, or to deliver a written acknowledgement of a transaction when trading with another counterparty, and subsequently execute a written transaction confirmation	Risk Mitigation Standards[34]: Standard 3: Covered entities should establish and implement policies and procedures to ensure the material terms of all non-centrally cleared OTC derivatives transactions are confirmed as soon as practicable after execution of the transaction. **This standard is already addressed in relation to Canadian banks.**	Not required.
14. Agreement for process of determining value of a derivative *Section 41*	Guideline B-7 (*Derivative Sound Practices*) provides that a bank should satisfy itself that the terms of any contract governing its derivatives activities are legally sound and the underlying transaction documentation is adequate. OSFI notes this is especially important with respect to provisions governing the calculation of settlement	**Substantially equivalent outcome: agreement of material terms to promote legal certainty** OSFI's standards regarding derivatives agreements achieve a substantially equivalent outcome as the CSA's proposed agreement	CFR Title 17 Section 23.504(b)(1) requires swap trading relationship documentation to be in writing and to include all terms governing the trading relationship between the swap dealer and its counterparty, including valuation.	Risk Mitigation Standards: Standard 2: Covered entities should establish and implement policies and procedures to execute written trading relationship documentation with their counterparties prior to or contemporaneously with executing a non-centrally cleared OTC	Not required.

[34] The Board of the International Organization of Securities Commissions, *Risk Mitigation Standards for Non-centrally Cleared OTC Derivatives* (January 2015) https://www.iosco.org/library/pubdocs/pdf/IOSCOPD469.pdf ("**Risk Mitigation Standards**"). "Covered entities" in this Report refers to financial entities and systemically important non-financial entities which at a minimum would be applied consistent with application of the margin requirements for non-centrally cleared OTC derivatives (s. 1.2). The Report also notes that "[O]nly non-centrally cleared OTC derivatives transactions **between two covered entities** are subject to the standards in this report [emphasis added]" (s. 1.3; also see 1.6).

INCLUDES COMMENT LETTERS

ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	**Existing Requirements for Canadian Banks**	**Conclusion**	**CFTC**	**IOSCO**	**G20[30]**
	amounts payable to or between parties upon the termination of a transaction. In order to promote legal certainty, banks should seek to agree in writing with counterparties to all material terms governing their trading relationship prior to or at the time of execution of a non-centrally cleared derivative. Guideline B-7 also provides that in order to reduce counterparty credit risk exposure, a bank should, where practicable, use legally enforceable bi-lateral and multi-lateral netting agreements with its counterparties. Further, OSFI expect that banks using derivatives instruments where material valuation uncertainty exists (e.g., instruments with complex payoffs, thinly traded or less liquid instruments where there are no readily available market prices) should have valuation and risk management processes that explicitly assess valuation uncertainty commensurate with the size and depth of its activities. Such assessments should be included in communication to senior management and/or the board, in their respective roles. OSFI Guideline E-22 (*Margin Requirements for Non-Centrally Cleared Derivatives*)	requirement.		derivatives transaction. Such documentation should include all material terms governing the trading relationship between the counterparties. However, in the case of one-off transactions, trading relationship documentation could take the form of a trade confirmation that includes all material rights and obligations of the counterparties to the non-centrally cleared OTC derivatives transactions, which have been agreed between them. Standard 4: Covered entities should agree on and clearly document the process for determining the value of each non-centrally cleared OTC derivatives transaction at any time from the execution of the transaction to the termination, maturity, or expiration thereof, for the purpose of exchanging margins. **These standards are already addressed in relation to Canadian banks.**	

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ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	**Existing Requirements for Canadian Banks**	**Conclusion**	**CFTC**	**IOSCO**	**G20[30]**
	requires mark-to-market (or for complex or illiquid trades, mark-to-model) exposure calculation connection with the exchange of variation margin.				
15. Agreement for process relating to disputes Policies and procedures for dispute resolution *Section 42(1) and (2)*	Analysis not necessary	In Appendix F to 93-102, the **CSA has recognized that OSFI's standards achieve a substantially equivalent outcome**.	CFR Title 17 Section 23.504(b)(1) requires swap trading relationship documentation to include dispute resolution terms.	Risk Mitigation Standards: Standard 7: Covered entities should agree on the mechanism or process for determining when discrepancies in material terms or valuations should be considered disputes, as well as how such disputes should be resolved as soon as practicable. The mechanism or process should provide for the escalation of material disputes to an appropriate level of senior management at the entity. Authorities may consider specifying in regulatory requirements or guidance whether covered entities should report to the relevant authority a valuation dispute in excess of an amount determined by regulation or above a pre-agreed threshold that is not resolved within a reasonable period of time. **This standard is already addressed in relation to Canadian banks.**	Not required.
16. Reporting unresolved disputes	OSFI Guideline B-7 (*Derivatives Sound Practices)* requires banks to implement procedures to resolve any discrepancies or	**Substantially equivalent outcomes: ensuring resolution of disputes and escalation of material issues**	No equivalent.	Risk Mitigation Standards: Standard 7: Covered entities should agree on	Not required.

INCLUDES COMMENT LETTERS

ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	**Existing Requirements for Canadian Banks**	**Conclusion**	**CFTC**	**IOSCO**	**G20[30]**
Section 42(3) and (4)	disputes with respect to material terms and valuations in a timely manner. OSFI Guideline E-22 (*Margin Requirements for Non-Centrally Cleared Derivatives*) requires that in the event that a margin dispute arises, covered entities should make all necessary and appropriate efforts, including timely initiation of dispute resolution protocols, to resolve the dispute. Pursuant to Section 455 of the *Bank Act*, a bank must (a) establish procedures for dealing with complaints made by persons having requested or received products or services in Canada from a bank, (b) designate an officer or employee of the bank to be responsible for implementing those procedures; and (c) designate one or more officers or employees of the bank to receive and deal with those complaints. In addition, pursuant to the *Complaints (Banks, Authorized Foreign Banks and External Complaint Bodies) Regulations*, banks must report to the public the number of complaints received, the average length of time to deal with complaints and the number of complaints resolved satisfactorily. In addition, the Financial Consumer Agency of Canada (which has jurisdiction over banks) has issued Guidance CG-12 *Internal dispute*	OSFI's standards regarding dispute resolution achieve a substantially equivalent outcome as the CSA's proposed requirement.		the mechanism or process for determining when discrepancies in material terms or valuations should be considered disputes, as well as how such disputes should be resolved as soon as practicable. The mechanism or process should provide for the escalation of material disputes to an appropriate level of senior management at the entity. Authorities may consider specifying in regulatory requirements or guidance whether covered entities should report to the relevant authority a valuation dispute in excess of an amount determined by regulation or above a pre-agreed threshold that is not resolved within a reasonable period of time. **This standard is already addressed in relation to Canadian banks.**	

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ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	**Existing Requirements for Canadian Banks**	**Conclusion**	**CFTC**	**IOSCO**	**G20[30]**
	resolution which provides further guidance on the requirements in respect of such policies and procedures. OSFI Guideline E-13 (*Regulatory Compliance Management*) sets out OSFI's expectation for the CCO to report to the board, on a timely basis, material instances of non-compliance, compliance issues and any measures to remediate issues or implement new or revised controls. In addition, regular reports to senior management and the board allow them to clearly understand the regulatory risks to which the bank is exposed, and the adequacy of key controls to manage those risks. OSFI's *Supervisory Framework* provides that OSFI reports annually to the Minister of Finance on the safety and soundness of banks and their compliance with the governing legislation.				
17. Business continuity and disaster recovery *Section 43*	Analysis not necessary	In Appendix F to 93-102, the **CSA has recognized that OSFI's standards achieve a substantially equivalent outcome**.	CFR Title 17 Section 23.603(a) requires swap dealers to establish a written business continuity and disaster recovery plan. The CFTC determined that OSFI standards are generally identical in intent to CFTC	DMI Report: Recommendation 14: DMIs should be required to develop and maintain an effective business continuity plan, based on their size, risks, and the nature of their operations, to allow them to mitigate, respond to and recover from business	Not required.

INCLUDES COMMENT LETTERS

ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	**Existing Requirements for Canadian Banks**	**Conclusion**	**CFTC**	**IOSCO**	**G20[30]**
			requirements because such standards seek to ensure that any market disruption affecting swap dealers is minimized and seek to ensure that entities adequately plan for disruptions and devote sufficient resources capable of carrying out an appropriate plan in a timely manner. On that basis, the **CFTC determined that business continuity and disaster recovery requirements of the OSFI standards are comparable to and as comprehensive as the above CFTC requirements.**	disruptions or disasters. **This recommendation is already addressed in relation to Canadian banks.**	
18. Portfolio reconciliation *Section 44*	Analysis not necessary	In Appendix F to 93-102, the **CSA has recognized that OSFI's standards achieve a substantially equivalent outcome**.	CFR Title 17 Section 23.502 requires swap dealers to engage in portfolio reconciliation as provided therein.	Risk Mitigation Standards: Standard 5: Covered entities should establish and implement policies and procedures to ensure that the material terms and valuations of all transactions in a non-centrally cleared OTC derivatives portfolio are reconciled with counterparties at regular intervals. **This standard is already addressed in relation to Canadian banks.**	Not required.
19. Portfolio compression *Section 45*	Analysis not necessary	In Appendix F to 93-102, the **CSA has recognized that OSFI's standards achieve a substantially equivalent outcome**.	CFR Title 17 Section 23.503 requires swap dealers to engage in portfolio compression as provided therein.	Risk Mitigation Standards: Standard 6: Covered entities should establish and implement policies and procedures to regularly assess and, to the extent	Not required.

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ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	**Existing Requirements for Canadian Banks**	**Conclusion**	**CFTC**	**IOSCO**	**G20[30]**
				appropriate, engage in portfolio compression. **This standard is already addressed in relation to Canadian banks.**	
20. Records requirements *Sections 46-47*	Sections 238, 239 and 597 of the *Bank Act* generally require banks carrying on business in Canada to maintain records in Canada and to ensure that OSFI can access in Canada any records necessary to enable OSFI to fulfill its supervisory mandate. In particular, pursuant to Section 238 of the *Bank Act*, a bank must prepare and maintain records containing the following (a) the incorporating instrument and the by -laws of the bank, (b) minutes of meetings and resolutions of shareholders and members, (c) the names of directors and auditors, (d) particulars of any authorizations, conditions and limitations established by OSFI in respect of the commencement and carrying on of business of the bank that are from time to time applicable to the bank, (e) particulars of exceptions granted in respect of any discontinuance, permission to a subsidiary of a foreign bank, or a sale of all or substantially all of its assets that are from time to time applicable to the bank; and (f) particulars from Schedule I or II that are applicable to the bank as they are from time	**Substantially equivalent outcome: comprehensive recordkeeping relating to derivatives.** OSFI's recordkeeping standards achieve a substantially equivalent outcome as the CSA's proposed recordkeeping requirement.	CFR Title 17 Section 23.201-203 requires swap dealers to keep full, complete, and systematic records (a) of all its swaps activities, including transaction records, position records and (b) of all activities related to its business as a swap dealer including governance, financial, complaints and marketing and sales materials. These sections also set out time periods required for records retention. The CFTC determined that OSFI's recordkeeping standards (i) are generally identical in intent to CFTC requirements because these standards seek to ensure the effectiveness of internal controls and transparency for regulators and market participants, (ii) require banks to keep data in a sufficient level of detail and (iii) employ effective risk management and facilitate strict compliance and regulatory oversight by requiring comprehensive records. On that basis, **the CFTC determined that**	DMI Report: Recommendation 15: DMIs should be required to retain OTC derivatives transaction records and be able to provide them in a timely, organized and readable manner. The record retention period for OTC derivatives transactions should apply for a specified period after its termination, maturity or assignment. **This recommendation is already addressed in relation to Canadian banks.**	Not required.

INCLUDES COMMENT LETTERS

ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	**Existing Requirements for Canadian Banks**	**Conclusion**	**CFTC**	**IOSCO**	**G20[30]**
	to time amended and published in the Canada Gazette. In addition, a bank must prepare and maintain adequate (a) corporate accounting records, (b) records containing minutes of meetings and resolutions of the directors and any committee thereof; and (c) records showing, for each customer of the bank, on a daily basis, particulars of the transactions between the bank and that customer and the balance owing to or by the bank in respect of that customer. Section 368 requires records to be retained for six years following dissolution. In addition, OSFI's Supervisory Framework requires banks to establish and maintain an enterprise-wide RCM framework of regulatory risk management controls, and these controls include oversight functions that are independent of the activities they oversee. OSFI expects the RCM framework to include ''Adequate Documentation'' as one of its key controls. Guideline B-7 (*Derivatives Sound Practices*) provides that banks should have mechanisms in place to assure the		**OSFI recordkeeping requirements are comparable to and as comprehensive as the above CFTC requirements**.[35] If the CSA provides US swap dealers with an exemption under s. 52, it follows that OSFI's standards must also achieve a substantially equivalent outcome as 93-102.		

[35] With the exception of the requirement to make records open to inspection by U.S. regulators. However, because 93-102 does not provide for an analogous requirement, this exception is not relevant in the context of 93-102.

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ANALYSIS			REFERENCE		
Proposed NI 93-102: Derivatives Registration	Existing Requirements for Canadian Banks	Conclusion	CFTC	IOSCO	G20[30]
	confirmation, maintenance, and safeguarding of derivatives contract documentation. Guideline B-7 also sets out OSFI's expectation that banks report derivatives transactions following the derivatives data reporting requirements that have been adopted in the province in which the head office and/or principal place of business of the bank is located. Section 36 of 91-507 (Ontario, Manitoba and Quebec) and MI 96-101 (rest of Canada) requires reporting parties to keep transaction records for the life of the transaction and for a further 7 years following expiration or termination.				

INCLUDES COMMENT LETTERS

SCHEDULE B TO
CMIC RESPONSE LETTER TO PROPOSED NI 93-102

Comparison to IOSCO DMI Report

NI 93-102	IOSCO
Derivatives Ultimate Designated Person (from NI 31-103)	Does not recommend specific positon – appropriate supervisory arrangements and management
Derivatives-specific CCO	Does not recommend specific position – sufficient control systems
Derivatives-specific CRO	Does not recommend specific position – risk management systems and organization
Specific proficiency requirements	Does not recommend specific requirements – "reasonable assurance" of competence
Registration of individuals	Does not recommend registration – relevant material information on DMIs should be publicly available and may include names of senior management and those acting on its behalf
Capital requirements – applicable to all registrants	Only applicable to DMIs that are not prudentially regulated
Audit, auditor, financial statements and financial information	No recommendations
Confirmation of material terms, agreement for determining value of derivative, disputes, portfolio reconciliation – applicable to all counterparties Portfolio compression – applicable to non-centrally cleared derivatives firms (whether registered or not)	Recommendations apply only to "covered entities" (similar coverage to margin rules) for non-centrally cleared derivatives
Agreement of material terms – no exemption for "one-off" transactions which is how trading occurs and in the FX market if no ISDA	For "one-off" transaction, trading documentation could take the form of a confirmation. Also recognizes that each product has different risks and jurisdictions should consider whether there is a regulatory need for creating specific registration requirements for each type of derivative product.
Dispute management – escalation of all unresolved disputes to board	Escalation of material unresolved disputes to senior management
Dispute management – escalation of all unresolved disputes to regulator	Authorities may consider specifying escalation to regulator above a pre-agreed threshold
Records – include financial statements and excess working capital, transaction records, minutes of board meetings, records of organizational structure, audit, compliance and risk management reports, business and strategic plans and financial records	Limited to transaction records

INCLUDES COMMENT LETTERS

SCHEDULE C TO

CMIC RESPONSE LETTER TO PROPOSED NI 93-102

Comparison to IOSCO Risk Mitigation Standards Report

Confirmation of Material Terms, Agreement for Determining Value, Dispute Resolution, Portfolio Reconciliation and Portfolio Compression

IOSCO Risk Mitigation Standards Report: It is CMIC's understanding that Sections 40-45 are in the Proposed Rules, as opposed to the Business Conduct Rule, because each of these sections cover items that include a risk management component, as opposed to dealing with business conduct and "bad" behaviour. CMIC further understands that these provisions are based on recommendations from IOSCO under its Risk Mitigation Standards for Non-centrally Cleared OTC Derivatives (the "**IOSCO Report**").[36] Based on a review of the IOSCO Report, CMIC notes the following:

- Section 1.3 of the IOSCO Report explicitly notes that the standards in the report only apply to non-centrally OTC cleared derivatives. In CMIC's view, this point illustrates that it is not global practice to apply these standards to centrally cleared derivatives. Also, section 1.6 of the report indicates that the standards apply only as between "covered entities" which are defined as "financial entities and systemically important non-financial entities". Section 1.2 of the report provides that the scope of "covered entities" should, at a minimum, be equivalent to covered entities that are subject to margin requirements for non-centrally cleared OTC derivatives. In CMIC's view, this means that it is not market practice, or practicable, and not consistent with global regulatory standards to apply these standards to all counterparties. Accordingly, Sections 40-45 of the Proposed Rules should not apply to centrally cleared OTC derivatives, including the alpha trade. Further, it is CMIC's view that the application of these provisions should be delayed until the CSA finalizes its margin rule. Otherwise, the CSA would risk applying these provisions beyond the scope anticipated by IOSCO. If the CSA is unwilling to delay the application of these provisions, it is CMIC's view that these provisions be limited only to derivatives parties with which the derivatives firm is already required to exchange variation margin under applicable margin rules/regulations.

- CMIC notes that in Section 2.3 of the IOSCO Report, IOSCO appears to recognize that the trading relationship documentation for FX transactions could occur through a confirmation rather than through a written agreement prior to or at the time of execution: "In the case of one-off transactions, trading relationship documentation could take the form of a trade confirmation that includes all material rights and obligations of the counterparties to the non-centrally cleared OTC derivatives transactions which have been agreed between them."[37] FX transactions that are not executed under an ISDA are "one-off" transactions as indicated in the IOSCO Report and that in those instances, a trade confirmation, including a SWIFT confirmation, is sufficient to satisfy the requirements under Section 41 of the Proposed Rules.

- With respect to dispute resolution, Section 7.1 of the IOSCO Report indicates that "the mechanism or process should provide for the escalation of material disputes to an appropriate level of senior management at the entity". CMIC accordingly recommends that Section 42(3) of the Proposed Rules be amended to allow for escalation to a firm's senior management and not directly to the board of directors. Further, CMIC notes that Section 42(3) does not include

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[36] Risk Mitigation Standards for Non-centrally Cleared OTC Derivatives, Report of the Board of IOSCO, January 28, 2015. Available here.

[37] *Ibid*, pg. 7.

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a materiality concept. Only disputes which are material to the derivatives firm should be escalated to senior management.

- In addition, Section 7.2 of the IOSCO Report provides that authorities may consider specifying in regulatory requirements or guidance whether covered entities should report to the relevant authority a valuation dispute in excess of an amount determined by regulation or above a pre-agreed threshold that is not resolved within a reasonable period of time. Accordingly, it is entirely appropriate for the Proposed Rules to allow parties to the derivatives transaction to have the ability to agree to a threshold such that only disputes above such threshold are reported to the regulators.

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SCHEDULE D TO
CMIC RESPONSE LETTER TO PROPOSED NI 93-102

RESPONSES TO QUESTIONS

1) Methodology for determining "notional amount"

Q: Annex I describes two different methodologies for determining notional amount for derivatives that reference a notional quantity (or volume) of an underlying asset: (i) the methodology based on the CDE Guidance, set out in Column 1 of Annex I, and (ii) the Regulatory Notional Amount methodology set out in Column 2 of Annex I.

(a) Please provide any comments relating to the constituent elements (price, quantity, etc.) of the proposed methodologies.

(b) Please provide comments on the most appropriate approach to determining the notional amount, for the purpose of regulatory thresholds, of a derivative with a notional amount schedule, including a schedule with notional amounts not denominated in Canadian dollars.

(c) Please provide comments on the most appropriate approach to determining notional amount for a multi-leg derivative.

For example, in a multi-leg derivative with multiple legs that are exercisable, deliverable or otherwise actionable and that are not mutually exclusive, is it appropriate to determine the notional amount for the derivative by summing the notional amount for each such leg that is exercisable, deliverable or otherwise actionable and that is not mutually exclusive?

Other multi-leg derivatives may have multiple legs that are not exercisable, deliverable or otherwise actionable or that are mutually exclusive. For these types of multi-leg derivatives, is it appropriate to determine the notional amount for the derivative by using a weighted average of the notional amount of each such leg that is not exercisable, deliverable or otherwise actionable or that is mutually exclusive?

(d) Please provide any general comments on determining notional amount for the purpose of regulatory thresholds, including relating to implementation of the proposed methodologies.

Answer:

With respect to all of the above questions, it is CMIC's view that whatever approach is taken, it should be harmonized with the approach taken globally. To that end, CMIC directs the CSA to the article by ISDA[38] which identifies the predominant use of notional amount outstanding by regulators in major jurisdictions globally, which will inform the discussion about whether the use of notional amount thresholds is appropriate for regulations that are intended to address risk. A risk-based approach certainly seems like a reasonable approach in circumstances where regulations are intended to address risk, however, as we have noted before, Canada should not be introducing bespoke OTC derivatives legislation, given the relative small size of the Canadian market. It would be reasonable for the CSA to align with whatever approach the CFTC has taken with respect to notional amounts, or will take in the future, particularly as they have had experience calculating notional amounts in the context of its *de minimis* threshold exemption from swap dealer registration.

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[38] Uses of Notional Amount in Derivatives Regulation, ISDA. May 2018. Available here.

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2) Definition of "affiliated entity"

Q: 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 II). Please provide any comments you may have on (i) the definition in the Instrument, (ii) a definition in Annex II, and (iii) the appropriate balance between harmonization across related rules and using different definitions to more precisely target specific entities under different rules.

Answer:

Whichever approach is adopted, the definition of “affiliated entity” should be the same for all OTC derivatives rules in all provinces. This will reduce confusion, in particular, to foreign market participants, and will avoid participants selecting a particular jurisdiction solely due to the differences in treatment of affiliated entities. Given this broad application of this definition, it is CMIC’s view that a separate consultation should be conducted by the CSA with regard to which approach to be adopted.

3) Definition of "eligible derivatives party"

Q: Paragraphs (m), (n) and (o) provide that certain persons and companies are eligible derivatives parties if they meet certain criteria, including meeting certain financial thresholds. Are these criteria appropriate? Please explain your response.

Answer:

We refer you to page 13 of this letter as well as our discussion in our Business Conduct Response relating to the following recommended changes to the definition of “eligible derivatives party”:

- remove the financial threshold for commercial hedgers in paragraph (n);
- lower the financial threshold in paragraph (m) for a non-individual from net assets of $25 million to total assets of $10 million; and
- remove the knowledge and experience requirement under paragraphs (m), (n) and (o).

4) Application of the derivatives adviser registration requirement to registered advisers/portfolio managers under securities legislation

Q: Under the Proposed Instrument, a person or company engaging in or holding himself, herself or itself out as engaging in the business of advising others in derivatives will be required to register as a derivatives adviser unless an exemption from registration is available.

We understand that a registered adviser under securities or commodity futures legislation may provide advice in relation to derivatives or strategies involving derivatives, or may manage an account for a client and make trading decisions for the client in relation to derivatives or strategies involving derivatives. If the performance of these activities in relation to derivatives is limited in nature so that it could reasonably be considered incidental to the performance of their activities as a registered adviser for securities, we may consider the registered adviser/portfolio manager to not be "in the business of advising others in relation to derivatives".

(a) Do you agree with this approach? If not, why not? Alternatively, should we consider including an express exemption from the derivatives adviser registration requirement for a registered adviser under securities or commodity futures legislation? If yes, what if any conditions should apply to this exemption?

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(b) When should the provision of advice by a registered adviser/portfolio manager in relation to derivatives be considered incidental to the performance of their activities as a registered adviser/portfolio manager? What factors should we consider in distinguishing between registered advisers who need to register as derivatives advisers from registered advisers that do not need to register as derivatives advisers?

Answer:

It is CMIC's strong view that persons who provide advice in respect of OTC derivatives should not be required to register as CMIC is not aware of any other jurisdiction with this requirement. If the CSA is unwilling to accept this recommendation, then it is CMIC's strong view that a registered adviser under securities or commodity futures legislation should not be considered to be "in the business of advising others in respect of derivatives" (whether entered into for hedging or non-hedging purposes) where the performance of these activities is limited in nature so that it could reasonably be considered incidental to the performance of their activities as a registered adviser for securities. An example of such incidental activity is where the derivatives-related advice would not be reasonably considered by the derivatives party to be core to the overall investment activity that is employed for the derivatives party. This may be evidenced by the description of the derivatives-related investment activity that is or will be employed by the registered securities adviser for a derivatives party relative to the overall investment activity of the securities adviser that is employed for the derivatives party, either orally or as set out in an investment management agreement or offering documents that are provided or otherwise made available to the derivatives party.

CMIC also strongly recommends that the test for what is "incidental" not hinge on the frequency of transacting. Large buy-side institutions may engage in various types of OTC derivatives transactions with repetition, regularity or continuity for hedging purposes. For example, currency hedging may be done on a very frequent basis, however, it should still be considered incidental to activities of a portfolio manager or adviser.

CMIC is also of the view that it would be appropriate for the Proposed Rules to include an express exemption for a registered adviser under securities or commodity futures legislation in either of the following circumstances:

1) Where the registered adviser complies with the following conditions: (i) it has incorporated and applies risk management-related policies and procedures that substantially comply on an outcomes basis with Section 39 of the Proposed Rules, (ii) a "derivatives chief risk officer" (which could be the registered adviser's current CRO or CCO) is designated by the registered adviser and the derivatives chief risk officer complies on an outcomes basis with Section 29 of the Proposed Rules, and (iii) the initial and ongoing proficiency requirements that are set out in Section 18(1) of the Proposed Rules are complied with. If these conditions are met, then a registered adviser will have complied with the rule in spirit, and the incremental benefits associated with complete compliance with the rule do not outweigh the costs and other burdens of such compliance.

2) Where the registered adviser is only providing derivatives-related advice to a derivatives party that is acting as a commercial hedger (as defined in Section 1(1) of the Proposed Rules) in relation to the derivatives that it transacts, and such derivatives party is an "eligible derivatives party" as defined in Section 1(1) of the rule. It is CMIC's view that, taking into account the sophistication of the commercial hedger, the limited nature of the advisory activity that is undertaken by the registered adviser and the limited purpose of the advice, compliance with the Proposed Rules by the registered adviser will not add any necessary protections to market participants, and that the incremental benefits associated with compliance with the rule do not outweigh the costs and other burdens of such compliance.

5) IIROC membership for certain derivatives dealers

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Q: Section 9 prohibits a derivatives dealer from transacting with an individual that is not an eligible derivatives party unless the derivatives dealer is a dealer member of IIROC. Should a derivatives dealer that deals with an individual that is not an eligible derivatives party be required to become an IIROC dealer member? Are there any other circumstances where a derivatives dealer should be required to be an IIROC dealer member?

Answer:

CMIC does not understand the rationale behind requiring derivatives dealers to be registered as an IIROC dealer in order to trade with an individual that is not an EDP. In CMIC's view, this is unduly restrictive and impractical and there should not be any restrictions in terms of categories of derivatives dealer that can enter into transactions with non-EDP individuals.

As an example of the impracticality of requiring non-EDP individuals to trade through an IIROC member firm, some Canadian banks have private banking and/or wealth management businesses where these clients are individuals who may not currently qualify as EDPs under the current proposal. Many of these clients are located in Asia and banks will book these transactions in their Asian branches. Assuming that the Proposed Rules will apply to these trades (which, for greater certainty and as explained in our Business Conduct Response Letter, the Proposed Rules should not apply to these trades), this would mean that (i) a client outreach would be required to determine whether these clients are EDPs and (ii) these trades would have to be entered into by an IIROC member. Obtaining written representations from private banking clients has always been problematic if other private banks have not requested similar information, as clients often bank with multiple banks. It would be highly unusual and impractical to require a Canadian bank to trade with non-EDP foreign individual clients through an IIROC member. We are not aware of any other global banks whose home regulators would require them to trade outside their home market through a home broker-dealer entity, which would then have to become licensed in these foreign markets. As a result, if the CSA's approach is taken, Canadian banks would be placed at a serious competitive disadvantage relative to other global banks. CMIC therefore strongly opposes the requirement that trades with non-EDP individuals be entered into through an IIROC dealer.

6) Exemption from the individual registration requirements for derivatives dealing representatives and derivatives advising representatives

Q: Subsection 16(3) and subsection 16(4) provide an exemption from the requirement to register an individual as a derivatives dealing representative or as a derivatives advising representative in certain circumstances. Are the exemptions appropriate? In subparagraph 16(4)(b)(ii), individuals that act as an adviser for a managed account are not eligible for the exemption from the requirement to register as a derivatives advising representative. Is this carve out appropriate where an individual has discretionary authority over the account of an eligible derivatives party?

Answer:

CMIC is of the view that the exemptions under Sections 16(3) and 16(4) are appropriate. EDPs do not need any added protection that would be provided when an individual is registered as a derivatives dealing representative or a derivatives advising representative, particularly, the specific course and examination requirements set out in Sections 18(4) and 18(6). Derivatives firms are still required to ensure that individuals acting on behalf of such derivatives firms have the proper education, training and experience that a reasonable person would consider necessary, as set out in Section 18(1). Given the sophistication of EDPs, this baseline proficiency requirement is sufficient.

With respect to managed accounts and the carve-out to the Section 16(4) exemption, it is CMIC's view that this carve out is not appropriate and that individuals who have discretionary authority over the account of an EDP should have the benefit of the exemption from the requirement to register as a

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derivatives advising representative. In CMIC's view, the underlying EDPs should not be treated like non-EDPs simply because they have chosen to purchase professional advice via a managed account arrangement. It is unclear why two EDPs should be treated differently simply because one EDP decides to enter into a contractually negotiated agreement with an adviser for a managed account, whereas another EDP that has the financial resources to enter into such an agreement chooses not to. We wish to highlight that advisers have a fiduciary duty to clients with managed accounts and therefore EDPs with managed accounts will have enhanced protection. CMIC therefore recommends that the carve out under Section 16(4)(b)(ii) be deleted.

7) Specific proficiency requirements for individual registrants

Q: Subsections 18(2) through (6) of the Instrument establish specific proficiency requirements for each individual registration category. Are these specific requirements appropriate? If not what specific exams, designations or experience are appropriate?

Answer:

CMIC is not aware of any other derivatives legislation (current or contemplated) that includes proficiency requirements as burdensome and involved as what is currently contemplated in Sections 18(2), 18(3), 18(4) and 18(6) of the Proposed Rules. We appreciate that the approach that the CSA has taken is inspired by Canadian securities legislation, however, the OTC derivatives market is substantially different and the costs and burden of complying with the proficiency requirements as currently written do not outweigh the benefits. In our view, the proficiency requirements that are set out in Section 18(1) should be sufficient and are consistent with IOSCO standards.

If the CSA does not agree to remove the proficiency requirements in Sections 18(2), 18(3), 18(4) and 18(6) for all categories of registration, then CMIC notes that the requirement under Section 18(4) with respect to derivatives dealing representatives appears to equate proficiency solely with education, whereas derivatives advising representatives satisfy the proficiency requirement under Section 18(6) through a combination of education and experience. In CMIC's view, an individual that is registered as a derivatives dealing representative or a derivatives advising representative should be able to satisfy the proficiency requirement through a combination of any one or more of education, training and experience. To clarify, if an individual has a certain number of years' experience in the derivatives industry, he or she should not be required to also pass a specified derivatives course in order to act on behalf of the derivatives firm. Further, there should be a transition period of at least three years from the date the Proposed Rules are finalized to the date they become effective in order to enable individuals in any category of registration to study for and complete the required exams.

CMIC notes that with respect to the specific courses listed in Section 18 of the Proposed Rules, these requirements should not be bespoke requirements. Instead, for liquidity and harmonization reasons, the only course requirement that should be listed is the proposed National Futures Association examination requirement commencing January 2020.

8) Derivatives ultimate designated person

Q: Subparagraph 27(3)(c)(i) requires a derivatives firm's ultimate designated person to report any instance of non-compliance with securities legislation, including the Instrument, relating to derivatives or the firm's risk management policies if the non-compliance creates a risk of material harm to any derivatives party. Is this requirement appropriate?

Answer:

In CMIC's view, it is inappropriate and unnecessary to have a bespoke requirement that a firm's ultimate designed person ("**UDP**") is required to report to the board of directors any instance of non-

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compliance with the Proposed Rules, securities legislation relating to derivatives or the firm's risk management policies where non-compliance creates a risk of material harm to a derivatives party or the capital markets, or is a pattern non-compliance. Instead, the requirement should be that such a report be made under existing internal procedures (as required under prudential regulation, if applicable) which may include reporting by the CRO or the CCO. Further, any board reporting requirement should be fulfilled where such reporting is made to a management committee of the board of directors and not directly to the board of directors. Adding such a bespoke board reporting regime is not consistent with existing prudential regulation or global standards, or with Canadian securities legislation. Please see CMIC's response to Question 9 below in respect of the obligation of the UDP to report to the securities regulator.

In terms of the requirement that such non-compliance must create a "risk of material harm", it is CMIC's view that the "material harm" must be as a direct result of non-compliance, and not the result of the trade itself, such as economic terms and market factors. It is CMIC's view that the Companion Policy should clarify this point.

9) Requirements, roles and responsibilities of ultimate designated persons, chief compliance officers and chief risk officers

Sections 27 through 29 of the Instrument establish requirements, roles, and responsibilities of individuals registered as the ultimate designated person, the chief compliance officer and the chief risk officer for each registered firm. Considering the obligations imposed on senior derivatives managers in the Business Conduct Instrument, are the requirements, roles and responsibilities in sections 27 through 29 of the Instrument appropriate?

Answer:

Please refer to our discussion of the senior derivatives manager regime in our Business Conduct Response Letter. In terms of whether the requirements, roles and responsibilities in sections 27 through 29 of the Proposed Rules are appropriate, it is CMIC's view that they are largely duplicative. If a derivatives firm has a CRO and a CCO, there is no need to specifically designate a derivatives chief risk officer and a derivatives chief compliance officer. Doing so will result in oversight fragmentation. The CRO and the CCO already have responsibility of ensuring compliance with, respectively, a firm's policies and procedures for managing risks and for a firm's compliance with all existing legislation and regulation applicable to the firm.

With respect to the appointment of a derivatives ultimate designated person, in CMIC's view, this role is already being performed by the CCO, at least as these requirements relate to Canadian banks, who is responsible for oversight of monitoring and reporting on compliance matters for the firm as a whole, taking into account all of the firm's businesses and materiality for the entire firm. The CCO is independent of the derivatives business units and will be objective in determining when non-compliance is material and should be reported to a board's senior management committee or and/or the regulators. Instead of having the UDP report instances of non-compliance to securities regulators, as contemplated in Section 27(3)(d) of the Proposed Rules, this should be accomplished by having the CCO (in the case of a bank) deliver the annual compliance report to securities regulators as material non-compliance with securities legislation is one component of that report. Accordingly, the current compliance structure within Canadian banks is working well and designation of specific individuals to meet these roles would be duplicative. As it relates to Canadian banks, it is not clear to CMIC (i) why the proposed designation of a derivatives UDP, and derivatives-specific CRO and CCO are necessary and (ii) how it will improve the existing compliance structure within banks that is functioning well under OSFI oversight and supervision on a basis that is consistent with global standards.

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Similarly, with respect to registered securities firms, it should be sufficient for the reporting that is currently contemplated as being the responsibility of the UDP to be the responsibility of the registered securities firm's CCO. This approach would be consistent with Part 5 of NI 31-103, in that the UDP's responsibilities under that instrument are limited to (i) supervising activities that are directed toward ensuring compliance with applicable law, and (ii) promoting compliance with applicable law. In contrast, the CCO's responsibilities under that instrument (and the Proposed Rules for that matter) include reporting. It is not clear to CMIC why registered securities firms can't continue to apply an approach that has been functioning well from a securities regulatory perspective.

Also, we note that the word "material" does not appear in Sections 27(3)(c), 27(3)(d) and 28(3)(c) of the Proposed Rules before the references to compliance with "this Instrument", which is inconsistent with the drafting of Section 32 of NI 93-101. The inclusion of Section 32 of NI 93-101 is duplicative and confusing and CMIC recommends that it be deleted, and that the word "material" be inserted where appropriate in the Proposed Rules.

Our comments here with respect to reporting matters to securities regulators are subject to our comments under "Information Given to Regulator" on page 7.

10) Minimum requirements for risk management policies and procedures

Q: Section 39 sets out the minimum requirements for risk management policies and procedures. Are any of the requirements inappropriate? Are the requirements for an independent review of risk management systems appropriate?

Answer:

As it relates to derivatives firms that don't qualify for substituted compliance or are not otherwise exempted from the registration requirement, CMIC recommends that such firm's risk management policies and procedures should permit reporting to a firm's senior management committee of the board of directors, rather than directly to the board of directors. In addition, the requirements under Section 39 should not apply to a registered derivatives dealer that is acting as an intermediary for a registered firm, nor should Section 39 apply to a registered derivatives adviser in the context of conducting advising activities with its clients.

In addition, CMIC makes the following recommendations with respect to Section 39:

(a) Under Section 39(3)(a), the words "specific derivatives or" should be deleted. It should be sufficient to identify the material risks of "types of derivatives" without including material risks of "specific derivatives". Imposing a requirement to identify material risks from a specific derivative suggests a level of analysis that must be undertaken for each and every trade, and this would add an unjustified compliance burden.

(b) Under Section 39(3)(d), the word "material" should be added before the words "and risk tolerance limits" in Section 39(3)(d).

(c) Under Sections 39(3)(f) and 39(3)(g)(iii), the board reporting requirement should be deleted and instead, a requirement to report to the derivatives CRO should be added. The more fulsome board reporting that is done by the CRO in accordance with Section 29(3)(d) should be sufficient.

(d) Under Section 39(3)(g), the words "material change to the registered derivatives firm's risk exposures" should be deleted. Risk limits will reflect what is acceptable to a firm from a risk perspective (taking into account changes in exposure) and it should be sufficient to

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report a material breach of a risk limit. Imposing a requirement to specifically monitor and report material changes to exposures adds an unnecessary compliance burden.

(e) Under Section 39(3)(g), the words "immediate report" should be changed to "timely report", as this is more realistic and it is consistent with other reporting that must be made on a timely basis.

(f) Under Section 39(4), CMIC does not agree with this requirement for an independent review of risk management systems and strongly recommends that this requirement be deleted. This would significantly and unnecessarily add to the cost and burden of compliance, is not something that is required by other major global regulators for non-prudentially regulated derivatives firms and is duplicative of existing requirements for prudentially regulated derivatives firms.

11) Exemptions from the requirement to register for derivatives dealers with limited derivatives

Q: Sections 50 and 51 establish exemptions from the requirement to register for derivatives dealers that have a gross notional amount that does not exceed prescribed thresholds. These exemptions provide that derivatives dealers that have their head office or principal place of business in Canada must calculate their gross notional amount based on outstanding derivatives with any counterparty, regardless of where the counterparty resides. Derivatives dealers that have their head office and principal place of business outside of Canada would calculate their gross notional amount based on outstanding derivatives where the counterparty is a Canadian resident. Would this result in Canadian resident derivatives dealers being placed at a competitive disadvantage, particularly where foreign derivatives dealers may be exempt from regulatory requirements in their home jurisdiction?

Answer:

Yes, CMIC's view is that the current formulation of the calculation of notional amount will place Canadian resident derivatives dealers at a competitive disadvantage. It is not clear why a distinction is being made here that foreign dealers can exclude OTC derivatives trading activity that occurs outside of Canada, whereas Canadian domestic dealers are not able to do the same. CMIC notes that this would be the case even if the foreign dealer is exempt from registration in its home jurisdiction and therefore such trades outside of Canada do not fall under regulatory supervision. What makes this distinction even more striking is the fact that trades of certain Canadian resident derivatives dealers with non-Canadian counterparties are already subject to regulatory supervision outside of Canada (such as trades between Canadian banks that are registered swap dealers and U.S. persons). Therefore, those trades are, in effect, being double counted. Accordingly, CMIC does not think there should be any distinction between a Canadian resident derivatives dealer and a foreign dealer and the methodology used to determine whether the *de minimis* threshold has been exceeded.

12) Exemptions from specific requirements in this Instrument for investment dealers

Q: Section 55 exempts IIROC dealer members from specific requirements under the Instrument where those dealer members are subject to equivalent IIROC requirements. The IIROC dealer members will also be required to register in each CSA jurisdiction where their activities result in an obligation to register as a derivatives dealer or derivatives adviser. Does this obligation to register result in an excessive regulatory burden for the firms? Please provide specific information relating to this burden.

Answer:

While CMIC has not performed a detailed analysis of equivalent IIROC requirements, CMIC supports exemptions for IIROC dealer members as such dealer members are subject to a fulsome registration and business conduct regime in accordance with the IIROC Dealer Member Rules, including

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requirements around designation of a chief compliance officer, minimum capital, financial reporting, maintenance of books and records, business continuity, and derivatives risk management. The CSA is encouraged to perform a detailed review of rules applicable to IIROC dealer members, and complete Appendix E to the Proposed Rules, with a view to granting substituted compliance on an outcomes basis.

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DELIVERED VIA ELECTRONIC MAIL

September 12, 2018

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 Commission
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
(collectively called the "**Authorities**")

c/o

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800 rue du Square-Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal (Québec) H4Z 1G3
counsultation-en-cours@lautorite.qc.ca

Grace Knakowski
Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8
comments@osc.on.gov.ca

Dear Sirs and Mesdames,

Re: Comments on Proposed National Instrument 93-102 *Derivatives: Registration* and Proposed Companion Policy 93-102 *Derivatives: Registration*

Enbridge Inc. together with its affiliates, subsidiaries and related entities (collectively "**we**" or "**Enbridge**") hereby respectfully submits these comments in response to Canadian Securities Administrators ("**CSA**") request for comments in connection with the following published documents:

- Proposed National Instrument 93-102 *Derivatives: Registration* (the "**Proposed Registration Rule**"); and
- Proposed Companion Policy 93-102 *Derivatives: Registration* (the "**Proposed Registration CP**").

(collectively, the **"Proposed Registration Instrument"**)

Enbridge appreciates the opportunity to comment on the Proposed Registration Instrument.

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I. Introduction

Enbridge is the largest energy infrastructure company in North America with an extensive portfolio of energy assets including the world's longest and most complex crude oil pipeline system and is one of North America's leading natural gas delivery companies. In addition to extensive crude oil pipelines and natural gas pipelines (both onshore in Canada and the United States, and offshore in the Gulf of Mexico), Enbridge is the largest natural gas distributor in Canada, owns and operates power generation, power transmission and has an extensive renewable portfolio with both wind and solar assets in Canada, the United States and Europe. Enbridge also has marketing affiliates that provide energy supply and marketing services to North American refiners, producers and other customers.

Like many other "end-users", Enbridge transacts in derivatives to hedge the risks associated with its core business of transporting and processing energy commodities as well as interest rate and foreign exchange risks. Enbridge transacts in derivatives on its own behalf, to mitigate its own risks.

Enbridge would request the CSA consider a long transition period between the publication of the final registration rule and its effective date. Market participants will need time to assess their registration status, put in place appropriate risk procedures including revised know-your-counterparty processes, complete compliance training with employees, assess if they need additional technology or other resources, and ensure their agreements have the appropriate representations as may be required by the final registration rule.

II. Endorsement of Comments

Enbridge would like to express its full support of the comment letter from Eversheds Sutherland (US) LLP, on behalf of The Canadian Commercial Energy Working Group, to the Canadian Securities Administrators dated August 2, 2018 (the "**CCE Letter**") and the comment letter filed by the International Energy Credit Association, (Canadian Derivatives Regulatory Group) (the "**IECAWG Letter**"). Enbridge was an active participant in the drafting of the IECAWG Letter. Throughout this letter Enbridge will refer specifically to the CCE Letter and the IECAWG Letter in support of the comments contained herein.

III. Notional Amount Calculations

Enbridge has reviewed the two different methodologies for determining notional amount and finds that the "Regulatory Notional Amount" methodology to be the most appropriate with a few changes with respect to commodity derivatives calculations. We would direct the CSA to the excellent discussion and examples of commodity notional amount calculations in both the CCE Letter and the IECAWG Letter.

IV. De Minimis Threshold Value

The consequences of becoming a derivatives dealer are significant and market participants require certainty that their activities do not move them out of the non-dealing "end user" category into the derivatives dealer category. Any activities undertaken to hedge or mitigate commercial risk should be expressly excluded from any de minimis calculation (whether under a general threshold or a commodity threshold). This would be consistent with how Enbridge is treated under derivative regulations in both the U.S. and in Europe where we are considered to be an "end user". Without this express hedging exclusion, to avoid being designated a derivatives dealer, end users will either stop or reduce hedging activities, which will result in increased costs for the consumer. Canadian companies will also be impacted negatively by reduced liquidity in the Canadian market as counterparties who would not be

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deemed a derivatives dealer in their own jurisdiction, will not run the risk of being designated a derivatives dealer in Canada and will either reduce their activities or choose not to transact in the Canadian market. We would direct the CSA to the discussion in the CCE Letter on pages 3 and 4. Further, the CSA should not modify its currently proposed commodity threshold of $1 billion. Any change to the $1 billion threshold should be carefully considered and only be made once the CSA has a clear picture of the data. Any lower threshold will negatively impact liquidity in derivatives that are tailored for the energy industry. In particular, a higher threshold is required due to the "holistic" nature of the business triggers in the proposed National Instrument 93-101: *Business Conduct* and the use of "trading" activities versus "dealing" activities.

V. <u>Definition of Affiliate</u>

The CSA has provided two definitions of "Affiliated Entity" in the Proposed Registration Instrument, the first one based on "control" and the second based on "consolidation". If the CSA is proposing to only accept one definition over the other, Enbridge prefers the "control" definition. Upon further review of Enbridge's consolidated financials, there are many active hedging entities within Enbridge that are not identified specifically in our consolidated financials. As an example, Enbridge utilizes what the Commodity Futures Trading Commission ("CFTC") calls "treasury affiliates", which are wholly-owned entities that transact with the market, and then sleeve or pass through the hedges they execute to other internal Enbridge entities (whether wholly-owned or partially owned) that have the underlying risk that requires hedging. Since it is difficult and time consuming to negotiate master derivative agreements with external counterparties, many large companies use this type of structure for their hedging programs. Also, use of the "control" definition would be consistent with all other definitions of "affiliate" under securities legislation in Canada. That being said, Enbridge would also be supportive of using the consolidation definition as an additional definition of "affiliate" if the CSA deems it appropriate.

VI. <u>Definition of Eligible Derivatives Party and Criteria</u>

The CSA has requested comments on the appropriateness of the criteria for eligible derivative party ("EDP") in the Proposed Registration Instrument.

The definition of EDP should be consistent with the current, well understood definitions being utilized by the energy industry, namely "qualified party" under Alberta Blanket Order 91-507 (and other similar provincial blanket orders), "accredited counterparty" under the Québec Derivatives Act, a "permitted client" as defined in National Instrument 31-103, and "eligible contract participant" under the *Commodity Exchange Act* in the United States. In the aforementioned definitions, under Canadian or provincial laws, there is no stipulation that the entity have a certain amount of assets, merely that the hedging activities are connected to the management of an entity's physical commodity business. As stated in Enbridge's original comment letter to National Instrument 93-101: *Business Conduct,* Enbridge would support an EDP definition that refers to **<u>total</u>** assets versus the currently proposed **<u>net</u>** assets. Furthermore, the CSA should consider how the U.S. has a much lower threshold for eligible contract participants, being $10 million in total assets or $1 million in net assets. Finally, market participants should be able to rely on representations that are made to each other within their trading agreements as to their status as an EDP without further analysis or investigation.

VII. <u>Derivatives Adviser and Commercial Hedger Definitions</u>

Enbridge would direct the CSA to the commentary on the derivatives adviser and commercial hedger definitions in the IECAWG Letter and Enbridge supports those comments. Energy market participants are sophisticated and should be able to give and receive tailored derivative advice from internal entities

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that may not be "affiliated entities" as well as other third parties without triggering registration as a derivatives adviser.

VIII. Portfolio Reconciliation Requirements

Any rules with respect to portfolio reconciliation with derivative dealers should clarify that the responsibility to review the data exchanged lies solely with the derivative dealers. There should be no expectation by derivative dealers for end users to either sign up to a specific portfolio reconciliation service (which is an expense for the end user) or check the data end users receive from our derivatives dealers. End users do not have the resources to take on derivative dealers' responsibilities in this regard. The U.S. and Europe have handled these issues by allowing swap dealers to have written policies and procedures in place that are reasonably designed to perform such reconciliation however, if a counterparty does not want to engage in the portfolio reconciliation, the swap dealer is not in violation of the portfolio reconciliation requirements.

IX. Proficiency Requirements for Compliance Positions

Enbridge would direct the CSA to the commentary on the proficiency requirements in the IECAWG Letter and Enbridge agrees with those comments.

X. Conclusion

Enbridge thanks the CSA again for the opportunity to submit our comments on the Proposed BC Instrument and Proposed Registration Instrument and sincerely hope the CSA would consider our comments and recommendations as the CSA drafts final rules to establish a regulatory regime for the OTC derivatives market in the multilateral jurisdictions. We would be pleased to discuss our thoughts with you further. If you have any questions or comments, please contact the undersigned.

Respectfully submitted,

Enbridge Inc.

Kari Olesen
Senior Legal Counsel

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September 13th, 2018

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

For delivery only to:

comments@osc.gov.on.ca and consultation-en-cours@lautorite.qc.ca

RE: Canadian Securities Administrators Notice and Request for Comment
Proposed National Instrument 93-102 Derivatives: Registration and
Proposed Companion Policy 93-102 Derivatives: Registration

We are a Portfolio Manager whose head office is in B.C. We are also an Exempt Market Dealer and an Investment Fund Manager in several provinces. We market different classes of securities of a number of proprietary non-reporting investment funds to our clients and the clients of a registrant in which we have an equity interest. The overwhelming majority of the purchasers of these securities are fully managed accounts.

CANADA'S BEST MANAGED COMPANIES
MOST ADMIRED

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Our comments are primarily directed towards Consultation Question #4 titled:

"*Application of the derivatives adviser registration requirement to registered advisers/portfolio managers under securities legislation*" (p. 20 of the Consultation Paper) which reads in part:

> *"We understand that a registered adviser under securities or commodity futures legislation may provide advice in relation to derivatives or strategies involving derivatives, or may manage an account for a client and make trading decisions for the client in relation to derivatives or strategies involving derivatives. If the performance of these activities in relation to derivatives is limited in nature so that it could reasonably be considered incidental to the performance of their activities as a registered adviser for securities, we may consider the registered adviser/portfolio manager to not be "in the business of advising others in relation to derivatives".*

The following questions are addressed to the investment industry:

(a) Do you agree with this approach? If not, why not? Alternatively, should we consider including an express exemption from the derivatives adviser registration requirement for a registered adviser under securities or commodity futures legislation? If yes, what if any conditions should apply to this exemption?

(b) When should the provision of advice by a registered adviser/portfolio manager in relation to derivatives be considered incidental to the performance of their activities as a registered adviser/portfolio manager? What factors should we consider in distinguishing between registered advisers who need to register as derivatives advisers from registered advisers that do not need to register as derivatives advisers?

CANADA'S BEST MANAGED COMPANIES
MOST ADMIRED

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With respect to both (a) and (b):

We are not in the business of either dealing or advising in derivatives; however, we will occasionally, if circumstances make doing so to be in the best interests of our clients or funds, enter into FX contracts for them. Our funds are Eligible Derivatives Parties (EDPs) and most of our clients for whom we would make trade in FX contracts are EDPs as well. We do not trade in any OTC contracts except FX contracts. **These activities are for their protection, and are incidental to the goal of optimizing returns.** Therefore, we do agree with this approach and believe that this is true of registered advisers/portfolio managers like us (and we suspect there are many of them) whose derivatives advising is limited to entering into currency forwards to hedge against the risk of loss for client portfolios and pooled funds under their management and where certain conditions are met, namely:

1) the derivatives position is not an independent strategy intended for profit on its own, in the absence of a matched position to be hedged;

2) the aim of the derivatives position is to directly (not indirectly) limit or reduce the risk of loss to the portfolio;

3) the taking of derivatives positions of this type is not an advertised independent service of the firm and positions are entered into on a "needs-only" basis;

4) the derivatives position is specifically matched to (and dictated by) the exposure in the portfolio.

If these four points apply, then this is our response to (b). When these conditions are not met, registration obligations may apply.

However, no "exemption" should be required, as an exemption is intended only to provide "relief" from an obligation, in this case to register as a derivatives adviser; and, subject to the presence of points 1 to 4 above, there is no derivatives advising business being conducted and, therefore, no obligation to register. However, this clarity must be provided in the Companion Policy if there is to be consistency of interpretation through the passage of time.

Furthermore, with respect to the proposal overall, one of the unintended consequences of this may well be that industry participants will cease to protect their clients' portfolios if to do so potentially requires what the CSA may not realize is likely to cost a small or medium sized advisor a minimum of over $750,000 per year (in perpetuity) in new staff expenses.

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Irrespective of the number of staff a firm has (from 1 to 5, or more than 5 but not an SRO dealer member firm size) this breaks down as:

a) the hiring of new "derivatives" advisors (estimated at a salary or revenue-sharing cost of $200,000+ per year with additional costs to firms of approximately 30% more, or $60,000 in payroll taxes and benefits) each,

b) a CRO (referring to the qualifications required, salary databases indicate the same cost to firm, $200,000+ per year plus $60,000 in employer-paid taxes and benefits) and

c) an additional CCO-derivatives who meets the qualifications (referring to the qualifications required, salary databases indicate the same cost to firm, $200,000+ per year plus $60,000 in employer-paid taxes and benefits).

As most portfolio managers will not be deemed to be derivatives dealers, their existing staff registered as advisers and CCOs will be unable to provide dual coverage as these advisers and CCOs will not qualify under the regulations as written.

This cost burden imposed by the regulation as written, if the "exemption" is not applied to portfolio managers, would be borne by investors as fees paid by investors are the sole source of revenue for firms that are not also investment banks. This would be a detriment to investors as the CSA and its' members have pointed out in their proposals around their Requests for Comments on 33-404/31-103. We would see this as an unintended negative consequence of the imposition of this regimen as written.

This is prohibitive for small- and medium-sized firms that may do no more than a few contracts per day or month. There would likely be little to supervise or advise upon for this high price in most small- and medium- sized firms. The risk of firms just opting not to hedge their clients at all is a real unintended negative consequence here.

We would also like to make the point that this means that the experience component of the new proposals for Derivatives Advisers is going to be nearly impossible for individuals other than those who work for the largest firms to obtain, at least in the arena of comprehensive wealth management. This is another unintended negative consequence and we suggest that, as with advising in exchange-traded derivatives, being a registrant under NI 31-103 and having the required educational courses listed in the proposal should be considered adequate for those who wish to advise on OTC derivatives. Any concern about the

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magnitude of contracts, inherent OTC contract risks and financial exposure should be addressed independent of the registration question.

It's important to note, too, that in light of the absence of any trigger-incidents or international outcry from members of IOSCO, etc. that would suggest this level of heavy oversight and regulation of retail advisors is necessary to protect the public, the industry or the integrity of the economic environment, we must raise the question of the real benefit to investors and the public of these regulations overall.

We do, however, appreciate the dedication of all your staff in seeking to protect investors and this opportunity to address our concerns with you and to provide this feedback.

With sincere regards,

Dannielle H. MacDonald, MBA CIM CAMS
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Delivered by Email

September 14, 2018

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 Securities of Securities, Newfoundland and Labrador
Office of the Securities of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

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Dear Sirs/Mesdames:

CSA Notice and Request for Comment – Proposed National Instrument 93-102 Derivatives: Registration and Proposed Companion Policy 93-102 Derivatives: Registration

Thank you for the opportunity to provide comments on the CSA Notice and Request for Comment published April 19, 2018 regarding the proposed derivatives registration regime.

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Background

GLC Asset Management Group Ltd. ("GLC") is a diversified asset management firm responsible for providing discretionary portfolio management services on over $55 billion of assets, including Canadian fixed income, Canadian equity, and US equity. Our firm is registered as a Portfolio Manager and the Ontario Securities Commission is our principal regulator. We are a wholly owned subsidiary of The Great-West Life Assurance Company ("GWL") and manage corporate assets, segregated funds, and mutual funds on behalf of GWL and its subsidiaries. GWL is a member of the Power Financial group of companies.

The comments expressed within this letter reflect the views of GLC and may not necessarily agree with those of GWL or its affiliates.

Comments

Our comments focus on two areas:

1. The creation of a duplicate registration regime, and
2. The lack of detail surrounding additional fees and capital requirements.

Registration Duplication

While we acknowledge there may be some benefits to registering derivatives dealers and advisers, the introduction of a new and separate registration regime will duplicate many of the existing elements within the National Instrument 31-103 registration framework. The proposed instrument introduces new roles and processes to an organization's regulatory requirements that mimic existing and well-established roles mandated within NI 31-103. Separate derivatives roles will require organizations to maintain and monitor two sets of registration files, make two sets of filings for any change to a registrant's information, and create other similar duplicated efforts.

We question the necessity and value of introducing separate and distinct oversight positions for participation in the over-the-counter derivatives market especially when derivative activity for most Portfolio Managers would be an ancillary activity within their overall business model.

Fees and Minimum Capital Requirements

The lack of detail provided concerning additional registration fees and minimum capital requirements is of concern to our firm. While the proposed instrument explicitly states these details will follow in a future consultation, both items are of considerable importance given ever increasing regulatory requirements and the overall competitiveness within the financial services industry. It therefore makes this consultative review more challenging in determining the full impact to our firm as a registrant.

Conclusion

The goal of increased transparency and accountability in the over-the-counter derivatives market is laudable. However, we believe NI 31-103 already provides the CSA with the ability to regulate and monitor registrants at both the firm and individual level without the need for a second registration regime. We would respectfully suggest that additional consultation and discussion with key stakeholders is required.

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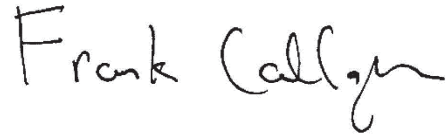
glc asset management

Yours truly,



Frank Callaghan
Senior Vice President, Finance & Operations
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Ref: GYG/69/H30
September 14, 2018

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Comments on the Proposed Instrument *Derivatives: Registration* issued by the Canadian Securities Administrators

Dear Madams:

We, the Japanese Bankers Association, would like to express our gratitude for this opportunity to comment on the Proposed National Instrument 93-102 *Derivatives: Registration* and the Proposed Companion Policy 93-102 *Derivatives: Registration* (collectively, "Proposed Instrument") issued on April 19, 2018 by the Canadian Securities Administrators ("CSA"). We respectfully expect that the following comments will contribute to your further discussion.

We would highly appreciate it if you read this comment letter and our comment letter concurrently submitted to the CSA in respect of Proposed National Instrument 93-101 and its companion policy issued in June together, given many issues are related to each other.

[General Comments]

<u>1. Exemption based on equivalence assessment</u>

Foreign derivatives dealers established in jurisdictions whose corresponding requirements are deemed to be equivalent to the requirements in the Proposed Instrument should be exempted from such requirements unconditionally, instead of applying certain conditions in Section 52. We request the CSA to assess equivalence of Japan's Financial Instruments and Exchange Act (the "Act") in cooperation with the

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Japan Financial Services Agency (JFSA) and grant an exemption to Japanese financial institutions based on the assessment that the Act is equivalent to the Proposed Instrument, instead of listing Japan in Appendix B and imposing certain conditions to qualify for the exemption from registration.

(Rationale)

Japan has already implemented the OTC derivatives regulations following the G20 agreement by incorporating them into the Act, whose equivalence to U.S. regulations has been recognized by the CFTC. Imposing Canadian registration requirements on Japanese financial institutions that are already subject to and in comply with such a strict national regulation would force them to address inefficient duplicated regulations, which result in excessive regulatory burdens for them.

If financial institutions that have been subject to national regulations on OTC derivatives are required to register as a derivatives dealer, some financial institutions may cease from transacting with Canadian firms in order to avoid regulatory burdens, causing adverse consequences on the liquidity of Canadian derivatives markets. That is as is the case with the U.S. when the OTC derivatives regulations under the Dodd-Frank Act took effect.

The following comments are provided in case that the Japanese financial institutions are not granted an exemption from the requirements in the Proposed Instrument.

2. Clarification of cross-border transactions

We request the CSA to consider and clarify how the Proposed Instrument will be applied to cross-border transactions.

(Rationale)

According to the Proposed Instrument, the requirements of trade reporting to Canadian authorities and portfolio reconciliation, etc. may be applied even to those transactions executed and booked by foreign derivatives dealers outside Canada or those transactions that do not involve Canadian counterparties.

For example, the Ontario Securities Commission Rule 91-507 requires trade reporting to Canadian authorities if at least one of the counterparties to a transaction is a "registered derivatives dealer". Therefore, if a non-Canadian person registers as a foreign derivatives dealer, all transactions executed by that foreign derivatives dealer would be subject to trade reporting and portfolio reconciliation requirements, which could result in excessive regulatory burdens.

Given the above, we request the CSA to consider and clarify how the regulations required

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by Canadian authorities will apply to cross-border transactions of foreign derivatives dealers in consideration of regulations in foreign jurisdictions where their head office and branches are located. Specifically, the scope of transactions should be limited to "transactions executed and booked within Canada" or "transactions with a Canadian counterparty located within Canada."

3. Derivatives dealer registration

The CSA should allow non-Canadian firms to register as a derivatives dealer on a branch-by-branch basis.

(Rationale)

The Proposed Instrument does not distinguish firms within Canada from firms outside Canada in terms of the derivatives dealer registration. However, given the fact that non-Canadian firms engage in a significant volume of derivatives transactions in foreign jurisdictions and that they are permitted to register as a Canadian financial institution on a branch-by-branch basis, the Proposed Instrument should also allow the derivatives dealers registration on a branch-by-branch basis, instead of on a firm-by-firm basis.

If non-Canadian firms uniformly become subject to the registration requirement according to the same criteria applied to Canadian firms and are only allowed to register on a firm-by-firm basis, they will need to register as a derivative dealer even though they only transact with Canadian firms to a very limited extent because the requirements in the Proposed Instrument will apply uniformly on a global basis. As is the case with the U.S. markets when the OTC derivatives regulations under the Dodd-Frank Act were implemented, some financial institutions may cease from transacting with Canadian firms in order to avoid regulatory burdens, which may ultimately cause harm to liquidity in Canadian derivatives markets.

[Specific Comments]

1. Conditions to qualify for the exemption of foreign derivatives dealers from registration requirement (Section 52)

As we express in the general comments, foreign derivatives dealers established in jurisdictions whose regulations are deemed to be equivalent to the Proposed Instrument should not be required to satisfy the certain conditions to qualify for the exemption from requirements to register set forth in Section 52. If this request is not accepted, paragraph (1)(a) "the person or company does not solicit or transact in a derivative with, for or on behalf of a non-eligible derivatives party" should be removed from the conditions. Furthermore, the CSA should provide the clarification to paragraph (2)(b)(ii)(B) (i.e. "all or substantially all of the assets of the person or company may be situated outside of the local jurisdiction"), one of the items required to be delivered to the derivatives party in writing. Also, the derivatives party to whom such disclosure in writing is required should

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be limited to those who are located within Canada.

(Rationale)

In the case of derivatives dealers operating in a jurisdiction where the CFTC recognize that it has an equivalent regulation to the Dodd-Frank Act, the condition that the derivatives dealer "does not solicit or transact in a derivative with, for or on behalf of a non-eligible derivatives party" would not be necessary for supervisory purposes because derivatives dealers are already subject to strict national regulations and have in place a robust customer protection framework.

With respect to paragraph (2)(b)(ii)(B) pertaining to one of the required items to be disclosed to the derivatives party, the CSA should expressly define the words "all or substantially all of the assets" as its meaning is not necessarily clear. In addition, please confirm that at least those firms located outside Canada and having a Canadian branch meets the condition in this paragraph.

Furthermore, paragraph (2)(b)(ii) of the Proposed Instrument can be interpreted that a foreign derivatives dealer should apply this disclosure requirement to all of its derivatives parties. Therefore, the term "the derivatives party," to which a written disclosure should be delivered, should be limited to the derivatives parties located within Canada and revise the stipulation.

2. Covered instruments (Section 3)

FX forwards, FX swaps and deposits or loans embedding derivatives, should be excluded from the scope of the Proposed Instrument.

(Rationale)

FX forwards and FX swaps are traded in those markets with relatively high liquidity and transparency. Also, there is a mechanism in place to mitigate their settlement risk. In light of these situations, similar regulations that have already been implemented in the U.S. exclude these products from the scope of application.

Regulations applied to define the scope of the Proposed Instruments (e.g. Ontario Securities Commission Rule 91-506) exclude ordinary deposits and some loans embedding derivatives from the scope but do not set forth specific covered contracts/instruments and instead only provide significantly limited examples. In the first place, those deposits and loans embedding derivatives only entail a limited risk as a derivative. Therefore, these types of deposits and loans embedding derivatives should be excluded from the scope of the Proposed Instrument.

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<u>3. Clarification of the registration requirement as a derivatives dealer (Annex IV Part 3/Section 6)</u>

The CSA should limit the registration requirements as a derivatives dealer as much as practical and is also requested to clarify the requirements by confirming our understanding specified below is correct.

i) The term "non-eligible derivatives party ('non-EDP')" is limited to a non-EDP that is "organized under the laws of Canada or a jurisdiction of Canada or that has its head office or principal place of business in Canada."

ii) If our understanding written above i) is correct, a firm is not required to register as a derivatives dealer, solely on the basis that it engages in a derivatives transaction with a counterparty outside Canada that is equivalent to the non-EDP.

iii) The registration requirement under Section 6(a) will apply if a firm enters into a transaction with a non-EDP after the finalized Instrument takes effect. That means, the requirement will not apply to all pre-effective date transactions (regardless of their remaining term) with a non-EDP even if that transactions' maturity arrive after the effective date.

iv) The registration requirement under Section 6(b) will not be applied if soliciting or initiating contact with a non-EDP is conducted or booked outside Canada.

v) Section 6(c) requires registration only if a firm facilitates the clearing for a "Canadian counterparty."

(Rationale)

The Proposed Instrument stipulates that "in the business of trading derivatives" or "required to register under section 6" is the "registration triggers" and does not refer to whether it is established within or outside Canada. Consequently, it can be interpreted that almost all financial institutions, including non-Canadian firms, are required to register if they satisfy the former condition, which seems to be an unnatural interpretation. From this viewpoint, the CSA should clarify the registration requirements.

Furthermore, the registration requirements should be limited as much as practical because, as mentioned previously, excessive regulatory burdens on non-Canadian firms will have negative effects on the Canadian markets. The CSA can, for example, apply the registration requirements to register only when a firm is required to register as a derivatives dealer pursuant to Canada's securities legislation or is required to register under section 6 and has its principal place of business or head office in Canada.

<u>4. Individual registration (Section 16)</u>

Individuals should not be required to register. If it is nevertheless determined to require individuals to register, the CSA should limit the scope of individual registration

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to those individuals who genuinely need registration and specify why such registration is necessary.

(Rationale)

The Proposed Instrument requires to extensively conduct individual registration, and therefore significant operational burdens are expected to be generated, while the necessity of such registration is unclear.

5. Risk management (Section 39)

With respect to the establishment of risk tolerance limits, the CSA should allow firms to manage risks associated with derivatives together with those with other products, instead of focusing on the risks associated with derivatives.

(Rationale)

Global firms generally perform risk management by taking into account interrelation between various types of products, rather than by focusing on specific products. For example, interest rate risk associated with derivatives is managed in an integrated manner together with bonds and other products. Under such practice, it is inefficient to separate products that are subject to a specific regulation (i.e., derivatives) and establish risk tolerance limits individually for them. Given this, the CSA should allow management of risks associated with derivatives together with those with other products.

6. Coverage of the threshold calculation (Sections 50 and 51)

From the perspective of reducing systemic risk in Canada, it would be reasonable to differentiate firms outside Canada from those within Canada for the coverage of the threshold calculation. However, with respect to the threshold to qualify for the exemption from the derivatives dealer registration, the CSA should consider the possibility of raising the threshold from C$250 million by analyzing relevant laws and risk coverage ratios applied in other jurisdictions, and should also review the coverage of the threshold calculation and observation period.

(Rationale)

If the proposed threshold is applied, an increasing number of financial institutions may exit from the Canadian markets to avoid regulatory burdens, reducing the liquidity and ultimately disrupting sound market activities. In order to maximize regulatory effects and at the same time maintain the soundness of the markets, the CSA should raise the proposed threshold and ensure that those financial institutions entailing significant risks and thus should be genuinely regulated will be subject to the derivatives dealer registration.

In addition, the Proposed Instrument does not provide a sufficient analysis that explains

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the threshold for the exemption from the derivatives dealer registration (i.e. C$250 million in aggregate gross notional amount outstanding in the previous 24 calendar months). While the calculation methods used cannot be simply compared with other jurisdictions, the U.S. has indicated in the consultative document on the SD regulation its direction to permanently apply the threshold of US$8 billion in the previous 12 months. Such an approach could be referenced and, for example, this threshold could be used as a criterion.

Furthermore, firms registered as a derivatives dealer should be excluded from the group-level threshold calculation because they are appropriately managing risks under the supervision of the Canadian authorities. In addition, a Canadian firm's branch located outside Canada should be excluded from the definition of "Canadian counterparty" and thus to exclude the branch from the threshold calculation, because transactions entered into by such a branch will pose limited risks associated with Canada[1].

If the Proposed Instrument sets a 24-month observation period to calculate the threshold, it would require lead time of more than two years when planning changes to a business model or booking scheme for transactions relating to Canada, which would make it difficult for firms to take agile actions. We therefore request the CSA to consider shortening the observation period to 12 months.

7. Clarification of interpretation, etc.

In finalizing the Proposed Instrument, please clarify the following point.

If a firm is exempted from the requirements to register by relying on, for example, "limited notional amount" (Section 50) or "foreign derivatives dealers" (Section 52), etc., we understand that the firm is exempted not only from the registration as an entity (Section 7) but also from the individual registration for its representative or employees (Section 16). Please inform whether our understanding is correct.

Sincerely,

Hideharu Iwamoto
Vice Chairman and Senior Executive Director

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[1] In the U.S. where similar regulations have already been implemented, a non-U.S. branch of a U.S. financial institution is excluded from the threshold calculation under certain conditions.

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September 14, 2018

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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

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RE: Comments on Proposed National Instrument 93-102 Derivatives: Registration

Hamblin Watsa Investment Counsel Ltd. ("HWIC") is pleased to submit this comment letter in response to the Canadian Securities Administrators' ("CSA") notice and request for comments regarding Proposed National Instrument 93-102 *Derivatives: Registration* ("Proposed Instrument") and Proposed Companion Policy 93-102 *Derivatives: Registration* ("CP", together with the Proposed Instrument, the

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"Proposed Registration Rule").[1] HWIC is a wholly-owned subsidiary of Fairfax Financial Holdings Limited ("Fairfax"), with its operations based in Toronto, Ontario.[2] HWIC provides investment management services exclusively to the insurance, reinsurance and certain other affiliates of Fairfax.

HWIC supports the efforts of the CSA to "help protect investors, reduce risk and, improve transparency and accountability in the over-the-counter (OTC) derivatives markets."[3] Further, HWIC appreciates the CSA's recognition in the Proposed Registration Rule that certain exemptions from registration as a derivatives adviser are appropriate. In particular, we are supportive of the inclusion of the exemption provided in Section 60 of the Proposed Registration Rule, which provides that a company is exempted from registration as a "derivatives adviser" in instances where it is only advising its "affiliated entit[ies]."[4] However, we believe that the terms and conditions around this exemption require further clarification. Accordingly, we have provided detailed comments on this clarification to Section 60, as well as related comments around the definition of what constitutes an "affiliated entity."

Proposed Section 60 should better promote centralized affiliate advising programs which improve corporate efficiencies and reduce risk.

The economic realities of today's markets often involve corporate groups engaging in multiple lines of business across disparate markets and geographies. Operations across various affiliates often introduce risks and inefficiencies that are exacerbated by deficient or inadequate centralization of management, expertise and oversight.

As a means to combat these risks and provide more fulsome, top-down supervisions, large companies often institute a centralized hedging and discretionary investment program, whereby the group consolidates its expertise into a single entity within the corporate group (a "PM"). In many instances the PM, in addition to performing a treasury-like function, provides investment management advice and services for its affiliates, which includes advice regarding derivatives. Structuring a corporate organization in this manner, with a centralized PM, promotes risk reduction and is an encouraged best practice, as it creates efficiencies across the company by leveraging talent, centralizing risk management oversight, streamlining decision-making, reducing redundancies, and ensuring consistency across affiliates. The PM's derivatives advising activities (and the PM's activities more generally) are purely inward facing and do not extend to third parties, limited solely to affiliates within its corporate group.

We appreciate the CSA's recognition in Section 60 of the Proposed Registration Rule that internal derivatives advising activities are distinguishable from third-party derivatives advising activities and should not be subject to derivatives adviser registration requirements. We note, however, that the exemption, as currently proposed, does not provide the regulatory certainty that is necessary in order to fully recognize the risk-reducing benefits of a PM. In particular, we note the following concerns.

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[1] Canadian Securities Administrators, *CSA Notice and Request for Comment, Proposed National Instrument 93-102 Derivatives: Registration and Proposed Companion Policy 93-102 Derivatives: Registration*, 41 OSCB 3253 (Apr. 19, 2018), *available at* http://www.osc.gov.on.ca/documents/en/Securities-Category9/csa_20180419_93-102_rfc-derivatives-registration.pdf. [hereinafter the "Proposed Registration Rule"].

[2] HWIC is a registered portfolio manager with the Ontario Securities Commission ("OSC"), while Fairfax is a publicly-traded company whose principal regulator is the OSC.

[3] Proposed Registration Rule at 3254.

[4] Proposed Registration Rule at 3297.

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The "investment fund" condition in the Proposed Registration Rule is overly broad and, consequently, must be further clarified.

The ambiguity created by the interplay between the exemption for advising affiliated entities in Section 60(1) and the limitation on advising affiliated "investment funds" in Section 60(2) should be clarified to exclude those instances where such affiliated investment funds' investors comprise of only affiliated entities. In particular, although Section 60(1) would generally provide an exemption for a person or company that is "advising an affiliated entity," Section 60(2) limits the availability of such an exemption if the advisee is an "affiliated entity that is an investment fund." Consequently, Section 60(2) would appear to preclude to a PM from qualifying for the exemption in Section 60(1) if the PM advises any affiliated investment fund. We believe that the limitation in Section 60(2) should be clarified to preclude from the exemption in Section 60(1) only those entities that advise an affiliated investment fund owned (i.e., invested in) by third-parties.

We note that an investment fund that is owned solely by affiliated entities of the same corporate group is distinguishable from an investment fund that is owned, in part, by third parties. We recognize that in many instances an affiliated investment fund is subject to a disparate ownership base comprised of third-party investors, and in such instances it may be reasonable to treat a company's derivatives advice as a third-party adviser relationship subject to registration requirements; however, Section 60(2), as drafted, ignores those instances where a company is providing derivatives advice to an affiliated investment fund that only has investors from within its affiliated corporate group. Indeed, investment funds are often used within a corporate group in order to provide an efficient investment mechanism for multiple affiliates within the corporate group—much like a PM serving as a centralized unit in which to advise the corporate group.

While we support the inclusion of the exemption in Section 60(1) of the Proposed Registration Rule, we believe the investment fund condition in Section 60(2) of the Proposed Registration Rule requires clarification to ensure that advising affiliated investment funds that are entirely owned by affiliates of a corporate group, with no outside investors, would not trigger registration as a derivatives adviser as, in this instance, such registration would not serve the intended purpose of Section 60(1) and would run contrary to the CSA's distinction between affiliate-based and third-party adviser services.

The "advising others" standard cannot be logically read to include inter-affiliate derivatives advice and, consequently, Section 60(2) should be clarified in the Proposed Registration Rule.

The CSA Derivatives Committee has explained that a "derivatives adviser" is a "[p]erson[] carrying on the business of advising others in relation to derivatives, or who hold[s] [themselves] out to be in that business in any Canadian jurisdiction."[5] We are in agreement with this interpretation and note that this explanation is supportive of our request for clarification to Section 60(2) of the Proposed Registration Rule. We respectfully request that a clarification make clear that Section 60(2) only precludes from the registration exemption in Section 60(1) of the Proposed Registration Rule, those entities that are advising affiliated investment funds owned (i.e., invested in) by one or more third-parties.

In particular, we posit that a logical reading of the CSA Derivatives Committee's explanation is that a PM cannot be "advising others" or be considered to be holding itself out as being in the business of providing derivatives advice in instances where the PM is only providing advice to affiliates (including affiliated investment funds owned solely by affiliated entities, with no third-party investors) of its corporate group. Indeed, it would be illogical to conclude that a PM—which is advising an affiliated

[5] CSA's Derivatives Committee Consultation Paper 91-407 Derivatives: Registration (Apr. 18, 2013).

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investment fund whose only investors are affiliates[6]—is "advising others" or holding itself out to third-parties when the only entities involved are part of the same corporate group as the PM. Moreover, we note that the OSC has granted similar exemptions from adviser registration in the securities and commodity futures contexts on the basis that a company that is only advising affiliates is not "advising others"[7]. In contrast, the distinction between affiliated investment funds owned by third-parties and those owned only by affiliated entities is clear, as the former illustrates a clear nexus to a third-party, and therefore logically constitutes the act of "advising others" as set forth in the CSA Derivatives Committee's interpretation.

Notwithstanding the intent behind "advising others" and holding out to be in the business of derivatives advice, a plain text reading of Section 60(2) is ambiguous. Accordingly, we urge the CSA to make clear that an advising company may qualify for the Section 60(1) exemption for advising affiliated entities if it advises an affiliated entity that is an investment fund where such affiliated investment fund (i) is wholly-owned by unitholders who themselves are affiliated entities within the corporate group and (ii) the advising company, the unitholders, and the investment fund all constitute affiliated entities that are under the same beneficial ownership and control.

Definition of "affiliated entity"

HWIC supports the proposed definition of "affiliated entity" in Section 1(3) which establishes that persons or companies will be considered to be affiliated entities if one controls the other or if the same person or company controls both, as well as the proposed test for "control" set forth in Section 1(4).[8] We believe the "control" based definition of "affiliated entity" provides greater certainty to

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[6] These internal investment funds do not permit outside investors (i.e., no third-party investors) and are wholly-owned by the same parent company as their affiliates.

[7] *See, e.g.*, In the Matter of *The Securities Act*, R.S.O. 1990, c. S.5, as amended (The Act) and In the Matter of Swiss Re America Holding Corporation, Swiss Reinsurance Company Ltd, Swiss Re Corporate Solutions Ltd and SR Corporate Solutions America Holding Corporation (Sept. 9, 2016) ("… they were not providing advice to others with respect to investing in securities or buying or selling securities because they were providing such advice only to affiliates or special purpose entities within the Swiss Re Group."); In the Matter of *The Securities Act*, R.S.O. 1990, c. S.5, as amended (The Act) and In the Matter of MEAG MUNICH ERGO Asset Management GmbH (Mar. 28, 2018) ("… was not providing advice to others with respect to investing in securities or buying or selling securities because it was providing such services only to affiliates within the Munich Re Group, and that its provision of such services did not constitute the "engaging in the business" of an adviser."); In the Matter of *The Commodity Futures Act*, R.S.O. 1990, Chapter C.20, as amended (The CFA) and In the Matter of DuPont Capital Management Corporation (July 13, 2018) (providing an exemption from the adviser registration requirement for a company acting as an adviser in commodity futures and options contracts "for a pension fund sponsored by an affiliate for the benefit of the employees of the affiliate.").

[8] Section 1(4) provides that "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); [and] (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; [and/or] (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); [and] (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."

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companies than the CSA's alternative version of the definition of "affiliated entity" that is based on "consolidation" under accounting principles and described in Annex II of the Proposed Registration Rule. While it is generally the case that affiliates within a corporate group are consolidated in prepared financial statements, there may be regulatory or business reasons for a particular entity not being included on consolidated financial statements, including changes in accounting rules.

* * *

Thank you in advance for your consideration of HWIC's comments in response to the Proposed Registration Rule. Please contact the undersigned at swilcox@fairfax.ca if you have any questions regarding our comments.

Respectfully submitted,

Sherry Wilcox
Vice President and Chief Compliance Officer

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September 16, 2018

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Dear Sirs/Mesdames of:
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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

Re: Canadian Securities Administrators ("CSA") Notices and Request for Comment – Proposed National Instrument 93-101 *Derivatives: Business Conduct* and Proposed Companion Policy 93-101 *Derivatives: Business Conduct* (the "Business Conduct Proposal") and National Instrument 93-102 *Derivatives: Registration* and Proposed Companion Policy 93-102 *Derivatives: Registration* (the "Registration Proposal") (collectively the "Proposals")

This comment letter is submitted on behalf of the Canadian division ("AIMA Canada") of the Alternative Investment Management Association ("AIMA") and its members to provide our comments to you on the legislative proposals referred to above.

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About AIMA

AIMA was established in 1990 as a direct result of the growing importance of alternative investments in global investment management. AIMA is a not-for-profit international educational and research body that represents practitioners in alternative investment funds, futures funds and currency fund management – whether managing money or providing a service such as prime brokerage, administration, legal or accounting.

AIMA's global membership comprises over 1,900 corporate members in more than 60 countries, including many leading investment managers, professional advisers and institutional investors and representing over $2 trillion in assets under management. AIMA Canada, established in 2003, now has more than 150 corporate members.

The objectives of AIMA are to provide an interactive and professional forum for our membership and act as a catalyst for the industry's future development; to provide leadership to the industry and be its pre-eminent voice; and to develop sound practices, enhance industry transparency and education, and to liaise with the wider financial community, institutional investors, the media, regulators, governments and other policy makers.

The majority of AIMA Canada members are managers of alternative investment funds and fund of funds. Most are small businesses with fewer than 20 employees and $50 million or less in assets under management. The majority of assets under management are from high net worth investors and are typically invested in pooled funds managed by the member.

Investments in these pooled funds are sold under exemptions from the prospectus requirements, mainly the accredited investor and minimum amount exemptions. Manager members also have multiple registrations with the Canadian securities regulatory authorities: as Portfolio Managers, Investment Fund Managers, Commodity Trading Advisers and in many cases as Exempt Market Dealers. AIMA Canada's membership also includes accountancy and law firms with practices focused on the alternative investments sector.

For more information about AIMA Canada and AIMA, please visit our web sites at canada.aima.org and www.aima.org.

Comments

Set out below are our comments on the Proposals, broken down between general comments and responses to specific questions from the Proposals relevant to our members, which have been replicated in each section for ease of reference.

AIMA Canada appreciates the opportunity to comment on these proposed changes, which if adopted could have significant consequences on Canada's investment industry.

We commend the CSA for their continuing analysis and consultation with respect to the issues and potential regulatory responses regarding the regulation of over-the-counter ("OTC") derivatives. AIMA Canada agrees that, in light of the 2008 financial crisis, enhanced regulatory oversight of the OTC derivatives market is required. We urge the CSA, however, 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.

GENERAL COMMENTS

1. ***Exemption of Foreign Exchange Forward Contracts and Swaps ("FX Forwards") from the Proposals***

The Proposals apply to OTC derivatives as defined by the various provincial regulations. In Ontario, OSC Rule 91-506 *Derivatives: Product Determination* effectively defines FX Forwards as OTC derivatives (which is consistent with the product determination rules in all other Canadian jurisdictions). **Notwithstanding this definition, AIMA Canada recommends that the CSA exempt from the application of the Proposals any registrant who engages solely in FX Forward transactions within defined parameters which**

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are set out below.

Treatment of FX Forwards By Other Regulators

For the purposes of regulation, FX Forwards have been excluded from the definition of OTC derivatives, for the purposes of regulation, by other regulatory and oversight authorities. We recommend that this approach be followed by the CSA for both international consistency and to maintain the competitiveness of the Canadian investment industry.

- In November 2012, the U.S. Department of the Treasury issued a final determination that FX Forwards would be exempted from certain mandatory derivatives requirements as part of the implementation of the Dodd-Frank Act. As a result, the U.S. Commodity and Futures Trading Commission ("CFTC") exempted FX Forwards from various monitoring and reporting requirements.

- In March 2015, the Basel Committee on Banking Supervision (the "BIS Committee") and the International Organization of Securities Commissions ("IOSCO") issued a paper on Margin Requirements for Non-Centrally Cleared Derivatives. In Requirement 1, paragraph 1.1, of this paper the BIS Committee and IOSCO state that "The margin requirements described in this paper do not apply to physically settled FX forwards and swaps."

- In February 2017, the Office of the Superintendent of Financial Institutions exempted physically-settled FX Forwards from the requirement to deliver initial and variation margin in Guideline E-22 *Margin Requirements For Non-Centrally Cleared Derivatives*.

With respect to the FX Forwards market, the above exclusions were deemed acceptable in light of the following factors with respect to the FX Forwards market:

a) Foreign exchange is unique as an OTC derivative in that the vast majority of FX transactions are short-term, thereby posing significantly less counterparty risk requiring oversight and regulation.

b) Foreign exchange transactions worldwide are already subject to strong, internationally coordinated oversight through central banks, with a well-functioning settlement process.

c) The transactions are often closely tied to the participants' funding and liquidity management activities.

d) Physically settled foreign exchange transactions should be viewed as money market or funding products. By definition such transactions are an agreement to deliver the full principal amount of one currency in exchange for the full principal amount of another currency. There are no "derivative" aspects to these transactions as participants know the exact extent of their obligations throughout the life of the contract.

Given these factors AIMA Canada recommends that the CSA exempt from the application of the Proposals any registrant who engages solely in FX Forward transactions within the following parameters:

a) FX Forwards are used by an entity registered as a securities adviser for risk management or hedging purposes linked to securities advising activities;

b) The FX Forward contracts have fixed terms requiring a physical exchange of currency; and

c) The average maturity of the portfolio of FX Forwards of the registrant is less than one year.

2. Fees – Division 2 Suspension and revocation of registration – derivatives firms <u>(Companion Policy of Registration Proposal)</u>

The Companion Policy states that a registered derivatives firm must pay fees every year to maintain its registration and that of its sponsored individuals. AIMA Canada asks the CSA to ensure that any additional proposed fees to be proposed are minimized for existing registered firms when the proposals are published for consultation.

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In particular we ask the CSA to confirm that there will not be any duplication of fees for registered individuals already acting in the same or similar capacities for their registered firms. In particular this would apply to the ultimate designated person ("UDP") and the chief compliance officer ("CCO") as they will likely be the same individuals under both the Registration Proposal and National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("NI 31-103"). It could also apply to an advising or dealing representative. There is no additional regulatory oversight required for an individual to be registered under both regimes, hence there should not be additional fees.

3. Exemption for International Derivatives Advisers

The Proposals provide for very limited exemptions for international firms, much more limited than the international exemptions found in NI 31-103. We recommend that the Proposals be aligned with NI 31-103 in this respect, to ensure harmonization across the regulatory regimes (which apply to the same set of regulated entities) and to avoid international firms avoiding the Canadian marketplace. It is not apparent to us why the international dealer exemption, the international adviser exemption and the international sub-adviser exemption, each as found in NI 31-103, cannot be mirrored for the OTC derivatives registration regime in the Proposals. We caution that not doing so may result in international firms being unwilling to provide services to the Canadian marketplace, which will ultimately harm Canadian investors by reducing choice and increasing costs.

To that end, **we recommend that:**

- An equivalent of the international sub-adviser exemption be available to firms with respect to OTC derivatives activities. It would be an unusual result that a firm relying on the international sub-adviser exemption for securities law purposes would have to register as a derivatives adviser, and be subject to extensive business conduct requirements, simply for sub-advising on a mandate that included OTC derivatives. As an international sub-adviser may only advise a registered Canadian adviser or dealer, specifically where that latter registered firm has agreed to ensure the international sub-adviser fulfill its fundamental obligations under Canadian securities laws, we do not see a policy concern arising as a result of the introduction of such an exemption in the Proposals.

- Equivalents of the international dealer exemption and the international adviser exemption be available to firms with respect to OTC derivatives activities. The terms of the these exemptions should be identical to the terms found in NI 31-103. We see no policy reason why such exemptions should not be available to firms that deal in or advise on OTC derivatives.

If these exemptions are not included, international firms, operating both in the securities and the OTC derivatives space, would face the unusual regulatory outcome of having to comply with one set of exemptions for their securities activities, and other set of requirements for their OTC derivatives activities, with no apparent reason or justification for this different regulatory treatment.

4. Senior Derivatives Manager

We have concerns with the multiple oversight and supervisory roles presented in the Proposals. In particular, we have concerns with the senior derivatives managers position – firms with limited activity in OTC derivatives may cease to undertake such activities rather than sustain the cost and time to build out systems associated with this role. It is onerous to require firms to designate an additional un-registered individual who fulfils substantially the same role as registered individuals (UDP, CCO and CRO). We see this as a particular concern for international firms with a small number of Canadian clients. Imposing requirements that are inconsistent with other major jurisdictions, particularly the United States, could negatively impact in a decrease in the competitiveness of the Canada marketplace and ultimately result in less expertise being made available to Canadian clients.

CSA QUESTONS

Definition of eligible derivatives party
(Business Conduct Proposal Q#2, Registration Proposal Q#3)

Paragraphs (m), (n) and (o) provide that certain persons and companies are eligible derivatives parties if they meet certain criteria, including meeting certain financial thresholds. Are these criteria appropriate? Please

explain your response.

In our opinion the criteria are appropriate as they are largely consistent with the definition of Permitted Client under NI 31-103. We strongly encourage consistency between the instruments given that the Proposals contemplate a parallel or overlapping registration regime.

Application of derivatives adviser registration requirement to registered advisers/portfolio managers under securities legislation
(Registration Proposal Q#4)

We understand that a registered adviser under securities or commodity futures legislation may provide advice in relation to derivatives or strategies involving derivatives or may manage an account for a client and make trading decisions for the client in relation to derivatives or strategies involving derivatives. If the performance of these activities in relation to derivatives is limited in nature so that it could reasonably be considered incidental to the performance of their activities as a registered adviser for securities, we may consider the registered adviser/portfolio manager to not be "in the business of advising others in relation to derivatives".

(a) Do you agree with this approach? If not, why not? Alternatively, should we consider including an express exemption from the derivatives adviser registration requirement for a registered adviser under securities or commodity futures legislation? If yes, what if any conditions should apply to this exemption?

(b) When should the provision of advice by a registered adviser/portfolio manager in relation to derivatives be considered incidental to the performance of their activities as a registered adviser/portfolio manager? What factors should we consider in distinguishing between registered advisers who need to register as derivatives advisers from registered advisers that do not need to register as derivatives advisers?

Registered advisers under securities or commodity futures legislation ("securities advisers") should not be required to register as derivatives advisers where their advice with respect to derivatives is incidental to their securities advising because it is important to ensure (i) that the designation as a derivatives adviser is meaningful and does not automatically require all securities advisers to also register as derivatives advisers, (ii) that registration as a derivatives adviser is required only where such registration satisfies some regulatory vacuum, such as proficiency or investor protection, and (iii) on a cost-benefit analysis, any additional regulatory burden is not lightly imposed on participants in the investment management industry. Securities advisers and other participants in the asset management industry are already subject to constantly changing, overlapping and costly regulation across multiple jurisdictions.

We recommend that the CSA provide an express exemption from the derivatives adviser registration requirement for the benefit of the following three categories of securities advisers. Those managers of investment funds and accounts that (i) enter into derivatives transaction for the purpose of hedging against a particular identified risk that is inherent in the securities or other assets in which they typically invest, such as interest rate and currency exposures (to the extent that FX Forwards are not exempted as set out above), (ii) enter into one or more derivatives transactions for the purpose of obtaining a long or short exposure to the securities or other assets in which they typically invest directly, such as an equity swap, and (iii) otherwise enter into derivatives that are incidental or ancillary to their stated investment strategy. Many securities advisers that manage investment funds and accounts need to maintain the flexibility to enter into derivatives transactions to hedge against certain risks inherent in their respective portfolios and would benefit from having the ability to use derivatives to obtain exposure to a particular asset in the class of assets in which they typically invest. However, given a securities adviser's obligations to its clients under existing rules, it would be redundant to also require a securities adviser to also register as a derivatives adviser.

In order to qualify for such an exemption, the securities adviser should be required to enter into the trade with a registered derivatives dealer or a domestic or international derivatives dealer that is exempt from registration (including a federally regulated financial institution where such entities are exempt from registration). An additional requirement for relying on this exemption is that the stated investment strategy of the applicable investment fund or managed account should expressly provide in writing the core investment strategy and should include disclosure of the circumstances where the securities adviser may use derivatives pursuant to the exemption referred to in the Registration Proposal. In furtherance of this exemption, and to enhance the protection of the investors and beneficial owners of the funds and managed accounts, the definition of "eligible

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derivatives party" should be amended in the Business Conduct Proposal so that investment funds and managed accounts advised by a securities adviser (in (k) and (l) of the definition) are not included in the definition. In the alternative, such investment funds and managed accounts should have to elect to be treated as an eligible derivatives counterparty. The later approach is probably appropriate for all of the parties that constitute eligible counterparties after part (c). Many of the parties referred to in (d) to and including (l) may benefit from the additional protections afforded to parties other than eligible derivatives parties under the Business Conduct Proposal.

Exemption from the individual registration requirements for derivatives dealing representatives and derivatives advising representatives.
(Registration Proposal Q#6)

We understand Subsection 16(3) and subsection 16(4) provide an exemption from the requirement to register an individual as a derivatives dealing representative or as a derivatives advising representative in certain circumstances. Are the exemptions appropriate? In subparagraph 16(4)(b)(ii), individuals that act as an adviser for a managed account are not eligible for the exemption from the requirement to register as a derivatives advising representative. Is this carve out appropriate where an individual has discretionary authority over the account of an eligible derivatives party?

We believe that the exemptions in subsections 16(3)(a) and 16(4)(a) are not appropriate to the extent that they would still require registration when advising an affiliated investment fund. The majority of AIMA Canada's members manage proprietary or affiliated pooled funds sold to accredited investors. As the creators and managers of such funds they are intimately aware of their strategies and management. We do not believe there is any reason to distinguish proprietary investment funds from other affiliated entities; especially as such investment funds qualify as eligible derivatives parties. We recommend that affiliated investment funds not be carved out of the definition of affiliated entities.

It is also our opinion that the carve out in subparagraph 16(4)(b)(ii) with respect to managed accounts is not appropriate and is inconsistent in its application. Under the terms of the provision as written an individual would not be required to register as a derivatives advising representative if the firm is managing or sub-advising an arm's length investment fund since it is an eligible derivatives party and is not a managed account. However registration would be required for a managed account. So, for example, there are different registration requirements if a pension fund invests in an arm's length fund (no registration) vs. having the registrant manage a separate account for a pension fund (registration required).

There is an additional inconsistency between subsections 16(4)(a) and 16(4)(b). An individual would be required to register when advising a proprietary fund (s. 16(4)(a)) but not when advising an arm's length fund (s. 16(4)(b)). In our opinion there is no reason to distinguish the two instances when the same services are being provided.

These inconsistencies should be resolved such that the requirements are identical no matter the fund (proprietary or arm's length) or the vehicle chosen by the client (fund or managed account). We would agree with the suggestion to allow an exemption from registration when the managed account is held by an eligible derivatives party (i.e. subsection (b)(ii) should be deleted). Allowing such an exemption is consistent with the treatment of an investment by an eligible derivatives party in a fund and with the changes made in the Business Conduct Proposal that recognized that the managed accounts of eligible derivatives parties require less protection than non-eligible derivatives parties.

Specific Proficiency Requirements for Individual Registrants
(Registration Proposal Q#7)

Subsections 18(2) through (6) of the Instrument establish specific proficiency requirements for each individual registration category. Are these specific requirements appropriate? If not what specific exams, designations or experience are appropriate?

The Quebec regulator currently requires relevant experience relating to each type of derivatives instrument (futures, forwards, options, etc.) in respect of which an individual seeking registration as a derivatives advising representative pursuant to the *Derivatives Act* (Quebec) intends to advise, but this is not expressly set out anywhere. This has the practical effect of resulting in registered derivatives advisers being limited in respect of their derivatives advising activities to the types of instruments for which sponsored individuals have been

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registered.

Unless the CSA wishes to create a regime where registered derivatives advisers are limited to particular categories of derivatives (in effect making each derivatives adviser a restricted derivatives adviser), we would recommend that the CSA clarify that any experience advising with respect to any category of derivatives is sufficient for an individual to be registered as a derivatives advising representative. It should be noted that individuals who advise with respect to one category of derivatives are invariably exposed to the entire universe of derivatives instruments and therefore are proficient across all types of derivatives instruments and underlyings.

Derivatives Ultimate Designated Person
(Registration Proposal Q#8)

Subparagraph 27(3)(c)(i) requires a derivatives firm's ultimate designated person to report any instance of non-compliance with securities legislation, including the Instrument, relating to derivatives or the firm's risk management policies if the non-compliance creates a risk of material harm to any derivatives party. Is this requirement appropriate?

We believe that this requirement is not appropriate. It is the responsibility of the CCO and management to deal with such situations, including through the annual reports to the Board by the CCO and chief risk officer ("CRO"). We also note that this requirement would be inconsistent with any requirements under NI 31-103.

Minimum requirements for risk management policies and procedures
(Registration Proposal Q#10)

Section 39 sets out the minimum requirements for risk management policies and procedures. Are any of the requirements inappropriate? Are the requirements for an independent review of risk management systems appropriate?

In our opinion the requirements in subsection 39(2) for Board approval of risk management policies and procedures and subsection 39(4) for an independent review are not appropriate. These procedures will be a part of the overall policies and procedures of a firm. A registrant is already required to establish policies and procedures designed to establish a reasonable system of controls and supervision (section 38), consistent with the requirements of NI 31-103. The approval, administration and monitoring or review of policies and procedures is the responsibility of management and the CCO and CRO, including through the annual reports to the Board. Singling out the risk management policies and procedures for approval and review is not required as they are part of the overall management of the firm. These provisions would be inconsistent with NI 31-103, which has no equivalent requirements.

We also note that an independent review could be very costly, especially for a small firm without an internal audit function. It is unreasonable to expect such a review for a portion of a firm's systems that are already the responsibility of management and are subject to regulatory review.

Conclusion

In conclusion, AIMA Canada:

1. Recommends that the CSA exempt from the application of the Proposals any registrant who engages solely in FX Forward transactions within defined parameters, as outlined in this letter. This is consistent with international recommendations from both IOSCO and the BIS Basel Committee and practice in the U.S. and would preserve the competitiveness of the Canadian industry.

2. Harmonize the ongoing compliance requirements between the Proposals and NI 31-103 and eliminate the senior derivatives manager position requirements.

3. Harmonize the exemptions for international firms between the Registration Proposal and NI 31-103.

4. Exempt securities advisers from the requirement to register as derivatives advisers where their

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activities are incidental to their securities activities and set out clear and actionable guidance for when a derivatives advising activity will be considered incidental to securities advising activities.

We appreciate the opportunity to provide the CSA with our views on the Proposals. Please do not hesitate to contact the members of AIMA set out below with any comments or questions that you might have. We would be pleased to meet with you to discuss our comments and concerns further.

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Yours truly,

ALTERNATIVE INVESTMENT MANAGEMENT ASSOCIATION

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Stikeman Elliott

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September 17, 2018

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

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Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comment – Proposed National Instrument 93-102 *Derivatives: Registration* and Proposed Companion Policy 93-102 *Derivatives: Registration* and CSA Notice and Second Request for Comment – Proposed National Instrument 93-101 *Derivatives: Business Conduct* and Proposed Companion Policy 93-101CP *Derivatives: Business Conduct*

1. INTRODUCTION

We submit the following comments in response to the Notice and Request for Comment published by the Canadian Securities Administrators (the "**CSA**") on April 19, 2018 with respect to Proposed National Instrument 93-102 *Derivatives: Registration* ("**Proposed NI 93-102**") and Proposed Companion Policy 93-102 *Derivatives: Registration* ("**Proposed 93-102CP**") and in response to the CSA's Notice and Second Request for Comment published on June 14, 2018 with respect to Proposed National Instrument 93-101 *Derivatives: Business Conduct* ("**Proposed NI 93-101**") and Proposed Companion Policy 93-101CP *Derivatives: Business Conduct* ("**Proposed 93-101CP**"). Collectively, Proposed NI 93-102, Proposed 93-102CP, Proposed NI 93-101 and Proposed 93-101CP are referred to as the "**Proposed Instruments**".

Thank you for the opportunity to comment on the Proposed Instruments. This letter represents the general comments of certain individual members of our Financial Products & Services practice group

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(and not those of the firm generally or any client of the firm) and are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client.

All references to parts and sections are to the relevant parts or sections of the applicable Proposed Instrument.

2. GENERAL COMMENTS

As a general comment, we applaud the continued effort by the CSA to develop a harmonized framework for the regulation of over-the-counter ("**OTC**") derivatives in Canada and to streamline the fragmented regulatory landscape that existing and prospective derivatives dealers, advisers and other derivatives market participants must currently navigate.

We have elected to provide a single comment letter to address both Proposed NI 93-102 and Proposed NI 93-101 and their respective Companion Policies, as our comments, concerns and recommendations largely apply across the Proposed Instruments.

Our comments and recommendations in this letter relate to several principal themes. Respectfully, in our view,

1. the scope of the Proposed Instruments is overreaching and the rules are misaligned with the realities of both the Canadian OTC derivatives market and global derivatives regulation;
2. the publication of proposed rules with blank appendices impedes the ability of industry stakeholders to assess the real impact of the Proposed Instruments on their businesses and comment in any meaningful way;
3. the Proposed Instruments, as currently formulated, will discourage access by foreign derivatives dealers and advisers to the Canadian OTC derivatives market;
4. the exemptions from registration and business conduct requirements under the Proposed Instruments require additional consideration and revisions; and
5. certain of the self-reporting requirements under the Proposed Instruments are out-of-step with the existing securities regulatory framework and inappropriate, particularly as they interact with the substituted compliance exemptions.

We also address our concerns and make recommendations regarding a lack of harmonization across regulatory instruments and the resulting complexity and compliance cost and burden to Canadian derivatives market participants; the unnecessary introduction of a "senior derivatives manager" concept into established compliance regimes; and additional aspects of the Proposed Instruments and exemptions therefrom.

For the foregoing and other reasons, we believe that the greatest risk of impeding access and thus discouraging participation in Canadian OTC derivatives markets is going to be to Canadian participants that need the increased liquidity and efficiency provided by participating in the global derivatives market.

3. THE CANADIAN DERIVATIVES MARKET AND SCOPE OF THE PROPOSED INSTRUMENTS

As a general comment, we note that the Proposed Instruments draw heavily from the existing securities regulatory regime in Canada. While we support all CSA efforts to align the derivatives and securities registration-related regimes to the greatest extent possible to eliminate duplicative regulation and oversight of dealers and advisers, the CSA must present a derivatives framework that recognizes the fundamental differences between the OTC derivatives markets and securities markets in Canada. The derivatives market primarily functions to allow businesses and, to a much more limited extent, individuals to hedge commercial risks. It is essential that the Proposed Instruments reflect this hedging and the primarily non-retail aspect of OTC derivatives markets, rather than the investment and investor protection focus of securities markets. In our view, as currently drafted, the Proposed Instruments do not adequately take this important distinction into account and,

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consequently, incorporate concepts and provisions that are not appropriate for the regulation of the OTC derivatives market.

For example, the business triggers for determining the application of the rules under the derivatives regime should be specifically tailored to the OTC derivatives market and not simply borrowed from the business trigger indicators that have been historically relied upon in the securities market context. In particular, proprietary trading activity should not be a trigger for registration or determining the applicability of the business conduct rules, regardless of whether the trading activity is frequent or repetitive, or whether the party solicits the transactions. This is acknowledged only in each of the Companion Policies to the Proposed Instruments (wherein the CSA have stated that "organized and repetitive proprietary trading, in and of itself, absent other factors… may not result in a person or company being considered to be a derivatives dealer" for purposes of the Proposed Instruments); however, this position should be clearly set out in the rules to avoid any interpretive inconsistencies, and is particularly important to buy-side institutions such as pension funds.

In addition, we have significant concerns about the resulting lack of alignment of the Canadian OTC derivatives market regime with those of other jurisdictions, particularly given the relative size of the Canadian market. As noted below, the Proposed Instruments introduce potentially significant increased costs and complexity of compliance for OTC derivatives market participants, with the consequential risk that the Canadian market may become an expensive and burdensome regulatory outlier in the global OTC derivatives market. To continue to attract vital foreign participation in the Canadian OTC derivatives market and preserve its depth and liquidity, we respectfully encourage the CSA to focus on developing a regulatory framework that is broadly consistent with recommendations of the International Organization of Securities Commissions ("**IOSCO**") and that is no more onerous or stringent than the U.S. regime.

4. INCOMPLETE RULES

It is imperative that the CSA publish material regulatory proposals of this order with all relevant information, including completed appendices. In particular, we note the fact that the jurisdictions for which substituted compliance is contemplated and the equivalent regulatory requirements to be listed in the schedules to the Proposed Instruments were not identified in these proposals. Consequently, foreign market participants, Canadian financial institutions and IIROC dealer members have no ability to assess how the requirements under the Proposed Instruments will apply to them. This has rendered it more difficult for market participants to assess the real impact of each of the Proposed Instruments on their businesses and provide meaningful and constructive comments on the proposals. We respectfully request that the CSA include complete appendices and schedules in the next publication for comment and provide an extended comment period of no less than 120 days to facilitate a more informed and detailed analysis of the Proposed Instruments.

5. IMPACT ON FOREIGN DEALERS AND ADVISERS

Substituted Compliance

In general, we are supportive of the substituted compliance approach in the Proposed Instruments—particularly in respect of foreign derivatives dealers and advisers—subject to the following observations and recommendations.

We are of the view that the CSA should adopt broad, purposive and outcomes-based substituted compliance exemptions, rather than engaging in a granular rules-based mapping of comparative regulatory requirements. These exemptions should defer as much as possible to foreign rules given the efforts at the IOSCO level and among other global agencies and industry associations to coordinate and harmonize the regulation of OTC derivatives registration and market conduct globally. The CSA's approach to substituted compliance should follow the recommendations of the March

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2014 *Report of the OTC Derivatives Regulators Group (ODRG) on Cross-Border Implementation Issues*[1] which stated that:

> "In line with the G20 Leaders' declaration of September 2013, as well as the G20 Finance Ministers and Central Bank Governors' communiqué of February 2014, ODRG members reached the following understandings with respect to the use of equivalence and substituted compliance as means of deference: a flexible, outcomes-based approach should form the basis of final assessments regarding equivalence and substituted compliance. The final assessments of a foreign regime for equivalence or substituted compliance should be based on regulatory outcomes of that foreign regime, taking into account the different frameworks, local market practices and characteristics across jurisdictions. An equivalence or substituted compliance assessment also should be based on an understanding that similar regulatory outcomes may be achieved through the implementation of detailed rules or an applicable supervisory framework, or both. Such assessments may be made on a broad category-by-category basis, rather than on the foreign regime as a whole. An equivalence or substituted compliance assessment should fully take into account international standards, where they are appropriate, regulatory arbitrage, investor protection, risk importation, prudential and other relevant considerations." [emphasis added]

Given the comparatively small size of the Canadian OTC derivatives market globally, we do not see any compelling policy rationale for the implementation of Canadian requirements that impose duplicative, differential or additional obligations on market participants that are already governed by substantially equivalent requirements in major derivatives markets.

Given the state of derivatives rulemaking globally, we respectfully urge the CSA to defer to the lead foreign regulator's supervision and oversight over the foreign firm and to principles of reciprocity and principles-based substituted compliance, and ask that the CSA remove these conditions in the next draft of the Proposed Instruments.

Conditions of Reliance

We respectfully submit that the requirements under Proposed NI 93-102 for compliance with equivalent requirements or guidelines under the laws of the foreign jurisdiction are inconsistent with and more stringent than the international dealer exemption and international adviser exemption applicable in the securities market context under National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("**NI 31-103**"), for no apparent policy reason. As currently contemplated in Proposed NI 93-102, the derivatives dealer and adviser registration exemptions in sections 52 and 59, respectively, of Proposed NI 93-102 are only available where a foreign firm is subject to and in compliance with the requirements of the laws of its home jurisdiction (noting that the appendices of foreign jurisdictions and prescribed laws were not published with Proposed NI 93-102). However, if a foreign firm relies upon an exclusion or exemption (including discretionary relief) from the requirements of its home jurisdiction, the exemptions under Proposed NI 93-102 are unavailable.

Notably, this condition for reliance would give rise to significant interpretation, technical, compliance and enforcement issues which would ultimately render these exemptions unworkable. For example, it would effectively imply a compliance certification by the authorized signatory of Form 93-102F2 *Submission to Jurisdiction and Appointment of Agent for Service,* at personal risk to that signatory. This type of certification would be unrealistic to expect at the point of filing (e.g., without up-to-the moment enterprise-wide internal due diligence). In particular, we think it would create intractable

[1] A copy of the report is available on the U.S. Commodity Futures Trading Commission website at: https://www.cftc.gov/sites/default/files/idc/groups/public/@internationalaffairs/documents/file/odrgreport033114.pdf

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issues for large multi-divisional financial services groups with separate business units and compliance divisions. Accordingly, we would ask that the CSA consider removing the requirements.

With respect to sections 52(1)(d) and 59(1)(d) of Proposed NI 93-102, in our view, the requirement to promptly notify the local Canadian regulator of each instance of material non-compliance with a requirement or guideline of the foreign jurisdiction is similarly unworkable and, accordingly, we recommend that it be removed. See our discussion under “Self-Reporting Requirements” below.

The exemptions set out in NI 93-102 sections 52 and 59 would already be restricted to firms operating in foreign jurisdictions determined by the CSA to have equivalent requirements, a condition which does not exist under the international dealer exemption and international adviser exemption requirements under NI 31-103. Moreover, we believe it would be appropriate for these exemptions to be framed on a basis that is similar to the international dealer exemption and the international adviser exemption under NI 31-103. Under these exemptions, specific disclosure is required to be provided regarding the regulatory status of the international participant, thereby allowing the permitted client (which is a carefully circumscribed, narrow category of investors) to determine for itself whether it wishes to engage with the foreign exempt firm.

We note that the requirements under sections 54(1)(c) and 61(1)(c) of Proposed NI 93-102 to notify the local regulator of each instance of material non-compliance with a requirement or guideline of the foreign jurisdiction is also unworkable from a cross-border compliance perspective and inconsistent with the existing compliance, self-reporting and enforcement framework of securities regulation. Accordingly, we suggest that these requirements also be removed.

Further, it is our view that it should be sufficient that a foreign dealer or adviser seeking to rely on the registration exemptions in Proposed NI 93-102 or the business conduct exemptions in Proposed NI 93-101 be registered, licensed or authorized under the rules of one of the jurisdictions specified in the applicable appendices, without that jurisdiction having to be the firm’s *home* jurisdiction. For example, a dealer that is a registered swap dealer under CFTC rules but not subject to registration, licensing or authorization in its home jurisdiction should be eligible to rely on the exemption.

These technical issues alone could create a material disincentive for foreign firms and advisers to rely on the exemptions, with consequential adverse effects on liquidity in the comparatively small Canadian OTC derivatives market.

Foreign Dealers and Advisers and the Business Conduct Rule

In respect of Proposed NI 93-101, we have concerns that the implementation of a two-tiered approach to the imposition of business conduct requirements to market participants in the Canadian derivatives market is at odds with the established framework for the regulation of market intermediaries in Canadian capital markets. In particular, as currently drafted, Proposed NI 93-101 would impose additional layers of both principles-based and prescriptive rules on foreign derivatives market participants in a manner that materially differs from the framework applicable to foreign exempt firms operating on the basis of filings-based and other exemptions available to foreign market participants under NI 31-103.

For example, the “fair dealing” model and the corresponding requirement to “act fairly, honestly and in good faith”, the rules governing the identification and management of conflicts of interest and know-your-derivatives party (gatekeeper) obligations may be broadly consistent with IOSCO policy objectives. These obligations may not, however, be implemented in the regulatory frameworks applicable to market participants in the major derivatives markets globally in a manner that can be easily reconciled with the substantive requirements of Proposed NI 93-101.

Respectfully, the CSA has not articulated a compelling rationale for the application of these “first tier” requirements to foreign firms that may, for the most part, already be subject to adequate market protection requirements in the global jurisdictions. Even for leading players in the global derivatives markets, the technical compliance challenges surrounding the interpretation of these differential

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requirements and the development of additional compliance systems to specifically address Canadian-specific market conduct requirements in the institutional market may simply not be worth the trouble. This proposal, combined with the material technical issues surrounding the filings-based exemptions for foreign derivatives dealers and advisers as currently proposed, may have a very real adverse impact on the cross-border OTC derivatives market. We strongly recommend that the terms and conditions of these exemptions be much more closely aligned with the terms and conditions of the international dealer and international adviser exemptions under NI 31-103 which the CSA successfully introduced into the cross-border securities market almost ten years ago.

Further exemption recommendations applicable to foreign derivatives dealers and advisers

Trades through a dealer - We respectfully suggest that the CSA include an exemption for transactions through or to a derivatives dealer that is registered or exempt from registration or otherwise subject to prudential supervision, similar to the inter-dealer exemption set out in section 8.5 of NI 31-103.

Foreign sub-advisory arrangements - We also recommend that the CSA provide an exemption analogous to section 8.26.1 of NI 31-103 (international sub-adviser exemption) to facilitate sub-advisory arrangements between Canadian registered derivatives portfolio managers and foreign managers that employ OTC derivatives trading strategies.

Importantly, the above-referenced exemptions under NI 31-103 are partly based on the premise that any investor protection or public policy concerns are addressed by the fact that such transactions are made through appropriately registered entities.

Trades with EDPs - Since cross-border derivatives transactions may involve multiple business units operating in affiliated firms (e.g., with counterparties potentially interacting with marketing teams, negotiation/documentary teams, finance teams and booking centres in different affiliated entities), we respectfully suggest that Proposed NI 93-102 more accurately address these commercial realities through additional exemptions (similar to subsections 16(3) and (4) for individuals) that would eliminate the need for duplicative registrations and exemptions in the case of transactions with EDPs.

In addition, we respectfully suggest that Proposed NI 93-101 should provide an exemption from relationship disclosure information requirements under section 18, transaction information reporting requirements under section 27 and derivatives party agreement requirements under section 33 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.

In our view, these additional exemptions are necessary and desirable to facilitate the maintenance of longstanding trading and advisory arrangements in the institutional market, particularly where a foreign derivatives participant may not be inclined to rely on the registration exemptions for foreign derivatives dealers and foreign derivatives advisers given the technical compliance challenges associated with those exemptions.

6. EXEMPTIONS FROM THE REQUIREMENT TO REGISTER

In addition to our comments above regarding the exemptions specifically applicable to foreign dealers and advisers under Proposed NI 93-102, we also make the following observations and recommendations:

Trades with an "eligible derivatives party"

We are generally very supportive of the concept of a uniform definition in all Canadian jurisdictions of an eligible derivatives party ("**EDP**") to classify sophisticated derivatives market participants. However, we respectfully suggest that—notwithstanding the differences in securities and derivatives markets, and acknowledging the CSA's response to this feedback following the first comment period relating to Proposed NI 93-101—the definition of EDP should be fully harmonized with the definition

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of “permitted client” under NI 31-103 and that a single term (e.g., “permitted party”) should be used to assist firms in streamlining client screening procedures and systems. Any additional derivatives-specific conditions (e.g., the derivatives-related knowledge and experience requirements in paragraphs (m), (n) and (o) of the definition of an EDP in Proposed NI 93-101 and Proposed NI 93-102) could be incorporated as additional counterparty qualification requirements.

We support the addition of the new “commercial hedger” category of the EDP definition; however, in our view, the minimum net assets condition for commercial hedgers should be eliminated. Under the *Derivatives Act* (Québec) (“**QDA**”) and existing blanket exemption orders applicable in many Canadian jurisdictions (e.g. Blanket Order 91-501 (BC) *Over-the-Counter Derivatives* and Blanket Order 91-507 (AB) *Over-the-Counter Trades in Derivatives*), the qualification of commercial hedgers is not contingent on any net asset condition. The Proposed Instruments purport to restrict this category and consequential access to commercial hedging solutions with no clear policy justification for doing so. Accordingly, we respectfully recommend that the minimum net assets condition in subparagraph (n)(ii) of the EDP definition be deleted.

We note that the definition of EDP includes a category for persons or companies acting on behalf of a “managed account” if certain conditions are met. With reference to paragraph 1(6) in each of Proposed NI 93-101 and Proposed NI 93-102, the purpose of qualifying the definition of “managed account” by reference to “a managed account owned by another person or company” is unclear. This language is inconsistent with the framework of existing exemptions for managed accounts and, in our view, should be removed.

Under paragraph 1(7) of each of Proposed NI 93-101 and Proposed NI 93-102, in determining whether a derivatives party is an EDP, a firm may not rely on a written representation if reliance on that representation would be “unreasonable”. We respectfully suggest that, rather than precluding reliance on a written representation based on a subjective standard of “unreasonableness”, the CSA should consider amending this provision to permit a firm to rely on written representations or other factual statements made by the other party, provided that it does not have reasonable grounds to believe that such representations or factual statements are false. See, for example, the guidance set forth in AMF *Policy Statement Respecting Accredited Counterparties* (Derivatives Act).

In addition, we respectfully submit that the definition of “commercial hedger” should be framed more broadly, consistent with existing definitions of “hedging” under the QDA and various provincial blanket orders, to more clearly capture ordinary commercial hedging activities (e.g., manufacturing inputs, currencies, commodities, interest rates, etc.). Further, the references in Proposed 93-102CP and Proposed 93-101CP to a “significant link” between the transaction and the business risks being hedged is unclear, nor is it clear how this concept reconciles with the definitions of “hedging” in National Instrument 81-102 *Investment Funds* and existing provincial rules. Finally, the new definition refers to “risks that arise from potential changes in value of one or more” of an asset, liability or services. The reference to “value” in that definition is challenging, as the hedger is hedging against the change in the price or cost of an asset, liability or services, rather than its value once owned. Accordingly, we would suggest that the CSA consider leveraging existing definitions for this purpose and clarify the related guidance.

Similar to the exemption from registration under Proposed NI 93-102 for clearing agencies, other entities that are registered or recognized (or exempted therefrom) under applicable Canadian securities laws, such as swap execution facilities and other derivatives trading facilities, should be specifically exempted from application of the Proposed Instruments as well.

Respectfully, the CSA in the jurisdictions outside of Ontario should take this opportunity to fully extend the firm level registration exemptions available under the *Securities Act* (Ontario) to specified financial institutions operating in the other Canadian jurisdictions on the basis that these market participants are otherwise already subject to robust prudential regulation by their principal regulators.

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7. EXEMPTIONS FROM THE BUSINESS CONDUCT RULES

As a general comment, we strongly encourage the CSA to provide for registration and business conduct exemptions that are consistent across both Proposed NI 93-101 and Proposed NI 93-102. Exemptions from the registration requirement should give rise to corresponding exemptions from business conduct requirements. For example, while Proposed NI 93-102 provides for a *de minimis* exemption from certain registration requirements, it is unclear why there is no corresponding business conduct exception under Proposed NI 93-101. In our view, the misalignment of these exemptions will result in unnecessary market confusion and, as such, we strongly support the implementation of harmonized exemptions across both Proposed Instruments.

In addition, we respectfully submit that, failing a much more streamlined treatment of the business conduct requirements and exemptions across Proposed NI 93-101 and NI 31-103, the compliance burden for firms registered to engage in trading or advisory activities in both securities and OTC derivatives will be rendered unreasonably more complex for no clear marginal benefit in terms of investor or market protection. In our view, the focus for market participants should be to apply core business conduct requirements across their businesses, without having to devote valuable compliance resources to implementing technical variations in the business conduct requirements applicable under both Proposed Instruments.

In particular, we suggest that the framework for waiver of business conduct obligations with respect to EDPs should be fully aligned with the corresponding framework for waiver of business conduct requirements under NI 31-103, except where the need for a different approach is demonstrably justified. As currently proposed, Proposed NI 93-101 requires specific written waivers in areas in which such waivers are not required under NI 31-103 for apparently no clear and compelling policy reason.

8. SELF-REPORTING REQUIREMENTS

As noted above in relation to self-reporting requirements for foreign dealers and advisers under Proposed NI 93-102, sections 32 and 43 of Proposed NI 93-101 requires that a derivatives firm 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” that Instrument or securities legislation relating to trading and advising in derivatives in the specified circumstances. In our view, this is troubling and out of step with established rules and practice in the Canadian securities industry, as well as other derivatives markets outside of Canada.

Respectfully, the CSA has not provided a compelling policy rationale to support this radical change of approach which should be the subject of much broader and extended industry consultations. Certain CSA regulators have developed their own jurisdiction-specific tools (e.g., credit for cooperation programs, whistleblowing rules and no-contest settlements) which already create an overwhelming incentive for firms to take ownership of material compliance issues and self-report them to the regulators once they have been uncovered and properly investigated. These types of measures should be expanded rather than introducing a self-reporting regime which conflicts with the existing rules in Canada and in a number of the major OTC derivatives markets globally.

Further, we respectfully question the imposition of a self-reporting requirement on foreign firms as a condition of their reliance on the substituted compliance framework in sections 38 and 43 of Proposed NI 93-101, which in our view, is also very problematic. The circumstances in which non-compliance by the foreign firm with a foreign derivatives rule could create, “in the opinion of a reasonable person”, a risk of material harm to a derivatives party in Canada or to capital markets—a standard that is already difficult in the Canadian market context—are fraught with uncertainty in the cross-border context. The foreign rules listed in Appendix A to Proposed NI 93-101 may be interpreted and enforced in very different ways in the foreign jurisdictions and these differences render this type of exercise almost impossible to conduct.

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Foreign firms that are not subject to mandatory self-reporting obligations in the foreign jurisdictions in which they conduct business would become subject to significantly increased regulatory exposure, particularly in those jurisdictions which have a less remedial and more aggressive enforcement environment. The addition of this self-reporting condition to sections 38 and 43 of Proposed NI 93-101 effectively makes these exemptions unworkable and impossible to rely on, particularly for large financial groups which must carefully coordinate regulatory reporting on a global basis. In the absence of a clear and effective substituted compliance provision, many foreign firms will likely elect to simply opt out of business lines which require compliance with an additional layer of Canadian-specific business conduct requirements.

We also note that such self-reporting requirements under the Proposed Instruments 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. In Canada, 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) reporting firms are subject to specific restrictions against disclosure of suspicious transactions or activities. As a result, such legal restrictions on disclosure may be in conflict with a firm's obligations under the Proposed Instruments.

Similarly, the substituted compliance exemptions in sections 39 and 40 for derivatives dealers that are IIROC member firms or Canadian financial institutions, contingent on "prompt" self-reporting of "each instance of material non-compliance with a requirement or guideline" are equally problematic and give rise to significant concerns. The requirement to "promptly" self-report non-compliance with a guideline is particularly difficult to reconcile with the current securities regulatory framework and would create significant compliance and enforcement challenges.

In addition, the requirement under section 27 of Proposed NI 93-102 for the derivatives ultimate designated person ("**UDP**") to report instances of non-compliance with Proposed NI 93-102 or other securities legislation relating to derivatives to the applicable securities regulatory authority is also inconsistent with the existing securities compliance, self-reporting and enforcement framework. See, for example, the scope of responsibilities for the ultimate designated person under Part 5 of NI 31-103. Accordingly, we recommend that this requirement be removed from the Proposed NI 93-102.

In our view, any self-reporting requirements of the type contemplated in these Proposed Instruments should be limited to periodic (e.g., annually or quarterly) reporting to the securities regulator of regulatory actions (e.g., non-confidential enforcement actions and settlements) which are already required by the lead regulator to be disclosed (e.g., consistent with the approach taken in Multilateral Instrument 31-102).

9. SENIOR DERIVATIVES MANAGERS

Under Proposed NI 93-102, derivatives firms are required to designate a UDP, a CCO and a Chief Risk Officer. Respectfully, we are of the view that the introduction of the "senior derivatives manager" concept under Proposed NI 93-101 is superfluous and out of step with supervisory and compliance structures under existing securities legislation. Absent any compelling explanation by the CSA as to its rationale, we recommend removing it from Proposed NI 93-101.

As currently proposed, the qualifications, role and responsibilities, and the potential liabilities associated with the "senior derivatives manager" position under section 31 of Proposed NI 93-101 require further consideration and clarification, particularly as the concept applies to smaller firms with no separate business units and to foreign firms which are not subject to similar requirements in their jurisdictions of operation.

In addition, it is unclear why the senior derivatives manager should not have compliance reporting responsibilities to the firm's derivatives UDP, CCO and Chief Risk Officer given their own respective compliance-related responsibilities at the firm-wide level.

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It is also not clear why functions related to the rectification and reporting of non-compliance allocated to the senior derivatives manager under subsections 31(1)(b) and 31(2)(a) and (b) and under related guidance in the Proposed 93-101CP should not be allocated to the CCO, given the need for the UDP and the CCO to oversee and monitor compliance on a consistent and firm-wide basis. The CCO, in particular, 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. In certain situations, the senior derivatives manager may be subject to conflicts of interest (e.g., performance and revenue targets), which may lead to biased or inappropriate responses or to inadequate reporting if the senior derivatives manager is not required to engage with the CCO. Senior derivatives managers may not have the same appreciation or comprehensive view of firm-wide risk exposure, which may also lead to inadequate outcomes beyond the specific derivatives business unit.

If the CSA is unwilling to remove the senior derivatives manager requirement from the Proposed Instruments, we strongly recommend that, at a minimum, the requirement to appoint a senior derivatives manager should not apply to firms that restrict their derivatives business to EDPs or to foreign firms that are already subject to similar requirements on an outcomes basis.

10. HARMONIZATION ACROSS INSTRUMENTS

As a general but significant comment, we would suggest that the CSA implement a single set of definitions applicable to both Proposed NI 93-102 and Proposed NI 93-101, as well as harmonize definitions and concepts across other relevant regulatory instruments. This would facilitate a more coherent and workable OTC derivatives regulatory framework. The absence of consistency with other regulatory definitions creates material compliance challenges and, in our view, there is no compelling policy or regulatory reason for these minor technical variations. They add unnecessarily to the compliance burden and associated compliance costs of market participants.

For example, we respectfully question how the definition of "transaction" under the Proposed Instruments is intended to relate to similar definitions under other securities legislation and rules. The definition of "trade" under section 1 of the *Securities Act* (Ontario) includes "a novation of a derivative, other than a novation with a clearing agency", whereas the definitions under the Proposed Instruments refer to "a novation of a derivative, other than a novation with a *'qualifying'* clearing agency". The definition also differs from the definitions of "transaction" for purposes of provincial trade reporting rules which refer to "entering into, assigning, selling or otherwise acquiring or disposing of a derivative or the novation of a derivative". Further, certain requirements of the Proposed Instruments make reference to persons "transacting" in derivatives while others refer to "trading" in derivatives.

Notwithstanding the related guidance in Proposed 93-102CP and Proposed 93-101CP, we urge the CSA to take this opportunity to 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, National Instrument 45-106 *Prospectus Exemptions*, and the Proposed NI 93-101 and Proposed NI 93-102.

11. ADDITIONAL RECOMMENDATIONS

Implementation and Transition

We respectfully submit that the revised draft of the Proposed Instruments should provide for an extended period of transition (a minimum of two years from the effective date) and broad grandfathering provisions for counterparty qualification requirements (e.g., under the QDA and existing provincial blanket orders), and individual proficiency and experience requirements. This would allow derivatives market participants adequate time to develop and implement internal policies and compliance procedures and update compliance systems.

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Compliance and Risk Management

In connection with the requirements for determining the value of the derivative and the process of dispute resolution under sections 41 and 42, respectively, of Proposed NI 93-102, we respectfully suggest that the CSA consider including a requirement that firms take into consideration prevailing market practices in the global derivatives jurisdictions.

We also note that the requirement in Proposed NI 93-102, section 42(4) for a firm to report to the regulator a dispute that has not been resolved within 30 days of reporting the dispute to its board of directors is not consistent with the existing compliance and dispute resolution framework outside of Quebec. Absent a compelling policy rationale for this requirement, we respectfully recommend that this requirement be deleted.

In respect of the requirement for firms to maintain procedures for portfolio reconciliation and portfolio compression exercises under sections 44 and 45 of Proposed NI 93-102, respectively, we would suggest that Proposed NI 93-102 provide a clear registration exemption for third party portfolio compression and related services and other non-dealer service providers that facilitate these risk mitigation procedures.

Pre-transaction Disclosure

The pre-transaction disclosure requirements set out in section 19 of Proposed NI 93-101 may not be entirely aligned with disclosure practices in the OTC derivatives industry. We think that these requirements should be eliminated. In the alternative, if required, we recommend that they be incorporated into the relationship disclosure information delivery requirements.

Non-targeted Advising

We are of the view that the definition of “financial or other interest” in subsection 57(1) of Proposed NI 93-101 is too vague and should be reconsidered. In particular, sub-clauses (d) (a financial arrangement in relation to the derivative or underlying interest) and (e) (any other interest that relates to the transaction) are very broad and may present unnecessary compliance issues/obstacles for advisers.

* * * * *

Thank you for the opportunity to comment on the Proposed Instruments. Please do not hesitate to contact any of the undersigned if you have any questions in this regard.

Yours truly,

Alix d’Anglejan-Chatillon
Ken Ottenbreit
Sterling Dietze
Ramandeep Grewal
Margaret Grottenthaler
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VIA EMAIL

September 17, 2018

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia 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
Nunavut Securities Office

Attention: Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
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C.P. 246, tour de la Bourse
Montréal (Québec) H4Z 1G3

Grace Knakowski
Secretary
Ontario Securities Commission
20 Queen Street West, 22nd Floor,
Toronto, Ontario M5H 3S8

Dear Sirs/Mesdames:

Re: Canadian Securities Administrators Proposed National Instrument 93-101 – *Derivatives: Business Conduct* & Proposed National Instrument 93-102 – *Derivatives: Registration*

Franklin Templeton Investments Corp. ("FTIC") is writing to provide comments with respect to the Canadian Securities Administrators' ("CSA") Proposed National Instrument 93-101 – *Derivatives: Business Conduct* (the "Business Conduct Rule") and

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Proposed National Instrument 93-102 – *Derivatives: Registration* (the "Registration Rule", collectively with the Business Conduct Rule, the "Derivatives Rules").

FTIC is currently registered in most provinces and territories in Canada as an adviser, investment fund manager, mutual fund dealer and/or exempt market dealer. FTIC is also registered with the Ontario Securities Commission as a commodity trading manager. FTIC is a wholly owned subsidiary of Franklin Resources, Inc., a global investment organization operating as Franklin Templeton Investments. Through its subsidiaries, Franklin Templeton Investments provides global and domestic investment advisory services to the Franklin, Templeton, Franklin Bissett, Franklin Mutual Series, Franklin Templeton and Franklin Quotential funds and institutional accounts. In Canada, FTIC has almost 500 employees providing services to nearly 500,000 unitholder accounts and over 100 pension funds, foundations and other institutional investors.

The Business Conduct Rule would impose a range of business conduct requirements and the Registration Rule would impose firm and individual level registration requirements on FTIC as well as its foreign affiliates engaged in the business of advising Canadian clients in connection with transacting in derivatives in any Canadian province or territory ("Jurisdiction"). FTIC and its affiliates do not engage in the business of what would constitute a "Derivatives Dealer" under the Business Conduct Rule, but we do engage in the business of what would constitute a "Derivatives Adviser"; therefore, our comments are limited to the impact of the Derivatives Rules on Derivatives Advisers.

We have reviewed and generally support the comments made by The Asset Management Group of the Securities Industry and Financial Markets Association, but we also wish to provide our own comments with respect to the Derivatives Rules.

General Comments

We support the work of the CSA to implement a comprehensive regime for the regulation of persons or companies in the business of advising on derivatives, but we see the Derivatives Rules as duplicative of existing requirements that advisers are already subject to, including under National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registration Obligations* ("NI 31-103"). We believe there is nothing inherently different about advising on over-the-counter ("OTC") derivatives, nor do they pose a unique set of risks, that cannot be addressed through amendments to NI 31-103. Furthermore, we question the creation of new positions (e.g., Senior Derivatives Manager) and new registration categories under the Derivative Rules that seem duplicative and do not exist under NI 31-103. Therefore, FTIC strongly recommends that the Derivatives Rules be integrated with NI 31-103 to create one uniform set of rules for persons advising on both securities and derivatives.

In addition, FTIC urges CSA members to integrate their rules governing other derivatives (e.g., *Commodity Futures Act* in Ontario) into NI 31-103 to eliminate the fragmented regime and duplicative requirements that currently exist.

While FTIC supports the integration of the Derivatives Rules into NI 31-103, specific comments on the Derivatives Rules as currently proposed are detailed below.

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Registration Rule

We are unable to provide meaningful comments regarding the current version of the Registration Rule since the CSA has not yet provided a completed version of Appendix G, which will list the foreign jurisdictions and requirements in those jurisdictions that a foreign derivatives adviser must comply with to be exempt from registration. We may have additional comments after the CSA publishes Appendix G.

It is our view that the foreign derivatives adviser exemption in the Registration Rule should be aligned with the international adviser exemption in NI 31-103, and should include foreign derivatives advisers that are exempt from registration in their principal jurisdiction. In its current form, the Registration Rule only provides an exemption for a foreign derivatives adviser that is registered, licensed or otherwise authorized under the legislation of the foreign jurisdiction to conduct derivatives activities. We believe it should be explicit that persons or companies exempt from registration in their home jurisdiction can also rely on the foreign derivatives adviser exemption.

We also encourage the CSA to include an international sub-adviser exemption in the Registration Rule, which is similar to the exemption that already exists in NI 31-103. In order to rely on such an exemption, a registered adviser must be responsible for the activities of the foreign sub-adviser and provide supervision and oversight of the foreign sub-adviser. For these reasons, we believe adequate protections would exist for clients and, therefore, an international sub-adviser exemption in the derivatives context is appropriate.

The foreign derivatives adviser exemption requires that a foreign derivatives adviser promptly notify the regulator of each instance of material non-compliance with a foreign requirement or guideline listed in Appendix G. We do not understand the rationale for this variation from the international advisor obligations under NI 31-103 and, depending upon how Appendix G is ultimately completed, we believe that this requirement may be overly onerous. Furthermore, it is likely that the need for the derivatives adviser to interpret the reference to "material non-compliance" will lead to different standards being applied by different participants.

As part of a global investment organization, many risk management functions for FTIC are performed by Franklin Templeton employees outside of Canada. These individuals currently perform these functions with respect to derivatives without any registration requirements. Making such individuals become an officer of a Canadian registrant in order to perform their roles under the Derivatives Rules could have unforeseen consequences for the individual and/or the registrant (e.g., tax consequences). We urge the CSA to allow individuals outside of Canada to continue performing these functions for their Canadian affiliates without requiring them to meet certain proficiency requirements or become an officer of the Canadian registrant.

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Business Conduct Rule

We believe that foreign derivatives advisers and sub-advisers that are exempt from registration under the securities legislation of the foreign jurisdiction in which their head office or principal place of business is located outside of Canada should be exempt from obligations under the Business Conduct Rule in order to align the proposed exemption with the international adviser and sub-adviser exemptions from registration currently found under subsections 8.26 and 8.26.1 of NI 31-103.

Fair Dealing, Conflict of Interest, Derivatives Party Specific Needs and Objectives, Suitability and Fair Terms and Pricing

These provisions already exist for advisers under NI 31-103. These obligations are also covered by the fiduciary duty owed by an adviser to its clients. FTIC does not believe that there is any reason to, nor that it is appropriate to, impose specific and slightly different requirements in connection with these obligations in the context of derivatives. Furthermore, imposing duplicative requirements between NI 31-103 and the Business Conduct Rule that are similar, but not identical, will complicate compliance with the established standards and practices that are already observed by investment advisers.

Definition of Eligible Derivatives Party

The concept of "Eligible Derivatives Party" ("EDP") is different from the concept of "permitted client" in NI 31-103. FTIC urges the CSA to align the EDP definition with the definition of permitted client in NI 31-103 and to add the commercial hedger definition to reflect the nature of the derivatives marketplace. We note that the commercial hedger definition should be expanded to include the hedging of an asset that the person or company uses in its business.

Conclusion

The differing concepts and protections for various types of investors under NI 31-103 and the Derivatives Rules are confusing and unnecessary. FTIC strongly urges the CSA to draft an integrated rule for all types of investments, especially since a typical client account could hold a mix of securities and derivatives. Having a different set of rules and exemptions for derivatives will increase administrative and compliance burdens for registrants, with no corresponding investor benefit.

If the CSA moves ahead without consolidating the Derivatives Rules into NI 31-103, it should insure the coordinated implementation of the Business Conduct Rule and the Registration Rule given the Derivatives Rules are so inter-connected. The CSA should also provide an appropriate transition period (at least two years) for firms to implement the Derivatives Rules once finalized.

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Thank you for your consideration of this submission. Please feel free to contact me at 416.957.6010 should you have any questions or wish to discuss our submission.

Yours truly,

FRANKLIN TEMPLETON INVESTMENTS CORP.

Brad Beuttenmiller
Senior Associate General Counsel

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September 17, 2018

DELIVERED VIA ELECTRONIC MAIL

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Newfoundland and Labrador Superintendent of Securities, Northwest Territories
Nova Scotia Securities Commission Superintendent of Securities
Ontario Securities Commission
Registrar of Securities, Prince Edward Island
Financial and Consumer Affairs Authority, Saskatchewan
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut

Me Anne-Marie Beaudoin Corporate Secretary Autorité des marches financiers, 800, rue du Square-Victoria, 22e étage C.P. 246, tour de la Bourse Montréal (Québec), H4Z 1G3 Consultation-en-cours@lautorite.gc.ca	Grace Knakowski Secretary Ontario Securities Commission 20 Queen Street West 22nd Floor Toronto, Ontario M5H 3S8 comments@osc.gov.on.ca

Dear Sirs and Mesdames:

RE: Canadian Securities Administrators Proposed National Instruments 93-101 and 93-102

Canadian Credit Union Association ("CCUA") is pleased to provide comments on the Canadian Securities Administrators' ("CSA") proposed National Instrument 93-101 Derivatives: Business Conduct (the "proposed Business Conduct Rule") and proposed National Instrument 93-102 Derivatives: Registration (the "proposed Registration Rule").

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CCUA is the national trade association for 251 credit unions in Canada outside Quebec that collectively control over $216 billion in assets and serve more than 5.6 million credit union member/owners through 1,800 branch locations.

With one notable exception[1], credit unions are provincially-chartered and regulated co-operative financial institutions that exist to serve their members. While credit unions generate profits for prudential and growth reasons, their primary objective is to meet the needs of their members. For 14 years running, credit unions have earned the top spot in the Ipsos "Best Banking" Awards and have similarly been rated the top service provider in repeated surveys of Canadian Federation of Independent Business (CFIB) members.

Credit unions in turn own and control provincial or regional centrals that provide them with wholesale financial services, liquidity management, payments processing and other services. These central entities include Atlantic Central (for credit unions in the Atlantic provinces), Central 1 Credit Union (for credit unions in Ontario and British Columbia) and Centrals in each of Manitoba, Saskatchewan and Alberta. Credit unions also own a federally-regulated bank called Concentra that provides wholesale financial and trust solutions to credit unions across Canada. This submission has been prepared in consultation with credit unions, Centrals and Concentra.

The vast majority of CCUA's credit union members use derivative products strictly for their own commercial hedging purposes.

Our comments are outlined below in three sections. We begin with some concerns with certain definitions that are applicable to both the proposed Business Conduct Rule and the proposed Registration Rule. We will then comment on specific requirements of each proposed Rule.

1. DEFINITION CONCERNS APPLICABLE TO THE BUSINESS CONDUCT RULE AND REGISTRATION RULE:

The definition of "Canadian financial institution":

The definition of "Canadian financial institution" in the proposed Business Conduct Rule is as follows:

> *"Canadian financial institution" means any of the following:*
> *(a) an association governed by the Cooperative Credit Associations Act (Canada) or a central cooperative credit society for which an order has been made under section 473(1) of that Act; or*

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[1] In 2016, the Caisses Populaires Acadiennes became a federal credit union under the Bank Act (Canada) operating under the trade name of UNI Financial Cooperation

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(b) a bank, loan corporation, trust company, trust corporation, insurance company, treasury branch, credit union, caisse populaire, financial services cooperative, or league that, in each case, is authorized by an enactment of Canada or a jurisdiction of Canada to carry on business in Canada or a jurisdiction of Canada.

While we appreciate that this language is reflective of the definition of NI 45-106 Prospectus Exemptions, 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) (the "CCAA"). 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.

On the assumption that the definition of "Canadian Financial Institution" is intended to include all provincially and federally regulated financial institutions, we would therefore propose that the definition of "Canadian financial institution" 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.***

The definition of "eligible derivatives party" – Commercial Hedger:

We appreciate that the definition of "eligible derivatives party" has been drafted with a specific derivatives perspective as opposed to repeating the definition of "permitted client" in the securities regulatory regime. In particular, we support the addition of a "commercial hedger" category notably as hedger clients have very specific needs, separate and apart from speculators. However, it is unclear on what basis the CSA Derivatives Committee chose to insert a requirement for commercial hedgers to have net assets of at least $10 million. We are not aware that any sort of quantitative assessment has been made that would indicate that $10 million is an appropriate threshold and we would further submit that the financial threshold should not be included in its entirety, or in the alternative, and it be significantly lowered to be no more than $1 million. The existing OTC derivatives blanket orders (in certain CSA jurisdictions) that govern the current regime in many provinces do not include any financial threshold, so it is unclear

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what systemic risk has arisen (or perhaps what analytics have been conducted on the trade reporting data) that warrant this significant financial threshold to be employed.

2. SPECIFIC COMMENTS ON PROPOSED NI 93-101 - BUSINESS CONDUCT RULE:

De Minimis Exemption:

Unlike in the proposed Registration Rule, there is no de minimis exemption (Notional Amount Exemptions) proposed for the derivatives dealer business conduct requirements. While we appreciate that even if a derivatives dealer has only one client that it should still be required to abide by the obligations of Fair Dealing, Conflict of Interest and Know Your Derivatives Party, the burden of having to comply with the balance of the requirements in proposed Business Conduct Rule (in particular the requirements in Part 5 Compliance and Record-Keeping and the need for a separate Senior Derivatives Manager) is inappropriately onerous for firms with a limited business model and comes with a significant cost that outweighs any measured benefit. The need for more prescriptive and process-oriented requirements need to be measured against the burden imposed on small or mid-market firms that pose no systemic risk to the market.

CCUA believes the CSA should apply "proportionality" and a "risked-based" policy lenses to national instruments such as the Business Conduct Rule. These principles are widely used by a range of regulators, including provincial credit union regulators but also the Office of the Superintendent of Financial Institutions (OSFI), the federal market conduct regulator, the Financial Consumer Agency of Canada (FCAC) and the Basel Committee on Banking Supervision (BCBS)[2] .

The application of these principles hinges on the idea that "one-size-fits-all" policies harm competition because of their disproportionate effect on smaller institutions like credit unions and centrals. Constraints on competition, in turn harm the consumer interests that regulatory measures often seek to protect. In this case, the compliance costs of aligning with the proposed Business Conduct Rule could outweigh the benefits of offering these services to members, leading to the withdrawal of these services and possibly a concentration of offerings at larger banks.

As indicated, we have no objection to compliance with the general market conduct requirements of Fair Dealing, Conflict of Interest and Know Your Derivatives Party but we are concerned with the balance of the Business Conduct rule requirements that would impose an unnecessary and unwarranted burden on smaller institutions.

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[2] For a discussion in a prudential context see: http://www.bis.org/fsi/publ/insightsl.htm

We would therefore propose that any firm that meets the final thresholds set forth in Section 50 and 51 (limited notional amount) of the proposed Registration Rule be provided with an outright exemption from the requirements in the Business Conduct Rule other than those requirements contained in Division 1 – General Obligations Towards All Derivative Parties.

Further Comment Period:

We understand that Section 40 of proposed Business Conduct Rule provides an exemption from requirements in the Rule for a derivatives dealer that is a Canadian financial institution and is subject to and complies with corresponding conduct and other regulatory requirements of its prudential regulator as set out in Appendix C of the Instrument. We further note that the proposed Business Conduct Rule continues to state "as of the time of this publication for comment, the equivalency analysis required to populate the Appendices of the Instrument has not been completed. The Appendices will be completed and published for public comment prior to the Instrument being finalized."

In order to provide meaningful comments to the CSA Derivatives Committee, it is important to understand what obligations and requirements of proposed Business Conduct Rule would be applied to centrals and credit unions and their members. Therefore, once this internal review has been completed by the CSA Derivatives Committee, the proposed Rule must be produced for a third comment period so that the impacted market participants can respond to the final proposed regime. CCUA would be pleased to provide any support to the Committee's further work on the Rule Appendices.

Transition Period:

As a follow-on to the comment above, it remains unclear as to the requirements that Canadian financial institutions (and in particular, centrals and credit unions) will be required to meet under the proposed Business Conduct Rule and this makes the systems and technology build-out timeframes uncertain. The CSA Derivatives Committee has signaled that there will be a 1 year transition period after final publication of Proposed Business Conduct Rule before the instrument takes effect. This will not be sufficient time for our industry to build such systems and prepare for implementation. We would propose a 2 year transition period in order to provide our members time to meet the new requirements.

3. SPECIFIC COMMENTS ON PROPOSED NI 93-102 – REGISTRATION RULE:

Consideration of a "Scope Rule" for Different Regulatory Requirements:

We note that in other foreign jurisdictions, the over-the-counter derivatives regulatory regimes have different instruments to address registration, business conduct, clearing etc. and that different instruments that are required under one set of requirements may

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not be included under another. In the proposed Canadian regime, OSC Rule 91-506: Derivatives: Product Determination (and equivalent in other jurisdictions), otherwise known as the "Scope Rule", not only confirms what types of instruments should be reported under the trade reporting rules but it is the same "Scope Rule" that governs registration and business conduct.

We would propose to the CSA Derivatives Committee to review the instruments caught in the scope rule. In particular we question the decision to include in the definition of derivative, the purchase or sale of a foreign currency settling in more than two business days (ie. FX forward, deliverable or non-deliverable).

Foreign exchange contracts are commonly used by credit unions and its end user clients to hedge risks associated with its commercial business. We would respectfully submit that the simplicity of these trades and highly transparent foreign exchange market do not pose a systemic risk to the Canadian capital markets to justify a registration requirement.

We further note that unlike more sophisticated derivative instruments like interest rate swaps and credit default swaps, there is no global harmonization over the regulation of over-the-counter foreign exchange instruments.

Lastly, the CSA contemplated that the application of the Product Determination Rules could vary depending on the particular regulatory instrument under consideration. For instance, the following is stated in CSA Consultation Paper 91-301 – Model Provincial Rules – Derivatives Product Determination and Trade:

"The Committee expects that elements of the Scope Rule, subject to necessary amendments, will also be made applicable to certain provisions of securities legislation, and to additional derivatives rules that will be brought into force, including but not limited to rules relating to over-the-counter central counterparty clearing, end-user exemptions, trading platforms, capital and collateral, and registration. <u>However, there may be variations in the application of the Scope Rule for these other rules. In particular, certain contracts or instruments that are prescribed to be securities or derivatives for the purposes of the TR Rule may be treated differently in other rules</u>." [emphasis added]

Need for Harmonization Across the CSA:

We appreciate that Ontario's Securities Act provides that certain specified financial institutions are exempt from registration and as a result, the Ontario Securities Commission (the OSC) will not register those specified financial institutions when they act as derivatives dealers or advisers in the Ontario market. Based on the existing prudential obligations and oversight of centrals and credit unions, we support the OSC's position that registration is not required of a Canadian financial institution. We reference again our above-noted suggested definition for "Canadian Financial Institution".

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With regards to the balance of the provincial securities regulators, there currently exist a number of blanket orders and other derivatives legislation that provides for a registration exemption for centrals and credit unions. It is unclear as to what statistical data has been reviewed or market analysis completed that indicates that the existing regime is not adequate and that these market participants pose any systemic risk that warrants a prescriptive securities regulatory regime as opposed to the current prudential regulation of credit unions in each province.

Additional Comment Periods Required to Address and Review Appendix F:

The proposed Registration Rule contains an exemption for Canadian financial institutions where they are subject to and comply with equivalent requirements imposed by a federal or provincial prudential authority. We appreciate that the CSA Derivatives Committee has completed an analysis of the requirements that apply to financial institutions that are regulated by OSFI and by the Autorité des marchés financiers (AMF), however, this is not of assistance to other Canadian financial institutions.

As noted above with regards to proposed Business Conduct Rule, in order to provide meaningful comments to the CSA Derivatives Committee, it is important to understand what obligations and requirements of the proposed Registration Rule would be applied to centrals and credit unions and their members. Therefore, once this internal review has been completed, the proposed Registration Rule must be produced for a lengthy second comment period (minimum of 150 days) so that the market participants can review and respond accordingly. CCUA would be pleased to participate in this review process.

Notional Amount Thresholds:

Notional amount is used in sections 50 and 51 of proposed Registration Rule to establish exemptions from registration for certain derivatives dealers that have a monetary notional amount below a prescribed threshold ($250 million in section 50 and $1 billion under commodities derivatives in section 51).

Given the onerous requirements proposed in the Registration Rule, we respectfully submit that these thresholds be increased to a minimum of $500 million under section 50 and that the amount for commodity derivatives remains the same.

Transition Period:

As noted above, given the significant obligations set forth in the proposed Registration Rule, the transition period should be extended to a minimum of two years.

Conclusion

CCUA is grateful for the opportunity to share its views on the proposed Derivatives Business Conduct Rule and the proposed Registration Rule. We would be pleased to

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provide any additional information as required with respect to our comments. Please do not hesitate to contact me at boconnor@ccua.com or directly by phone at 416-232-3405.

Yours sincerely,

Brenda M. O'Connor
Vice President, General Counsel
& Corporate Secretary

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OLYMPIA
TRUST COMPANY

Via Email

September 17, 2018

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Financial and Consumer Services Commission (New Brunswick)
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Ontario Securities Commission
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

Dear Sirs/Mesdames:

Re: Proposed National Instrument 93-101 *Derivatives: Business Conduct*, Proposed Companion Policy 93-101CP *Derivatives: Business Conduct*, Proposed National Instrument 93-102 *Derivatives: Registration* and Proposed Companion Policy 93-102 *Derivatives: Registration*

Olympia Trust Company ("**Olympia**") is grateful for the opportunity to provide comments to the Canadian Securities Administrators (the "**CSA**") with respect to Proposed National Instrument 93-101 *Derivatives: Business Conduct*, Proposed Companion Policy 93-101CP *Derivatives: Business Conduct*, Proposed National Instrument 93-102 *Derivatives: Registration* and Proposed Companion Policy 93-102 *Derivatives: Registration* (collectively, the "**Proposed National Instruments**").

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About Olympia

Olympia is a non-deposit taking trust corporation formed under the *Loan and Trust Corporations Act* (Alberta). Olympia is licensed to provide trust services in the Provinces of Alberta, British Columbia, Saskatchewan, Manitoba, Quebec, Nova Scotia, Prince Edward Island, New Brunswick and Newfoundland and Labrador.

Olympia's Foreign Exchange division provides its customers with the ability to exchange currencies using spot trades and forward contracts, and is principally focused on providing individuals and small and medium sized corporations with a cost-effective currency exchange alternative to the major financial institutions. Olympia's Foreign Exchange division has allowed over 9,000 of its customers to exchange approximately $20 Billion in currencies over its 13 years of operation.

Expansion of the Definition of "Eligible Derivatives Party"

It is Olympia's view that paragraph (o) of the definition of "Eligible Derivatives Party" as set forth in the Proposed National Instruments should be expanded to be consistent with definition of "Accredited Investor" as set forth in National Instrument 45-106: *Prospectus Exemptions* ("**NI 45-106**"). Olympia notes that subparagraph (o)(ii) of the definition of "Eligible Derivatives Party" is substantially the same as paragraph (j.1) of the definition of "Accredited Investor". It is Olympia's view that paragraph (o) of the definition of "Eligible Derivatives Party" should be substantially expanded to include the other categories of individuals identified in the definition of "Accredited Investor", specifically:

(a) individuals who, either alone or with a spouse, beneficially own financial assets having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds $1,000,000;

(b) individuals whose net income before taxes exceeded $200,000 in each of the 2 most recent calendar years or whose net income before taxes combined with that of a spouse exceeded $300,000 in each of the 2 most recent calendar years and who, in either case, reasonably expects to exceed that net income level in the current calendar year; and

(c) individuals who, either alone or with a spouse, has net assets of at least $5,000,000.

Olympia notes that even with the above additions to paragraph (o) of the definition of "Eligible Derivatives Party" the standard required of individuals wishing to be categorized as an Eligible Derivatives Party is still more onerous than the standard required of individuals wishing to categorized as an "Accredited Investor". Olympia reaches this conclusion largely as a result of the provisions subparagraph (o)(i) of the definition of "Eligible Derivatives Party" which require that the individual represent that: "he or she has the requisite knowledge and experience to evaluate the information provided to the individual about

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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". The definition of "Accredited Investor does not have a corresponding requirement.

Olympia is also of the view that the definition of "Eligible Derivatives Party" should be expanded to include corporations and other entities that are controlled by individuals who otherwise meet the definition of "Eligible Derivatives Party". Such a revision would be substantially similar to paragraph (t) of the definition of "Accredited Investor" which reads:

> (t) person in respect of which all of the owners of interests, direct, indirect or beneficial, except the voting securities required by law to be owned by directors, are persons that are accredited investors,

Olympia is of the view that the proposed regulatory regime should not prevent individuals, who otherwise meet the definition of "Eligible Derivatives Party", from trading derivatives using corporations and other entities that they control.

Net Asset Threshold for "Commercial Hedgers"

Olympia applauds the CSA for its inclusion of "commercial hedgers" in the definition of "Eligible Derivatives Party", but is concerned that the requirement that commercial hedgers have net assets of at least $10,000,000 as shown on its most recently prepared financial statements is too high and is out of step with the other financial requirements contained elsewhere in the definition of "Eligible Derivatives Party". In particular, Olympia notes that under paragraph (o) of the definition of "Eligible Derivatives Party" an individual is only required to own financial assets with an aggregate realizable value before tax but net of any related liabilities of only $5,000,000.

Furthermore, a commercial hedger has the additional requirement of demonstrating that they meet the definition of "commercial hedger". Olympia notes that, as per the companion policies to the Proposed National Instruments, a general representation by a counterparty that they meet the definition of "commercial hedger" is not sufficient. Olympia understands that it is the CSA's expectation that derivatives dealers will establish policies and procedures to reasonably verify that a counterparty does indeed meet the definition of "commercial hedger". Given this additional requirement, it is Olympia view that commercial hedgers should not be subject to a financial requirement that is twice as onerous as that required of individuals.

If anything, the "commercial hedger" category of Eligible Derivatives Party should be structured in such a way as to allow parties who own financial assets with an aggregate realizable value before tax but net of any related liabilities of less than $5,000,000 with the ability to be categorized as an Eligible Derivative Party if they can demonstrate that they are "commercial hedgers".

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Accordingly, it is Olympia's view that commercial hedgers should be required to demonstrate that they own net assets of not more than $5,000,000.

Conclusion

As a provider of foreign currency exchange services, Olympia is concerned that the Proposed National Instruments will create additional barriers to entry to an industry that is already dominated by large financial institutions. Under the Proposed National Instruments, many small and medium sized Canadian businesses with foreign business operations will not meet the proposed definition of an "Eligible Derivatives Party" and will be required to purchase currency risk mitigation products from large financial institutions for 2x to 3x their current cost, or forego such currency risk mitigation products altogether. While Olympia is certain this is not the intent of the Proposed National Instruments, if enacted as proposed, this will likely be an unintended consequence.

Olympia appreciates that the CSA needs to balance the twin goals of investor protection and the encouragement of an open and free capital market, but believe that the Proposed National Instruments may have swung the pendulum too far in away from a open and free capital market. Olympia strongly encourages the CSA to reconsider the financial thresholds set out in the definition of "Eligible Derivatives Party" and whether the CSA's competing policy objectives are being balanced appropriately.

Sincerely,

Craig Skauge

Craig Skauge
President
Olympia Trust Company

Derick Kachuik

Derick Kachuik
Vice-President Foreign Exchange Division
Olympia Trust Company

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September 17, 2018

VIA electronic submission

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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
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Dear Sirs/Mesdames:

Re: Comment Letter on CSA Notice and Request for Comment – Proposed National Instrument 93-102 Derivatives: Registration and Proposed Companion Policy 93-102 Derivatives: Registration.

TransAlta Corporation **("TransAlta"**) and its affiliates hereby respectfully submit comments on the Canadian Securities Administrators (**"CSA"**) notice and request for comment. TransAlta appreciates the opportunity to share its feedback and looks forward to continued collaboration following the submission.

<u>TransAlta Background:</u>

TransAlta is a publicly traded generator and marketer of electricity and renewable power. TransAlta owns, operates and manages a highly contracted and geographically diversified portfolio of assets that utilize a broad range of generation fuels including natural gas, coal, hydro,

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wind and solar. TransAlta's major markets are Canada, the U.S. and Australia, managing a total of 8,266 MW across these jurisdictions.

TransAlta's primary objectives as a generation and marketing company are to mitigate and optimize exposures to short-term, spot market power prices, to hedge price risks associated with fuel inputs, and to proprietary trade within a limited and well-defined risk framework. TransAlta utilizes a variety of instruments to manage its price exposure, including physical forward contracts for electricity, natural gas and environmental commodities, and financial derivative transactions based on those same commodities. Much of TransAlta's trading activity takes place on regulated electronic exchanges and clearing platforms, such as ICE (Intercontinental Exchange) and NGX (Natural Gas Exchange), but also through third-party brokered transactions and directly with counterparties. Interest rate and foreign exchange derivatives are transacted by our centralized treasury function and are entered into solely for the purpose of risk mitigation. TransAlta is a registered "market participant" in the Alberta wholesale electricity market constituted as the Alberta "Power Pool" under the Electric Utilities Act of Alberta (the **"EUA"**) and is also a licensed "retailer" (as defined in the EUA) of electricity services to large commercial and industrial customers in the Alberta retail electricity market.

General Comments:

First, we would like to state that we support the efforts of the CSA to design and implement a derivatives regulatory regime that addresses Canada's G-20 commitments. We also commend the Committee for amending the Proposed National Instrument to address many of the comments already submitted by affected market participants. The specific comments raised below address some of the areas in the National Instrument that TransAlta feels are still of concern.

TransAlta is also aware of the comments submitted by Eversheds Sutherland (US) LLP, on behalf of The Canadian Commercial Energy Working Group, in a letter dated August 2, 2018 (the **"Sutherland Letter"**). Although TransAlta is not associated with the Canadian Commercial Energy Working Group, we support the comments in the Sutherland Letter and respectfully urge the CSA to adopt the proposed revisions to the Proposed National Instrument set forth in the Sutherland Letter.

Specific Comments:

BUSINESS TRIGGERS

The CSA's proposed Business Triggers, while we take the CSA's word that they intended to be applied holistically, provide limited clarity to market participants and remain a source of confusion. The CSA should consider adopting further interpretative explanation and indicia of derivatives dealers, including borrowing language used by the CFTC. This could include: entering into derivatives to satisfy the business or risk management needs of a counterparty (as opposed to entering into derivatives to accommodate one's own desire to participate in a particular market); allocating separate staff and resources to dealer-type activities including client onboarding, document negotiation, confirmation generation, credit and portfolio reconciliation, etc.; creating new derivatives products; and other dealer-trader distinctions.

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EXEMPTION FOR CERTAIN DERIVATIVES END-USERS[1]

The term 'regularly' is used in both (c) and (d), but the Companion Policy is silent in this area on how to interpret the term. The CFTC has provided clarification that a regular business means activities that are usual and normal in the person's course of business and identifiable as a swap dealing business. The CSA could provide something equivalent but contextualize it in the CSA's distinct language of derivatives regulation, such as linking the discussion provided in the Companion Policy on page 95 under 'Factors in determining a business purpose – general' with the 'Exemption for certain derivatives end-users' section.

GENERAL DE MINIMIS EXEMPTION ($250M OVER 24 MOS) AND COMMODITY DE MINIMIS EXEMPTION ($1B OVER 24 MOS)

We appreciate that to calculate our room under the de minimis exemptions we must first remove physicals, exchange-traded / cleared and inter-affiliate transactions from the equation. However, we believe that excluding commercial hedges is also required. The $1B calculation in particular should not include commercial hedging transactions, as these are ultimately a measure of the size of a generator / producer's portfolio of assets, not its dealing or trading activity in OTC markets.

For example, corporate renewable PPAs are becoming increasingly popular in the US to backstop the development of new wind and solar facilities. They provide corporate and government off-takers the ability to demonstrate their sustainability goals by supporting the growth of new renewable energy sources.[2] These PPAs are typically papered as financial contracts-for-difference and as such are reportable derivatives (Canada) / swaps (US). They also have large notional amounts. For example, a 15-year PPA on a 90MW wind farm at $42/MWh would have a $500M notional amount (using the CPMI-IOSCO definition). Developing two wind farms in this manner equates to $1B notional and would eliminate the ability for a Canadian energy parent and its affiliate marketing arm to rely upon the Commodity Derivatives Exemption in the Proposed National Instrument.

Instead the CSA should include commercial hedging language within the exemptions. The CSA used the following definition of hedging in Model Provincial Rule 91-303[3], and while the final rule ultimately dropped this concept, we feel the inclusion of this concept within the Proposed National Instrument on Derivatives Registration would make these exemptions available to commercial energy companies seeking to hedge or mitigate their commercial price exposure[4]:

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[1] Proposed National Instrument 93-103 *Derivatives: Registration*. Page 59 Section 49. (2)

[2] https://www.utilitydive.com/news/salesforce-kaiser-permanente-add-to-boom-in-corporate-renewable-ppas/532328/

[3] CSA Staff Notice 91-303: http://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20131219_91-303_mandatory-counterparty-clearing-derivatives.htm

[4] As well as providing consistency with US and European de minimis exemptions.

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Interpretation of hedge or mitigation of commercial risk

3. In this Rule, a derivative is held for the purpose of hedging or mitigating commercial risk when all of the following apply:

(a) it establishes a position which is intended to reduce risks relating to the commercial activity or treasury financing activity of the counterparty or of an affiliate, and, alone or in combination with other derivatives, directly or through closely correlated financial instruments meets any of the following:

> (i) that derivative covers the risks arising from the change in the value of asset, services, inputs, products, commodities or liabilities that the counterparty or its group owns, produces, manufactures, processes, provides, purchases, merchandises, leases, sells or incurs or reasonably anticipates owning, producing, manufacturing, processing, providing, purchasing, merchandising, leasing, selling or incurring in the normal course of its business;
>
> (ii) that derivative covers the risks arising from the indirect impact on the value of assets, services, inputs, products, commodities or liabilities referred to in subparagraph (i), resulting from fluctuation of interest rates, inflation rates, foreign exchange rates or credit risk;

(b) such position is not held for any of the following purposes:

> (i) for a purpose that is in the nature of speculation;
>
> (ii) to offset or reduce the risk of another derivative transaction, unless that other position itself is held for the purpose of hedging or mitigating commercial risk.

To ensure that market participants apply the guidance appropriately, the CSA could include an anti-evasion clause allowing it to request confirmatory information from market participants, thereby conditioning the use of the de minimis exemption on the market participant demonstrating, upon a specific request from the relevant provincial regulator, that it had a reasonable basis for its characterization of a transaction intentioned to hedge or mitigate commercial risk as a bona fide hedge.

METHODOLOGY TO DETERMINE NOTIONAL AMOUNT

The CSA proposes two alternate methodologies: 1) the CPMI-IOSCO methodology, which TransAlta critiqued during its consultation period; and 2) the Regulatory Notional methodology. Neither of these methodologies are without fault, and we believe it would beneficial for the CSA to pause and align itself with the CFTC methodology that will result from its ongoing consultation, given the harmonization and consistency benefits that could result.

As TransAlta's comments to IOSCO have previously identified, the CPMI-IOSCO methodology calculates basis swaps and options notional amounts incorrectly. The option calculation grossly

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overstates or understates the notional amount when the strike is above or below the underlying price, respectively (even though the economic profile and risk on each option may be the same). The basis swap calculation also biases the notional by using the spot price, when the price spread is the true value of the product exchanged.

The CSA's Regulatory Notional methodology substitutes the fixed notional volume for a prorated monthly equivalent. In our example in the section above for corporate renewable PPAs, this would 'scale down' the 15-year deal into a smaller monthly equivalent. On the other hand though, this methodology may be biased against active short-term markets, such as in electricity and natural gas. Electricity forward markets in particular exhibit a strong 'term structure' of liquidity, with near-term hourly, daily and weekly contracts being exchanged at large multiples of the volume of quarterly or calendar year contracts for settlement further into the future. These near-term contracts would 'scale up' to a monthly equivalent, with each one somewhat paradoxically potentially matching the size of the 15-year PPA. While the use of only 'outstanding' commodity derivatives in the de minimis calculation may mitigate this bias somewhat, this methodology might also have unintended consequences on trading activity during month ends and natural gas bidweeks when commodity companies often do a majority of their hedging and optimizing. Additionally, the Regulatory Notional still has issues on the price side of the equation for certain derivative instruments, such as commodity basis swaps where it is unclear why the CSA chose 'the greater of' the two legs instead of the price spread.

The advantages of pausing and assessing the CFTC's proposal are many. Most derivative market participants in Canada see it as fair and reasonable that only financial institutions and three very large commodity participants have been provisionally registered as swap dealers in the US. The scenario testing that accompanied the CFTC's recent decision to maintain their $8B de minimis swap dealing threshold proved that this level was robust and appropriately tuned.[5] The CFTC's proposed standardized notional amount guideline is equally anticipated and expected to be just as robust, and the CSA would benefit from the discussion of competing methodologies and calculation variations for specific derivative instruments that should arise from the CFTC's consultation. If consistency between the two jurisdictions can be achieved, this also reduces the work required by market participants to develop their notional amount calculations for testing against the respective de minimis thresholds.

Conclusion:

TransAlta would like to thank the Committee for the opportunity to provide comments on CSA Staff Notice 93-102 and we support the great undertaking of OTC derivatives market reform. TransAlta looks forward to additional opportunity for comment and consultation on the Committee's efforts to design and implement OTC reform. If you have any questions or concerns regarding our comments, please contact either of the undersigned.

[5] https://www.gpo.gov/fdsys/pkg/FR-2018-06-12/pdf/2018-12362.pdf

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Sincerely,

/s/ Daryck Riddell

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September 17, 2018

DELIVERED VIA EMAIL: consultation-en-cours@lautorite.qc.ca
comments@osc.gov.on.ca

Alberta Securities Commission
Autorité des marches 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

Dear Sirs/Mesdames:

Re: Proposed National Instrument 93-101 *Derivatives: Business Conduct* and Proposed National Instrument 93-102 *Derivatives: Registration* (collectively, the "Proposed Rules")

The Canadian Life and Health Insurance Association is pleased to provide comments on the Canadian Securities Administrators' proposed National Instruments 93-101 *Derivatives: Business Conduct* (the "Business Conduct Rule") and proposed National Instrument 93-102: *Derivatives Registration* (the "Registration Rule").

The Canadian Life and Health Insurance Association (CLHIA) is a not-for-profit, membership-based organization that represents companies which together account for 99 percent of Canada's life and health insurance business. CLHIA's member companies, through a wide range of products and services, help Canadians to protect themselves and their families against the financial risks surrounding premature death, illness and retirement. These products include individual and group life insurance, supplementary health insurance and individual and group annuities (including RRSPs, RRIFs, TFSAs and Defined Contribution pension plans).

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The CLHIA supports the goal of establishing a robust investor protection regime related to derivatives that meets The International Organization of Securities Commission's international standards and which protects participants in the OTC derivatives markets from unfair, improper or fraudulent practices.

Life Insurance Company Operations

Canadian life insurance companies generally participate as end-users in Canadian and foreign derivatives markets, and we understand that the end-user exemptions in Section 49(2) of the Registration Rule and Section 37(1) of the Business Conduct Rule will be relied upon where appropriate to exempt Canadian life insurance companies from the requirements of the Proposed Rules which apply to derivatives dealers and derivatives advisers. A key matter is that life insurance companies do not function as "market-makers" in derivatives.

In addition, insurance contracts have generally been excluded from the application of securities registration requirements. For example, section 8.14 of National Instrument 31-103: *Registration Requirements, Exemptions and Ongoing Registrant Obligations* entitled "Variable insurance contract" specifically exempts trades by insurance companies in certain insurance products. Similarly, section 2.39 of National Instrument 45-106: *Prospectus Exemptions* (NI 45-106) provides insurance companies with an exemption from the prospectus requirements for distributions of certain insurance products including group insurance.

To enhance alignment between the Proposed Rules and existing securities registration requirements, consideration should be given to including in the Registration Rule an exemption for insurance companies dealing in certain insurance products, with such exemption mirroring the language found in section 2.39 of NI 45-106.

Additionally, we would note that OSFI actively regulates life insurance companies as Federally Regulated Financial Institutions with respect to solvency and risks, including the risks associated with derivatives exposure, resulting in a robust regulatory framework.

Investment Management Subsidiaries

Canadian life insurance companies also often have investment management subsidiaries that are registered advisers under Canadian securities legislation with employees who are also registered and provide advice with respect to investments in segregated funds, mutual funds, managed accounts and purchases for general account holdings of life insurers. Some of these insurance company subsidiaries and their personnel may also be subject to registration as derivatives dealers or derivatives advisers in accordance with the requirements of the Proposed Rules.

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In this regard, we note that sections 53(1) and 60(1) of the Registration Rule provide that entities that would be brought within the registration requirements solely as a result of their dealing with, or providing advice to an affiliated entity are exempted from the registration requirement. Section 4 of the Business Conduct Rule includes a somewhat similar exemption for persons or companies in respect of their dealing with or advising an affiliated entity; however, section 4 of the Business Conduct Rule does not, on a strict reading, necessarily provide an exemption from registration obligations.

Given the foregoing, we think it would be more clear as to which persons and entities need to be registered if the exemptions in the Proposed Rules were made consistent. This would mean adding the exemptions from sections 53(1) and 60(1) of NI 93-102 to 93-101 and adding the exemption from section 4 of NI 93-101 to NI 93-102.

Support for CMIC's Submission to the CSA

In this context, at least two large Canadian insurers have participated in developing the submissions of the Canadian Market Infrastructure Committee (CMIC), and the CLHIA wishes to express its general agreement with the concerns raised in the CMIC submissions related to the Proposed Rules.

Given the small size of the Canadian derivatives market and its heavy reliance on global participants, it is vitally important to harmonize with international standards where appropriate. In particular, it is important to harmonize with requirements in the United States. Further detail is also required about what jurisdictions will qualify for substituted compliance. We share the concern that many foreign dealers and advisers will not want to assume increased legal and regulatory risk and compliance burden associated with any unique Canadian requirements. Reduced foreign participation in the Canadian market will result in restricted liquidity and access to foreign advisers, and it will increase costs for Canadian businesses.

We support the goal of avoiding duplicative and / or unnecessary regulation, particularly where the OTC derivatives markets in Canada are functioning well and the costs do not appear to outweigh the benefits. We agree with CMIC's view that it is appropriate to exclude financial institutions which are federally regulated by OSFI from the dealer and adviser registration requirements. We also agree with CMIC's recommendations with respect to derivatives advisory services that are provided by foreign advisers and by non-foreign advisers that are currently registered under Canadian securities legislation.

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The CLHIA appreciates the opportunity to provide its comments on the Proposed Rules. If you require any additional information at this time, please feel free to contact me by email at JWood@clhia.ca or by telephone at 416-359-2025.

Yours truly,

"*James Wood*"

James Wood
Senior Counsel

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ISDA® Safe, Efficient Markets

SENT BY ELECTRONIC MAIL

September 17, 2018

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

c/o

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Me Anne-Marie Beaudoin, Corporate Secretary
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Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comment – Proposed National Instrument 93-102 *Derivatives: Registration* and Proposed Companion Policy 93-102CP *Derivatives: Registration*

The International Swaps and Derivatives Association, Inc. ("**ISDA**")[1] has been actively engaged for many years with providing input on regulatory reforms impacting derivatives in major jurisdictions globally, including Canada. ISDA appreciates the opportunity to provide comments to the Canadian Securities Administrators ("**CSA**") in response to the notice and request for comments (the "**Notice**") regarding the above-noted Proposed National Instrument 93-102 – *Derivatives: Registration* (the "**Proposed Instrument**") and Companion Policy ("**CP**" and, together with the Proposed Instrument, the "**Proposed**

[1] Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 68 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

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Registration Rule”). In this letter, ISDA wishes to outline areas that require further scrutiny and revision, in addition to our responses to the specific questions posed by the CSA in the Notice, which are included in Schedule A. This comment letter and ISDA’s comment letter on the revised Proposed National Instrument 93-101 *Derivatives: Business Conduct* and Proposed Companion Policy 93-101CP *Derivatives: Business Conduct* (The “**Proposed Business Conduct Rule**”) should be read together given the many overlapping issues in the two instruments.

As a general comment, ISDA encourages the CSA to consult widely with relevant stakeholders to ensure that Canada adopts a derivatives registration framework that is directly responsive to local derivatives markets. In particular, this means that Canada should consider derivatives registration rules that are designed specifically for derivatives markets, not securities markets. We note that the structure and much of the content of the Proposed Registration Rule is drawn from the existing securities regulatory regime for registration and regulation of securities dealers and securities advisers. The CSA should consider all comments on the Proposed Registration Rule with the understanding that derivatives markets and securities markets are fundamentally different and accordingly require different regulatory regimes. Although ISDA refers to analogous concepts of the existing securities registration regime in this comment letter, our view, based on the global derivatives reform experience, is that the better approach is to develop a derivatives registration regime that is developed from, and tailored to, the realities of the Canadian derivatives market.

We are concerned that the derivatives registration framework in the Proposed Registration Rule does not address the realities of the local Canadian derivatives market, the majority of which is cross-border. If the Proposed Registration Rule is adopted as drafted, the Canadian derivatives market could suffer the fragmentation and decreased liquidity that occurred in the global derivatives market after the introduction of derivatives trading rules.[2] This would clearly be an unintended consequence of the type that Canadian regulators have long sought to avoid. We refer to the Discussion Paper entitled “Reform of Over-the-Counter (OTC) Derivatives Markets in Canada”[3] published in 2010 by the OTC Derivatives Working Group, which included members of the CSA. As described in the Discussion Paper, the OTC Derivatives Working Group was tasked with helping to ensure that Canada met its G-20 commitments “in a manner consistent with the continued stability and vibrancy of the Canadian financial system”. Canada has met or is meeting its G-20 commitments with respect to standardization, central clearing, trade reporting and transparency. Respectfully, the rationale for many aspects of the Proposed Registration Rule have not been clearly demonstrated, considering the potential risks to the stability and vibrancy of the Canadian financial system in the event that already regulated derivatives

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2 See *ISDA Research Note: Cross-Border Fragmentation of Global Derivatives: Second half 2015 Update*, available on https://www.isda.org/a/OSiDE/fragmentation-final1.pdf

3 Available on https://www.bankofcanada.ca/wp-content/uploads/2010/10/reform.pdf

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dealers and derivatives advisers withdraw from, or substantially limit their exposure to, the Canadian derivatives market.

ISDA therefore urges that any Canadian derivatives registration rules should align with other jurisdictions of comparable size and with similar counterparty types, such as Australia. We are very concerned about the negative impact on Canada's derivatives market if Canada were to have a derivatives registration regime that goes further than IOSCO's and the G20 recommendations for derivatives market reform and goes further in many respects than the swap dealer registration rules promulgated by the U.S. Commodity Futures Trading Commission ("**CFTC**"). The Canadian market, which is largely an institutional market, relies on foreign markets for liquidity. The derivatives registration regime should reflect this reality.

Also, ISDA strongly recommends that the CSA prioritize harmonization of concepts in the Proposed Registration Rule with other concepts that are commonly used in the industry. As a tangible example, and as more fully discussed in the Appendix, ISDA believes that the CSA should include, in the definition of eligible derivatives party ("**EDP**"), any person that is (i) a "permitted client" as defined in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("**NI 31-103**") and not an individual and (ii) an "eligible contract participant" as defined in Section 1a(18) of the U.S. *Commodity Exchange Act* (the "**CEA**"). This harmonization would help reduce the need for Canadian market participants to obtain separate compliance documentation for many clients. The experience with Canadian trade reporting rules demonstrated the difficulty in obtaining Canadian-specific client documentation even where the underlying rules were similar in purpose to G20 trade reporting rules.

To reiterate, the Proposed Registration Rule presents significant liquidity risks to the Canadian derivatives markets. ISDA described these risks in detail in our comment letter on the 2013 *CSA Consultation Paper 91-407 on Derivatives: Registration*:[4]

> we urge the Committee to consider the global nature of the markets when creating regulations for OTC derivatives to ensure that such regulations do not restrict the ability of Canada market participants to continue participating in, and remaining competitive in, the global OTC derivatives market. To this end, ISDA cautions regulators against adopting duplicative, overlapping or incremental requirements and/or infrastructure where sufficient alternatives exist ... Moreover, regulators should bear in mind the more limited number and types of counterparties participating in the Canadian market, as well as products traded, when compared to other foreign markets. The only other country with an OTC registration requirement comparable to [the] Committee's proposal is the United States, which is a market of a size, diversity and liquidity that does not compare to that of the Canadian market. Furthermore, the United States' OTC derivatives registration regime includes a number of exemptions and

[4] Letter dated June 17, 2013 from Katherine Darras, General Counsel, Americas, ISDA, page 4.

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> thresholds that have not been incorporated, in whole or in part, in the Committee's proposal … Many Canadian counterparties have, therefore, expressed concerns that a registration regime may make participation in the Canadian market too burdensome or expensive in particular for foreign derivatives dealers, with the result that Canadian market participants may face a dwindling number of counterparties willing to transact in Canada.

There is a significant risk that an overly prescriptive and complex derivatives registration regime will restrict the ability of Canadian market participants to continue participating in, and remain competitive in, global OTC derivatives markets. As mentioned in our previous letter, ISDA cautions regulators against adopting duplicative or overlapping requirements where sufficient alternatives exist. IOSCO, the Financial Stability Board and other international groups of regulators have noted the value of recognizing prudential supervisory regimes as equivalent to avoid unintended consequences for impacted markets.

1. **Business Trigger Guidance for the Registration Requirement**

ISDA appreciates the addition of a more robust description of market making activity in the list of business trigger factors used to determine whether an entity is acting as a derivatives dealer. As we have previously commented to the CSA, ISDA prefers that market making be the *only* factor to determine whether an entity is acting as a derivatives dealer. However, if the CSA are not willing to limit the scope of derivatives dealing to market making, in the alternative we continue to recommend that the proposed definitions of derivatives dealer and derivatives adviser be revised to more precisely and clearly articulate whether the activities of a person or company bring them into the scope of these definitions.

In particular, the factor of "directly or indirectly carrying on the activity with repetition, regularity or continuity" is problematic and difficult or impossible to apply in practice, particularly for buy-side institutions. Frequent derivatives *trading* activity, in the absence of the other business purpose factors, should not constitute dealing activities. For example, large buy-side institutions may engage in various types of OTC derivatives transactions with repetition, regularity or continuity. Examples include the hedging of foreign currencies or the frequent trading of OTC equity derivatives. These transactions are not dealing activity and may not squarely fit within the registration exemption for end users in Section 49 of the Proposed Instrument. We also note that this factor is not included in the similar list of factors to identify a derivatives dealer for trade reporting purposes in the companion policy to MI 96-101 *Trade Repositories and Derivatives Data Reporting*. We see no reason why this factor could be relevant to identify a derivatives dealer for business conduct and registration but not trade reporting. We therefore recommend that the CSA remove from the CP the factor of "directly or indirectly carrying on the activity with repetition, regularity or continuity" as a business trigger or, in the alternative, modify the factor as "directly or indirectly carrying on *market-making* activity with repetition, regularity or continuity".

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2. Dealer Registration Exemptions

ISDA is generally supportive of the proposed dealer registration exemptions included in the Proposed Registration Rule. We offer the specific comments below and in Schedule A.

(a) *Trades with a Canadian derivatives dealer*

ISDA has significant concerns that, unlike the securities dealing exemption in Section 8.5 of NI 31-103, there is no registration exemption for derivatives transactions conducted with a Canadian derivatives dealer (for purposes of this section, either a registered derivatives dealer or a regulated financial institution exempt from registration under Section 35.1 of the *Securities Act* (Ontario). The registration exemption in Section 8.5 of NI 31-103 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. Under the Proposed Registration Rule, however, a trade between an unregistered firm and a Canadian derivatives dealer could potentially subject the unregistered firm to registration or the need to perfect a registration exemption, or at minimum the need to conduct an analysis of whether registration is required. This may cause significant harm to liquidity in Canadian derivatives markets without any corresponding benefit of protection to Canadian investors or market participants. So long as one party is a Canadian derivatives dealer it serves no purpose for both counterparties to be registered in a derivatives trade. ISDA therefore proposes that an exemption for derivatives transactions conducted with a Canadian derivatives dealer be included in the Proposed Registration Rule and the Proposed Business Conduct Rule.

(b) *Registration exemptions for foreign derivatives dealers*

ISDA supports the provisions in the Proposed Registration Rule which would allow substituted compliance for certain foreign derivatives dealers.[5] However, we note that the Proposed Registration Rule deviates from the registration requirements of foreign dealers in NI 31-103, in that foreign derivatives dealers that will seek to rely on the registration exemption in Section 52 of the Proposed Instrument must be regulated under prescribed laws of a specified list of foreign jurisdictions (both the prescribed laws and the foreign jurisdictions to be identified in an Appendix to the rule not yet published). In contrast, under NI 31-103, a foreign dealer may rely upon the international dealer exemption in Section 8.18 of that instrument so long as it is registered in a category of registration in its home jurisdiction "that permits it to carry on the activities in that jurisdiction that registration as a dealer would permit it to carry on in the local (Canadian) jurisdiction." ISDA proposes that substituted compliance be an exemption that is available in the

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[5] It is also noted, however, that ISDA is not aware of any evidence that the current model of derivatives dealer registration exemptions employed by most provinces of Canada, which are not conditioned on substituted compliance, is inadequate. ISDA would be supportive of maintaining the status quo of derivatives dealer registration exemptions premised solely on the derivatives parties being EDPs.

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Proposed Registration Rule for **all** derivatives dealers that are appropriately registered, exempt from registration, or otherwise not required to be registered in *any* foreign jurisdiction, subject to reasonable limitations. One such limitation, for example, could be that the foreign jurisdiction is an ordinary member of IOSCO.

For greater certainty, if a bank or other entity is operating under a dealer exemption, or is not required to be registered, in its home jurisdiction, the same entity should not be required to register under Canadian derivatives rules for conducting the same activity in Canada. Introducing a carve out that would apply when a bank or other entity is operating under a dealer exemption in another jurisdiction is consistent with the approach towards foreign adviser registration exemption under Section 8.26(4)(b) of NI 31-103, and ISDA is not aware of any compelling reason why this should not apply in the context of a dealer. Further, as we noted in the Proposed Business Conduct Rule Comment Letter, ISDA also requests that the CSA clarify the foregoing carve out for foreign derivatives dealers (and derivatives advisers) will extend to Canadian branches of foreign dealers (and advisers) that are registered or exempt from registration in their home jurisdictions.

(i) Should the CSA keep the approach to substituted compliance for foreign dealers that is currently taken in the Proposed Registration Rule, then it is essential that the CSA publish for public comment the list of available substituted compliance jurisdictions and laws, along with re-publishing the Proposed Instrument and any applicable revisions in advance of finalizing both the Proposed Registration Rule and the Proposed Business Conduct Rule.

In the alternative and where the CSA does not agree to what is proposed above, ISDA urges the CSA to provide certainty as to whether the registration requirements under U.S. Dodd-Frank Act rules are considered fully eligible for substituted compliance. For example, a U.S. bank that only engages in spot FX and physically deliverable FX forwards is not required to be registered as a Swap Dealer under the U.S. Dodd-Frank Act because such FX transactions are not regulated as "Swaps" under the of the U.S. Treasury exemption[6]. Under the Proposed Registration Rule, this same entity would be required to register as a dealer for its same physically delivered FX forward activity with Canadian counterparties. ISDA strongly recommends that the CSA consider current and anticipated regulatory reform proposals in other jurisdictions, such as the proposed registration of security-based swap dealers by the U.S. Securities and Exchange Commission, or the CFTC's request for comments on its proposal to exclude Non-Deliverable Forwards from the U.S. Swap Dealer de-minimis threshold, to provide adequate flexibility for substituted compliance in the Proposed Registration Rule, and to prevent further regulatory market fragmentation. For example, a U.S. firm may be registered as a Swap Dealer but no registration requirement applies to its security-based swap activities. The U.S. firm should be eligible for substituted

[6] https://www.treasury.gov/press-center/press-releases/Documents/11-16-2012%20FX%20Swaps%20determination%20pdf.pdf; 83 Fed. Reg. 27444, 27447 (noting that for CFTC purposes FX swaps and FX forwards do not count towards determining whether a person must register as a Swap Dealer), available at https://www.cftc.gov/sites/default/files/2018-06/Federalregister06052018_0.pdf.

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compliance for all of its derivative dealing activities, including those that are considered security-based swaps in the U.S. Finally, ISDA recommends that the CSA develop a mechanism to efficiently add new jurisdictions and foreign laws to any list of substituted compliance jurisdictions. It would be contrary to the purpose of Part 10 of the Proposed Registration Rule for a foreign firm to need to apply for discretionary exemptive relief if the firm is based in a jurisdiction with an appropriate derivatives registration regime but that does not appear in the Appendices to the rule.

Notably, the U.S. CFTC has recently signaled its intention to pursue the utilization of a flexible, outcomes-based approach to substituted compliance, and, particularly for swaps execution and cross-border activities of swap dealers, to recommit to deference processes (such as equivalence and substituted compliance) to increase regulatory coordination and reduce market balkanization. In a recent speech, Chairman Giancarlo of the CFTC stated:

> "When it comes to swaps reforms that do involve global systemic risk transfer [i.e. business conduct and registration], we must pursue multilateral coordination to achieve high levels of comparability on the basis of comity but not on the basis of what is identical. The alternative is a world in which every regulator asserts global jurisdiction over swaps trading abroad by its home-domiciled institutions. This leads to overlapping, duplicative and possibly conflicting regulations that stymie global economic recovery…It is a path that is essential for the growth of not only U.S. markets, but also those of important global partners, such as Singapore [which has a share of the global derivatives market larger than that of Canada]."[7]

Given the CFTC's drive to build consensus among the regulatory community in a global, coordinated manner, ISDA strongly supports the CSA taking a broad approach to assessing substituted compliance while prioritizing an avoidance of disruption of cross border trade flows. Rather than granularly mapping of analogous legal provisions across multiple jurisdictions, we support a comprehensive approach whereby any jurisdiction that is a member of IOSCO would be an appropriate substituted compliance regime. From a policy perspective, ISDA's view is that there is no justification to limiting foreign dealers to registered dealers of only certain IOSCO jurisdictions.

ISDA also wishes to propose a wording change to Section 52(2)(d) of the Proposed Instrument to address the legal restrictions that may apply to some Canadian and non-Canadian firms if asked to provide information to the CSA:

> (d) <u>subject to any blocking, privacy or secrecy laws applicable to the person or company, and, where customary, giving preference to the cooperation between home and host country regulatory authority regarding books and records access</u>, the person or company undertakes to the securities regulatory authority to provide the

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7 Remarks by Chairman J. Christopher Giancarlo at the ISDA Industry and Regulators Forum, Singapore, September 12, 2018

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securities regulatory authority with prompt access to its books and records upon request.

We note that the same wording change should apply to Section 59(2)(d) of the Proposed Instrument and any other sections of the Proposed Registration Rule that require that materials be provided to a securities regulatory authority. We further note that access to books and records should be limited to books and records relating to transactions with Canadian counterparties.

(c) *Registration Exemptions for Globally Integrated Firms*

ISDA is concerned that the Proposed Registration Rule may give rise to significant unintended adverse business consequences for derivatives dealers or advisers that operate in a globally integrated fashion. For example, some global financial firms will involve individuals who represent multiple affiliated entities in a single derivatives transaction with a Canadian counterparty. One simple example of this approach is a global derivatives firm that maintains salespeople in a Canadian affiliate to solicit trades, trading personnel in a foreign affiliate to negotiate and price trades and execute confirmations, and a booking entity in a third jurisdiction that acts as the counterparty to trades. Another example of this approach is a global derivatives firm that provides advisory services through one affiliate and provides negotiation and trade execution services through another affiliate. ISDA submits that consideration should be given to either (i) clarifying the registration triggers in the CP or (ii) adding an additional registration exemption in the Proposed Instrument, to avoid unnecessary duplication of registration and compliance obligations across multiple affiliated entities. For example, it would be useful to provide guidance in the CP that a foreign derivatives counterparty to a trade that acts as a booking entity and is not involved in soliciting or negotiating the trade is not in the business of dealing in derivatives in Canada. Another possibility would be the introduction of derivatives dealer and adviser registration exemptions that would be applicable where globally integrated firms involve multiple affiliated entities in a derivatives transaction, which exempts affiliated entities that have an incidental involvement in the transaction, subject to the affiliated entity with 'primary' responsibility for the transaction either being registered as a derivatives dealer or derivatives adviser or relying upon a registration exemption.

For example, a Canadian registered adviser (A Co) may advise clients in Canada, but negotiation and execution of derivatives transactions may be the responsibilities of an affiliate (B Co) in the U.S. under an execution services agreement. Under the Proposed Registration Rule, A Co is subject to registration as a derivatives adviser, and B Co is subject to registration as a derivatives dealer due to its facilitation/intermediary activities. However, it could be argued that from the perspective of the "group", services are simply being split up and it should be sufficient for A Co to be registered as a derivatives adviser, with the dealing activity being viewed as incidental to the advising activity. Correspondingly, where the services to a client are shared between affiliates, it should be sufficient if one of the affiliates is registered as either a derivatives adviser or a derivatives dealer, provided that the exempt affiliate's activities can be viewed as incidental to the non-exempt entity's activities.

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3. Adviser Registration Exemptions

ISDA is concerned that the proposed exemption for foreign derivatives advisers in Section 59 of the Proposed Instrument will be subject to a condition that the foreign derivatives adviser be registered, licensed or otherwise authorized to give advice in respect of derivatives in its home jurisdiction. While many foreign jurisdictions have developed registration requirements for derivatives dealing, it remains uncommon for foreign jurisdictions to apply a registration requirement to derivatives advising activity. For example, there is no registration category specific to swaps advisers (that do not also advise on certain non-OTC derivatives, such as futures) under the U.S. Dodd-Frank rules. In our view, it is not feasible for the CSA to generate a list of foreign jurisdictions, or laws of foreign jurisdictions, that qualify for substituted compliance from Canadian derivatives adviser rules. ISDA recommends that the better approach would be for the CSA to adopt a foreign derivatives adviser exemption that is similar to the international adviser exemption in Section 8.26 of NI 31-103, in that the exemption would be available to any foreign derivatives adviser registered or operating under an exemption from registration in its home jurisdiction as a derivatives adviser. ISDA recommends that this exemption should also be available to a foreign derivatives adviser that is not required to be registered in connection with its derivatives-related activities in its home jurisdiction, provided that the foreign derivatives adviser is registered or is operating under an exception from registration under the foreign jurisdiction's securities legislation. These alternatives would not be conditioned on substituted compliance with an enumerated list of eligible foreign jurisdictions and laws and takes into account the fact that foreign jurisdictions do not have registration requirements applicable to OTC derivatives-related advising activity. ISDA believes that flexibility is necessary and appropriate to ensure that Canadian end users and investors may continue to access a broad range of expert foreign advice in respect of their derivatives trading activities.

The CSA should also consider the introduction of an exemption from derivatives dealer registration for registered derivatives advisers and their registered advising representatives that is similar to the adviser exemption for registered derivatives dealers and their registered dealing representatives without discretionary authority in Section 58 of the Proposed Instrument. If the derivatives dealing activity is in connection with a transaction for which the individual engaged in the dealing activity has the necessary proficiency under Section 18(1) of the Proposed Instrument, then this should be sufficient and the same rationale that applies to the inclusion of Section 58 in respect of derivatives advising activity should apply in the scenario of derivatives dealing activity.

The CSA should also consider the introduction of an exemption from derivatives dealer registration for derivatives advisers and their advising representatives (whether registered or exempt from adviser registration) that is similar to the exemption for registered advisers and their advising representatives in Section 8.5.1 of NI 31-103, in that the exemption should be available where the dealing activities are in connection with the providing of advice to a client. While the exemption in Section 8.5.1 of NI 31-103 is subject to the condition that the trade is made through a registered dealer or a dealer operating under an exemption from registration, it is ISDA's view that this condition is not appropriate for the

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derivatives market, since derivatives would not typically be transacted "through" a derivatives dealer.

Further, ISDA is concerned that the affiliated entity exemption in Section 60 of the Proposed Instrument requires clarification that Section 60(2) would not disqualify a company that advises an affiliated investment fund whose only investors are other affiliated entities. It is common for an entity within a corporate group to centralize its expertise and advise affiliated entities within that corporate group, including wholly-owned investment funds, on derivatives hedging and investment strategies. A company that advises an internal investment fund that is wholly-owned by affiliated entities and does not permit third party investors cannot logically be viewed as "advising others" since there is no connection to an outside party and a company cannot logically advise itself. For the same reasons, the company cannot logically be viewed as holding itself out to others since there are no outside parties or investors and the company cannot hold it out to itself.

4. **Delivery of Quarterly Financial Statements and Working Capital Calculations**

Section 36 of the Proposed Instrument requires all registered derivatives firms to file quarterly financial information. Section 37(2) of the Proposed Instrument also requires registered derivatives dealers to file quarterly working capital calculations. These quarterly filing requirements are substantial and inconsistent with current requirements for securities dealers (other than IIROC dealers) and advisers, who are required to file financial information and working capital calculations annually, not quarterly. The CSA has not explained why it is necessary for a derivatives firm to comply with enhanced financial reporting obligations that do not apply to non-IIROC regulated securities dealers and advisers that carry on business in Canada. We request that the CSA provide clarification that entities can deliver consolidated financials to meet the quarterly financial information requirement pursuant to section 36(2) of the Proposed Instrument.

5. **Confirmation of material terms**

Section 40 of the Proposed Instrument requires a registered derivatives firm to confirm the material terms of each derivative transacted with or for the derivatives party as soon as feasible after completion of the transaction. The CP further notes that where the derivatives party is an individual or is not an EDP, the registered derivatives firm complies with the requirements of subsection 40(1) by delivering the written confirmation that is required to be sent by a derivatives dealer under section 29 of the Proposed Business Conduct Rule (which is Section 27 in the revised version of the Proposed Business Conduct Rule). There is no Section 40(1), and Section 29 of Proposed Business Conduct Rule referenced under the CP should be changed to Section 27 under the revised version of the Proposed Business Conduct Rule.

ISDA also seeks clarification over what is required in order to comply with Section 40 when the derivatives party is an EDP. Presumably, it is sufficient for a registered derivatives firm to comply with Section 27 of the Proposed Business Conduct Rule but this is unclear. Further, we request that the CP clarify that Section 40 of the Proposed

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Instrument only applies to a derivatives dealer, which would be consistent with Section 27 of the Proposed Business Conduct Rule.

6. Determining the Value of a Derivative

Section 41 of the Proposed Instrument requires registered derivatives firms to enter into a written agreement with each derivatives party with which it enters into a transaction to establish a process for determining the value of the derivative. However, the Proposed Instrument doesn't specify whether "value" means mark-to-market or close-out amount. The requirement to enter into a written agreement that sets out the process for determining the value of a derivative in a written agreement is not feasible for foreign exchange trades which may not be conducted pursuant to an industry standard agreement such as an ISDA Master Agreement. The requirement to enter into a written agreement to determine value would be a significant disruption to FX trading with non-U.S. counterparties. It is not possible or feasible to force global counterparties to adhere to a Canadian specific protocol. ISDA therefore submits that the Section 41 requirement should either be eliminated or modified with reasonable guidance on acceptable practices for determining the value of a derivative. For example, instead of specifically requiring a written agreement to determine value, Section 41 could be modified to give guidance on how a dealer may determine the value of a derivative and provide appropriate disclosure over valuation assumptions and methodologies to its counterparty.

If the CSA is not willing to eliminate the requirement under Section 41, ISDA requests that the CSA clarify that, where the Section states that "a registered derivatives firm must, in relation to each transaction with a derivatives party, enter into a written agreement with the derivatives party that establishes a process for determining the value of a derivative", this is in reference to a written agreement that must be in place between a registered dealer and its counterparties, rather than an agreement that must be in place between and adviser and the adviser's derivatives party. It would also be helpful if Section 41 was revised to clarify whether this Section applies to a registered derivatives adviser. Further, the CP should expressly indicate that the entering into of a standard form (boilerplate) ISDA Master Agreement will meet the requirements of this Section.

7. Reporting Unresolved Disputes, Portfolio Reconciliation and Portfolio Compression

Section 42 of the Proposed Instrument requires registered derivatives firms to enter into an agreement with each derivatives party it enters into a derivatives transaction with that provides for a dispute resolution process. The registered derivatives firm must also report disputes that have not been resolved "within a reasonable period of time" to its board of directors and, if unresolved within 30 days of reporting the dispute to the board, report the dispute to the regulator. ISDA submits that (i) the reporting should be permitted to be made to an appropriate management committee or sub-committee; (ii) that the 30 day period within which disputes must be resolved after reporting to the board (where, if not resolved, such disputes must be reported to the regulator) is too short and should be extended; and (iii) that an unresolved dispute should only need to be reported to the regulator by a

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registered derivatives dealer and only if such dispute would reasonably be expected to have a material adverse effect on the business and operations of the registered derivatives dealer (when a counterparty to a transaction). Further, the CP should include guidance that materiality should be determined based on the business and operations of the derivatives firm as a whole. ISDA also proposes that there should not be any obligation to report a dispute to a Canadian regulator when the derivatives transaction involving a registered derivatives firm does not involve a Canadian counterparty.

Further, the requirement under Subsection 44(4) of the Proposed Instrument for a registered derivatives firm to enter into a written agreement with each derivatives party that describes the terms of the portfolio reconciliation required to be conducted under Subsection 44(1) is also not feasible for foreign exchange trades which may not be conducted under an industry standard agreement such as the ISDA Master Agreement and Credit Support Annex. Also, as the standard form Credit Support Annex currently used by Canadian market participants do not satisfy the requirements of Subsection 44(4), this Subsection will also require market participants to amend their current Credit Support Annexes in order to remain compliant.

Ultimately, ISDA observes that Section 42 (and Section 44) of the Proposed Instrument will also necessitate a Canadian-specific ISDA protocol similar to the ISDA 2013 EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol introduced in the European Union post EMIR. Our concern is that, unlike the E.U., foreign dealers will not be willing to adhere to a Canadian specific protocol and will simply trade with other market participants instead. No other jurisdiction with a derivatives market of a comparable size (e.g. Australia) has an ISDA protocol. The CSA should expressly indicate that the entering into of a standard form (boilerplate) of the Credit Support Annex to ISDA Master Agreement will meet the requirements of Section 42(1). Also, the words “as soon as possible” in Section 42(1)(b) should be changed to “within a reasonable period of time”, to be consistent with Sections 42(2) and 42(3) and to more realistically take into account actual market practice. Lastly, ISDA requests that the word “material” be inserted before the word “dispute” in Sections 42(3) and 42(4).

In addition to the above, ISDA also requests clarification by the CSA that Sections 41 and 42 of the Proposed Instrument do not apply to a derivatives firm that is an adviser that acts for or on behalf of a derivatives party. The use of the words “or for” in Section 40, but not in Sections 41 or 42, suggests that a derivatives firm that is an adviser does not have the responsibilities (that more clearly would apply to a derivatives dealer) that are set out under these two Sections. We note that Sections 41 and 42 appear to dovetail with Section 33 of the Proposed Business Conduct Rule, and the CP to the Proposed Business Conduct Rule suggests that the relevant agreement is between two counterparties to a transaction. Sections 41 and 42 should therefore be revised to clarify the responsibilities of a derivatives adviser when acting for or on behalf of its client.

ISDA also notes that Sections 44 and 45 of the Proposed Instrument should only apply to a derivatives dealer when it is a counterparty, and not to a derivatives adviser, since the adviser will never be a “counterparty” for which portfolio reconciliation or portfolio

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compression exercises are applicable. More specifically, bilateral and multilateral portfolio compression exercises referenced under Subsections 45(1)(c) and 45(1)(d) of the Proposed Instrument would only be undertaken between derivatives parties that are derivatives dealers, and not between derivatives advisers and their clients. Accordingly, ISDA requests that the CSA change that all references in Sections 44 and 45 of the Proposed Instrument to "a derivatives firm" to "a derivatives dealer", and all references to "a registered derivatives firm" to a "registered derivatives dealer". Alternatively, ISDA requests the CSA to provide clarification as how Sections 44 and 45 of the Proposed Instrument applies to registered derivatives advisers.

8. Interplay of Proposed Registration Rule with Trade Reporting Requirements

ISDA is concerned about the interplay between the Proposed Registration Rule and the trade reporting rules in Ontario, Quebec and Manitoba (together, "**91-507**"), which differ from the trade reporting rules in other jurisdictions of Canada ("**96-101**"). Under 91-507, the definition of "local counterparty" includes a registered derivatives dealer. As a result, all transactions with a registered derivatives dealer must be reported, even if the counterparty to the registered derivatives dealer is not in Canada. Alternatively, under 96-101, while the definition of "local counterparty" includes a derivatives dealer (whether registered or not), Section 42 of 96-101 provides an exclusion from reporting for derivatives transactions between a non-resident derivatives dealer and a non-local counterparty.

The practical consequence of the difference between 91-507 and 96-101 reporting requirements is that, upon the registration requirements of the Proposed Registration Rule taking effect, certain domestic and any non-resident registered derivatives dealers that are not local counterparties under paragraph (a) of the definition of local counterparty in 91-507 will be required to report *global* trading activity in Ontario, Quebec and Manitoba, but report only *local* trading activity in all remaining provinces. With respect, this distinction is untenable. In our view, there is no reasonable basis for registered derivatives dealers to report global trading activity to securities regulators and regulatory authorities in Ontario, Manitoba and Quebec. To do so would require all reporting parties to do a new outreach to all local counterparties in the three provinces with an updated Canadian trade reporting counterparty representation letter. ISDA therefore requests that the securities regulators and regulatory authorities in Ontario, Manitoba and Quebec to amend their respective 91-507 trade reporting rules to include the same reporting exclusion found in Section 42 of 96-101 for the purposes of harmonization and efficiency of capital markets.

9. Capital Requirements and Other Information Contained in Appendices

We request that the CSA publish for public comment a proposed framework for capital requirements (Appendix C of the Proposed Instrument) sufficiently well in advance of the Proposed Registration Rule taking effect. It is essential that market participants have an opportunity to consider the Proposed Registration Rule and the Proposed Business Conduct Rule with all relevant information available, including all information that will ultimately populate the appendices and schedules of the two rules.

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10. <u>Dealing and advising with affiliates and non-affiliates</u>

Sections 53 and 60 of the Proposed Instrument set out exemptions from the requirement to register when a person or company is required to register as a derivatives dealer or adviser only as a result of dealing with or advising an affiliated entity. Where a derivatives firm is transacting with or advising affiliates in addition to non-affiliates, the exemptions in Sections 53 and 60 will not be available, and the derivatives firm must register as derivatives dealer or adviser. However, it is unclear whether the derivatives firm must comply with all provisions of the Proposed Registration Rule in respect of the specific relationship(s) between the derivatives firm and its affiliates. ISDA requests that the CSA provide clarification on this matter in the scope provision (Section 2) of the CP.

11. <u>Effective date and scope of Proposed Registration Rule</u>

The requirements in the Proposed Registration Rule and the Proposed Business Conduct Rule should come into effect concurrently, with sufficient time allowed to implement appropriate policies and procedures, train relevant personnel, receive any required representations, execute any required amendments to counterparty documentation and put in place any new required counterparty documentation.

Multiple members of ISDA have also emphasised the importance of CSA publishing the entire Proposed Registration Rule including the proposed appendices for comment prior to its finalization. Without sufficient knowledge over the scope of substituted compliance, it is impossible for market participants to assess the impact of the Proposed Registration Rule.

We also request that the CSA clarify that the requirements in the Proposed Registration Rule will not apply to unexpired derivatives that were entered into before the effective date of the Proposed Registration Rule. The Proposed Registration Rule currently does not contemplate grandfathering of derivatives that are entered into before the effective date of the Proposed Registration Rule. In our view, all pre-effective date transactions (regardless of their remaining term) should be grandfathered. That grandfathering should apply even if pre-effective date transactions are subsequently amended after the effective date of any final registration rule. Although ISDA notes that the requested relief may only be effective until such time as derivatives dealing or derivatives advising occurs in respect of transactions entered into after the Proposed Registration Rule comes into force, the requested relief will be very valuable to members of ISDA, some of which have run-off relationships with dealer counterparties with which there is no intention of transacting further.

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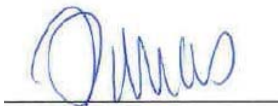
ISDA and its members would like to reiterate our appreciation to the CSA for the opportunity to provide feedback on the Proposed Registration Rule. We are happy to discuss our responses and to provide any additional information that may be helpful.

Thank you for your consideration of these important issues to market participants. Please contact the undersigned if you have any questions or concerns.

Yours very truly,



Name: Katherine Darras
Title: General Counsel

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Schedule A:

Specific requests for comment from the CSA

1. **Methodology for determining "notional amount"**

Annex I describes two different methodologies for determining notional amount for derivatives that reference a notional quantity (or volume) of an underlying asset: (i) the methodology based on the CDE Guidance, set out in Column 1 of Annex I, and (ii) the Regulatory Notional Amount methodology set out in Column 2 of Annex I.

Please provide any comments relating to the constituent elements (price, quantity, etc.) of the proposed methodologies.

Please provide comments on the most appropriate approach to determining the notional amount, for the purpose of regulatory thresholds, of a derivative with a notional amount schedule, including a schedule with notional amounts not denominated in Canadian dollars.

Please provide comments on the most appropriate approach to determining notional amount for a multi-leg derivative.

For example, in a multi-leg derivative with multiple legs that are exercisable, deliverable or otherwise actionable and that are not mutually exclusive, is it appropriate to determine the notional amount for the derivative by summing the notional amount for each such leg that is exercisable, deliverable or otherwise actionable and that is not mutually exclusive?

Other multi-leg derivatives may have multiple legs that are not exercisable, deliverable or otherwise actionable or that are mutually exclusive. For these types of multi-leg derivatives, is it appropriate to determine the notional amount for the derivative by using a weighted average of the notional amount of each such leg that is not exercisable, deliverable or otherwise actionable or that is mutually exclusive?

Please provide any general comments on determining notional amount for the purpose of regulatory thresholds, including relating to implementation of the proposed methodologies.

The calculation of notional amounts for purposes of the derivatives dealer registration exemptions in Sections 50 and 51 of the Proposed Instrument requires a firm to count the aggregate month-end gross notional amount under outstanding derivatives that involve the firm and its affiliates (but excluding derivatives transactions between affiliated entities). This calculation should exclude notional amounts of affiliates that are:

(i) registered, licensed or otherwise authorised to conduct derivatives activities, or

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(ii) exempt from registration.

under the laws of Canada or the laws of a recognized foreign jurisdiction.

Alternatively, the calculation of notional amount should include those derivatives such an affiliate has with Canadian counterparties. Accordingly, for all other foreign jurisdictions only derivatives between the affiliates and Canadian legal entities should be included in the calculation of notional amounts pursuant to Section 50 and 51 of the Proposed Instrument.

Further, some ISDA members prefer the CDE guidance over the Regulatory Notional Amount methodology as set out in Column 2 of Annex I. The CDE Guidance methodology is consistent with the current methodology used for the members' regulatory and financial reporting. The Regulatory Notional Amount methodology would require significant implementation efforts as data required for that methodology is currently not readily available in the members' source systems.

2. **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, the CSA is 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 II). Please provide any comments you may have on (i) the definition in the Instrument, (ii) a definition in Annex II, and (iii) the appropriate balance between harmonization across related rules and using different definitions to more precisely target specific entities under different rules.

As ISDA has noted in previous comment letters until such time as the CSA addresses the definition of affiliate more broadly, ISDA believes it is important that the Proposed Registration Rule not create additional uncertainty as to how the term affiliate is to be applied. It would be problematic if a different definition of affiliate were applied in different derivatives rules such as registration, trade reporting or mandatory clearing rules without a comprehensive consultation. We request that the CSA make efforts to avoid the potential for additional uncertainty by avoiding a change to the definition of "affiliate" specifically for the Proposed Registration Rule. ISDA supports a separate consultation to understand and improve the definition of affiliate more generally throughout Canadian OTC derivatives rules.

3. **Definition of "eligible derivatives party"**

Paragraphs (m), (n) and (o) provide that certain persons and companies are eligible derivatives parties if they meet certain criteria, including meeting certain financial thresholds. Are these criteria appropriate? Please explain your response.

ISDA appreciates that the CSA has included a category of "commercial hedgers" in paragraph (n) of the definition of EDP. We expect that the inclusion of a commercial hedger category will help mitigate the risk that Canadian commercial hedgers will be unduly burdened by the introduction

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of the Proposed Registration Rule and Proposed Business Conduct Rule. However, ISDA continues to have other concerns with the EDP definition.

While we acknowledge that the CSA has taken steps to ensure that commercial hedgers are subject to a lower financial threshold to qualify as eligible derivatives parties when compared to other, non-individual, persons or companies, we have concerns with the high threshold for a commercial hedger category of EDP at paragraph (n). Currently there is no hedger threshold in most of Canada, and a much lower Eligible Contract Participant ("**ECP**") threshold in the U.S. Members of ISDA urge the CSA to delete the financial threshold for commercial hedgers and, failing that, align the EDP and ECP definitions.

Respectfully, sophisticated entities with less than $10 million in net assets should be eligible to hedge using derivatives as EDPs. At a threshold of $10 million in net assets, ISDA expects that many mid-market entities will not be able to satisfy the asset threshold to qualify as EDPs and would therefore be unfairly prevented from participating in certain derivatives transactions should derivatives dealers opt to only trade with EDPs. Absent a clear policy justification for excluding mid-market entities from access to OTC derivatives transactions as qualified EDPs, we request that either there be no minimum net asset threshold or a lower net asset threshold of $1 million in net assets for these smaller businesses. ISDA believes that this will result in healthy competition in the Canadian markets for commercial hedgers, while still satisfying the CSAs policy objectives. Further, many subsidiaries of large multinational corporations, including special purpose entities, may not satisfy the $10 million net asset requirement, which is inconsistent with the ECP requirements. Such subsidiaries are centrally managed by corporate treasury and are generally using derivatives to hedge or mitigate commercial risks. Many such special purpose entities are also intentionally structured to minimize net assets. A lower net asset threshold would help to mitigate these concerns.

With respect to paragraphs (m), (n) and (o) of the definition specifically, as noted in past comments to the CSA, the requirement for written representations regarding requisite knowledge and experience requirement is unnecessary and may have the unintended effect of disadvantaging sophisticated derivatives parties that currently benefit from participation in the derivatives market. We believe that financial thresholds, which have been widely adopted as the objective standard to assess sophistication in Canadian securities regulation and U.S. securities and derivatives regulation, are appropriate and sufficient to identify derivatives parties who are not in need of extra protections. Whether individuals or not, persons who have sufficient financial resources to purchase professional advice (where necessary) or are otherwise financially sophisticated parties can independently assess their risks and make their own judgments regarding their derivatives transactions.

ISDA also remains concerned that, in addition to obtaining written knowledge representations from a derivatives party, the CP would require firms to assess the reasonableness of relying on a derivative party's written representations regarding their knowledge and experience. As we have previously expressed to the CSA, this creates unnecessary ambiguity around the determination of a derivatives party's EDP status. If the requirement to obtain such representations is retained by the CSA in the final definition of EDP in both the Proposed Registration Rule and Proposed

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Business Conduct Rule, derivatives firms should be able to rely on those representations absent having any basis or grounds to believe the representations are false. It is unduly burdensome to impose 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.

To reiterate, requiring written representations regarding requisite knowledge and experience from derivatives parties and requiring a subjective assessment of those written representations by derivatives firms will impose a significant burden on derivatives firms without any meaningful benefit to derivatives parties. The additional cost and compliance burden may seem minor in isolation, but when combined with derivatives trade reporting requirements, mandatory clearing requirements, margin requirements for uncleared derivatives trades and requirements that may apply under securities law, the cumulative impact on derivatives firms to obtain another written representation from derivatives parties and assess the reasonableness of that representation is unwarranted and onerous. If the CSA has an informed concern, based on an objective assessment of current Canadian derivatives markets, that there is a meaningful population of Canadian persons who meet the financial thresholds in paragraphs (m), (n) or (o) but do not have the requisite knowledge and experience to transact in derivatives, that concern should be specifically explained in future rule proposals subject to public comment so that derivatives firms can consider and respond with proposed solutions to mitigate or address that concern.

ISDA also remains concerned that the EDP definition mostly duplicates other established Canadian definitions, such as “permitted client” in NI 31-103. As ISDA has observed in past comments to the CSA, notwithstanding differences between the securities and derivatives markets, ISDA believes that the definition of EDP should include all the persons that qualify as “permitted clients” under NI 31-103. We have previously indicated that the derivatives industry will face an enormous compliance burden if existing disclosures and representations by clients regarding their “permitted client” status cannot be leveraged to determine EDP status under the Proposed Registration Rule and Proposed Business Conduct Rule. We do not believe that this compliance burden is warranted. If an entity is eligible to participate in the exempt securities market, it stands to reason that it does not need the full set of protections contemplated under the Proposed Business Conduct Rule for non-EDPs. It should be re-emphasized that, given that derivatives dealers typically have an ongoing credit relationship with their derivatives counterparties, derivatives dealers indirectly address investor protection concerns as dealers have an extra incentive to appropriately assess and manage risk with their derivatives counterparties.

We have previously observed that, given the existing definitions of “accredited investor” for prospectus disclosures and “permitted client” under NI 31-103, a different definition for EDPs would result in market participants trading prospectus exempt securities and derivatives having to analyze and give representations with respect to three separate definitions. Also, for derivatives firms that are regulated in other jurisdictions, it is commonly the case that the derivatives firm must confirm whether the derivatives party is an “eligible contract participant” as defined in the CEA.

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Participants in the global derivatives markets have incurred significant costs in recent years overhauling their onboarding procedures and reference data systems to classify counterparties under the many different rule sets and related definitions implemented as part of the G20 reform agenda (including, most recently, in connection with new rules for margin for uncleared derivatives). Unless dealers and advisers may rely on existing representations and disclosures regarding their clients' "permitted client" and "eligible contract participant" status, a large-scale outreach effort will be required to determine the EDP status of all counterparties to comply with the Proposed Registration Rule. Respectfully, no compelling policy reason has been identified which would justify imposing such a significant compliance burden on the derivatives markets in Canada. We therefore request that additional paragraphs be added to the definition of EDP to deem any derivatives party that is (i) a "permitted client" as defined in NI 31-103 or (ii) an "eligible contract participant" as defined in the CEA to also be an EDP.

4. **Application of the derivatives adviser registration requirement to registered advisers/portfolio managers under securities legislation**

Under the Proposed Instrument, a person or company engaging in or holding himself, herself or itself out as engaging in the business of advising others in derivatives will be required to register as a derivatives adviser unless an exemption from registration is available.

The CSA understands that a registered adviser under securities or commodity futures legislation may provide advice in relation to derivatives or strategies involving derivatives, or may manage an account for a client and make trading decisions for the client in relation to derivatives or strategies involving derivatives. If the performance of these activities in relation to derivatives is limited in nature so that it could reasonably be considered incidental to the performance of their activities as a registered adviser for securities, the CSA may consider the registered adviser/portfolio manager to not be "in the business of advising others in relation to derivatives".

(a) Do you agree with this approach? If not, why not? Alternatively, should the CSA consider including an express exemption from the derivatives adviser registration requirement for a registered adviser under securities or commodity futures legislation? If yes, what if any conditions should apply to this exemption?

Firms that are registered or exempt from registration as an adviser under securities legislation or commodity futures legislation, and that may provide limited advice in relation to derivatives or strategies involving derivatives, or may manage an account for a client and make trading decisions on limited occasions for the client in relation to derivatives or strategies involving derivatives, should not be subject to a derivative registration requirement where the performance of these activities in relation to derivatives is limited in nature so that it could reasonably be considered to be incidental to the performance of their activities as a registered adviser for securities. Advising on derivatives on an incidental basis, for example giving advice in respect of a hedging transaction entered into in relation to a securities trade, should not trigger the application of either the Proposed Registration Rule or the Proposed Business Conduct Rule, so long as the firm is appropriately registered or relies on a registration exemption under applicable Canadian securities law.

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ISDA believes that there should be a specific exemption for incidental advice in respect of derivatives. CP guidance on the derivatives adviser registration trigger is insufficient, especially given the broad registration triggers such as “recommending a derivatives trading strategy”. An exemption would provide greater clarity and comfort for firms that provide incidental advice in respect of derivatives and would be consistent with similar exemptions in commodity futures legislation.

Another example of activities that are limited in nature and that could reasonably be considered incidental to the performance of activities as a registered adviser for securities is where the derivatives-related advice, whether for hedging or non-hedging purposes, would not be reasonably considered by the derivatives party to be core to the overall investment activity or the primary investment activity that is employed for the derivatives party. This may be evidenced by the description of the derivatives-related investment activity that is employed by the registered securities adviser for a derivatives party relative to the overall investment activity that is employed for the derivatives party, either orally or as set out in an investment management agreement or offering documents that are provided or otherwise made available to the derivatives party.

Also, the test for what is “incidental” should not hinge on the frequency of transacting. As stated on the second page above, large buy-side institutions may engage in various types of OTC derivatives transactions with repetition, regularity or continuity. Currency hedging is often done on a very frequent basis but this activity may still be considered incidental.

It would be appropriate for the Proposed Instrument to also include express exemptions for a registered adviser under securities or commodity futures legislation in either of the following circumstances:

- Where (i) the registered adviser has incorporated and applies risk management-related policies and procedures that substantially comply on an outcomes basis with Section 39 of the Proposed Instrument, if and to the extent that the CSA requires a derivatives adviser acting for its clients to comply with that Section (please see ISDA’s response to Question 10 below), (ii) a “derivatives chief risk officer” is designated by the registered adviser and the derivatives chief risk officer complies on an outcomes basis with Section 29 of the Proposed Instrument, and (iii) the initial and ongoing proficiency requirements that are set out in Section 18(1) of the Proposed Instrument are complied with.

- Where the registered adviser is only providing derivatives-related advice to a derivatives party that is acting as a commercial hedger (as defined in Section 1(1) of the Proposed Instrument) in relation to the derivatives that it transacts, and such derivatives party is an “eligible derivatives party”. Taking into account the sophistication of the commercial hedger, the limited nature of the advisory activity that is undertaken by the registered adviser and the limited purpose of the advice, compliance with the rule by the registered adviser will not add any necessary protections to market participants.

When should the provision of advice by a registered adviser/portfolio manager in relation to derivatives be considered incidental to the performance of their activities as a registered

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adviser/portfolio manager? What factors should the CSA consider in distinguishing between registered advisers who need to register as derivatives advisers from registered advisers that do not need to register as derivatives advisers?

See response to 4(a) above.

5. IIROC membership for certain derivatives dealers

Section 9 prohibits a derivatives dealer from transacting with an individual that is not an eligible derivatives party unless the derivatives dealer is a dealer member of IIROC. Should a derivatives dealer that deals with an individual that is not an eligible derivatives party be required to become an IIROC dealer member? Are there any other circumstances where a derivatives dealer should be required to be an IIROC dealer member?

ISDA is not aware of any compelling policy rationale for requiring a derivatives dealer to become an IIROC dealer member in order to transact with an individual that is not an EDP. For example, it is common for Canadian financial institutions to provide currency hedges to individuals who are purchasing property in another country. Such practice, which is not for an investment purpose, should not require regulatory oversight by IIROC. Further, it should be observed that only Canadian domiciled firms are eligible to become members of IIROC. Accordingly, Section 9 would prohibit any foreign firm from transacting with an individual that is not an EDP. ISDA believes that this prohibition is unwarranted in light of the many compliance obligations imposed on derivatives firms under the Proposed Registration Rule and the Proposed Business Conduct Rule.

ISDA is also concerned that, as drafted, the proposed prohibition on a registered derivatives dealer transacting with a derivatives party who is individual is not limited to derivatives parties in Canada. The Proposed Registration Rule should not prohibit a registered derivatives dealer from transacting with a derivatives party who is an individual but who is not a resident of Canada. For example, some financial institutions in Canada trade OTC derivatives with non-Canadian individuals through branches in foreign jurisdictions. These individuals must satisfy applicable thresholds under foreign laws. To require those financial institutions to trade through a Canadian IIROC broker dealer (and presumably licence that broker dealer entity in the foreign jurisdiction) is not feasible and does not appear to be supported by any reasonable policy rationale. Such a prohibition would be a significant overreach and beyond the scope of authority of the CSA.

6. Exemption from the individual registration requirements for derivatives dealing representatives and derivatives advising representatives

Subsection 16(3) and subsection 16(4) provide an exemption from the requirement to register an individual as a derivatives dealing representative or as a derivatives advising representative in certain circumstances. Are the exemptions appropriate? In subparagraph 16(4)(b)(iii), individuals that act as an adviser for a managed account are not eligible for the exemption from the requirement to register as a derivatives advising representative. Is this carve out appropriate where an individual has discretionary authority over the account of an eligible derivatives party?

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While ISDA welcomes the exemptions from individual registration for trading only with EDPs, we are concerned that the exemption does not apply if acting as an adviser to a managed account for an EDP. The reasons for this distinct treatment are not articulated in the Proposed Registration Rule. An EDP that chooses to retain a derivatives firm to provide managed account services in respect of derivatives does not, as a matter of investor protection, require individual representatives of the derivatives firm to be registered. Respectfully, an EDP that engages a derivatives firm for managed account services can conduct their own assessment of the experience and expertise exhibited by individual representatives of a derivatives adviser. Further, as indicated in the CSA's introduction to the Proposed Instrument, an EDP may reasonably be considered to be sophisticated or have sufficient financial resources to protect itself through contractual negotiation. In the case of a managed account, the EDP will have entered into a negotiated investment management agreement (or similar) and will also benefit from the responsibilities owed to it by the registered adviser as a fiduciary. In addition, the individuals will still have to meet the proficiency requirements that are set out in Section 18(1) of the Proposed Instrument. Lastly, the deletion of the condition that the individual must not act as an adviser to a managed account of any derivatives party would be consistent with the CSAs' decision to see past the managed account structure and delete Section 7(3) from Proposed Business Conduct Rule.

More generally, registration of dealing representatives and advising representatives is not appropriate for the derivatives markets. It is inconsistent with international approaches to regulating derivatives firms to require a firm's representatives to be registered. A better approach, consistent with IOSCO recommendations, would be a requirement for derivatives firms to disclose to clients and counterparties the names of senior managers and those acting on its behalf.

7. **<u>Specific proficiency requirements for individual registrants</u>**

Subsections 18(2) through (6) of the Instrument establish specific proficiency requirements for each individual registration category. Are these specific requirements appropriate? If not what specific exams, designations or experience are appropriate?

The CSA should not set proficiency requirements for individual representatives of derivatives dealers and derivatives advisers, and individuals should be exempt from registration without being subject to the conditions set out in Sections 16(3) and 16(4) of the Proposed Instrument. Setting proficiency requirements is inconsistent with international approaches to regulating derivatives dealers, derivatives advisers and their representatives. In a competitive and highly regulated market environment, a derivatives firm must employ individuals with diverse skills and experience to deal with counterparties and advise clients . These individuals usually possess years of experience or post-graduate degrees (or both), may be Chartered Financial Analysts and/or may be accountants or lawyers. It should be the responsibility of the derivatives firms, including the firm's ultimate designated person, chief compliance officer, chief risk officer and supervisors, to ensure that the firm's representatives have sufficient knowledge, skill and experience to trade or advise in derivatives. Respectfully, it will be difficult for Canadian securities regulators and the Canadian Securities Institute to have an informed perspective on what proficiencies the representatives of a derivatives firm should individually and collectively possess. The onus should be on derivatives firms to ensure that their representatives have appropriate proficiency for their

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specific responsibilities, taking into account the types of derivatives traded and the attributes of a firm's clients or counterparties. The CSA should instead require registered firms to act reasonably in setting proficiency requirements for its representatives. If conditions in respect of proficiency are to apply, ISDA submits that Section 18(1) of the Proposed Instrument would be sufficient to protect market participants.

Also, ISDA submits that the individual at a derivatives firm that assumes the role of the derivatives Chief Risk Officer and any person that is currently authorized under securities legislation to act as an ultimate designed person, chief compliance officer, dealing representative or advising representative should be grandfathered from the new proficiency requirements, similar to the approach that was taken for previously registered individuals with the introduction of NI 31-103 in 2009. For example, for firms that are registered under Canadian securities legislation and have a registered Chief Compliance Officer, and if applicable, a Chief Risk Officer, who will assume the role of derivatives chief compliance officer and derivatives chief risk officer, as applicable, ISDA proposes the grandfathering of such individuals from any proficiency requirements contemplated in the Proposed Registration Rule.

Should the CSA choose to move forward with prescribing specific requirements, ISDA requests that there be, at minimum, a three-year transition period to enable individuals to study for and complete the prescribed exams.

In addition to the above, ISDA submits that Section 18 should be amended as follows:

Proficiency requirements for the derivatives chief compliance officer

- Section 18(2)(a)(iii)(B) – Please insert the words "at a registered securities firm" before the words ",a derivatives dealer". ISDA sees no justifiable reason for including experience gained while working at a registered firm under Section 18(2)(a)(iii)(A) but not including such experience under Section 18(2)(a)(iii)(B).

- Section 18(2)(b)(i) – Please delete the words "specified in column 1 of Appendix B" after the words "adviser in a foreign jurisdiction". We see no justifiable reason for this requirement and note that it is not included in Section 18(2)(a)(iii)(A).

Proficiency requirements for the derivatives chief risk officer

- Section 18(2)(b)(ii) and 18(3)(c)(ii) – Please insert the words "or an affiliate" after the words "at a Canadian financial institution".

- Section 18(3)(a) – Please insert the word "or" after "CFA Charter," for greater certainty.

- Section 18(3)(a) – Some ISDA members employ staff who have completed a course designation known as "Financial Risk Manager" (FRM) that is hosted by the Global Organization of Risk Professionals. This course has a very significant derivatives component and we would ask the CSA to consider adding the FRM designation to Section 18(3)(a) as an additional way to obtain proficiency.

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- Section 18(3)(b)(i) – Please delete the words "specified in column 1 of Appendix B" after the words "adviser in a foreign jurisdiction".

- Section 18(3)(c)(i) – Please insert the words "at a registered securities firm" before the words ",a derivatives dealer".

8. Derivatives ultimate designated person

Subparagraph 27(3)(c)(i) requires a derivatives firm's ultimate designated person to report any instance of non-compliance with securities legislation, including the Instrument, relating to derivatives or the firm's risk management policies if the noncompliance creates a risk of material harm to any derivatives party. Is this requirement appropriate?

ISDA is generally supportive of requirements that reports of non-compliance with derivatives laws, the Proposed Instrument and a firm's risk management policies be prepared and delivered to a derivatives firm's board of directors (or equivalent) where non-compliance creates a risk of material harm to a derivatives party or the capital markets, or if the non-compliance is part of a pattern of non-compliance. This practice is emblematic of good governance and creating a culture of compliance with derivatives laws. However, ISDA does not believe that the Proposed Registration Rule should prescribe that such report be delivered by a firm's ultimate designated person. Other individuals, such as a firm's chief compliance officer or chief risk officer, should be able to perform this task, if deemed appropriate by the derivatives firm. Some ISDA members have noted that, as the Proposed Registration Rule is currently drafted, too many persons are reporting to the board. ISDA members request for more flexibility in respect of who performs such reporting duties and believe that the derivative chief compliance officer is a more appropriate candidate. Also, ISDA believes that the requirement to report on compliance to a derivatives firm's board of directors should more closely resemble the requirements applicable to securities registrants under Part 5 of NI 31-103, as this would reduce the cost and compliance burden associated with compliance with the Proposed Instrument. For example, under Part 5 of NI 31-103 there is no requirement for an ultimate designated person to report to a registered firm's board of directors, and the ultimate designated person's responsibilities are limited to supervising the activities of the firm to ensure compliance with securities legislation and promoting compliance with securities legislation. Also, Part 5 of NI 31-103 provides that a chief compliance officer must report to a registered firm's board of directors on an annual basis with an assessment of the firm's compliance with securities legislation. ISDA is not aware of any rationale for the internal reporting requirements for derivatives firms to be introduced at a much higher standard than the long-standing reporting requirements for registered securities firms. In the absence of any compelling rationale, ISDA respectfully requests that the CSA not deviate from longstanding conventions relating to reporting responsibilities in introducing a new derivatives registration regime. A better approach, which is already reflected in Section 30 of the Proposed Instrument, is to require that a registered derivatives firm must ensure that its ultimate designated person, chief compliance officer and chief risk officer have reasonable access to the firm's board of directors (or equivalent), if and when required.

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Lastly, ISDA is also of the view that the requirement for the derivatives ultimate designated person to report to the board in the circumstances set out in Section 27(3)(c) of the Proposed Instrument duplicates the requirement for the senior derivatives manager (or the derivatives chief compliance officer if delegated) to report to the board in the circumstances set out in Section 31(2) of Proposed Business Conduct Rule. On this basis, we are of the view that Section 27(3)(c) of the Proposed Instrument can be deleted in its entirety.

9. Requirements, roles and responsibilities of ultimate designated persons, chief compliance officers and chief risk officers

Sections 27 through 29 of the Instrument establish requirements, roles, and responsibilities of individuals registered as the ultimate designated person, the chief compliance officer and the chief risk officer for each registered firm. Considering the obligations imposed on senior derivatives managers in the Business Conduct Instrument, are the requirements, roles and responsibilities in sections 27 through 29 of the Instrument appropriate?

ISDA notes that Sections 27 through 29 of the Proposed Instrument overlap in significant ways with the conduct obligations proposed for senior derivatives managers in the Proposed Business Conduct Rule. ISDA is concerned with how these requirements overlap, and overlap with other roles and responsibilities prescribed under NI 31-103 or banking regulations. The CSA should avoid overlapping requirements wherever possible to avoid undue compliance burdens on registered derivatives firms.

In particular, the regulatory reporting requirement in Section 27(3)(d) of the Proposed Instrument, which are duplicative of the reporting requirements in Section 32 of the Proposed Business Conduct Rule, are not appropriate. First, there is unnecessary confusion and complexity that results from overlapping compliance requirements in the two instruments.

Second, while ISDA strongly supports that derivatives firms must identify and resolve compliance issues that may arise, and further that derivatives firms should be encouraged to self-report material violations of securities legislation to the regulators, ISDA disagrees with the proposed requirement for derivatives firms to self-report material non-compliance on a “timely basis”. ISDA believes that imposing a self-reporting requirement greatly exceeds the scope of the Proposed Registration Rule and the Proposed Business Conduct Rule, particularly given that there are no similar self-reporting requirements for other market participants under applicable provincial securities law. The CSA has not provided any justification as to why derivatives firms registered in Canada should be held to a significantly different standard than securities firms registered in Canada or derivatives firms under similar regulatory regimes outside of Canada. In the absence of any such justification, ISDA respectfully requests that the CSA to re-consider the self-reporting requirement, or significantly alter the requirement to focus on periodic reporting (annually or quarterly) that assesses the firm’s compliance with applicable derivatives regulations in Canada. At a minimum, the CSA should permit Section 27(1)(d) to become an obligation that could be fulfilled by the derivatives chief compliance officer or the derivatives chief risk officer (similar to our recommendations on board reporting above) and insert the word “material” before “non-compliance” in Section 27(1)(d).

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10. Minimum requirements for risk management policies and procedures

Section 39 sets out the minimum requirements for risk management policies and procedures. Are any of the requirements inappropriate? Are the requirements for an independent review of risk management systems appropriate?

ISDA submits that the requirements in Section 39 of the Proposed Instrument should apply only to registered derivatives dealers which are counterparties to derivatives trades i.e. not to registered dealers that are acting as an intermediary for a registered firm, or to registered advisers. It is unclear how this is meant to apply in the context of a derivatives adviser acting for its client. The risks are to the derivatives party in this scenario and not "to the registered derivatives firm".

ISDA has the following specific comments on the proposed minimum requirements for risk management policies and procedures:

- Section 39(3)(a): the CSA should delete the words "specific derivatives or". It should be sufficient to identify the material risks of "types of derivatives". Imposing a requirement to identify material risks from a specific derivative suggests a level of analysis that must be undertaken for each and every trade, and this would add an unjustified compliance burden. Alternatively, the CSA may wish to consider changing the words "specific derivatives or" to "specific novel derivatives".

- Section 39(3)(d): the word "material" should be inserted before the words "risks and risk tolerance limits".

- Section 39(3)(f): the board reporting requirement should be replaced by a requirement to report to the derivatives chief risk officer. The more fulsome board reporting that is done by the derivatives chief risk officer in accordance with Section 29(3)(d) should be sufficient.

- Section 39(3)(g): the words "material change to the registered derivatives firm's risk exposures" should be deleted. Risk limits will reflect what is acceptable to a firm from a risk perspective (taking into account changes in exposure) and it should be sufficient to report a material breach of a risk limit. Imposing a requirement to specifically monitor and report material changes to exposures adds an unnecessary compliance burden.

- Section 39(3)(g): the words "immediate report" should be changed to "timely report", as this is more realistic and it is consistent with other reporting that must be made on a timely basis (see, for example, Section 27(3)(c) of the Proposed Registration Rule and Section 32 of the Proposed Business Conduct Rule).

- Section 39(3)(g)(iii): the requirement for board reporting that appears in this Section should be replaced with a requirement to report to the derivatives chief risk officer. This is appropriate, taking into account the board reporting that is performed by the derivatives chief risk officer in accordance with Section 29(3)(d).

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- Section 39(4): there should not be a requirement for an "independent" review of risk management systems. This would significantly add to the cost and burden of compliance without clear justification. This requirement is also inconsistent with the approach taken by other major regulators.

11. **Exemptions from the requirement to register for derivatives dealers with limited derivatives**

Sections 50 and 51 establish exemptions from the requirement to register for derivatives dealers that have a gross notional amount that does not exceed prescribed thresholds. These exemptions provide that derivatives dealers that have their head office or principal place of business in Canada must calculate their gross notional amount based on outstanding derivatives with any counterparty, regardless of where the counterparty resides. Derivatives dealers that have their head office and principal place of business outside of Canada would calculate their gross notional amount based on outstanding derivatives where the counterparty is a Canadian resident. Would this result in Canadian resident derivatives dealers being placed at a competitive disadvantage, particularly where foreign derivatives dealers may be exempt from regulatory requirements in their home jurisdiction?

Section 50(2)(c) of the Proposed Instrument provides for an exemption from registration where a dealer's gross notional amount under derivatives does not exceed a prescribed threshold. It is contemplated by the Proposed Registration Rule that Canada-based dealers will need to do a notional calculation based on their global book while foreign dealers will count only derivative transactions with Canadian counterparties. ISDA does not appreciate the rationale for this distinction. Notional calculations should be performed on a province-by-province basis. For example, under the latter formulation if either a Canada-based or foreign derivatives dealer is under the notional amount threshold with counterparties in the Yukon but over the notional amount threshold with counterparties in Quebec, the Canada-based and foreign derivatives dealer would be treated equitably, in that each would only have to register in Quebec but not the Yukon.

ISDA notes that Regulation 1.3 of the CFTC restricts the consideration of the gross notional of swap positions connected with a person's dealing activity in determining whether the person qualifies for the *de minimis* exception from registration as a swap dealer[8], and that swaps entered into for the purpose of hedging physical positions are not considered in determining whether a person is a swap dealer[9]. A similar approach is recommended for Canada.

The CSA should also clarify when an entity (and relevant individuals) would be required to register once it can no longer meet one of the exemptions, and when would an entity be allowed to de-register after satisfying the requirements for the exemptions. Specifically, the entity should be permitted to register no later than two months after the end of the month in which the entity

[8] CFTC Regulation § 1.3 (ggg)(4) (de minimis exception for swap dealer registration)

[9] CFTC Regulation § 1.3 (ggg)(6)(iii) (swaps entered into for hedging physical positions as defined in the rule are not considered in the determination of whether a person is a swap dealer)

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becomes no longer able to take advantage of the exemption, following Regulation 1.3 of the CFTC[10], and to de-register no more than two months after satisfying the requirements of the exemptions.

12. Exemptions from specific requirements in this Instrument for investment dealers

Section 55 exempts IIROC dealer members from specific requirements under the Instrument where those dealer members are subject to equivalent IIROC requirements. The IIROC dealer members will also be required to register in each CSA jurisdiction where their activities result in an obligation to register as a derivatives dealer or derivatives adviser. Does this obligation to register result in an excessive regulatory burden for the firms? Please provide specific information relating to this burden.

At this time, it is not possible to comment on Section 55 of the Proposed Instrument absent the publication of Appendix E (Exemptions for IIROC Dealer Members). ISDA looks forward to commenting on Section 55 of the Proposed Instrument upon the publication of Appendix E and a republication of the Proposed Registration Rule.

[10] CFTC Regulation § 1.3 (ggg) (4)(iii) (registration period for persons that can no longer take advantage of the [de minimis] exception)

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Alberta Securities Commission — September 17, 2018
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority of Saskatchewan
The Manitoba Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission
Nunavut Securities Office
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

Attention:

Me Anne-Marie Beaudoin	Grace Knakowski
Corporate Secretary	Secretary
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C.P. 246, tour de la Bourse	22nd Floor
Montréal, QC H4Z 1G3	Toronto, Ontario M5H 3S8

comments@osc.gov.on.ca and consultation-en-cours@lautorite.qc.ca

Re: Canadian Securities Administrators Second Notice and Request for Comment – Proposed National Instrument 93-101 – Derivatives: Business Conduct and Proposed Companion Policy 93-101CP - Derivatives: Business Conduct

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OVERVIEW

The Portfolio Management Association of Canada (**PMAC**), through its Industry, Regulation & Tax Committee, is pleased to have the opportunity to provide comments on the second notice and request for comment published by the Canadian Securities Administrators (**CSA**) titled Proposed National Instrument 93-101 – *Derivatives: Business Conduct* (**NI 93-101**) and Proposed Companion Policy 93-101CP - *Derivatives: Business Conduct* (the **Consultation**).

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The 2017 consultation in respect of then-proposed NI 93-101 is referred to herein as the **2017 Proposal**. All other capitalized terms used in this letter but not defined in this submission have the same meaning given to them in the Consultation.

PMAC represents investment management firms registered to do business in Canada as portfolio managers. PMAC's over 250 members encompass both large and small firms managing total assets in excess of $1.8 trillion for institutional and private client portfolios.

PMAC advocates for the highest standard of unbiased portfolio management in the interest of the investors served by our members. PMAC consistently supports measures that elevate standards in the industry, enhance transparency, improve investor protection and benefit the Canadian capital markets as a whole.

In light of the many overlapping issues in the two instruments, this submission should be read conjunction with our contemporaneous submission on Proposed National Instrument 93-102 – *Derivatives: Registration* and Proposed Companion Policy 93-102 – *Derivatives: Registration* (**NI 93-102** or the **Registration Consultation**).

GENERAL COMMENTS

Consistent with our submission with respect to the 2017 Proposal, PMAC supports the CSA's aim to establish a robust investor protection regime that meets the International Organization of Securities Commissions' (**IOSCO**) standards with respect to over-the-counter (**OTC**) derivatives.

PMAC supports 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. We also applaud the CSA for developing a harmonized derivatives registration and business conduct regime across Canada. We believe that the establishment of a national regime is a positive step for industry, the Canadian economy, and investors.

PMAC continues to believe that the Consultation and the Registration Consultation are primarily focused on addressing policy issues arising from dealing activities and do not identify specific investor or market protection issues with respect to the activities of advisers, particularly portfolio managers, vis-à-vis derivatives.

In particular, we look to the CSA's anticipated benefits of NI 93-101 and note that, chief among them is a reduced likelihood of loss through inappropriate transactions, inappropriate sale of derivatives and market misconduct. We respectfully disagree 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.

We strongly believe that the imposition of additional, prescriptive and onerous requirements on portfolio managers is not an effective or efficient solution to the CSA's stated policy concerns with respect to derivatives. For registered advisers, we continue to believe that the CSA's laudable policy objectives of creating a uniform approach and protecting participants in the OTC derivatives markets from unfair, improper and fraudulent practices can be best achieved by leveraging National Instrument 31-103 – *Registration Requirements,*

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Exemptions and Ongoing Registrant Obligations (**NI 31-103**) and by providing an exemption from the derivatives registration and business conduct requirements for portfolio managers, all as more fully set out below and in our response to the Registration Consultation.

Our submission covers the following: 1) a summary of certain of PMAC's key recommendations relating to NI 93-102 and NI 93-101; 2) Consultation Feedback; and 3) responses to certain Consultation questions. The questions are identified by the number assigned to them in the Consultation and, as such, their numbering is not consecutive.

SUMMARY OF PMAC'S KEY RECOMMENDATIONS

1. **Portfolio managers should be exempt from NI 93-101 and from registration under NI 93-102.** As set out in further detail in PMAC's submission with respect to NI 93-102, registered advisers should be entirely exempt from NI 93-101 and from registration as derivatives advisers under NI 93-102, subject to being able to evidence general proficiency and implementing certain risk-management practices relating to derivatives. 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 advisers must adhere to under NI 31-103 – coupled with a lack of any policy rationale justifying the need for separate registration and business conduct regimes for advisers - warrants an exemption for portfolio managers.

PMAC has concerns that a Canadian derivatives regime that goes beyond IOSCO's standards and that captures advisers in a way that the U.S. Commodity Futures Trading Commission does not, may have a negative impact on the Canadian derivatives market, as well as on Canadian investors. PMAC respectfully disagrees with the CSA's cost benefit analysis with respect to implementing the derivatives regime for advisers. We note that NI 93-102 and NI 93-101 would require material additional compliance resources and costs and the repapering of existing instruments, client documentation and policies and procedures, all without a demonstrated investor or market harm being addressed. PMAC's submission on NI 93-102 also explores the need for clarity on when advising in derivatives is considered to be "incidental" and sets out certain alternative exemptions for advisers in greater detail.

2. **Exemptions are required for international advisers and sub-advisers.** PMAC believes that exemptions for international advisers and sub-advisers, similar to exemptions set out in NI 31-103, should be included in NI 93-102 and NI 93-102 to ensure competitiveness and to maintain investor choice and market liquidity. PMAC is concerned that there could be unintended adverse consequences to investors and the Canadian market if existing business relationships with foreign advisers were to be interrupted as a result of the implementation of NI 93-102 and NI 93-101.

3. **Eligible Derivatives Parties**. We request that the CSA amend the definition of eligible derivatives party (**EDP**) to include any "permitted client" (as such term is defined in NI 31-103) that is not an individual. We further request that the CSA reconsider the requirement for firms to obtain a written representation from non-individual EDPs as to their "knowledge and experience" to evaluate information about derivatives. As currently drafted, the definition of EDP is not sufficiently harmonized with existing securities law concepts, nor

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does it acknowledge the unnecessary burden that this new, additional definition will impose on firms and the sophisticated clients that it is intended to capture.

4. **Pre-Existing Transactions with EDPs**. PMAC requests that all derivatives transactions with "permitted clients", "accredited counterparties" or "qualified parties" that pre-exist the effective date of NI 93-101 be grandfathered. We believe that these sophisticated clients will not be prejudiced by this approach and that grandfathering all such pre-existing transactions will ease the regulatory burden without any corresponding deleterious impact to markets or EDPs.

In the alternative, should the CSA not be amenable to grandfathering these transactions, we believe that the application all of the EDP requirements should be delayed for such pre-existing transactions for a period of 4 years. We believe that this is an appropriate way to transition firms and these sophisticated clients into the derivatives business conduct requirements, while still allowing these relationships to be renewed and revised in the normal course of business.

5. **Derivatives Party Assets.** We believe that the CSA has yet to provide clarification regarding the intended application of the provisions related to segregation, use, holding and investment of derivatives party assets as these apply to a portfolio manager acting on behalf of a managed account client. While these requirements may make sense from a dealer perspective, it is unclear how they apply to a portfolio manager with a fiduciary duty not to commingle client assets.

6. **Senior derivatives manager and reporting requirements**. PMAC is pleased that the CSA made revisions to NI 93-101 to allow the senior derivatives manager to delegate his or her responsibility to submit a report to the board of directors to the firms' Chief Compliance Officer (**CCO**). However, we continue to believe that it is onerous to require firms to hire or designate an additional individual who is tasked with fulfilling substantially the same role as the firm's other registered individuals, such as the Ultimate Designated Person (**UDP**), the Chief Risk Officer (**CRO**) and the CCO. Members are concerned that requirements such as this will negatively impact the competitiveness of the Canadian market and of smaller and mid-sized Canadian firms.

7. **Coordination with other regulatory initiatives and transition matters**. PMAC's submission on NI 93-102 sets out in further detail our request that the CSA 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 implementing the derivatives registration regime. Other than PMAC's request set out with respect to pre-existing transactions with EDPs, firms have approximated that a three year transition period may suffice for the implementation of many of the amendments necessitated by the derivatives regime.

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CONSULTATION FEEDBACK

Amendments to NI 93-101 since the 2017 Proposal

We would like to start by thanking the CSA for their responsiveness to the comments received as a result of the 2017 Proposal that have been reflected in the Consultation. We view several of these amendments as improving the proposed derivatives business conduct regime for the benefit of investors. In particular, PMAC supports the amendment in the Consultation that allows managed account clients that are EDPs to benefit from the exemptions from certain requirements and protections applicable to other EDPs.

The amendment to NI 93-101 allowing firms to rely on certain pre-existing "permitted client", "accredited counterparty" or "qualified party" representations as set out in Section 45 of NI 93-101 in order to determine EDP status during the transition period, is a welcome starting point. PMAC requests that, all derivatives transactions with "permitted clients", "accredited counterparties" or "qualified parties" pre-existing the effective date of NI 93-101 be grandfathered. We believe that these sophisticated clients will not be prejudiced by this approach and that grandfathering all such pre-existing transactions will ease the regulatory burden without any corresponding deleterious impact to markets or EDPs.

In the alternative, should the CSA not be amenable to grandfathering these transactions, we believe that the application all of the EDP requirements should be delayed for such pre-existing transactions for a period of 4 years. We believe that this is an appropriate way to transition firms and these sophisticated clients into the derivatives business conduct requirements, while still allowing these relationships to be renewed and revised in the normal course of business.

International Standards and the robust Canadian regulation of advisers

The substance and purpose of NI 93-101, as explained by the CSA in the Consultation, is to develop an instrument to protect investors, reduce risk, and improve transparency and accountability in the OTC derivatives market. The Consultation is also a response to IOSCO's concerns about the contribution to the financial crisis of 2008 by some firms dealing in derivatives as a result of not effectively managing their own derivatives-related risks. Importantly, NI 93-102 references IOSCO's comments that:

> Historically, market participants in the OTC derivatives markets have, in many cases not been subject to the same level of regulation as participants in the traditional securities market. This lack of sufficient regulation allowed certain participants to operate in a manner that created risks to the global economy that manifested during the financial crisis of 2008. [emphasis added]

PMAC believes that portfolio managers are already robustly regulated and overseen by members of the CSA under NI 31-103 and that the creation of a parallel - but not identical - regulatory regime to oversee this category of registrants is not warranted to address IOSCO's OTC derivatives market concerns.

We believe the CSA has approached the Consultation from the point of view that advisers must be regulated in the same way as dealers in order to satisfy Canada's IOSCO

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obligations with respect to OTC derivatives. PMAC feels that this approach does not adequately account for unique circumstances regarding the regulation of portfolio management firms. These factors include the rigorous proficiency requirements required of advisers, the fiduciary duty of care owed by advisers to their investors, minimum insurance and capital requirements, and the robust, principles-based regime that advisers must adhere to under NI 31-103. We believe these factors warrant the exclusion of portfolio managers from the application of NI 93-101.

Concerns regarding applicability of NI 93-101 to portfolio managers

Despite the amendments to NI 93-101 and the publication of the Registration Consultation, PMAC continues to believe that a compelling policy rationale for requiring separate market conduct and registration rules for advisers with respect to derivatives has not been adequately articulated. We respectfully disagree with the CSA's response to the 2017 Proposal that the proposed business conduct regime for derivatives advisers does not unnecessarily duplicate certain requirements under NI 31-103 for portfolio managers.

We do not believe that investors or the Canadian capital markets will benefit from the CSA imposing duplicative and additional market conduct requirements on advisers in the derivatives context.

Application of NI 93-102 to foreign firms

One of PMAC's key concerns with respect to NI 93-101 and NI 93-102 arises in connection with how the CSA will treat foreign derivatives firms who are exempt from registration under equivalent foreign or domestic regulations but would nonetheless be required to be registered in Canada under the Registration Consultation and be required to comply with the requirements proposed in NI 93-101 by virtue of tripping over the business trigger. In setting out the anticipated costs and benefits of NI 93-102, the CSA note:

> There is a possibility that foreign derivatives firms may be dissuaded from entering or remaining in the Canadian market due to the costs of complying with [NI 93-102], which would reduce Canadian derivatives parties' options from derivatives services. However, [NI 93-102] contemplates a number of exemptions, including exemptions for smaller derivatives dealers that only deal with eligible derivatives parties and for derivatives firms located in foreign jurisdictions, which are subject to and in compliance with equivalent requirements for foreign firms. These exemptions could significantly reduce compliance costs associated with [NI 93-102] for derivatives firms located in and complying with the laws of approved foreign jurisdictions.

Members are concerned about the impact on end investors should the complexity, filing burden and/or cost of the Canadian derivatives regime deter international participation in our markets.

Canadian rules with respect to derivatives, should account for our reliance on foreign markets for liquidity and access to foreign advisers in order to achieve a balance of interests. PMAC has concerns regarding the proposed requirement that foreign derivatives firms that are exempt from registration under equivalent foreign or domestic regulations

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would nonetheless be required to be registered in Canada under NI 93-102 and be required to comply with NI 93-101. We continue to strongly urge the CSA to extend certain aspects of the international adviser exemption in Section 8.26 of NI 31-103 as well as the international sub-adviser exemption set out in subsection 8.26.1 of NI 31-103 in both NI 93-101 and NI 93-102 so that existing business relationships and access to investments for firms' clients will not be disrupted.

We understand that the CSA wishes to limit the exemption from the registration requirement to firms that are "registered, licensed or otherwise authorized under the securities, commodity futures or derivatives legislation of a foreign jurisdiction specified in Appendix G" of NI 93-102 (**Appendix G**). PMAC believes that, if the CSA is prepared to rely on the substituted compliance of those foreign jurisdictions for firms that must be regulated, it also follows that the exemptions from derivatives regulation that those jurisdictions have approved should similarly be valid exemptions for the purposes of NI 93-101 and NI 93-102.

Further, PMAC is not aware of other jurisdictions that have registration regimes applicable to derivatives advisers in respect of OTC derivatives transactions, so substituted compliance as currently contemplated will not be meaningful. For this reason, we recommend that an exemption from the registration and business conduct requirements also be available where a foreign derivatives adviser is not required to be registered in its home jurisdiction to advise in respect of derivatives, if that foreign derivatives adviser is registered, or exempt from registration, under its home jurisdiction's securities legislation.

We believe that the CSA can concurrently take a meaningful and principles-based approach to addressing the issue of substituted compliance while, at the same time, avoiding implementing measures that would unnecessarily disrupt cross-border trade flows. Certain members have suggested that one way of achieving a more principles-based assessment of substituted compliance would be to permit IOSCO member jurisdictions that have implemented IOSCO's recommendations in this respect to automatically be included in the CSA's substituted compliance regime.

If the CSA's derivatives regime is implemented without a workable exemption for international advisers, members have voiced concerns that Canadian firms may be unable to attract and hire top international talent for their investors since international advisers may be deterred from participating in the Canadian market without an exemption. We also note that the Canadian registered firm would continue to be – as is currently the case under subsection 8.26.1(1)(b) of NI 31-103 – responsible for any loss that arises out of the failure of the international sub-adviser and that the sub-adviser would be subject to the Canadian registered firm's initial and on-going due diligence, if an exemption similar to section 8.26.1 of NI 31-103 is included in NI 93-102 and NI 93-101.

While PMAC strongly recommends that the CSA not adopt the proposed substituted compliance concept in the derivatives regime, we understand that Appendix G will be completed and published for comment under separate cover once the CSA has completed an equivalency analysis. We believe that, in order to respond to evolving regulatory regimes, the CSA should develop a way that would permit the efficient evaluation and addition of new

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jurisdictions to the list of acceptable substituted compliance jurisdictions under Appendix G, as opposed to risking a static list that could become outdated.

Members have also raised concerns about the increased costs to Canadian dealers that provide their services to Canadian portfolio managers. Such Canadian dealers may not only experience increased costs directly as a result of proposed NI 93-101 and NI 93-102, but may also experience increased costs indirectly as a result of having fewer international dealers to deal with, should there be significant foreign dealer exits from Canada. Such costs at the dealer level could have the unintended negative consequence of wider spreads and a drag on investment returns for Canadians.

Senior derivatives manager and reporting requirements

PMAC is pleased that the CSA made revisions to NI 93-101 to allow the senior derivatives manager to delegate his or her responsibility to submit a report to the board of directors to the firms' CCO. PMAC believes that this ability makes sense from a compliance oversight standpoint, and is also reflective of the business reality that boards prefer to deal with a set number of known and trusted executives.

We believe that the requirement for the derivatives UDP to report to the board of directors of a firm in the circumstances set out in Subsection 27(3)(c) of NI 93-102 is duplicative of the requirement for the senior derivatives manager (or, if delegated, the CCO) to report to the board in the circumstances set out in Subsection 31(2) of NI 93-101 and as elaborated on in the Proposed Companion Policy to NI 93-101. We believe that deleting the requirement in Subsection 27(3)(c) of NI 93-102 would clarify the reporting obligations without creating a duplicative burden that does not bolster the compliance function.

We also refer the CSA to PMAC's submission on the Registration Consultation where we highlight a number of comments and concerns surrounding the roles and responsibilities of the senior derivatives manager, UDP, CCO and CRO and pose a number of questions about the responsibility of and interplay between these various roles.

Overall, we continue to believe that the requirement to hire or designate a senior derivatives manager is onerous and unnecessary. We urge the CSA to simplify and streamline personnel and reporting requirements and believe that failure to do so could negatively impact the competitiveness of Canada's market and of our firms, without a corresponding market or investor protection benefit.

RESPONSES TO SPECIFIC CONSULTATION QUESTIONS

> 2. ***Definition of "eligible derivatives party".*** *Are the criteria in paragraphs (m), (n) and (o) appropriate?*

While PMAC had hoped the CSA would leverage the existing "permitted client" definition instead of introducing a new category of sophisticated investor, given the CSA's decision to continue with the definition of EDP, we encourage as much consistency as possible between NI 31-103, NI 93-101 and NI 93-102 based on the philosophy of these being parallel regulatory regimes and in order to avoid confusion and complexity. As such, we request

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that the CSA amend the definition of EDP to include any non-individual person that is a "permitted client", as such term is defined in NI 31-103.

While PMAC believes the criteria in subsection (n) of the EDP definition are an appropriate way for the CSA to harmonize EDP with the "accredited counterparty" category under the *Derivatives Act* (Quebec). However, members have noted concerns, however, that such criteria remains insufficiently harmonized with the "eligible contract participant" category under the U.S. Commodity Exchange Act. We believe it is crucial to ensure as much harmonization as possible.

We note that, as proposed, NI 93-101 and NI 93-102 will require many firms to potentially grapple with four different sophisticated investor definitions: "accredited investor", "permitted client", "qualified party" and EDP. This is not only overly cumbersome for firms, but it is likely to be frustrating for investors who will be required to complete all the resultant paperwork. We continue to believe that this additional complexity is unwarranted.

PMAC further asks the CSA to reconsider the requirement for firms to obtain a written representation of an institutional EDP's "knowledge and experience" to evaluate information about derivatives. For institutional EDPs, the requirement to obtain such a representation only creates regulatory burden without corresponding risk reduction or investor protection benefits. Institutional EDPs do not require these additional protections and have the resources and the expectation that they will contractually negotiate their own commercial arrangements with derivatives advisers.

> *5. **Derivatives Party Assets.** […] Please provide any comments you may have, including whether it would be appropriate to include, for all derivatives parties, restrictions with respect to collateral delivered to a derivatives firm (as initial margin) or adopt a model of requiring informed consent with respect to its use and investment, or some combination of the two approaches.*

PMAC believes that it would be appropriate to adopt an informed consent model.

We believe that the CSA has yet to provide clarification regarding the intended application of the provisions related to segregation, use, holding and investment of derivatives party assets as these apply to a portfolio manager acting on behalf of a managed account client. While these provisions may make sense from a dealer's perspective, it is unclear how they would apply to a portfolio manager with a fiduciary duty not to commingle client assets.

CONCLUDING COMMENTS

We would like to thank the CSA for the work, thought and outreach that has gone into developing and publishing this Consultation as well as the Registration Consultation.

We continue to believe that it is of utmost importance for the CSA not to impose one-size-fits-all rules on portfolio managers and that, instead, investors and the market are better served by leveraging more principles-based regulation that recognizes the already robust regulatory requirements and legal duty of care these professionals owe their clients.

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We would be happy to speak with you further about any of the remarks in our letter and/or in our submission on the Registration Consultation.

We look forward to continuing our dialogue with the CSA on these matters at the up-coming OSC Roundtable on Derivatives.

Sincerely,

PORTFOLIO MANAGEMENT ASSOCIATION OF CANADA

Katie Walmsley
President
Portfolio Management Association of Canada

Margaret Gunawan
Managing Director – Head of Canada Legal & Compliance
BlackRock Asset Management Canada Limited

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DATE: September 17, 2018

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

c/o

Grace Knakowski, Secretary
Ontario Securities Commission
20 Queen Street West, 22nd Floor
Toronto, Ontario M5H 3S8
Via Email: comments@osc.gov.on.ca

Me Anne-Marie Beaudoin, Corporate Secretary
Autorité des marchés financiers
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C.P. 246, tour de la Bourse
Montréal, Québec H4Z 1G3
Via Email: consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comment – Proposed National Instrument 93-101 *Derivatives: Business Conduct*, Proposed Companion Policy 93-101CP *Derivatives: Business Conduct*, Proposed National Instrument 93-102 *Derivatives: Registration*, and Proposed Companion Policy 93-102CP *Derivatives: Registration*

We are writing in response to the request for comments on Proposed National Instrument 93-101 *Derivatives: Business Conduct*, ("**NI 93-101**") Proposed Companion Policy 93-101CP *Derivatives: Business Conduct*, ("**CP 93-101**"), Proposed National Instrument 93-102 *Derivatives: Registration*, ("**NI 93-102**") and Proposed Companion Policy 93-102CP *Derivatives: Registration* ("**CP 93-102**"). In our comments below, we have referred to NI 93-101 and CP 93-101 collectively as the "**Business Conduct Rule**" and to NI 93-102 and CP 93-102 collectively as the "**Registration Rule**".

ATB Financial is a full service, deposit-taking financial institution located in the Province of Alberta. We are a crown corporation, owned by the Province of Alberta. Pursuant to the *ATB Financial Act* (Alberta) we are also an agent of the Province of Alberta for all purposes. With assets of more than $51.9 billion, we are the largest Alberta-based financial institution. Our operations include a full-service financial markets group focused on foreign exchange, interest rates, and commodity transactions and this has informed our perspective. We appreciate the opportunity to comment on the proposed instruments and are supportive of the regulatory steps to harmonize derivative practices.

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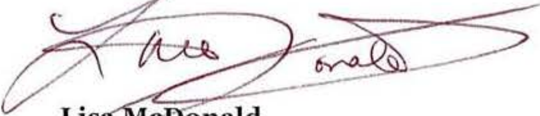
ATB atb.com

We consent to the disclosure of our submission in whole as part of a non-attributed summary of comments that requires that our identity and any personal identifiers be removed prior to publication.

Yours Truly,



Lisa McDonald
Chief Risk Officer
Risk Management

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Part A: Business Conduct Rule

In your request for comment on the Business Conduct Rule, you have asked commenters for feedback on specific questions, in addition to providing general comments. We will begin with our comments on the specific questions listed in the request for comment:

1) Definition of "affiliated entity".

We do not have a strong preference between defining affiliated entities based on control versus consolidation of accounts. However, we believe that the harmonization of these definitions across related rules will provide clarity to the industry, as having similar (or identical) terms with different definitions, in related rules is likely to lead to confusion among industry participants.

2) Definition of "eligible derivatives party"

We believe that the definition of this term should be aligned with the definition of "qualified party" contained in the various blanket orders issued by securities regulators (for example, Alberta Securities Commission Blanket Order 91-507). Our rationale is that the latter definition has proven to be well understood by market participants and has been effective in ensuring derivative parties are receiving appropriate protection.

Therefore, we suggest that the reference to '$25,000,000 in net assets' in sub-section (m) be amended to refer to 'total assets' (instead of net assets) and that the reference to '$5,000,000' in sub-section (o)(ii) simply refer to 'net assets'.

While we believe the various requirements in (m)(i), (n)(i), and (o)(i) are reasonable, we would also suggest it be clarified that a derivatives party can also meet those requirements by obtaining external advice, should they not have the required expertise 'in-house'.

3) Anonymous transactions executed on a derivatives trading facility

We would support an expansion of the exemption in section 41 of NI 93-101 to cover all situations where a derivatives firm is expected to provide documentation to a derivatives party. For example, section 28 obligates a derivatives firm to provide quarterly statements to a derivatives party. However, in the case of a transaction that has been accepted for clearing by a qualified clearing agency, the derivatives firm is no longer the derivative party's counterparty for the transaction, and therefore we do not believe it is appropriate to have the section 28 requirements continue to apply. As such, we would support the expansion of these exemptions to all cases where derivatives are submitted for clearing to a regulated clearing agency.

4) Handling complaints

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We do not believe the obligations in section 16 should be expanded towards all derivative parties. We believe that eligible derivative parties are sophisticated enough to be able to resolve complaints with derivative firms without needing regulatory intervention.
Furthermore, we also note that, on its face, section 16 is not limited to complaints about the derivative firm's derivative operations. In the case of derivative firms that have significant other operations (such as financial institutions) the effect of this rule appears to be to regulate those other operations as well. Therefore, we suggest this section be amended to specifically refer to complaints about the firm's derivative operations only.

5) Derivatives Party Assets

We do not believe the requirements in sections 25 and 26 of NI 93-101, which deal with the appropriate model for protecting customer assets of derivatives parties, should apply to all derivative parties. We do not believe these protections are required by eligible derivative parties. We also note that other regulations may impose restrictions on collateral, and we would discourage the practice of having the same topic dealt with in multiple, potentially overlapping, regulations.

6) Policies, procedures and controls

Our only comments on section 30(1)(c)(iii) of NI 93-101 are that we would expect most derivative firms to rely primarily on a company-wide code of conduct or similar document requiring all employees to act with integrity. It may be helpful to clarify in CP 93-101 that such a document may be relied upon, at least in part, to provide the reasonable assurance required by section 30. We also note that section 30(1)(c)(iii) is not expressly limited to acting with integrity with respect to the firms derivative activities. While an employee's actions, that are unrelated to the firm's derivative activity, may be of concern to the firm, as employer, we do not believe regulatory intervention would be appropriate in such a case, provided that such actions do not impact the firm's derivative operations.

General Comments on the Business Conduct Rule:

In addition to the above, we have the following comments on the Business Conduct Rule:

1. The definition of "Canadian financial institution" includes, among other things, a 'treasury branch'. ATB Financial was formerly known as Alberta Treasury Branches prior to our name change in December 2017. We believe the reference to a 'treasury branch' in the definition of Canadian financial institution operates to include ATB Financial.

   While we believe that interpretation is still accurate, given our name change, and for the sake of clarity, we would request that the definition of Canadian financial institution be amended to include a reference to 'financial institutions'. This will help to clarify that ATB Financial continues to be included in that term.

2. We believe that certain requirements applicable to trades with non-eligible derivative parties may have an unintended consequence of reducing the willingness of derivative firms to transact with

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non-eligible derivative parties, rather than providing those non-eligible derivative parties with the intended increased protection.

For example, the suitability requirement in section 12 requires, in part, that a derivatives firm take reasonable steps to ensure that a derivative and a transaction are suitable for a derivatives party before the firm accepts instructions to transact in the derivative. However, current practice is for derivative firms to expressly obtain representations from their counterparties that the counterparty is capable of making, and has made, its own suitability assessment. We believe this practice reflects the fact that, in the derivatives area, the derivatives firm and its counterparty take the opposite sides of a transaction.

We also note the tied selling obligation listed in section 18 of NI 93-101, which prohibits a derivatives firm from requiring a person obtain a product or service from the derivatives firm as a condition of obtaining another product or service. CP N3-101 makes clear that the intent of this rule is that a derivatives firm, that is also a lender to a person, cannot require that the person hedge their exposure under the loan with the derivatives firm. The obligation to engage in derivatives may be required in borrower-specific circumstances as a risk mitigation tool and 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 the borrowing arrangement. Even where it is not explicitly stated, a borrower may practically find it difficult to enter into a hedge with another entity, at least without incurring additional costs, given that the borrower has likely already granted the lender with security as part of the lending relationship.

We refer to our comment above about aligning the definition of eligible derivatives party with the definition of a qualified party currently used in various blanket orders. However, an alternative suggestion would be to permit non-eligible derivative parties to qualify as eligible derivative parties by obtaining the services of a registered derivatives advisor. Through regulations applicable to the derivatives advisor, regulators could ensure that these parties are receiving any protection that is required, including being provided with necessary disclosures, while avoiding the potential issues outlined above.

3. As a practical consideration, on occasion, derivative parties will request to enter into a transaction with a derivative firm before a 'master agreement' has been executed between the parties. Typically, the practice is that pricing and other trade-specific terms are discussed between the parties, but more general terms, such as events of default, are not. Those more general terms are typically contained in the trade confirmation exchanged between the parties (often by way of the parties being deemed to have entered into a 'master agreement' pending the actual execution of one), as required by section 27(1).

   However, it is unclear whether such a practice would violate section 33. We suggest this be clarified by specifying that the requirements in section 33 can be met by way of the confirmation required to be delivered under section 27(1).

4. We note that section 45(3)(b) provides an exception for pre-existing transactions, so long as the derivative firm has taken reasonable steps to determine that their counterparty meets one of the listed definitions. We suggest that the threshold for 'reasonable steps' be clarified to include

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receiving a written representation, and having no reason to question the accuracy of that representation.

Finally, we understand that Appendix C, which will list any requirements that do not apply to a Canadian Financial Institution, is scheduled to be released at some future point. As such, our comments are subject to further review of that document.

Part B: Registration Rule

We note that Section 5(c) of the Registration Rule exempts crown corporations or agencies, if their accounts are 'consolidated for accounting purposes' with those of the federal or a provincial government.

As noted in our opening comments, ATB Financial is a crown corporation, owned by the Province of Alberta, as well as an agent of the Province. As ATB Financial's overall financial results (including, but not limited to, results from our derivative trading activity) are consolidated in the Alberta provincial government's annual financial reporting, we therefore believe ATB Financial would be included in the exemption under Section 5(c). As a result, we have refrained from providing comments on the Registration Rule.

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BLACKROCK®

September 17, 2018

Submitted via electronic filing: comments@osc.gov.on.ca; consultation-en-cours@lautorite.qc.ca

Alberta Securities Commission
Autorité des marches 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 Commission
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

Attention:

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal, QC H4Z 1G3

Grace Knakowski
Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8

Re: Canadian Securities Administrators Notice and Request for Comment – Proposed National Instrument 93-102 – *Derivatives: Registration* and related Companion Policy 93-102CP (together, "Proposed Registration Rule")

Dear Me Beaudoin and Ms. Knakowski:

A. About BlackRock

BlackRock Asset Management Canada Limited ("**BlackRock Canada**") is an indirect, wholly-owned subsidiary of BlackRock, Inc. (together with BlackRock Canada, "**BlackRock**" or **"we"**) and is registered as a portfolio manager, investment fund manager and exempt market dealer in all jurisdictions of Canada, a commodity trading manager in Ontario, and an adviser under *The Commodity Futures Act* (Manitoba).

BlackRock is one of the world's leading asset management firms. We manage assets on behalf of institutional and individual clients worldwide, across equity, fixed income, liquidity, real estate, alternatives, and multi-asset strategies. As an investment adviser, we embrace our role as a fiduciary to our clients and recognize its importance in protecting investors.

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B. General Observations

BlackRock supports the Canadian Securities Administrators' ("**CSA**") development of a regulatory regime "to protect investors, reduce risk and, improve transparency and accountability in the over-the-counter (OTC) derivatives markets"[1] by introducing both the Proposed Registration Rule and Proposed National Instrument 93-101 and Proposed Companion Policy 93-101CP – *Derivatives: Business Conduct* (the **"Proposed Business Conduct Rule"**). We have also provided comments on the Proposed Business Conduct Rule, which should be read together with this letter. From the perspective of a firm registered as an adviser (or equivalent) for both the securities and exchange-traded derivatives markets, BlackRock Canada is of the view that many of the requirements of the Proposed Registration Rule are duplicative with current registrant requirements and therefore, unnecessarily adds regulatory burden with no corresponding additional benefit to investors or the capital markets. We disagree with the CSA's conclusion that the costs to be borne by registered advisers in complying with the Proposed Registration Rule are in line with the benefits to be gained by the Canadian market, and ultimately, investors[2]. We do not see a well-articulated policy rationale for introducing a separate registration regime for registered advisers who already owe a fiduciary obligation to clients and who must meet the highest proficiency standards as portfolio managers under National Instrument 31-103 - *Registration Requirements, Exemptions, and Ongoing Registrant Obligations* (**"NI 31-103"**). Furthermore, BlackRock believes that the Proposed Registration Rule and Proposed Business Conduct Rule are focused on addressing policy issues arising from certain dealing activities resulting in the 2008 financial crisis and that the CSA has not identified any specific activities or behaviours from registered advisers that require a regulatory response[3].

In our experience, asset managers such as BlackRock would typically implement robust compliance and risk management programs applicable to their entire business and continually monitor these programs to ensure their effectiveness and make improvements when needed. In the investment context, registered advisers would not generally differentiate between asset classes in applying compliance and/or risk management policies and procedures.

As a general principle, we support initiatives that encourage long-term savings by improving the quality of advice, better aligning interests of registrants with those of their clients, and broadening the choice of investments and services offered to investors. The introduction of new regulatory requirements or significant amendments to regulation must be assessed using this lens to ensure benefits versus implementation costs can be appropriately weighed. The Proposed Registration Rule may result in smaller, independent firms and also foreign firms that conduct OTC derivatives business with Canadian firms and clients from exiting the market, as the requirements under the Proposed Registration Rule are potentially very costly and onerous, especially as it is duplicative of, or lacking harmonization with, other Canadian and/or international regulations. Alternatively, derivative firms may decide to decrease their participation in the Canadian OTC derivatives market, thereby impacting liquidity or may pass on the additional costs of complying with the Proposed Registration Rule to clients, both of which would be unfortunate unintended consequences.

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[1] (2018), 41 OSCB 3254.

[2] (2018), 41 OSCB 3264.

[3] "During the financial crisis of 2008, some firms *dealing in derivatives* [emphasis added] contributed to the crisis by not effectively managing their own derivatives related risks." (2018), 41 OSCB 3254.

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Finally, the Proposed Registration Rule and the Proposed Business Conduct Rule should be enacted and come into force concurrently, given both are intended to be the comprehensive regime for the regulation of OTC derivatives. Given that many of the issues we point out in our submissions, the substantive content is reflected in both proposed rules, and the publication of the appendices relevant for full consideration and feedback from industry is still outstanding, BlackRock believes that enacting the Proposed Business Conduct Rule prior to the Proposed Registration Rule will be an inefficient way for industry to implement the new requirements and have a negative, disruptive impact on both investors and the market.

Beyond these general observations, our specific feedback on certain questions posed about the Proposed Registration Rule is set out below. All capitalized terms used in this letter but not defined herein have the same meaning given to them in the Proposed Registration Rule. We have also kept the numbering of the questions consistent with the numbering in the notice section of Proposed Registration Rule.

C. BlackRock's Responses

3) Definition of "eligible derivatives party"

Paragraphs (m), (n) and (o) provide that certain persons and companies are eligible derivatives parties if they meet certain criteria, including meeting certain financial thresholds. Are these criteria appropriate? Please explain your response.

Obtaining a written representation on "knowledge and experience"

We note that concerns regarding the need to obtain a written representation on "knowledge and experience" were raised by several commentators in the first publication of the Proposed Business Conduct Rule and that the CSA did not make any changes. We ask that the CSA re-consider its position in obtaining the written representation both in that rule and the Proposed Registration Rule. While BlackRock agrees that certain eligible derivatives parties (**"EDP"**) should have the requisite knowledge and experience to evaluate information about derivatives, its appropriateness and characteristics, the requirement to obtain a written representation from such an EDP under paragraphs (m), (n), and (o) of the Proposed Registration Rule is too rigid and will not enhance investor protection. In fact, we would argue that if a "bright line test" based on financial thresholds available in other exemptions under securities laws is sufficient (i.e. under the "permitted client" and "accredited investor" exemptions, there is currently no requirement to obtain a representation about "knowledge and experience"), then unless there is a compelling reason, this approach should be no different in the context of OTC derivatives. There may be other ways to conclude an EDP's knowledge and experience outside of obtaining a written representation[4].

It is not appropriate to impose a requirement for derivatives advisers that provide services only to sophisticated, institutional parties to obtain a written representation from those parties as to their "knowledge and experience". Such a requirement will impose a significant new

[4] Furthermore, allowing other means to make this "knowledge and sophistication" determination would still be consistent with section 7 of the *Québec Derivatives Act*, where there is no express requirement to obtain a written representation.

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administrative burden on both the derivatives adviser and its institutional clients, with virtually no investor protection or risk reduction benefit. For example, registered pension plans and regulated financial institutions do not require additional regulatory protection and have the resources to obtain independent advice and can negotiate the commercial arrangements they desire with derivatives dealers and advisers. The additional complexity introduced in assessing sophistication and knowledge against potentially three sets of definitions (i.e. permitted client, accredited investor and now, EDP) is unduly burdensome and does not have a corresponding benefit to investors, particularly institutional clients. The CSA should also take into account the fact that the same sub-set of large institutional clients will be asked by several derivatives firms for the same written representation prior to the transition period lapsing[5]. It is clear they can make the representation, but it will be highly frustrating for them to deal with the extra paperwork.

Other categories of EDP to be included in the definition

The CSA should also reconsider including persons and entities that qualify as "permitted clients" under NI 31-103, in the definition of EDP. Permitted clients already participate in the exempt market for securities without the full set of protections contemplated for non-EDPs and no justification has been outlined for excluding any category of "permitted client" from the definition of EDP.

The net asset test of $25mil included in paragraph (m)(ii) of the EDP definition is too high and should be decreased to $10mil. This would make the financial requirement more harmonized with the US Commodity Exchange Act definition of "eligible contract participant" (although in US dollars) and address the competitive disadvantage derivatives firms will encounter when conducting business in the Canadian OTC derivatives market.

4) Application of the derivatives adviser registration requirement to registered advisers/portfolio managers under securities legislation

BlackRock strongly believes that registered advisers should be exempt entirely from registration as a derivatives adviser. As referenced above and in our submission on the Proposed Business Conduct Rule, registered advisers are already subject to robust and extensive regulation under NI 31-103. Furthermore, for firms that are also registered under commodity futures statues in the applicable provinces to advise on exchange-traded derivatives, there is another layer of regulatory oversight on top of NI 31-103. Portfolio managers are also subject to a common law fiduciary duty when dealing with their clients[6]. In meeting these regulatory and common law obligations, registered advisers do not vary the standard of care they are operating under between asset classes such as equities, fixed income and derivatives. The additional regulatory burden created for registered advisers under the Proposed Registration Rule is unnecessary given no specific risks have been identified resulting from the actions of registered advisers. It is also contrary to the good work the CSA has recently undertaken in reducing the regulatory burden for reporting issuers and investment fund issuers.

[5] Currently, there is a one year transition period contemplated under section 45 of the Proposed Business Conduct Rule.

[6] In some provinces, the fiduciary duty is statutory and exists in the provincial securities acts.

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We are also concerned that the additional burdens placed on smaller independent firms who are registered advisers will be detrimental to the ultimate end client and the competitiveness of the asset management industry generally. These smaller businesses do not have the same breadth and depth of resources such as BlackRock to rely upon. In looking at the requirements for an independent review of risk management systems under subsection 39(4) as an example, this means retaining and paying for an external firm or individual to conduct the review as firms need to be of a sufficient size and scale to justify creating an internal audit department. Further, there is also no equivalent requirement in NI 31-103 for advisers to do an independent review of compliance policies and procedures. Smaller, independent firms play an important role in ensuring Canadian investors have the option of choosing not to do business with a large domestic or global financial firm. Should these types of firms shutter their doors or decrease their investment offerings, it would reduce investor choice and impact the ability to use OTC derivatives in a cost-effective way that creates a meaningful investment outcome.

There is a real possibility that the regulatory burden imposed by the Proposed Registration Rule and the Proposed Business Conduct Rule may increase the cost of using OTC derivatives and impact the liquidity of these instruments as the CSA acknowledges. This unintended result is not, in our view, proportionate to the benefits identified, particularly as NI 31-103 and the fiduciary duty portfolio managers operate under impose substantively the requirements being introduced.

Exemption related to provision of incidental advice on OTC derivatives

BlackRock is of the view that introducing an "incidental advice" concept into the Proposed Registration Rule will pose practical challenges for advising firms. For instance, the current guidance in the companion policy on what factors are viewed as business triggers for registration are too broad and nebulous (i.e. "recommending a derivatives trading strategy"). In practical terms, it may be difficult (or arbitrary) to determine where the line is crossed from providing incidental advice to triggering the requirement to register, such as in the case of using derivatives to hedge risk. We experience this already under current "incidental advice" exemptions available[7] and firms will typically err on the side of caution and register, incurring additional costs and taking on compliance obligations which may not be needed in the context of their business models. For these reasons, an express exemption for registered advisers is preferable.

Applicability/scope of the Proposed Registration Rule to foreign registered (or exempt) derivatives advisers

BlackRock respectfully submits that foreign advisers who are registered or rely on an exemption in a foreign jurisdiction should also be exempt from the Proposed Registration Rule by adopting the well-recognized and well-functioning international adviser and international sub-adviser exemptions currently available in NI 31-103[8]. The Proposed Registration Rule (and Proposed Business Conduct Rule) currently introduce a completely new "substituted compliance" regime which, from a policy perspective, is unwarranted. It is also difficult to assess the full impact of complying with the requirements of the exemptions when the relevant appendices have not yet been published for comment.

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[7] For example, section 31 of the *Commodity Futures Act* (Ontario) and section 33 of *The Commodity Futures Act* (Manitoba).

[8] Sections 8.26 and 8.26.1 of NI 31-103, respectively.

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It is common practice for Canadian registered advisers to retain foreign firms as sub-advisers for various reasons. The foreign sub-adviser may have particular expertise and a strong performance track record managing specific types of mandates, allowing the domestic adviser to offer diversified portfolios to its clients without needing to build its own expertise in-house. In our own case, BlackRock Canada does not have a portfolio management function in Canada and similar to other global firms, we outsource the management of our Canadian domiciled products and accounts to affiliates in other jurisdictions, relying on the international sub-adviser exemption. These affiliates are registered or exempt from registration in their applicable home jurisdiction. We are comfortable operating under the current international sub-adviser exemption and are concerned that uncertainty has now been introduced for several of our affiliates who are exempt, for example, from registration as a commodity trading adviser under the US Commodity Exchange Act. The Proposed Registration Rule will make it a prerequisite for these exempt affiliates to potentially apply for discretionary relief to continue to act as a sub-adviser to BlackRock Canada only in respect of OTC derivatives and not for other securities. The potential disruption this would entail for our clients is very concerning.

BlackRock questions what additional protection from risk a client gains by requiring foreign sub-advisers to comply with substituted compliance when one of the prerequisites of the international sub-adviser exemption under section 8.26 of NI 31-103 is for the Canadian registered adviser to be ultimately responsible for the acts of the foreign sub-adviser. This requirement already insulates Canadian clients from potential losses arising out of the failure of the foreign sub-adviser to meet its standard of care.

Deviation from the regulatory approach in NI 31-103 has not been satisfactorily explained in the guidance (for example, the requirement to notify the applicable Canadian securities regulator of instances of material non-compliance is both vague and onerous) nor has a policy rationale been articulated as to why there are more limited exemptions for foreign advisers in the Proposed Registration Rule. The substituted compliance regime will impede Canada's competitiveness and foreign advisers may be reluctant to continue to operate, or establish a presence, here. Ultimately, decreasing investor choice is not a good outcome.

Should the CSA decide to stay with the substituted compliance option, BlackRock requests that a process be developed to update the foreign jurisdictions that are included in Appendix G and that an opportunity for public comment on the process to add and delete jurisdictions be provided.

6) Exemption from the individual registration requirements for derivatives dealing representatives and derivatives advising representatives

We believe that individuals acting as an adviser for a managed account should be eligible for a registration exemption and that the carve out under subparagraph 16(4)(b)(iii) is not appropriate. Similar to the reasons set out above as to why registered firms should be wholesale exempt from the Proposed Registration Rule, individual advising representatives have already been sufficiently vetted by the regulators for both proficiency and experience and are subject to a fiduciary duty when advising on a discretionary basis. In addition, there are ongoing obligations applicable to the registered individual to maintain his or her registration in good standing. BlackRock does not see a compelling policy rationale for requiring an additional registration category for advising representatives in respect of OTC derivatives.

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At a minimum, the managed accounts of EDPs should be removed from subparagraph 16(4)(b)(ii) of the Proposed Registration Rule to maintain consistency with its removal from the equivalent section in the Proposed Business Conduct Rule.

7) Specific proficiency requirements for individual registrants

Although BlackRock's preference is to exempt registered advisers and individuals acting on their behalf, there should be consistency between the Proposed Registration Rule and NI 31-103 with respect to both the (i) categories of registration and (ii) proficiency requirements for each individual registration category. We suggest, for instance, that a derivatives associate advising representative category is necessary to address succession planning concerns and allow for the career development of professionals.

BlackRock is supportive of grandfathering individuals who currently manage OTC derivatives or who are currently registered under provincial commodity futures legislation provided they have a minimum number of years of relevant investment management experience relating to derivatives (for example, minimum 10 years).

8) Derivatives ultimate designated person ("UDP")
9) Requirements, roles and responsibilities of UDPs, chief compliance officers ("CCO") and chief risk officers ("CRO")

In general, sections 27 to 29 of the Proposed Registration Rule are potentially duplicative and overlapping with respect to the requirements, roles and responsibilities of the UDP, CCO and CRO. Exacerbating this is the requirement to designate a senior derivatives manager under the Proposed Business Conduct Rule who, in turn, has similar obligations as the UDP, CCO and CRO[9]. For a global firm like BlackRock which does not have a portfolio management presence in Canada and is part of a broader organization, the individuals assigned to fill at least a few of these roles will not be in Canada and the coordination required will be extensive. This is the best case scenario but we could foresee a situation where a smaller firm or a foreign firm with a small Canadian business or client base may be less committed to serving clients here given the perceived hassle of complying with duplicative and overlapping requirements.

Requiring the derivatives UDP to report instances of material non-compliance is more onerous than what is mandated of the UDP with respect to securities under NI 31-103 and BlackRock does not see any obvious reason why this requirement is necessary in the context of OTC derivatives, particularly when the derivatives CCO has a similar reporting obligation to the UDP and must also submit, at a minimum, an annual report to the board.

There should be permission to delegate all reporting, whether to the CSA or the board of directors of the registered firm, to the CCO. This would make the reporting obligations much more straight-forward.

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[9] Please refer to our more specific comments regarding the designation of one or more senior derivatives managers in our submission on the Proposed Business Conduct Rule.

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The instances of non-compliance to be reported should also conform with the current requirements in NI 31-103 as the “material” qualifier included in the Proposed Registration Rule sets out two differing standards for securities and OTC derivatives for no clear reason.

D. Conclusion

BlackRock appreciates the opportunity to provide input on this important regulatory initiative and would be pleased to make appropriate representatives available to discuss any of these comments with you.

Sincerely,

Margaret Gunawan
Chief Compliance Officer and Secretary, BlackRock Asset Management Canada Limited

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TransCanada
450 – 1st Street SW, Calgary, Alberta, Canada T2P 5H1

TransCanada
In business to deliver

September 17, 2018

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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

c/o:
Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, rue du Square-Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal (Québec) H4Z 1G3
Fax: 514-864-6381
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Grace Knakowski
Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8
Fax: 416-593-2318
comments@osc.gov.on.ca

Dear Sirs/Mesdames:

RE: CSA Notice and Request for Comment dated April 19, 2018 with respect to Proposed National Instrument 93-102 *Derivatives: Registration* and Proposed Companion Policy 93-102 *Derivatives: Registration*

TransCanada Corporation (**TransCanada**) is pleased to submit its comments in response to:

- Proposed National Instrument 93-102 Derivatives: Registration (the **Instrument**)

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- Proposed Companion Policy 93-102 Derivatives: Registration (the **CP**);

(collectively, the "**Proposed Rule**") as published and solicited for comments by staff of the Canadian Securities Administrators. TransCanada will also refer to Proposed National Instrument 93-101 Derivatives: Business Conduct (the **Business Conduct Instrument**), and Proposed Companion Policy 93-101 Derivatives: Business Conduct (the **Business Conduct CP**).

TransCanada appreciates the opportunity to provide its comments on the Proposed Rule. The comments below are provided with the goals of achieving effective regulatory oversight of the OTC market while not unduly burdening market participants and ensuring that the Proposed Rule contains the necessary clarity to be effectively applied.

I. TransCanada

With more than 65 years' experience, TransCanada is a leader in the responsible development and reliable operation of North American energy infrastructure including natural gas and liquids pipelines, power generation and gas storage facilities. TransCanada operates one of the largest natural gas transmission networks that extends more than 91,900 kilometres, tapping into virtually all major gas supply basins in North America. TransCanada is a leading provider of gas storage and related services with 653 billion cubic feet of storage capacity. A large independent power producer, TransCanada owns or has interests in approximately 6,100 megawatts of power generation in Canada and the United States. TransCanada is also the developer and operator of one of North America's leading liquids pipeline systems that extends approximately 4,900 kilometres, connecting growing continental oil supplies to key markets and refineries. TransCanada's common shares trade on the Toronto and New York stock exchanges under the symbol TRP. For more information visit www.transcanada.com.

II. Comments to Specific Questions Posed by the Authorities

1) Methodology for determining "notional amount"

(a) In general, TransCanada suggests that details informing specifically how these proposed methodologies will be applied are needed. Several questions under both methodologies exist, which prevent fulsome understanding of the CSA's intent. Specific comments follow:

1. The individual merits of the Regulatory Notional Methodology vs the CDE Guidance are unclear. By applying different notional thresholds to each methodology, the fundamental accuracy of both methods, with respect to determining the actual systemic risk arising from each derivatives transaction, is called into question. TransCanada advocates for use of well-established and well-understood methodologies that are commonly used by market participants.

2. Product "Commodity options and similar products", Column 2 – the concept of a delta-adjusted spot price is not standard in many commodities and is neither frequently calculated nor easily verified. Additional clarification on how and why the CSA proposes to use delta-adjusted spot price, in particular for commodities with highly volatile and/or variable spot prices, would greatly facilitate understanding of this mechanism. TransCanada notes that in commodities with such volatile and/or variable spot prices, spot prices can diverge significantly from forward prices, thereby causing inaccurate or seemingly arbitrary notional valuations.

3. Products "Commodity fixed/float swaps and similar products" and "Commodity CFDs and similar products" – these concepts are used synonymously for some commodities. The discrepancy the CSA sees between these two, and why they warrant separate notional calculation methodologies, is unclear.

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4. The delta-adjusted price methodology appears to produce different notional valuations of the same transaction depending on whether the party is on the buy-side or the sell-side. The notion that the same transaction could produce different notional values for the two parties involved creates confusion.

5. Regarding option valuations, TransCanada continues to believe that use of the option premium is the clearly the most appropriate method for determining the market value of an option. The option premium method provides the market-facing value of the instrument at the time of execution. This method is also objectively observable, in that the premium is clearly stated in the contract. Conversely, use of the strike price method produces an inaccurate reflection of the inherent risks when an option is deep-in-the-money or deep out-of-the-money. Similarly, the delta-adjusted price method would rely on the option-modelling tools employed by individual firms, thereby creating inconsistent valuations. Both methods proposed by the CSA appear to have the potential to frequently produce significantly overstated notional amount valuations.

   Although some may view the option premium method as producing notional amount values that are "too small", TransCanada advocates for a valuation methodology that accurately reflects the actual, verifiable market value of an option transaction at the time of execution.

6. TransCanada proposes that the method of determining notional value for basis swaps should be spread between two nodes. This most accurately calculates the actual notional value of the transaction. By contrast, the proposed method projects a basis swap as two separate transactions, which it is not – this does not produce an accurate representation of the transaction's value.

(b) TransCanada proposes the most appropriate approach to determining notional amount of a derivative with a notional amount schedule would be to use the summation of the notional amounts that apply to each of the schedule dates. Understanding the definition of "notional amount schedule" as used by the CSA would allow for better understanding of this question, and would permit more specific feedback.

(c) TransCanada offers the general comment that attempting to assign values to different components of a multi-leg derivative introduces the possibility of subjectivity in valuation. In the case of mutually exclusive multi-leg derivatives, assigning the value of the leg with the highest value to the multi-leg derivative creates a more easily-understood, replicable methodology.

In instances where transactions consisting of multiple derivatives mechanisms are 'bundled' into a single product, such as multi-leg derivatives (other than mutually exclusive multi-leg derivatives), TransCanada proposes that the CSA consider applying a fungibility analysis. (The result of the notional amount calculation should be the same for a series of five transactions or a single transaction with five separate "legs", all other factors like price and volume being the identical). This approach would ensure that the notional amount arising from a bundled transaction would be the same as the amounts contributed by the individual components.

2) Definition of "affiliated entity"

TransCanada supports the definition of "affiliated entity" and "control" as currently set out in the Instruments based on a legal definition of those terms. This definition of affiliation is clear and consistent with definitions of affiliation found in business corporations' statutes across Canada generally. TransCanada would discourage the use of definitions referring to rules made by other

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professional organizations or bodies such as IFRS, since CSA regulators may have little notice, visibility or input into changes made by such independent governing bodies.

3) Definition of "eligible derivatives party"

TransCanada supports this definition.

4) Application of the derivatives adviser registration requirement to registered advisers/portfolio managers under securities legislation

No comment provided.

5) IIROC membership for certain derivatives dealers

No comment provided.

6) Exemption from the individual registration requirements for derivatives dealing representatives and derivatives advising representatives

TransCanada supports these exemptions.

7) Specific proficiency requirements for individual registrants

TransCanada submits that the qualifications are unnecessarily onerous, and may not otherwise be required for individuals currently holding similar/suitable roles in companies whose primary business is not dealing or trading in derivatives or securities. Alternative proficiency requirements, such as demonstration of requisite experience, a statement of suitability from a company's senior management, or a combination of both, should be considered as an alternative to mandatory education/licensing criteria.

8) Derivatives ultimate designated person

TransCanada submits that 28(3)(c) of the Instrument should be limited to confirmed, rather than potential, instances of non-compliance. This prevents the unnecessary burden of creating reporting mechanisms that apply to uninvestigated events, which may ultimately prove to be compliant with the Instrument. Additionally, 28(3)(c)(i) should be limited to entities that the non-compliant party knows to be directly affected by the non-compliance event. Extending this requirement beyond these parameters creates a burden of understanding what events may or may not materially harm third parties that are not, or are not known to be, directly affected by non-compliance with the Instrument.

9) Requirements, roles and responsibilities of ultimate designated persons, chief compliance officers and chief risk officers

TransCanada submits that each of sections 27, 28 and 29 of the Instrument should contain the ability for companies to nominate alternative individuals, possessing appropriate seniority and requisite knowledge, who can adequately fulfill the necessary requirements in those sections. This would offer the ability for a company to identify a more appropriate representative when the roles at that company, as specified in Sections 27-29, are not well-suited to conduct of the required tasks (such as

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Vice President, Risk Management which may not be the head of the business unit whose activities trigger the requirement to register).

Specifically in reference to the obligations imposed on senior derivatives managers in section 31 of the Business Conduct Instrument, redundant requirements (for example, section 31(1)(a) in the Business Conduct Instrument and section 27(3)(a) in the Instrument) appear to exist in both of National Instruments 93-101 and 93-102, relating to Business Conduct and Registration. Eliminating these redundant requirements not only reduces compliance burden, but also improves understanding of the aggregated requirements. At a minimum, TransCanada respectfully urges the CSA to harmonize the two rules to address the possibility of 'double jeopardy' enforcement action against a firm in response to single act or action being caught by a substantively similar requirement in each instrument.

10) Minimum requirements for risk management policies and procedures

TransCanada proposes a revision to Section 39(3)(g) to remove the reference to "…a material change to the registered derivatives firm's risk exposures or a material breach…". Limiting this section's application to actual breaches of a firm's risk management policy focuses the requirement on the intended mechanism, and does not introduce the ambiguity of determining materiality of non-breach events. TransCanada also proposes adding language to confirm that reporting to a firm's board would only be necessary in response to breaches of those risk limits that are directly approved or determined by the board.

TransCanada views the requirement in section 39(4) to have risk systems independently reviewed no less than once every two years as being appropriate.

11) Exemptions from the requirement to register for derivatives dealers with limited derivatives

TransCanada strongly supports the use of exemptions for derivatives users who do not pose a significant systemic risk to Canada's commodity trading markets through their derivatives dealing activities.

However, Sections 50 and 51 fail to distinguish between derivatives trading (such as for hedging purposes) and derivatives trading for dealing purposes. TransCanada proposes that the CSA expressly exclude transactions that are intended to hedge or mitigate commercial risk from the determination of whether an entity exceeds either de minimis exemption. Doing so would make both of those exemptions available to larger corporate families that primarily use derivatives to hedge financial risks or physical commodity risks, but also engage in limited derivatives dealing activities.

Further, excluding transactions intended to hedge or mitigate commercial risk would provide cross-border consistency with the approach taken in the United states by the Commodity Futures Trading Commission ("CFTC"). For example, under CFTC Regulations, transactions that hedge physical commodity risk are not considered swap dealing activity and do not factor into the CFTC's swap dealer de minimis exception analysis. Providing a similar methodology to determine registration requirements for Canadian derivatives market participants assists with cross-border consistency and competitiveness. Moving to the above-described approach may require a re-evaluation of the relevant thresholds.

12) Exemptions from specific requirements in this Instrument for investment dealers

No comment provided.

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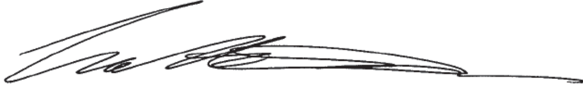
TransCanada hopes these comments will be useful to the Authorities in their deliberations. If you have any questions or would like to discuss any of these matters, please do not hesitate to contact the undersigned.

Sincerely,



Matthew Davies

Compliance Manager

TransCanada Corporation

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17 September 2018

BC Securities Commission

To whom it may concern,

Please accept these comments with regards to the proposed OTC derivatives National Instruments 93-101 and 93-102.

NI 93-101 Derivatives: Business Conduct

Part 4 Division 1, 20. (1) Daily reporting

On each business day, a derivatives dealer must make available to a derivatives party a valuation for each derivative…

Our corporate FX clients deliver on their forward and option hedges. They rarely close them out. They only buy USD forward for example because they have USD accounts payable in the coming months. For instance, they will book a 3-month forward buying USD at 1.3150 today and they may start pre-delivering against that contract at 1.3150 in a few days or weeks. By the value date of the contract it will be fully drawn down. The marked-to-market (MTM) value of the forward is of no significance to the client. They have locked in a rate (1.3150) to protect the cost of their USD payables and they don't care what the MTM value of that forward is. They will deliver against it rather than selling it back to the market.

Same goes for options, whether vanilla calls and puts or structured zero-cash options. What matters to clients is their protection rate and their participation rate. These are the rates they may or may have to deliver or take delivery of USD at. The MTM value of the contract has no meaning in our deliverable FX business.

The MTM value of a 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. Our clients use forwards and options to reduce FX rate uncertainty, not to beat the market. We encourage them to hedge systematically on a rolling 12-month basis, for example, and not try to time the market. Whether the hedge is in-the-money or out-of-the money once it is booked is irrelevant and could mislead our clients if we report it to them on a daily basis. What's important to FX hedging clients is the actual rates they'll be delivering or receiving USD at over their hedging horizon.

NI 93-102 Derivatives: Registration

Page 3281 Part 5 Division 1 18 (2) (b) (i)

"the individual has worked at a registered securities firm, at a derivatives dealer…"

Does "registered" apply to the derivatives dealer or just securities firm? Assume it does not apply to derivatives dealer since a registered derivatives dealer has not existed in Canada to date.
An individual who meets the requirements in 18 (2) (b) and has been employed at a non-registered derivatives dealer for 5 years, including 36 months in a compliance capacity, would qualify as a chief compliance officer?

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Same applies to chief risk officer qualifications. We have lots of senior people that have worked their entire career in at non-registered FX firms offering derivatives. Is that experience being recognized for registration purposes?

Page 3282 Part 5 Division 1 18 (4) (b)

"the individual has passed the Futures Licensing Course Exam and the National Commodities Futures Exam"

As a non-bank FX dealer, we only offer OTC FX forwards and options. We do not sell exchange listed futures. Since starting EncoreFX in 2015, we have required all our dealers to pass the CSI Derivatives Fundamentals and Options Licensing course (DFOL). We looked at all the courses available through CSI and determined that the DFOL was the best fit for our OTC FX business. The options licensing course is considerably more relevant to our business than the futures licensing course. We utilize options a lot in client hedging strategies, never futures.

Page 3282 Part 5 Division 1 18 (6) (a)

"the individual has earned a CFA Charter and has gained 12 months of relevant investment management experience, including experience relating to derivatives…"

We have CFA charter holders who have worked their entire career in the FX risk management business offering hedging advice to corporate clients. They have never worked in the investment industry but have years of FX hedging experience. Will that experience count under 18 (6) (a) or do they have to have investment management experience?

Page 3282 Part 5 Division 1 18 (6) (b) (i)

We have FX hedging experts on staff with years of experience helping businesses manage their FX risks. For dealers wanting to upgrade their credentials beyond the DFOL, but the CFA program is not a viable option, we encourage them to attain the CSI Certificate in Derivatives Market Strategies. The company pays for this program. We believe this program is a much better fit for our risk management oriented dealers than the investment industry CIM. Hedging and risk management are similar to the investment industry in some respects but it is really a very different vocation. Our dealers are trained to help business clients reduce market risk through prudent hedging strategies. That requires a different knowledge set and expertise than investment management. Many of our dealers are well on their way to attaining the Certificate in Derivatives Market Strategies. It should be recognized for purposes of qualifying as a derivatives adviser along with the CIM.

Sincerely,

ENCOREFX INC.
Paul Lennox, CFA
President

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September 17, 2018

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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

Me Anne-Marie Beaudoin
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Grace Knakowski
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comments@osc.on.gov.ca

Dear Sirs/Madams:

Re: Comments on Proposed National Instrument 93-101 *Derivatives: Business Conduct* and Proposed Companion Policy / Proposed National Instrument 93-102 *Derivatives: Registration* and Proposed Companion Policy

The International Energy Credit Association **(IECA)** hereby submits the comments contained in this letter on behalf of its members in response to the solicitation for comments made by the Canadian Securities Administrators ("**CSA**") in respect of the following published documents:

Proposed National Instrument 93-101 *Derivatives: Business Conduct* **(Proposed Business Conduct Rule)**; and

Proposed Companion Policy 93-101 Proposed CP *Derivatives: Business Conduct* **(Proposed Business Conduct CP)**

(collectively, Proposed Business Conduct Instrument).

Proposed National Instrument 93-102 *Derivatives: Registration* **(Proposed Registration Rule)**; and

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Proposed Companion Policy 93-102 *Derivatives: Registration* **(Proposed Registration CP)**.

(collectively, Proposed Registration Instrument).

INTRODUCTION

The IECA is not a lobbying group. Rather, the IECA is an association of several hundred energy company credit management, contract administration and legal professionals grappling with credit-related issues in the energy industry.

The IECA seeks to protect the rights and advance the interests of the commercial energy end-user community that makes up its membership. The IECA membership includes many small to large energy companies, few of whom are likely to be deemed derivatives dealers in Canada, but all of whom have a fundamental mission of providing safe, reliable, and reasonably priced energy commodities that Canadian businesses and consumers require for our economy and our livelihood.

Correspondence with respect to this comment letter and questions should be directed to the following individuals:

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Immediate Past President
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james.hawkins@cenovus.com

Priscilla Bunke
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priscilla.bunke@petrochina-ca.com

COMMENTS OF THE IECA

On April 18, 2013 the CSA published the CSA Consultation Paper 91-407 *Derivatives: Registration* which provided an overview of the CSA's proposal for the regulation of key derivatives market participants through the implementation of a registration regime and a compliance system/internal business conduct regime. The CSA has since decided to split the regulation in this space into two separate regulations: one national instrument for business conduct and one national instrument for registration.

On April 4, 2017, the CSA published the Proposed Business Conduct Instrument for comment. On June 14, 2018, the CSA republished the Proposed Instrument for a second request for comment. Also on April 19, 2018 the CSA published the Proposed Registration Instrument for comment. The IECA strongly believes that the Proposed Business Conduct Instrument and the Proposed Registration Instrument should continue to be moved forward in unison. The IECA is grateful for the opportunity to submit supplementary comments on the Proposed Business Conduct Instrument during the comment period for the Proposed Registration Instrument.

The IECA would like to express its general support of the Comment Letter from Eversheds Sutherland (US) LLP, on behalf of The Canadian Commercial Energy Working Group, to the Canadian Securities Administrators dated August 2, 2018 **(CCE Letter)**.

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GENERAL COMMENTS

The IECA believes that its members are mostly commercial hedgers or commercial hedging end-users and traders of derivatives (both exchange-traded and OTC) primarily for the purposes of hedging commercial risks and asset optimization. These hedging activities foster the development and continued operations of energy infrastructure, the production of energy, the marketing of Canadian natural resources to domestic and international markets and the insulation of customers from price volatility in energy markets. Though the IECA believes that few of its members are likely to be "derivatives dealers" or "derivatives advisers" as defined in the Proposed Registration Instrument, the IECA is offering the following comments in the event the CSA finalizes the Proposed Registration Instrument in its current form into a final national instrument in which those terms are construed too broadly, so as to apply to members of the IECA. The IECA respectfully submits that such a broad construction of the proposals in the Proposed Registration Instrument would have a materially adverse impact on Canadian energy commodity trading and Canadian energy derivatives markets.

The IECA notes that the CSA stated in its notice and request for comment that "the implementation of the Proposed Instrument is therefore subject to the Quebec National Assembly's decision to revoke this exemption" in the Quebec Derivatives Act **(QDA)** for accredited counterparties when they are trading with each other. Therefore, the IECA hereby respectfully asks of the Autorité des marchés financiers **(AMF)** Quebec whether the AMF has started or intends to start the legislative process in the Quebec National Assembly to revoke the registration exemption in the QDA for trades between accredited counterparties.

AFFILIATED ENTITY

Different definitions across different but related rules of the definition of "affiliated entity" would put Canadian companies at a material disadvantage relative to non- Canadian companies, especially U.S. companies who are often the counterparties in the energy space to Canadian energy companies and lend a lot of liquidity to the Canadian derivatives market. One of the key tenets of effective regulation of a market by regulators, the IECA recommends, would be harmonization of a definition such as "affiliated entity" in every national instrument, so market participants do not face an undue burden and hardship that would require an internal corporate restructuring of their organizations to be compliant and to enjoy certain exemptions that the Canadian rules offer affiliated entities.

From a review of the CSA published national and multilateral instruments so far under the mandate to reform the Canadian OTC derivatives market, there is only in one instance connecting affiliated entities by consolidated financial statements in the *National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives* under the Intragroup exemption. Sub-section 7(1) of NI 94-101 provides that "*a local counterparty is exempt from the application of section 3, with respect to a mandatory clearable derivative, if all of the following apply: (a) the mandatory clearable derivative is between a counterparty and an affiliated entity of the counterparty* ***if each of the counterparty and the affiliated entity are consolidated as part of the same audited consolidated financial statements*** *prepared in accordance with "accounting*

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principles" as defined in National Instrument 52- 107 Acceptable Accounting Principles and Auditing Standards". It is IECA's recollection, based on discussions surrounding the proposal of NI 94-101, that the rationale had little, if anything, to do with defining affiliated entities. Rather, it was a result of a discussion of what the availability of the intragroup exemption in NI 94-101 should be. From the proposed NI 94-101 to the final version that is in effect today, the CSA decided to remove this restriction of making consolidated financial statements necessary for prudentially supervised entities as well.

Therefore, the IECA respectfully submits that the control-based definition in the Proposed Registration Instrument, which the CSA has used in all other related rules and national instruments, should be the definition of an affiliated entity. The IECA recommends against adopting the proposed definition in Annex II and believes that using different definitions across different rules would materially disadvantage and cause confusion and additional regulatory burden on Canadian companies.

ELIGIBLE DERIVATIVES PARTY

The IECA supports the comments made in the CCE Letter on the broadening of the definition of eligible derivatives party **(EDP)** so it is consistent with existing derivatives regulations and has no additional comment. Regarding the specific question asked by the CSA whether the criteria paragraphs (m), (n) and (o) in the definition of EDP, the IECA submits that the comments in the CCE Letter address this question and it has no additional comment.

COMMERCIAL HEDGER

The Proposed Registration Rule defines a commercial hedger to mean:

> a person or company that carries on a business and that transacts a derivative that is intended to hedge risks relating to that business if those risks arise from potential changes in value of one or more of the following:
>
> (a) an asset that the person or company owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising;
> (b) a liability that the person or company incurs or anticipates incurring;
> (c) a service which the person or company provides, purchases, or anticipates providing or purchasing.

The IECA appreciates the CSA clearly enumerating the items in the definition which provides some clarity on whether a derivative qualifies as a hedging transaction. However, it is unclear from the definition whether a derivative that mitigates a change in foreign exchange rates would qualify as a hedging transaction. The Proposed Registration CP explains that the "concept of 'commercial hedger' is meant to apply to a business entering into a transaction for the purpose of managing risks inherent in its business." The IECA believes that the CSA intends fluctuating foreign exchange rates to be an inherent risk in a business that is involved in international commercial transactions, such as the Canadian energy industry, where a company's working currency, the currency of index prices referenced in its transactions and currency of settlement may not be the same currency. For absolute clarity on this very common scenario, the IECA seeks a clear statement that derivatives that hedge this currency risk which clearly is not intended for speculative purposes

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would be a commercial hedging transaction. Furthermore, as a general statement, the IECA seeks more specific guidance on what transactions constitute a qualifying hedge, similar to what was provided by the Commodity Futures Trading Commission **(CFTC)** in the United States and the European Market Infrastructure Regulation **(EMIR)** by the European Union

Furthermore, the IECA specifically notes its supports of the CCE Letter regarding the importance of reducing the currently proposed $10 million net asset commercial hedger threshold. The membership of the IECA, we believe, are mostly commercial hedgers or commercial hedging end-users and traders of derivatives (both exchange-traded and OTC) primarily for the purposes of hedging commercial risks and asset optimization. Moving from the current regime under the provincial blanket orders having no asset threshold to one that sets a high threshold calculated on the inappropriate measure of shareholder equity will result in smaller companies being denied a tool to manage their risks, which ironically could lead to instability in the Canadian energy industry.

DERIVATIVES ADVISER

The definition of "derivatives adviser" is identical in both the Proposed Business Conduct Rule and the Proposed Registration Rule:

> "derivatives adviser" means
> (a) a person or company engaging in or holding himself, herself or itself 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;

The wording and guidance with respect to "advisers" is similar to National Instrument 31-103.

The Proposed Business Conduct CP and the Proposed Registration CP state that when making the determination of whether or not an entity is a "derivatives adviser", it should consider its activities holistically and without any particular weight to any one factor. Given the broad nature of the factors, many Canadian energy companies will find themselves captured by the derivatives adviser definition.

Accordingly a clear exemption from the requirement to register as a derivatives adviser is extremely important to energy market participants. The consequences of being deemed a derivatives adviser are significant and energy market participants therefore require certainty that their activities do not inadvertently move them out of the "end user" category into the "derivatives adviser" category. Any additional guidance the CSA could provide on the weighting of specific business triggers for energy market participants, and providing for a long transitional period in the Canadian rules from being an exempted end user to a derivatives adviser, would be essential. Many energy market participants do not have an abundance of resources (both information technology and people) at their disposal, as compared to their derivative dealer counterparts, which may strain their ability to handle know-your-client requirements, counterparty conflict of interest management, or disclosure obligations. In addition, energy market participants may not have the appropriate compliance management staff or individual representatives that have completed the extensive individual training requirements. Therefore,

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if a former end user energy market participant were to transition to the "derivatives adviser" category, it would take a significant amount of time and cost to get the proper processes, software and resources in place.

The proposed rules provide for some exemptions including providing non-tailored general advice, advising affiliates and providing relief for foreign advisers that are registered or authorized under their foreign derivatives legislation. Given the variety of transactions and business structures utilized by energy market participants (including asset management agreements that may include the use of derivatives and the complexity of hedging the risks of joint ventures), it will be difficult to know how the various securities commissions will "holistically" assess their many different activities and transactions. Any advice given by one energy participant to another with respect to a transaction would most likely need to be tailored and may be regularly facilitated based on the relationship between the parties. Further, an entity may want to assist a joint venture entity within its corporate structure with hedging but most likely that joint venture entity will not fall under the definition of "affiliate".

For the above reasons and given that energy market participants transact with other sophisticated energy market participants that are capable of assessing their own use of derivatives, it would be helpful to the energy industry to have an exception similar to the accredited counterparty exemption in Quebec. The statutory exemption under Section 7 of the Quebec Derivatives Act, Chapter I-14.01, for advisers who assist accredited counterparties would be preferred by energy market participants. The Derivatives Act exempts the offering of OTC derivatives from the qualification and authorization requirements (and also from the derivatives dealer registration requirement) where the activities are conducted exclusively with accredited counterparties by an accredited counterparty.

Any foreign derivative advisers (or advisers out of Quebec), including US energy companies will have a competitive advantage over Alberta and other Canadian energy companies that engage in similar activities if the requirements of the other jurisdictions are less stringent. The U.S. swap regulations exempt from CFTC regulatory oversight, within certain parameters, a category of advisors – "commodity trading advisors" – who provide tailored advice to their energy clients but do not have the authority to trade on their client's behalf. Canadian energy market participants would benefit from a similar exemption for providing "guiding" advice without the authority to transact. Again, in the energy industry the participants are sophisticated and do not require all the protections found under the various provincial securities regulations when advising with respect to derivatives with their energy counterparts. Without clear exemptions, many Canadian energy companies may be deemed to be "derivatives advisers" and will incur a substantial compliance burden for essentially the same type of trading activity and services that are conducted across the border in the U.S. or be forced to restructure their business to remain exempt in Canada.

BUSINESS TRIGGERS

The definition of "derivatives dealer" in the Proposed Registration Rule and the Proposed Conduct Rule is anchored to the activity of "engaging in the business of trading in derivatives" and "trading in derivatives for a business purpose". Clarity in the scope of what constitutes these activities is

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of fundamental importance since only parties that engage in those activities will be deemed to be derivatives dealers and therefore subject to the registration and business conduct requirements set forth in the Proposed Instruments.

Inconsistencies in exemptions concerning business purpose factors – "quoting prices". Section 37 of the Proposed Business Conduct Instrument and Sections 48 & 49 of the Proposed Registration Instrument provide exemptions from each Proposed Instrument for certain derivatives end-users, i.e. entities that are not in the business of trading in derivatives. The heading to Section 48 of the Proposed Registration Instrument suggests that Section 48 is intended to only apply to derivatives end-users in British Columbia, Manitoba and New Brunswick. Although not stated in the heading to Section 49 of the Proposed Registration Instrument, it appears that Section 49 is intended to apply in the rest of Canada except for British Columbia, Manitoba and New Brunswick. Also, it appears that Section 37 of the Proposed Business Conduct Instrument is intended to apply in all of Canada without exception. The IECA asks that the CSA please confirm if these inferences are correct?

Each Section noted above describes conduct that would qualify a party for exemptions to the registration and business conduct requirements of the Proposed Instruments. The exemption described in Section 48(c) of the Proposed Registration Instrument differs slightly from the exemptions described in Section 49(2)(c) of the Proposed Registration Instrument and Section 37(1)(c) of the Proposed Business Conduct Instrument. Section 48(c) of the Proposed Registration Instrument reads as follows:

> (c) the person or company does not regularly quote prices at which they would be willing to transact a derivative or otherwise make or offer to make a market in a derivative;" [emphasis added]

Section 49(2)(c) of the Proposed Registration Instrument and Section 37(1)(c) of the Proposed Business Conduct Instrument both read as follows:

> (c) the person or company does not regularly make or offer to make a market in a derivative with a derivatives party;

The concept of "quoting prices" has been removed from Section 49(2)(c) of the Proposed Registration Instrument and Section 37(1)(c) of the Proposed Business Conduct Instrument though it remains in Section 48(c) of the Proposed Registration Instrument. Whether or not this difference was intentional, the IECA respectfully suggests that the language in these Sections should be made consistent by removing the "quoting prices" concept from Section 48(c) of the Proposed Registration Instrument. The IECA believes that a consistent description of this end-user exemption across the Proposed Instruments will facilitate consistent interpretation and application of the Proposed Instruments across Canada.

Less ambiguous and more objective guidance generally. In IECA's September 1, 2017 letter to the April 4, 2017 version of the Proposed Business Conduct Instrument, the IECA, at page 11, urged the CSA to provide a clear, unambiguous definition of derivatives dealer. We expressed concern that the guidance on the business purpose factors was so ambiguous that it allowed for reasonable, but potentially conflicting, interpretations between a market participant and the CSA

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on whether an entity was a derivatives dealer, given the "holistic analysis" approach advocated by the CSA.

The IECA appreciates the clarifications made in the current version of the Proposed Business Conduct Instrument concerning the "quoting prices" concept; however, we believe that further clarifications should be made to the business purpose factors guidance, in both Proposed Instruments, to make that guidance more objective and less ambiguous.

Other factors that the CSA may consider. In both Proposed CPs the CSA states that, with respect to the business purpose factors, it considers the listed factors important, but that the list is not complete and that "other factors may also be considered". The IECA asks that the CSA please explain, or provide examples of, what "other factors" the CSA may consider.

Holistic analysis and weighting of factors. In both Proposed CPs the CSA states:

> In determining whether or not it is, for the purposes of this Instrument, a derivatives dealer, a 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.

With respect to the quoted statement, the IECA requests that the CSA provide guidance concerning how it might rank the factors in terms of importance as part of a holistic analysis? Also, if meeting any one factor may not be determinative, what threshold of factors being met would be considered determinative?

Proprietary trading vs. dealing. Within the guidance in both Proposed CPs concerning several of the business purpose factors, the CSA appears to draw a distinction between acting as a derivatives dealer and engaging in derivatives transactions for a party's own risk management needs or to speculate in the market (i.e. "proprietary trading"). This distinction appears in the CSA's commentary addressing the "Acting as a market maker", "Transacting with the intention of being compensated", and "Directly or indirectly soliciting in relation to transactions" factors. In addition, the CSA makes the following statement (in the context of a person or company engaging in the discussed factors in an organized and repetitive manner):

> Similarly, organized and repetitive proprietary trading, in and of itself, absent other factors described above, may not result in a person or company being considered to be a derivative dealer for the purposes of the Instrument.

The IECA supports drawing a distinction between proprietary trading and activities that would deem a party to be a derivatives dealer. The IECA notes that a similar distinction between proprietary trading and swap dealing is made by the CFTC under its swap dealer definition. A clear distinction between derivatives dealing activity and proprietary trading activity should be made in Canada and we urge the CSA to further develop and define this distinction. For example, the CSA should provide a definition of "proprietary trading" within the Proposed Instruments themselves, rather than simply allude to this concept in the Proposed CPs.

With a clear definition of proprietary trading embedded in the Proposed Instruments, the next step would be to include proprietary trading as an express exemption within the current end-user

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exemptions in the Proposed Instruments. In other words, if a party engages only in proprietary trading, which is distinct from the trading derivatives for a business purpose factors, such party would not be deemed to be a derivatives dealer.

In the IECA's view, the CSA has already identified, in the Proposed CPs, activities that would comprise the basis for a definition of proprietary trading, for example, organized and repetitive trading by a party: (i) for purposes of accommodating its own risk management needs, including to hedge specific risks (i.e. a party acting as a "commercial hedger", which is already defined in the Proposed Instruments); and (ii) to speculate in changes in the market value of a derivative, including with the goal of realizing a profit from such changes. The IECA respectfully urges the CSA to turn the commentary about these activities into a clear, concise and substantive definition of proprietary trading within the Proposed Instruments.

Directly or indirectly carrying on the activity with repetition, regularity or continuity. The CSA states in both Proposed CPs that:

> Frequent or regular transactions are a common indicator that a person or company may be engaged in trading or advising for a business purpose. The activity does not have to be its sole or even primary endeavor for it to be in the business. We consider regularly trading or advising in any way that produces, or is intended to produce, profits to be for a business purpose.

The IECA respectfully submits that this business purpose factor should either be deleted entirely from the guidance because the language above is so ambiguous and subjective as to be essentially incomprehensible or be modified to make clear that the activity is "market making activity". Otherwise, how should a party interpret "frequent or regular transactions", or "regularly trading or advising"? By what measures would the CSA determine frequency or regularity?

In addition, we believe that this particular guidance and factor is superfluous to, and potentially conflicts with, other guidance the CSA has provided with respect to the business purpose factors. The "frequent and regular transactions" concept is already adequately addressed within the guidance concerning being a "market maker" and "routinely standing ready" to transact a derivative in response to requests for quotes. It is conflicting because the "frequent and regular transactions" concept is directly at odds with the proprietary trading guidance, discussed above, which correctly recognized that parties could be trading in an organized and repetitive manner, for purposes of making profits, and yet not be deemed to be a derivatives dealer.

Consistency across all Canadian rules. There are a multitude of regulations, and more expected in the future, affecting derivative market participants who are derivatives dealers. The IECA requests that the CSA scopes the business triggers for the definition of derivatives dealer the same across all Canadian rules, current and future. Otherwise, compliance with the variously scoped rules will create administrative burdens and the inconsistency could make market participants vulnerable to inadvertent non-compliance. Respectfully, the IECA cannot see any basis for varying business triggers across the Canadian rules and views any inconsistency as raising needless complexity and risk.

CALCULATION OF NOTIONAL AMOUNT

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In response to the CSA's request to provide comment on the methodologies for determining notional amount, the IECA provides the following comments:

Commodity Options and similar products: Whether column 1 or column 2 is ultimately adopted by the CSA, the notional amount should be calculated using the delta-adjusted forward price, not the spot price. Use of the spot price is not appropriate when valuing deals with a maturity date that is not spot. In the CDE Guidance, Section 2.71 Delta was added into the final technical guidance in response to industry comments stating that the notional amount for options should be adjusted by the delta to reflect the probability of options being exercised. The delta adjusted notional amount reflects the volume of the option that is hedged by a party with a swap and is a more accurate representation of a party's position. ESMA has adopted delta for calculation of the notional amount for purposes of position limits under MIFID II. For example, a gas producer interested in locking in the price of future production may hedge price exposure by selling a swap at a fixed price of $3.00/MMBtu for a volume of 75,000 MMBtu. Alternatively, the producer may sell an option to hedge a comparable level of exposure by selling a call with a strike of $3.50/MMBtu for a volume of 300,000 MMBtu. The delta of the option is .25, resulting in an option delta position (300,000*.25=75,000) equal to the swap volume.

Commodity Forwards and similar products: Physically settled commodity forwards should be excluded from the de minimis notional amount calculation as such products are excluded under the product determinations.

Commodity fixed/float swaps and similar products: Neither methodology is an appropriate measure and, instead, the calculation of the notional amount of a commodity fixed/float swap and similar products should be identical to that for commodity basis swaps, namely, using the spread between the fixed price and the floating price. A calculation based on the fixed price leg of the fixed/float swap does not, it is respectfully submitted, lead to an appropriately calibrated systemic-risked based notional amount.

Commodity Basis Swaps and similar products: Whether column 1 or column 2 is ultimately adopted by the CSA, the price for basis swaps such as locational basis swaps and index swaps such as a gas index spreads should be the spread between the two floating prices specified in the contract, which is viewed as the price of the swap by market participants and is how these swaps are quoted and transacted in the energy commodity markets. Section 2.50 Price of the CDE Guidance recognizes that "[c]ommodity basis swaps and the floating leg of commodity fixed/float swaps, as it is understood in the information included in the data element spread may be interpreted as the price of the transaction".

Under a basis swap, a party's exposure under a basis swap is the spread – the difference in the movement of two prices with respect to one another and not outright price movements on one of the legs. Spread is approved for use by the CFTC in locational basis trades for purposes of the swap dealer de minimis calculation in its FAQ about Swap Entities from October 2012. For entities that engage in de minimis levels of swap dealing in both the U.S. and Canada, a consistent calculation under both regulatory regimes would provide certainty to such entities and reduce compliance burdens of performing two different calculations for the same types of activity.

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Under a gas index spread, one party exchanges the variability of one index for another. For example, in the natural gas markets, one counterparty might pay First of the Month Index price and receive Gas Daily price in exchange. Often, the notional amount of an index spread swap is small given the similarity in the market price of both indices in the forward months. The "fair market value", or "price", is the spread or difference between the two indices.

Commodity swaptions and similar products: Whether column 1 or column 2 is ultimately adopted by the CSA, the use of the delta-adjusted spot price should be used to calculate the notional amount for the reasons stated above under "Commodity options and similar products". It is incorrect to presume that an option is always exercised. If the swaption is exercised into a swap, the notional amount should then be adjusted to reflect the notional amount of the underlying swap transaction (e.g., fixed price*quantity for a fixed vs float swap).

Variable Price/Volume: Under either methodology 1 or 2, for transactions that have varying prices and/or varying volumes, the IECA suggests a weighted average calculation of the price or volume for purposes of the notional amount. The same approach should be taken for a derivative with a notional amount schedule. In addition, the determination of the total notional quantity (under methodology 1) or the monthly approximation (under methodology 2) should be based on the notional quantity that remains to be settled under the swap and not the notional quantity of the entire swap.

Preference for Regulatory Notional Amount Methodology: The Regulatory Notional Methodology, rather than the CDE Guidance Methodology, is a more appropriate approach because it excludes the duration of a swap from the calculation and uses a monthly approximation even with a threshold below $1 billion. The registration trigger is based on an entity being in the business of trading derivatives. If Dealer 1 trades one 30 year swap with 360 monthly calculation periods, Dealer 1 should not have the same notional amount for purposes of dealer registration as Dealer 2 that trades 360 separate monthly swaps. Dealer 2 has 360 times as much dealing activity as Dealer 1. Under the CDE Guidance Methodology, however, Dealer 1 and 2 would have the same notional amount calculation, which is an extremely unfair result for dealers that tend to trade longer dated deals. The right result is found if the Regulatory Notional Methodology is used where only a 1 month volume for Dealer 1's swap is used. If the duration of the derivative is less than 1 month, the total notional quantity would be the appropriate measure of the volume.

Multi-Leg Derivatives: In respect of call spread options, where there are 2 legs to a derivative and the legs are of "like" derivatives with the same volume such as a Buy of a Call Option at $3.25 and a Sell of a Call Option at $3.50 with a notional quantity of 10,000 MMBTU's, the notional amount calculation should be based on 10,000 MMBTU's and not 20,000. In respect of a three-way option collar, the notional amount of one of the "like" options should be added to the "non-like" option notional amount. For example, if a party is the buyer of call, buyer of put and seller of a put, the call option plus one of the put options volume should be added together as only two of the three options would ever be able to be exercised. In respect of a multi-leg derivative consisting of an option and a swap, the notional amount for each derivative type should be determined and then added together.

DE MINIMUS THRESHOLD

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The IECA seeks clarity with respect to the consideration of affiliates in the calculation of the de minimis threshold, specifically Section 51(3)(c) of the Proposed Registration Rule. Within an affiliated group of entities, only those entities that engage in dealing activities should be considered derivatives dealers for the purpose of calculation of the de minimis threshold. While a single affiliate group may have multiple derivatives dealers comprising the group, it should be recognized that an affiliate in that group may not be a derivatives dealer and, as such, that non-derivatives dealer affiliate should not be precluded from benefitting from the exemption just because a member of its group is a derivatives dealer.

Concerning the amount of the commodity de minimis exemption, market price is a component of the notional amount calculation for commodity swaps. As commodity prices rise, so too then will the notional amount calculation. Given the fluctuating nature of commodity prices, there should be a mechanism in the rule to allow the regulators to adjust the de minimis threshold based on a significant change in commodity prices for the major commodities such as gas, power and oil.

The IECA believes that derivatives that hedge or mitigate commercial risk, whether physical or financial, should be excluded from the notional amount calculations. Firstly, the rationale for derivatives dealer oversight does not apply to transactions used to hedge or mitigate commercial risk. The purpose of hedging or mitigating commercial risk is fundamentally different from the purpose of being in the business of trading derivatives or advising others on derivatives, holding itself out as being in the business or trading or advising, or engaging otherwise as specified in Section 6 of the Proposed Registration Rule. Secondly, excluding derivatives that hedge or mitigate commercial risk would align the Canadian rules with the approach taken by the CFTC and by EMIR. The IECA desires that the Canadian rules make it absolutely clear that the derivatives to be included in the calculation of the aggregate month-end gross notional amount are only those derivatives that a derivatives dealer enters into in connection with its business of trading derivatives.

PORTFOLIO RECONCILIATION REQUIREMENTS

Section 44(1) of the Proposed Registration Rule requires a registered derivatives firm to conduct a portfolio reconciliation at least once a year. This raises some questions of practical application. What if a counterparty refuses to engage in the reconciliation exercise? Is the derivatives firm then prohibited from transacting with that counterparty? The CFTC and EMIR have handled these issues by allowing swap dealers to have written policies and procedures in place that are reasonably designed to perform such reconciliation but if a counterparty does not want to engage in the portfolio reconciliation, the swap dealer is not in violation of the portfolio reconciliation requirements. The IECA seeks the CSA to provide similar relief to entities under the Canadian rules.

DISPUTE RESOLUTION

Section 42(1) of the Proposed Registration Rule requires a registered derivatives firm to enter into a written agreement with each derivatives party that establishes when a material terms or valuations discrepancy is considered a dispute and a process for resolving the dispute as soon as

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possible. Under Section 42(3), the registered derivatives firm must report an unresolved dispute to its board of directors and if the dispute is not resolved within 30 days of reporting to the board, the registered derivatives firm must notify the regulators. The IECA proposes that such a reporting requirement should be required only where one of the parties is a "Canadian counterparty".

Furthermore, the IECA proposes that registered derivatives firm should be able to report to the board of directors or an appropriate management committee authorized by the board or appropriate management committee and to the regulators only if the size of the dispute exceeds a material threshold, such as $10,000,000, similar to the requirements imposed by the CFTC in its external business conduct rules for disputes.

PROFICIENCY REQUIREMENTS FOR COMPLIANCE POSITIONS

The IECA understands the rationale and motivation for proposing proficiency requirements for Derivatives Chief Compliance Officers **(CCOs)** and Derivatives Chief Risk Officers **(CROs)**. However, considering that these proficiency requirements have not fully been established in Canada because of the newness in regulating the OTC derivatives market in Canada, it might be very difficult to have many candidates for these important roles to fit the proficiency requirements as provided in the Proposed Registration Instrument. Consequently, the IECA supports the suggestion in the CCE Letter that the CSA create an alternative path of qualification for the CCOs and the CROs if they do not meet all the requirements in the Proposed Registration Instruments.

REGISTRATION TIMING AND DEREGISTRATION

The IECA proposes that the CSA clearly specify the deadline by which entities must register once the registration threshold is met. Under its swap dealer rules, the CFTC has imposed a registration deadline of two months after the day an entity can no longer take advantage of the de minimis exception. The IECA believes that a two-month period is reasonable. The IECA further proposes a tolerance that provides relief from registration in limited circumstances in recognition of the dynamic reality of commercial business. Specifically, an entity should be relieved from having to register in the case it exceeds the registration threshold by no more than 20% in one quarter if, in and during the entirety of the next quarter, the entity remained under the threshold, similar to the CFTC Major Swap Participant rule in the United States. The IECA believes that the risk of non-registration in such circumstance is far overwhelmed by the administrative burden incurred by entities having to scramble to register while registration also becoming unnecessary in the next quarter. Registration in that context, therefore, serves no substantive regulatory function or purpose. Furthermore, once a derivatives dealer is registered pursuant to the rules, the IECA proposes that such entity should be able to withdraw its registration anytime during the one year window after the day an entity should be able to take advantage of registration exemption, provided that during the entirety of that window period and on the date of effective withdrawal the entity was, in fact, exempted from registration pursuant to the Canadian rules.

EXEMPTION UNDER PROPOSED REGISTRATION RULE FOR FOREIGN DERIVATIVES DEALERS

Section 54 of the Proposed Registration Rule provides exemptions for foreign derivatives dealers. The IECA appreciates recognition by the CSA of foreign rules similar to the Canadian rules that

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achieve the same regulatory purpose and result but believes that substituted compliance could be extended further without increasing risk. Specifically, the registration requirement should not be required of US entities that are not required to be registered as a swap dealer under the CFTC de minimis threshold rule.

EXEMPTION UNDER PROPOSED BUSINESS CONDUCT RULE

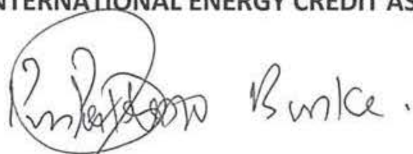
The Proposed Business Conduct Rule applies to all derivative dealers, subject to certain enumerated exemptions. Those exemptions do not include derivative dealers who are not required to be registered under the Proposed Registration Rule; however, the IECA submits that such registration-exempt derivative dealers should be exempted from the business conduct rules for reasons of efficiency, flexibility and simplicity of regulatory oversight, which would harmonize the Canadian rules with the U.S. in this regard. The same considerations made by the CSA in granting the various exemptions from the registration rule including the notional amount threshold for registration should also apply in assessing whether there are real incremental benefits to be gained, and of a magnitude that exceeds the regulatory burdens, in requiring registration-exempt derivative dealers to comply with the business conduct rules. Striking that balance of appropriate regulatory oversight, that is, having sufficient protective measures while managing flexibility to encourage commercial participation, with respect to registration requirements but not to business conduct requirements would produce an inefficient regulatory framework overall.

CONCLUSION

The IECA appreciates the opportunity to table our members' comments and concerns to the CSA. This letter represents a submission of the IECA, and does not necessarily represent the opinion of any particular member.

Yours truly,

INTERNATIONAL ENERGY CREDIT ASSOCIATION



Priscilla Bunke

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WU BUSINESS SOLUTIONS

September 17, 2018

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

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, rue du Square-Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal (Québec) H4Z 1G3

Grace Knakowski
Secretary
Ontario Securities Commission
20 Queen Street West, 22nd Floor
Toronto, Ontario M5H 3S8

Dear Sirs / Mesdames:

Re: CSA Notices and Requests for Comment ("CSA Notices") on Proposed National Instrument 93-101 Derivatives: Business Conduct (the "Business Conduct Rule" or "93-101") and Proposed National Instrument 93-102 Derivatives: Registration (the "Registration Rule" or "93-102") and the related Companion Policies ("93-101CP" and "93-102CP")

Custom House ULC operating as Western Union Business Solutions ("**Western Union**") appreciates the opportunity to comment on the Business Conduct Rule, the Registration Rule and the related Companion Policies. Capitalized terms used in this letter and not defined herein will have the same meaning as in the CSA Notices.

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General Comments

1. Uniform approach across Canada

Western Union is supportive of the CSA's attempts to ensure that a uniform approach to derivatives market conduct regulation is achieved in Canada. Adopting a regime that is applied and interpreted consistently across the country for financial institutions, provincial credit unions and other market participants is welcomed and we believe it will assist in ensuring an even, competitive playing field for all market participants, inclusive of the FX asset class.

However, the risks of over-regulation are significant and could create undue costs and risks for both derivatives firms and corporate end-users of hedging products. We highlight below a number of proposed provisions in the rules considered unduly burdensome which we feel have little or no practical benefit to counterparties, thereby increasing the threshold costs involved in servicing customer needs, ultimately resulting in a decrease in liquidity and an obstacle to efficient pricing.

2. Broadening the category of hedger eligible derivatives party

We previously requested that the CSA consider broadening the definition of "eligible derivatives party" ("EDPs") to include a hedging exemption similar to the "hedger" category under the "accredited counterparty" definition in the Quebec Derivatives Act and the hedger exemption included as a class of "qualified party" in the various provincial OTC derivatives blanket orders that are currently in force. As highlighted in past CSA Notices, derivatives are different than securities and the risks associated with such products are also different.

In our experience, when commercial enterprises enter into FX derivatives to hedge FX risk, they do so based on detailed knowledge of their business needs and expectations, and related currency exposures. As such, corporate practitioners are using FX hedging products as a risk management tool and not for speculative purposes. This type of hedging activity is a large component of all OTC FX derivatives trading, and complements corporate users' spot market activity for commercial payments and risk management. As these hedges are related to underlying foreign currency assets and liabilities, they do not introduce systemic risk and other regulatory concerns associated with speculative derivatives trading. Given the volume of FX hedging conducted in Canada's economy, the demonstrated sophistication of FX hedgers and the need to have FX derivatives serve as a practical adjunct to spot market trading, this specific sophisticated use of FX derivatives in a commercial context is best served by permitting commercial hedgers the widest range of potential hedging counterparties by eliminating unnecessary regulatory barriers.

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To the extent the CSA considers that additional customer protections need to be layered on when dealing with smaller hedgers, we suggest that the asset threshold required for a hedger to qualify as an EDP should roughly align with the analogous US "eligible contract participant" (ECP) hedger category established under the Commodities Exchange Act. Under the US provisions, a corporation or other entity that has a net worth in excess of US$1,000,000 is permitted to enter into swaps, including foreign exchange options, for the purpose of hedging commercial risk.[1] We believe that setting a threshold more in alignment with the US ECP test for commercial hedgers would be most appropriate. Alternatively, we believe *total* assets of C$10 million would be a more reasonable threshold for commercial hedgers than the current proposal of C$10 million of *net* assets.

3. Implementation Timeline

We appreciate the inclusion of a one year implementation period in Section 45(1) of the Business Conduct Rule. Upon further review of the regulatory, operational, logistics and training requirements required to properly implement the Business Conduct Rule in an orderly manner, we consider that the minimum implementation period should be 24 months. A lengthy implementation period is needed to ensure compliance with the new rules, including time for amending existing policies and procedures, implementing operational measures to ensure requirements are reflected in the trading process (including potential IT operational build-out), training staff on new policies and procedures, amending existing documentation, collecting any new executed customer documentation and developing new reporting requirements.

A full 24 month implementation period is also requested in respect of the Registration Rule given the staffing, hiring and training decisions that will need to be made once a business model is finalized, given the operational and systems measures which will need to be taken to implement the requirements and put appropriate controls in place, and given the need to produce policies and procedures and complete the registration process.

[1] See 7 U.S. Code Sect 1a(18)(A)(v)(iii). The US ECP test applies only to options, as the U.S. Treasury has excluded FX forwards from application of the provision and entities may enter into FX forwards without meeting any asset qualification. See, https://www.treasury.gov/press-center/press-releases/Pages/tg1773.aspx.

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Business Conduct Rule Comments

4. Description of the Scope of the Business Conduct Rule Fair Dealing Requirement in the Companion Policy – Suitability and "Fair Pricing" Obligations

We recognize the policy rationale for including a fair dealing obligation in the Business Conduct Rule that is aligned with the obligation imposed on registered securities dealers "to deal fairly, honestly and in good faith with its clients".

However, it is important not to expand this obligation to include suitability obligations that are properly addressed under Business Conduct Rule section 11. Moreover, it is not appropriate to add general fair pricing obligations which are inconsistent with securities laws, market practice and customs, free market policies and the nature of typical negotiated derivatives transactions between a buyer and seller where both parties are dealing at arm's-length having confirmed their ability to represent their own best interests.

Fair Dealing and Suitability: In respect of suitability, the fair dealing section of the Business Conduct Rule Companion Policy (93-101CP s. 8) states that:

> "…deliberately selling a derivative that is not suitable for a derivatives party, would not be considered to be "fair" and, in our view, would be a breach of the fair dealing obligation."

We believe that consideration of suitability is more properly addressed under Section 12 (Suitability). Our understanding is that dealers should not be expected to conduct suitability analysis in respect of EDP counterparties, but this Companion Policy statement could improperly require dealers to consider suitability when dealing with EDPs which would be a new, inappropriate and burdensome obligation.

Fair Dealing and Pricing Obligations: The draft Business Conduct Rule Companion Policy (93-101CP s. 8) suggest that dealers would be constrained in determining the pricing that may be quoted to particular counterparties, and that a specific fair and "rational" basis for pricing each transaction must be established. These statements include the following:

> "As part of the policies and procedures required under section 30, a derivatives firm is expected to be able to demonstrate that it has established and follows policies and procedures that are reasonably designed to achieve fair terms, in the context, for the derivatives firm's derivatives parties…"

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> "We interpret the fair dealing obligation to include determining prices for derivatives transacted with derivatives parties in a fair and equitable manner."

Our view is that there should be no fair dealing pricing obligation for dealers negotiating pricing terms with a counterparty in an open and competitive market on an arm's-length basis, nor should there be an obligation to establish policies and procedures designed to achieve fair terms. Mandatory legal obligations describing pricing levels that should be offered are not consistent with open market practices where competition is readily available and de facto fair pricing between parties to bilateral negotiations exists as a foundational element of open market trading. We do however support a requirement that dealers adopt policies designed to prevent predatory or manipulative pricing behaviours and high-pressure sales tactics.

We note that no such requirement is reflected in the CFTC's Business Conduct Standards applicable for swap dealers. The CFTC Standards recognize that fair dealing is achieved through disclosure to counterparties of material information concerning the transaction, a fair and balanced communications requirement, and the prohibition of fraud, manipulation and other abusive practices.

Dealers are compelled by competitive pressures to provide pricing on a competitive basis in the context of the market, but dealers compete on a very broad range of factors that define their service offerings including for example the platform and execution venue, the certainty and finality of execution, the time that offers are left open, the number of quotations that are provided by voice or through a price streaming service, the extent to which credit or leverage is provided, the reporting and post-transaction support that is provided, and the integration of derivatives transactions with other services provided by the dealer. Any specific pricing obligations for arm's-length voluntary bilateral transactions are inconsistent with free market principles and the current operation of derivatives markets and would reduce liquidity and improperly suggest to customers that they can automatically rely on dealers for determining fair pricing.

We recognize that there are important policy grounds for protecting vulnerable Non-EDPs from improper sales practices including high-pressure sales tactics and "predatory" behaviours such as making misrepresentations and providing misleading scenario analyses. However, this does not mean that some ideal of fair pricing is appropriate, or even possible.

We note that there are no analogous obligations imposed on securities dealers. For example, securities dealers are not obliged to provide spot FX transaction pricing "on fair terms" or to sell securities or issue loans at specific interest rates that are determined in a fair and equitable manner. We believe that if it is not appropriate to impose specific pricing obligations on spot FX transactions that may often

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involve customers with less sophistication and less bargaining power than derivatives parties, then it is not appropriate to impose these pricing obligations on FX derivatives transactions.

FX dealers quote both spot and forward prices to clients competitively based on numerous market considerations and their clients choose services based on a consideration of a broad range of factors. This is of course a large market that functions with minimal regulation and as a result is very efficient and highly competitive. It would be fundamentally anti-competitive if FX spot providers could not quote prices in such an unrestricted manner. In the same way, FX swap providers need this flexibility to supplement FX spot pricing with FX forward pricing which is determined without any fair pricing restriction.

If a dealer has taken the time to satisfy its disclosure obligations in good faith, and the client has the opportunity to consider pricing (including competitor offerings) and consult third parties prior to committing to a transaction, then there should be no sweeping obligation to "determine prices in a fair and equitable manner" or to establish methods for tracking compliance with this nebulous concept. If there are concerns about counterparties not understanding derivatives pricing, then that should addressed through Business Conduct Rule section 19 (Pre-transaction disclosure).

Disclosure of "Implications of Terminating a Transaction": Business Conduct Rule Companion Policy section 8 (fair dealing) includes the statement that: "[The CSA] also expect the derivatives firm to provide a derivatives party with information about the implications of terminating a derivative prior to maturity, including potential exit costs."

We ask for this sentence to be clarified to state that it only applies when a termination is being discussed or negotiated. Our concern here is that this sentence might be interpreted as imposing an additional pre-transaction disclosure obligation that applies in respect of every individual transaction. The implications of terminating a derivative, including costs, are wholly dependent on market conditions existing at the time of termination and it is not practicable to meaningfully disclose such implications prior to entering into the transaction.

5. Obligations to Assess a Client's Needs and Objectives and the Application of the Suitability Requirement to Dealers Contracting at Arm's Length

Western Union anticipates entering into FX forward and option transactions with a broad range of business clients which are fully capable of assessing the merits of hedging FX risks and managing their own FX needs and exposures. We consider that it is imperative that clients be permitted to make their transacting and hedging decisions free from Western Union interference. We do not second-guess clients that enter into spot FX contracts and we believe the same principle should apply in

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respect of FX forwards and options. However, certain provisions included in the proposed Business Conduct Rule in respect of suitability obligations and the need to establish suitability run counter to this basic commercial premise.

We recognize that in order to qualify a client as an EDP under the commercial hedger category, we should confirm that the client has commercial exposures to a particular currency, but we do not consider that this means that the particular hedging decisions being made by a client each time it transacts need to be recorded. In our view, so long as the transaction fits the client's hedging profile (e.g., managing USD exposure in an amount of less than $200 million notional), then there should be no further requirement to confirm hedging criteria in respect of each individual transaction. We expect this makes sense both from a policy perspective and a practical implementation standpoint, and provides adequate protections for clients which have asserted that they should be treated as hedging EDPs.

Dealers generally transact at arm's length with counterparties. It would be helpful for the CSA to confirm in 93-101CP s. 11 that when entering a transaction 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 the size, timing and tenor of the transaction. – Such an inquiry is not appropriate to arm's-length negotiations. However, the current Companion Policy discussion seems overly skewed towards considering cases where a dealer or adviser is providing advice or execution services to a client (as opposed to simply acting as an arm's-length counterparty), which improperly suggests that additional actions need to be taken even by an arm's-length dealer. For example, 93-101CP s. 11 provides that:

> "Derivatives parties may have a variety of execution priorities. For example, a derivatives party may have as their primary objective the objective of having the transaction executed as quickly as possible rather than trying to obtain the best available price. Factors to consider when evaluating execution include price, certainty, timeliness, and minimizing the impact of making a trading interest public.
>
> Before transacting with a derivatives party, we expect a derivatives firm to have the appropriate information to assess the derivatives party's knowledge, experience and level of understanding of the relevant type of derivative, the derivative's party's objective in entering into the derivative and the risks involved, in order to assess whether the derivative is suitable for the derivatives party. The derivatives-party-specific KYC information is obtained with this goal in mind."

Ultimately, a dealer that is quoting prices on an arm's-length basis should not be subject to this scope of KYC burdens including in particular the obligation to

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determine "the derivative's party's objective in entering into the derivative and the risks involved". The dealer should only need to confirm that the counterparty appears to have the competence to understand the terms of the relevant transactions and to use derivatives as part of its business. It is not appropriate to ask a counterparty to disclose additional commercial information as a condition to transacting and we do not consider that in this situation it would be appropriate to advise a counterparty, as suggested in 93-101 s. 12(2) and 93-101CP s. 11, that "the information is required to determine whether the derivative is suitable for the derivatives party, and without this information there is a strong risk that [the dealer] will not be able to determine whether the derivatives party has the ability to understand the derivative and the risks involved with transacting the derivative". If the counterparty and the dealer agree that the dealer will not be responsible for determining suitability, then the dealer should focus on transaction terms and not ask questions which suggest that the dealer is determining suitability.

We would like to emphasize that this is consistent with the international approach to conduct regulations. In particular, we note that CFTC Conduct Rule 23.434 (Recommendations to counterparties -- institutional suitability) only applies where a dealer or adviser recommends a transaction or trading strategy, and a safe harbour is provided that disapplies the provision if a dealer discloses in writing that it is acting in its capacity as a counterparty and is not undertaking to assess the suitability of the swap or trading strategy involving.

6. Overlapping KYDP Requirements in Business Conduct Rule section 10

Section 10 of the Business Conduct Rule imposes certain KYDP obligations which appear to be loosely based on anti-money-laundering legislation but not strictly consistent with existing legal requirements and there does not appear to be a strong policy justification for imposing such additional requirements under the Business Conduct Rule. Although the related Business Conduct Rule Companion Policy refers to dealers having a "gatekeeper role" which requires derivatives firms to establish the identity of, and conduct due diligence on, their counterparties, we consider that this role should not apply from a derivatives policy standpoint to dealers that only transact at arm's-length with their counterparties.

We recognize that diligence is required from a commercial standpoint to address credit exposures, but we do not consider that it is necessary to layer onto this an undefined obligation to consider "the reputation of the derivatives party" (s. 11(2)). – We do not have a view as to whether this is an appropriate obligation to impose on dealers that are transacting on behalf of third parties, but where a dealer transacts opposite a third-party this is not an appropriate obligation to impose.

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Furthermore, like numerous money services businesses and securities dealers, Western Union is subject to and complies with the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA) and we do not consider that it is appropriate for derivatives legislation to alter those requirements or attempt to layer on similar requirements. For that reason we consider that Section 10(3) which is directed to identifying ultimate beneficial ownership of counterparties should not apply to dealers that are already subject to the PCMLTFA.

7. Disclosure Obligations in respect of Referral Arrangements

We do not consider that referral arrangements should be required to be disclosed if the referring party has no ongoing role in the derivatives relationship (Conduct Rule ss. 13(1)(c), 15 and 18(1)(e)). For example, if a dealer acquires a list of business leads in accordance with existing contractual obligations and applicable laws, then the pricing agreed for these referrals should not be subject to disclosure. The CSA may have concluded that this disclosure is necessary in some advisory context where the referring firm continues to have some derivatives-related involvement with the client, but generally this type of disclosure is not and should not be required for derivatives dealers. To the extent any disclosure is required, we would request that the final rule not require a disclosure of the exact quantum of fees, but rather, simply the disclosure of the fact that a fee is paid.

8. Pre-transaction Pricing Disclosure Obligations in respect of Arrangements

The disclosure obligations under Conduct Rule section 19(2) to disclose "if applicable, the price of the derivative to be transacted and the most recent valuation" before transacting in a derivative are unclear to us, perhaps because we do not understand when the price and value of a derivative would be "applicable" (e.g., does this only refer to transactions that are already outstanding and therefore have a "most recent valuation"?).

It is not clear what disclosure would be required if a dealer is proposing to enter into a new transaction. If the dealer offers to enter into the transaction on particular terms at a particular rate, is the offered rate the "price" of the derivative and is there a "most recent valuation"?

To the extent disclosure of market prices or mid-market rates is required, we strongly request that such market information should only be provided upon client request, or that clients may waive the right to receive such disclosure. It is generally possible to provide an end-of-day fair value valuation of outstanding transactions which is useful for certain limited purposes and is determined based on relatively well-understood principles and a pool of market data, but this daily valuation data may not reflect pricing available in the market, is often not

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available intra-day, and it would be difficult in the context of pricing a particular derivative to explain the assumptions that have been made in reaching the valuation, what the time cut-off or pool of data used is for this purpose or how such valuation may not provide all of the relevant information for determining the terms on which the client should be able to enter into a transaction in the broad market or with specific dealers. For these and other reasons, it is difficult and time-consuming to provide such specific valuation information in the context of a particular transaction, and any obligation to provide such information may frustrate the ability to offer stream-lined FX hedging services by voice or electronic means.

To the extent available inter-day benchmark pricing is relevant as the principal factor in determining mid-market pricing, such information usually reflects rounded standard periods (e.g., 1 month forwards, 3 month forwards) which will often not align with the customized negotiated transaction, and we and other dealers would be contractually restricted in sharing this information under a live feed which would be necessary to operationalize this type of valuation disclosure information for various stream-lined transaction models.

We note that no-action relief has been granted under CFTC Letter No. 13-12 which exempts CFTC rules swap dealers from the requirement to provide pre-trade market pricing information for most ordinary FX forwards and swaps. In particular, the exemption applies if the transaction is "(1) a foreign exchange swap or forward that, by its terms, is physically settled, where each currency is one of the BIS 31 Currencies [i.e., the top 31 currencies (by volume) described in a particular BIS report] and where the transaction has a stated maturity of one year or less, or (2) a vanilla foreign exchange option that, by its terms, is physically settled, where each currency is one included among the BIS 31 Currencies, and where the option has a stated maturity of six months or less; (b) real-time tradeable bid and offer prices for the transaction are available electronically, in the marketplace, to the counterparty; and (c) the counterparty to the transaction agrees in advance, in writing, that the [Swap Dealer or Major Swap Participant] need not disclose a [pre-trade mid-market mark]".

Given the operational difficulties, costs and disruptive timing implications associated with making this disclosure available, it is important that the Canadian disclosure obligation does not exceed what is provided under CFTC rules for swap dealers and so we would request that this carve-out from pricing disclosure be provided in respect of at least the enumerated types of FX transactions. Furthermore, given that the overwhelming majority of all FX transactions only involve the BIS 31 currencies referred to in the CFTC letter and real-time tradeable bid and offer prices are generally available in the market, we would suggest that the CFTC exemption could be simplified for use in Canada by not including the limitations set out in clauses (b) and (c) above.

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9. The General Segregation Obligation and the Identification Derivatives Party Assets

For dealers transacting with counterparties on an arm's-length basis, it is not appropriate to require segregation of collateral. For that reason, we consider that the body of the Business Conduct Rule s. 24 (and not just the Companion Policy) should describe "accounting segregation" as sufficient, and a statement should be included in the Companion Policy that accounting segregation is consistent with re-use or rehypothecation of collateral.

We also consider that the definition of "derivatives party assets" should be more precisely defined. The term is currently defined in the Business Conduct Rule as follows:

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

This definition could be interpreted (or misinterpreted) as including 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.

Where a dealer is transacting on an arm's-length basis with a counterparty, assets which are transferred outright to the dealer should not be subject to any ongoing obligation. Such assets are equivalent to payments and of course there should be no obligations owing in respect of money or securities which are transferred outright in satisfaction of derivatives obligations.

Furthermore, we consider that only assets that are held primarily as security for derivatives should be characterized as derivatives party assets. A dealer may have a number of relationships with a counterparty which could involve various custody and pledging relationships. Only those assets which are pledged to or required to be maintained with a derivatives dealer as a condition or term of the derivatives relationship should be considered to be derivatives party assets for which particular business conduct obligations apply.

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10. Material Non-Compliance Reporting Obligation

Business Conduct Rule section 32 imposes an obligation on derivatives firms to report to the relevant regulator material non-compliance with the Business Conduct Rule or derivatives laws. This obligation goes significantly beyond the requirements imposed on securities dealers and we do not see any justification for this type of requirement. Derivatives firms' primary obligations will be to comply with derivatives laws, and sufficient internal controls have already been proposed in the Business Conduct Rule which should be satisfactory to achieve the regulatory objective in respect of firms that are conducting operations in good faith with the intention of complying with laws.

This same comment applies in respect of Registration Rule section 27(3)(d) which essentially reproduces the Business Conduct Rule section 32 reporting requirement.

Registration Rule Comments

11. Requirement for IIROC Membership if Dealing with Individuals that are Non-EDPs

We see no justification for requiring a dealer to become an IIROC member in order to transact with an individual that is not an EDP (Registration Rule section 9). This is an extremely anti-competitive step that would likely have a severe impact on hedging options available to individual entrepreneurs.

The Proposed Rule does not set out any justification for this requirement in the Proposed Rule, nor have the market impact, costs and operational burdens that this will introduce been evaluated and described in the Proposed Rule. The IIROC qualification regime and rules are patently not appropriate for regulatory oversight of derivatives firms which in the past has been recognized by CSA members which as a result have not required derivatives firms to register with IIROC. Very significant revisions to IIROC's rule book and the elimination, for example, of the IIROC requirement for members to be Canadian corporations would be required in order to make IIROC an appropriate regulatory body. Even if IIROC were to undertake this project, there are significant risks that the interests of current IIROC members could bias IIROC towards over-regulation and unnecessarily burdensome membership and capital requirements. We do not consider that it is appropriate for the CSA to pass off the responsibility to determine the membership requirements and scope and terms of regulation of OTC derivatives markets to a securities self-regulatory organization, and we are strongly opposed to the additional financial burdens and fees that would inevitably result with no demonstrated regulatory benefit and an undeniably negative impact on market competition and liquidity.

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12. Registration Requirements and Exemptions for Dealing Representatives
We share the view expressed by other comment letters that registration of individual dealing representatives and advising representatives is not appropriate for the derivatives markets. We do not object to identifying a UDP, CCO and CRO, but the specific registrations obligations are not necessary so long as a registered firm confirms proficiency of its representatives under Registration Rule section 18.

To the extent the registration obligation for individuals is retained, we ask that the CSA clarify Registration Rule section 58 to make clear that in order to rely upon the exemption from advisor registration obligations the individual representative only needs the proficiency required under section 18(1). As currently drafted, section 58 could be read as implying that a registered dealing representative would not be able to provide incidental advice in connection with a transaction if the individual does not have a CFA Charter or otherwise satisfy the requirements in section 18(6). We do not consider that such a requirement is reasonable and would in effect largely eliminate the benefit of providing the section 58 exemption. We note that if section 18(6) is intended to apply then we request that section 18(7) (which provides an exemption to representatives of registered advisers from the section 18(6) CFA requirement if the representative only advises EDPs) should be stated to apply for representatives of derivatives dealers to eliminate the section 18(6) CFA (or similar) requirement if the individual is only advising EDPs.

However, we consider that the section 18(6) CFA (or similar) requirement is not necessary or consistent with the international regulatory approach. Individuals working as dealing representatives will very often be fully capable of providing investment advice in respect of derivatives without having completed the CFA Charter (which of course covers a very broad span of securities matters with relatively minimal focus on derivatives) or two courses and 2 years of investment management experience (which experience dealer representatives generally will not have as they are not employed to manage funds or accounts).

As a related point, a *non-registered* dealing representative should also have the benefit of the section 58 exemption from adviser registration obligations if the non-registered dealing representatives is only advising EDPs. This change is required in order to parallel the exemption in section 16(4) which permits individual representatives of registered advisers to deal with EDPs without registration.

13. Portfolio Reconciliation Obligations
We consider that the Registration Rule section 44 portfolio reconciliation requirements for derivatives dealers facing non-EDPs are redundant and unnecessary given that they overlap fully with daily valuation reporting obligations and the obligation to deliver quarterly statements that apply under Business Conduct Rule ss. 20(1) and 28. The quarterly statement delivery

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requirement adequately spells out all of the details that would typically be included in a portfolio reconciliation report. It is unnecessary to require dealers to include in their client relationship agreements a new provision requiring counterparties to review and confirm the quarterly statements as part of portfolio reconciliation. As non-EDP counterparties will already be receiving the relevant reports, it is unnecessary to impose a new obligation requiring the counterparty to review such reports and confirm agreement.

Portfolio reconciliation obligations have been imposed on large financial institutions in cases where there is no obligation for dealers to provide quarterly reports. Furthermore, the OSFI requirement under OSFI Guideline B-7 only applies where there are a material number of derivatives outstanding with a counterparty.

14. Portfolio Compression Obligations

We consider that the Registration Rule section 45 portfolio compression obligations are an unnecessary burden which will provide little if any practical benefit.

In respect of section 45(1)(a), this obligation to terminate fully offsetting derivatives could be problematic because many dealers (e.g., FRFIs) will be exempt from the obligation and so there is no mutual obligation to terminate. Of course, in practice both parties will frequently agree to terminate fully offsetting derivatives but if there is some dispute between the parties as to whether transactions are truly fully offsetting then the inclusion of the obligation would be problematic.

In respect of section 45(1)(c), if the provision is retained we would appreciate if it was limited to only apply "for portfolios with large numbers of uncleared derivatives contracts containing substantially similar economic terms" where the compression could reasonably be expected to materially "reduce the risk, cost, and inefficiency of maintaining redundant transactions on the counterparties' books". These limitations on the compression obligation are set out in the parallel requirement under OSFI Guideline B-7, are an appropriate description of the circumstances when compression is appropriate, and will align non-bank dealers' obligations with those of chartered banks that are their counterparties.

15. Reporting of Disputes to Regulators

We considered that disputes which are unresolved after 30 days of internal escalation (i.e., reporting to the board) should only be reportable to regulators under Registration Rule section 42(4) if the disputes would reasonably be expected in aggregate to have a material adverse impact on the registered firm.

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We thank you for the opportunity to provide these comments. We would be happy to address any questions you may have and appreciate the time you are taking to consider our points of view. Please feel free to contact us at shannon.seitz@westernunion.com, on this or any other issue in future.

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Counsel, Western Union Business Solutions

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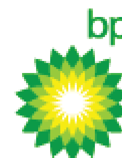

September 17, 2018

VIA ELECTRONIC MAIL

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 Commission
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

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Corporate Secretary
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c/o:
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Dear Sirs/Madams:

Re: Comments on Proposed National Instrument 93-102 *Derivatives: Registration* and Proposed Companion Policy

BP Canada Energy Group ULC and its affiliates ("BP") appreciate the opportunity to provide the Canadian Securities Administrators ("CSA") comments on the following documents:

- Proposed National Instrument 93-102 Derivatives: Registration ("Proposed Registration Rule);
- Proposed Companion Policy 93-102: Derivatives Registration ("Proposed Registration CP").

BP's business in Canada encompasses a range of activities including the exploration, production, purchase and sale of hydrocarbons and other energy commodities. As a major participant in the marketing and trading of Canadian natural gas and crude oil, BP also manages risk and maximizes value across physical and financial markets through its participation in the Canadian over –the-counter ("OTC") energy derivatives market.

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BP has reviewed the Canadian Commercial Energy Working Group's ("CCE") comment letter on the Proposed Instrument submitted by Eversheds Sutherland (US) LLP on August 2, 2018 (the "CCE Letter") and is generally supportive of the CCE comments. BP will not duplicate the comments in the CCE Letter, but would encourage the CSA to consider and incorporate the comments and requests set forth therein in any Final Registration Rule.

BP also respectfully requests that the CSA consider BP's additional comments with respect to the following:

A. The Scope of the General De Minimis Exemption (Section 50) and the Commodity De Minimis Exemption (Section 51)

BP appreciates the CSA providing for the General De Minimis Exemption and the Commodity De Minimis Exemption in the Proposed Registration Rule and generally supports the comments made in the CCE Letter pertaining thereto. BP would also respectfully request that the CSA consider the following additional comments:

(i) <u>*Treatment of Affiliates*</u>. As currently worded, BP interprets sections 50 and 51 of the Proposed Registration Rule as requiring an entity having its head office or principal place of business in a jurisdiction of Canada ("Party A" or a "Canadian domiciled entity") to include in its de minimis calculation, all of its outstanding derivative transactions and all outstanding derivative transactions of all affiliated entities Canadian domiciled and non-domiciled (excluding transactions between affiliates). BP shares the CCE's concerns that such approach is potentially disadvantageous for Canadian derivative market participants who could be prohibited from relying on the de minimis exemptions by virtue of an affiliate's derivatives activities which, in BP's view, are outside the scope of activities the CSA intends to capture. BP would respectfully request that the CSA consider excluding the notional amounts of derivative transactions of those affiliates of Party A that are (a) registered, licensed or otherwise authorized to conduct derivatives activities, or (b) exempt from registration, under the laws of Canada or the laws of a recognized foreign jurisdiction. BP would respectfully submit that for any other non-Canadian domiciled affiliates, only those transactions with Canadian counterparties should be included when calculating the de minimis threshold of Party A.

<u>*Commodity de Minimis Exemption*</u>: As currently worded in section 51 of the Proposed Registration Rule, the Commodity de Minimis Exemption is only available to a person or company that is only a derivatives dealer in respect of commodity derivatives. BP would like to receive some guidance or clarification as to how the CSA would view foreign exchange ("FX") derivative transactions executed by a commodity derivatives dealer. Many market participants in the commodity derivatives market have a functional currency for accounting purposes but transact in multiple currencies and they will often hedge the resulting exposure through FX derivatives transactions. BP would respectfully submit that a commodity derivatives dealer who enters into FX derivative transactions for hedging purposes should not be viewed as "dealing" in non-commodity derivatives and consequently prohibited from relying on the Commodity de Minimis Exemption. Therefore, BP would respectfully request that the CSA consider providing clarity that FX hedging transactions would not preclude a company from being entitled to rely on the Commodity de Minimis Exemption.

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B. **Eligible Derivatives Party**:

BP supports the comments made in the CCE Letter in respect of expanding the definition of eligible derivatives party ("EDP") in the Proposed Registration Rule so that it is consistent with existing derivatives regulations.

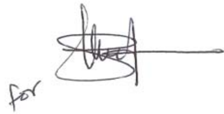
C. **Calculation of Notional Amount**:

BP appreciates the CSA putting forth two proposals in respect of the calculation of notional amount in the Proposed Registration Rule and believes that it is important that any methodology adopted is reflective of how market participants would view the price under a derivatives transaction. For this reason, BP does prefer the Regulatory Notional Methodology with the modification requested in the CCE Letter to use the difference between the two floating prices as the "price" when calculating the notional amount of float-for-float swaps. BP would also however, urge the CSA to use the difference between the fixed price and the floating price as the "price" when calculating the notional amount of fixed-for-float swaps, as it is similarly reflective of how market participants would view the price in a fixed-for-float swap and therefore the more useful valuation for the purposes of the de minimis calculations.

BP respectfully submits its comments set forth in this letter and thanks the CSA for seeking and considering comments from interested stakeholders.

Respectfully submitted,

BP Canada Energy Group ULC



Stephen Connelley,
CFO, IST

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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

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Re: Notice and Request for Comments (*Proposed National Instrument 93-102 Derivatives: Registration*)

The Coalition for Derivatives End-Users (the "Coalition")[1] appreciates the opportunity to provide comments in response to the Proposed National Instrument 93-102 *Derivatives: Registration* ("Proposed Instrument") and Proposed Companion Policy 93-102 *Derivatives: Registration* ("CP", together with the Proposed Instrument, the "Proposed Registration Rule").[2]

[1] The Coalition represents end-user companies that primarily employ derivatives to manage risks. Since 2009, hundreds of companies have been active in the Coalition for both legislative and regulatory matters. The Coalition's mission is straightforward: to ensure that financial regulatory reform measures promote economic stability, reduce systemic risks and increase transparency without imposing undue burdens on derivatives end-users, which are the engines of the global economy.

[2] Canadian Securities Administrators, *CSA Notice and Request for Comment, Proposed National Instrument 93-102 Derivatives: Registration and Proposed Companion Policy 93-102 Derivatives: Registration*, 41 OSCB 3253 (April 19, 2018), *available at* http://www.osc.gov.on.ca/documents/en/Securities-Category9/csa_20180419_93-102_rfc-derivatives-registration.pdf. [hereinafter the "Proposed Registration Rule"].

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The Coalition represents the views of hundreds of companies employing derivatives primarily to manage risks associated with operating their businesses.[3] Our members' businesses range from small domestic manufacturers and producers to large multi-national entities. Irrespective of size, location or purpose, Coalition members and the end-user community generally serve as the backbone of the local, domestic, and global economy. End-users' use of derivatives to hedge commercial risk not only benefits their own commercial growth, planning and forecasting, but also serves to dampen systemic economic risks by promoting sustainable economic growth, job creation and stable commercial markets.

The Coalition supports strong, effective and fair regulation of derivatives markets, which appropriately balances the goals of promoting transparency and mitigating systemic risk against the risks of unduly burdening commercial businesses and harming job growth. Our mission is straightforward: to ensure that financial regulatory reform measures promote economic stability, reduce systemic risks and increase transparency without imposing undue burdens on derivatives end-users, which are the engines of the global economy.

Consistent with our mission, we offer our comments below on four aspects of the Proposed Registration Rule: (1) the "commercial hedger" category of the eligible derivatives party ("EDP") definition; (2) the eligibility requirements for the affiliated entity exemption from derivatives adviser registration; (3) the definition of "affiliated entity"; and (4) the need for international harmonization in all aspects of derivatives regulation.

1. ***EDP Definition: The Proposed Registration Rule establishes a net asset threshold requirement for commercial hedgers that is set at an unduly high level; the threshold level should be reconsidered in light of its intended purpose.***

The Coalition supports the CSA's intention to allow certain "commercial hedgers" to qualify for EDP status, but believes that this aspect of the proposed definition should be revised in part. Section (n) of the EDP definition in the Proposed Registration Rule allows commercial hedgers to qualify as an EDP if the commercial hedger (i) certifies to its requisite sophistication (i.e., knowledge and experience with derivatives) and (ii) has net assets of at least $10 million as shown on its most recently prepared financials. While the inclusion of the "commercial hedger" category would better enable end-users to access the tailored derivatives products needed for commercial hedging purposes, we believe that the proposed threshold is unduly high for two important reasons.

First, we believe that the $10 million net asset threshold is set unduly high from a policy standpoint, as it would likely exclude a range of sophisticated end-user entities—including subsidiary entities of large corporations and middle market commercial entities—which may utilize certain corporate structures in order to prudently manage their commercial risks. For example, large commercial entities may form special purpose entities for particular business ventures. These special purpose entities are, typically, centrally managed by an affiliated corporate treasury unit that oversees enterprise-wide commercial hedging needs. Under this scenario, if a special purpose entity does not have a net worth of $10 million, despite it being managed by sophisticated personnel dealing exclusively with derivatives transactions, the special purpose entity would fail to meet the EDP

[3] You can see a list of companies and associations that have been active in the Coalition here: http://coalitionforderivativesendusers.com/AboutUs/coalition-members.

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threshold. In order to meet the $10 million threshold, a commercial entity would have to infuse capital into the special purpose entity to bring it above the EDP threshold. This transfer of capital would not make the special purpose entity any more sophisticated; instead, it would needlessly divert capital from the parent entity solely for the purpose of having the special purpose entity qualify as an EDP. The capital diverted in this instance could otherwise be used to help grow the company, create jobs and expand into new ventures. Therefore, we would request that the CSA reconsider the net asset threshold to either remove the threshold or significantly lower it.

Second, while we recognize the unique differences in Canadian and U.S. markets and the need for some deviations, we believe that the proposed net asset threshold should be no higher than the net worth test for a hedging entity to qualify as eligible contract participant ("ECP") under U.S. derivatives rules. Section 1a(18)(A)(v)(III) of the Commodity Exchange Act establishes a net worth threshold of USD 1 million for hedging entities, which is approximately 10 times lower than the proposed net asset test in the EDP definition. Many U.S. and Canadian domiciled end-users have affiliates in both Canada and the United States and inconsistencies between the EDP and ECP definitions could make it difficult for these end-users to manage risks on a global basis. Further, the commercial hedger category of the EDP definition includes a sophistication requirement that should render the $10 million net asset threshold unnecessary. In contrast, the ECP definition in the United States does not have a similar sophistication requirement but only requires that the entity's net worth exceed USD 1 million and the derivatives are used in connection with the entity's business to manage risks associated with such business.

In addition to lowering the threshold, the Coalition would also recommend that the CSA consider incorporating two additional concepts in determining whether the threshold is met, which are currently permissible under the U.S. ECP requirements. Those concepts under the U.S. ECP rules and guidance allow the commercial hedger to count towards the threshold certain credit support arrangements and anticipatory loan proceeds. We believe that the addition of these concepts to the EDP definition for commercial hedgers would help end-users to efficiently manage their capital, while meeting the intent of the EDP definition to ensure that only sophisticated parties are transacting in complex derivatives.

With respect to credit support arrangements, the Coalition notes that under U.S. law, a guarantee, keepwell, equity commitment letter or other form of credit support agreement from the parent or affiliate of a hedging entity may be taken into account when calculating whether a hedging entity meets the ECP capitalization threshold (*i.e.*, a $10mm guarantee from a parent or affiliate would confer ECP designation on the hedging entity). The CSA should consider adding the same concept to the EDP definition. The addition of a credit support concept would eliminate the need for a commercial hedger's parent or affiliate to transfer capital to the commercial hedger in order to meet the EDP dollar threshold, while still guaranteeing the commercial hedger's net worth.

Similarly, the Coalition would support the addition of a concept that would allow for the commercial hedging entity counterparty to reasonably anticipate EDP status in connection with a disbursement under a lending arrangement. Under CFTC no-action relief,[4] the CFTC has

[4] CFTC No-Action Letter No. 12-17, *Staff Interpretations and No-Action Relief Regarding ECP Status: Swap Guarantee Arrangements; Jointly and Severally Liable Counterparties; Amounts Invested on a Discretionary Basis; and "Anticipatory ECPs"* (Oct. 12, 2012).

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determined that counterparties to hedging entities who are hedging interest rate risk may treat such hedging entity as ECPs in instances where there is a bona fide loan commitment or lending arrangement to the hedging entity that, when fully funded, would exceed the ECP threshold. For example, special entities are commonly formed for the purposes of construction projects and those special entities are often funded in milestone payments. Consequently, these special entities may not qualify as ECPs until completion of the project. By allowing the special entity's counterparty to anticipate ECP status, however, the special entity is able to benefit from commercially accessible hedging solutions based on the anticipated funding of the milestone-based loan. The Coalition asks that the CSA add a similar concept to its EDP definition for commercial hedgers, whereby a counterparty to a commercial hedger can "anticipate" EDP status upon reviewing a bona fide loan commitment in favor of the hedging entity. As highlighted above, this anticipatory-EDP status concept would help to mitigate capital diversion from a corporate group in order to qualify an entity for EDP status and would provide special purpose entities with access to derivatives hedging solutions.

For the foregoing reasons, the Coalition supports the inclusion of the commercial hedger prong in the EDP definition; however, we also strongly urge the CSA to (i) remove or significantly lower the net asset threshold requirement in the commercial hedger category of the EDP definition in the Proposed Registration Rule; and (ii) add both a credit support agreement concept and an anticipatory EDP status concept similar to what are provided in the U.S. ECP rules and guidance.

2. ***Affiliated Entity Exemption Eligibility Requirements: The Proposed Registration Rule's affiliated entity exemption to the derivatives adviser registration requirement needs further clarification with respect to the limitation placed on investment fund affiliates.***

The Coalition supports the CSA's efforts to exempt affiliated entities from derivatives adviser registration requirements, but believes that limiting the exemption to non-investment fund affiliates requires further clarification. Section 60(1) of the Proposed Registration Rule provides that a person or company is exempt from the requirement to register as a derivatives adviser if the person or company solely advises affiliated entities. Section 60(2) limits that exemption by providing that a person or company would have to register if the person or company advises an affiliated entity that is an investment fund. The limitation in Section 60(2) on the exemption in Section 60(1) is susceptible to multiple interpretations; one of which could significantly frustrate one of the primary ways many commercial end-users structure their derivatives trading programs.

Many commercial end-users employ a centralized treasury unit or program (a "CTU"), whereby one entity performs the treasury functions for the entire corporate group, including the use of derivatives to hedge commercial risks. The benefits of a CTU include holistic oversight, concentrated corporate knowledge and talent, improved decision-making processes and reduction of overhead costs by eliminating corporate redundancies and transacting in greater economies of scale. These cost savings and benefits are then used to grow the business, create jobs and expand into new markets. Consequently, the ability to efficiently institute a CTU is critical to Coalition members' day-to-day business functions. In that way, the proposed affiliated-entity-exemption to derivatives adviser registration is much welcomed relief.

However, the CSA should clarify the ambiguous language in Section 60(2) to make clear that a CTU may advise affiliated investments funds that limit participation in such funds to affiliates

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within the corporate group. The lack of such a clarification could prove to be an impediment to the use of CTUs and to end-user risk management more generally, as end-users may find themselves needing to hire separate personnel to advise on a wholly internal investment fund that does not permit outside investors. This unlikely but probable interpretation of the limitation in Section 60(2) would be an anomalous result and seemingly contrary to the intent of the exemption set forth in Section 60(1).

Further, a plain reading of Section 60(2) seems to contradict the CSA Derivatives Committee's 2013 interpretation of a derivatives adviser as a "[p]erson[] carrying on the business of advising others in relation to derivatives, or who hold[s] [themselves] out to be in that business in any Canadian jurisdiction."[5] In particular, we note that a CTU cannot be "advising others" if it is providing derivatives hedging advice to its affiliate investment fund that limits its participants to affiliates, nor could it be "holding themselves out" to be in such business since it is not soliciting business or otherwise marketing itself to third parties. In this case, the CTU is solely advising entities within its corporate group.

Given this ambiguity in the interpretation of the limitation in Section 60(2), the Coalition requests that in the final rule the CSA clarify that Section 60(2) of the Proposed Registration Rule only applies to those investment funds that are owned, in part, by a third-party entity, which is outside of the corporate group (*i.e.*, the affiliated investment fund includes non-affiliate investors). This interpretation of Section 60(2) would comport with the intent of Section 60(1) and the CSA Derivatives Committee's 2013 interpretation.

3. ***Affiliated Entity Definition: The CSA's proposed "control" definition provides more certainty than the CSA's alternative version of the definition.***

The Coalition generally supports the proposed "affiliated entity" definition, which applies a control-based affiliation test. This test provides for more certainty and greater flexibility for end-users than a consolidated financial statement test, which the CSA has proposed as an alternative version of the definition. The alternative consolidated financials-based definition proposed in Annex II of the Proposed Registration Rules could raise issues for end-users on three grounds: (1) end-users with international operations, especially those with operations in a control-based jurisdiction, would need to evaluate and potentially alter business and risk management practices in the event that their Canadian operations are subject to a consolidated financials-based analysis; (2) the consolidated financials-based approach is subject to future changes to accounting rules and interpretations, and such changes may not allow for public notice and comment; and (3) a consolidated-financials based analysis may unreasonably frustrate an end-user's ability to structure its business for tax, regulatory and other legitimate business reasons.

Given the uncertainties that a consolidated financial statement test may pose for end-users, we preliminarily believe that the control-based test is preferable, as it is unclear how a consolidated financial statement test may be applied in future contexts.

[5] Canadian Securities Administrators, CSA Consultation Paper 91-407 Derivatives: Registration (April 18, 2013) *available at* http://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20130418_91-407_derivatives-registration.htm.

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4. ***International Harmonization: The CSA should harmonize the Proposed Registration Rule with the rules of other jurisdictions.***

The Coalition urges the CSA to harmonize the Proposed Registration Rule with international derivatives regulatory regimes, wherever possible. Disparate rulesets aimed at addressing the same issues lead to unnecessary duplication and increased compliance costs either directly on end-users or on end-users' dealer counterparties, which are ultimately passed along to end-users. The Coalition supports inclusion of broad substituted compliance provisions for foreign derivatives dealers, which would reduce compliance costs, but we believe that other aspects of the Proposed Registration Rule, such as the EDP definition, should be harmonized with other derivatives regulatory regimes for the reasons discussed above.

* * *

Thank you in advance for your consideration of the Coalition's comments in response to the Proposal. Please contact Michael Bopp at 202.955.8256 or at mbopp@gibsondunn.com if you have any questions regarding our comments or require any additional information on any of the topics discussed herein.

Respectfully submitted,

The Coalition for Derivatives End-Users

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asset management group

September 17, 2018

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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

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Re: Comments with respect to Proposed National Instrument 93-101 *Derivatives: Business Conduct*, Proposed Companion Policy 93-101CP *Derivatives: Business Conduct*, Proposed National Instrument 93-102 *Derivatives: Registration* and Proposed Companion Policy 93-102 *Derivatives: Registration*

The Asset Management Group of the Securities Industry and Financial Markets Association ("**SIFMA AMG**" or "**AMG**") appreciates the opportunity to provide comments to the Canadian Securities Administrators ("**CSA**") on Proposed National Instrument 93-101 *Derivatives: Business Conduct* (the "**Business Conduct Instrument**") and Proposed Companion Policy 93-101CP *Derivatives: Business Conduct* (the "**Business Conduct CP**" and, collectively with the Business Conduct Instrument, the "**Business Conduct Rule**") and Proposed National Instrument 93-102 *Derivatives: Registration* (the "**Registration Instrument**") and Proposed Companion Policy 93-102 *Derivatives: Registration* (the "**Registration CP**" and, collectively with the Registration Instrument, the "**Registration Rule**")(collectively, the Business Conduct Rule and the Registration Rule, the "**Proposed Rules**").

SIFMA AMG brings the asset management community together to provide views on policy matters and to create industry best practices. SIFMA AMG's members represent U.S. and multinational asset

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management firms whose combined global assets under management exceed USD $39 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds. In their role as fiduciaries to investors and clients, AMG members use futures and cleared swaps, as well as other derivatives, for a range of purposes, including as a means to manage or hedge investment risks such as changes in interest rates, exchange rates, and commodity prices.

In transacting in derivatives for their clients, portfolio managers such as AMG members are entering into transactions with dealer counterparties on behalf of clients. The portfolio manager is not a principal in such a transaction – the risk and exposure related to the transaction lies with the dealer and the client, not the portfolio manager. Further, a portfolio manager acting on behalf of a client is governed by the client's investment mandate, which prescribes the concentration, risk, exposure, liquidity, leverage etc. limits on the client's account. The risk management systems of a portfolio manager are properly concerned with, and monitor for, limits, risks and exposure at a client account level. This contrasts with the risks and exposure of dealer firms, where the dealer itself faces risk and exposure of the transactions it enters into. It is this risk and exposure that is the more appropriate focus of business conduct and registration rules relating to derivatives.

The Proposed Rules significantly impact AMG members, including many that provide asset management services to Canadian clients on a cross-border basis. This is particularly the case given that the Proposed Rules do not include equivalents of the international sub-adviser exemption found in section 8.26.1 of NI 31-103 (the "**International Sub-Adviser Exemption**") and the international adviser exemption found in section 8.26 of NI 31-103 (the "**International Adviser Exemption**"). It is critical to our members that the Proposed Rules include exemptions mirroring the International Sub-Adviser Exemption and the International Adviser Exemption. Failing to include these exemptions in the Proposed Rules may limit the participation of foreign firms in the Canadian marketplace and therefore ultimately decrease choice and increase costs for Canadian market participants.

Given this and our below comments on the Proposed Rules, including the fact that the relevant Appendices for the exemptions available to foreign derivatives advisers under the Proposed Rules have not been made available to the public, a third round of consultation and comments on the Business Conduct Rule is necessary, as well as further consultation and comments on the Registration Rule to ensure a meaningful opportunity for comment. The transition periods for the Proposed Rules should sufficiently and fairly reflect these factors. Given that the majority of AMG members or their affiliates are non-Canadian firms, it is imperative that the Proposed Rules identify the jurisdictions that will provide a partial or full exemption in order to give market participants a sufficient opportunity to provide meaningful comments on the proposed exemptions. Because the Proposed Rules do not contain this material information, foreign firms are in a state of uncertainty as to whether they will receive, full, partial or no exemptions from the registration requirements. Without this critical information, foreign firms cannot determine how they will be impacted by the Proposed Rules and consequently, foreign firms are being deprived of the opportunity to provide meaningful comment on the Proposed Rules. Consequently, foreign firms will be forced to decide—without the benefit of important information—on the appropriate

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course of action, which may include registering in Canada or ceasing its OTC derivatives operations in Canada.

We begin our comments with introductory thoughts on the Proposed Rules, followed by our comments that apply to both Proposed Rules and concluding with separate specific comments on each of the Business Conduct Rule and the Registration Rule. We also set out in Appendix "A" our responses to certain of the matters relevant to our members that the CSA has requested specific feedback with respect to the Business Conduct Rule and in Appendix "B" our responses to certain of the matters relevant to our members that the CSA has requested specific feedback with respect to the Registration Rule.

A. Introductory comments applicable to both of the Proposed Rules

Regulating dealers and market participants in OTC derivatives, who have not been subject to the same level of regulation as securities industry market participants, is the stated focus of the Proposed Rules:

> "During the financial crisis of 2008, some firms dealing in derivatives contributed to the crisis by not effectively managing their own derivatives related risks. The International Organization of Securities Commissions (IOSCO) noted in 2012 that "historically, market participants in OTC derivatives markets have, in many cases not been subject to the same level of regulation as participants in the traditional securities market. This lack of sufficient regulation allowed certain participants to operate in a manner that created risks to the global economy that manifested during the financial crisis of 2008." [*emphasis added*]

In contrast, securities advisers in Canada are, and have historically been, subject to extensive regulatory oversight.[1] Such advisers are currently subject to the requirements in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("**NI 31-103**").

NI 31-103 already provides an extensive, harmonized and comprehensive framework for the regulation of portfolio managers operating or conducting activities in Canada and it should remain the principal regulatory instrument for portfolio managers, even in the OTC derivatives space. Expanding the regulatory oversight of portfolio managers to the Proposed Rules is unnecessarily onerous and does not appear to be justified by any identified systemic risks created by ***portfolio managers*** in the Canadian marketplace.[2]

Further, applying the Proposed Rules will create an even more fragmented regulatory regime for portfolio managers in Canada. For instance, a foreign portfolio manager that proposes to advise an institutional client in Ontario with respect to securities, commodity futures and OTC derivatives, in reliance on registration exemptions, will have to be concerned with three separate regimes and three different sets of exemptions.[3]

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[1] In this letter, we use the term "portfolio manager" to refer to advisers registered or exempt under NI 31-103 and applicable commodity futures legislation (as context dictates).

[2] Notably and as cited in this letter, the implementation of the Proposed Rules is premised on risks created by dealers and market participants in OTC derivatives that have not been subject to the same level of regulation as securities industry market participants.

[3] These exemptions include: (i) in NI 31-103, the International Adviser Exemption and the International Sub-Adviser Exemption; (ii) under the *Commodity Futures Act* (Ontario) (the "**CFA**"), the discretionary exemptions that mirror the

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Any exemptions in the Proposed Rules should mirror the existing rules pertaining to the International Adviser Exemption and the International Sub-Adviser Exemptions. Not only do the Proposed Rules not mirror the existing international exemptions, they fail to identify which jurisdictions are fully exempt from registration as well as those jurisdictions that are partially exempt and they introduce conditions that have not generally been seen in the Canadian securities regulatory landscape, including creating a new investor status and requiring registration in the relevant home jurisdiction, substituted compliance and notification to regulators of material non-compliance matters). The requirement for a firm to be registered in its home jurisdiction is particularly challenging for SEC-registered investment advisers, which are able to use derivatives in certain situations, while being exempt from the CFTC's Commodity Trading Advisor registration requirements.

This lack of harmonization with existing securities exemptions, combined with the proposed compliance requirements of the exemptions, may reduce the number of foreign portfolio managers willing to provide advisory services to Canadian clients and may reduce the amount of derivatives trading activity in Canada, thereby reducing liquidity.

For these reasons, we believe that the CSA must re-evaluate each of the following issues prior to its consideration of finalizing the Proposed Rules:

- The Proposed Rules should not apply to registered portfolio managers because they are already sufficiently regulated;

- Requiring comment on either the full or partial exemptions for foreign derivatives firms, as well as on various other parts of the Proposed Rules that have not been fully determined, deprives the CSA of the benefit of informed comment on those issues;

- The Proposed Rules deviate from international standards and risk harming cross-border activity, including reducing cross-border liquidity into Canada;

- To the extent that portfolio managers advising on OTC derivatives pose an identified and significant risk to Canadian capital markets, appropriate revisions should be made to NI 31-103 to address such risks instead of adding a new, separate regulatory regime under the Proposed Rules;

- The Proposed Rules (to the extent that they will apply to portfolio managers) should only impose the fundamental obligations found in Part 3 Division 1 of the Business Conduct Rule on portfolio managers (i.e., fair dealing, conflict of interest management and general/gatekeeper know-your-derivatives party);

- To avoid cross-border issues and to improve harmonization, NI 31-103, or alternatively, the Proposed Rules (to the extent that they will apply to portfolio managers), should include adviser registration exemptions that mirror the International Adviser Exemption and the International Sub-Adviser Exemption; and

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conditions of the International Adviser Exemption and the International Sub-Adviser Exemption; and (iii) the foreign derivatives adviser exemptions available under the Proposed Rules, which do not mirror the conditions of International Adviser Exemption and the International Sub-Adviser Exemption.

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- The Proposed Rules should not adopt a new investor status in the "eligible derivatives party" definition and should not create new material reporting thresholds in the foreign adviser exemptions; instead, the Proposed Rules should apply the concepts already existing in the securities space.

While we have not commented on the specific dealer requirements in the Proposed Rules, we ask that you refer to the comments and concerns raised by dealers – to the extent that there are fewer dealers with whom advisers may transact as a result of the Proposed Rules, advisers will have difficulty in hedging risk and providing liquidity for their Canadian clients.

B. Comments applicable to both of the Proposed Rules

Application of the Proposed Rules to Portfolio Managers

1. Applying a new regime to portfolio managers is duplicative, unnecessary and unduly burdensome

Portfolio managers are already subject to extensive regulation. For instance, portfolio managers registered under NI 31-103 must establish and maintain significant policies, procedures and controls to manage the risks of their businesses and ensure compliance with securities legislation. The roles of a registered Ultimate Designated Person and a registered Chief Compliance Officer already exist to oversee portfolio managers' compliance systems. Each individual engaged in advising activities with the firm are already subject to registration requirements as well. Further, portfolio managers are already required to maintain minimum levels of capital, maintain extensive books and records, provide fulsome disclosure and reporting to clients, ensure fairness in allocating investment opportunities among clients, appropriately manage conflicts of interests and client complaints and avoid certain conflicted transactions, among other obligations, including maintaining insurance. In addition, portfolio managers that advise on exchange-traded derivatives are also subject to additional regulation in certain provinces under commodity futures legislation.

Layering additional yet largely duplicative regulation on portfolio managers that advise on OTC derivatives is unnecessarily burdensome and not in line with international standards, particularly those found in the United States. It is also out of step with recent regulatory burden reduction efforts by the CSA (for instance, see CSA Staff Notice 81-329 *Reducing Regulatory Burden for Investment Fund Issuers*).

2. Registered portfolio managers should be fully exempted from the application of the Proposed Rules and, to the extent that portfolio managers advising on OTC derivatives pose an identified risk to Canadian capital markets, appropriate revisions should be made to NI 31-103 to address such risks

Given the considerations above, registered portfolio managers should be fully exempted from the Proposed Rules. Otherwise, registered portfolio managers, in order to avoid the onerous application of the Proposed Rules, may limit their clients' access to certain OTC derivatives in Canada. The Proposed Rules may also drive foreign portfolio managers out of the Canadian marketplace, likely resulting in reduced investor choice in Canada and increased costs for both investors and Canadian firms.

To the extent that the CSA believes that portfolio managers, either registered or exempt, advising on OTC derivatives pose a residual risk to Canadian capital markets, appropriate revisions should be made to NI

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31-103 to address such risks. For instance, the International Adviser Exemption and the International Sub-Adviser Exemption can be modified to be made available to foreign portfolio managers advising on OTC derivatives.

The "incidental" guidance in the Business Conduct CP and the Registration CP does not address these concerns. Such guidance is vague, difficult to apply in practice and does not provide sufficient clarity for market participants in determining whether they are subject to the registration requirement. Clear exemptions in each Proposed Rule is our preferred approach.

We also have a concern with respect to the product scope of the Proposed Rules. We understand that the Proposed Rules will apply to persons in the business of dealing in or advising on instruments as determined by the relevant derivatives product determination rule in each province and territory (the "Product Determination Rules"). Under the Product Determination Rules, foreign exchange contracts are "in scope" and therefore would be "in scope" for the purposes of the Proposed Rules.

Assuming that the Proposed Rules will apply to portfolio managers, the CSA should consider the instruments caught by the Product Determination Rules for the purposes of the Proposed Rules. In particular, foreign exchange contracts should not be "in scope" for the purposes of the Proposed Rules – these contracts do not present a systemic risk to Canadian capital markets. Foreign exchange contracts are commonly used by portfolio managers to hedge risks associated with their clients' investment portfolios (a necessary incidental aspect of managing a securities portfolio) and this activity should not subject a portfolio manager to the Proposed Rules.

The CSA contemplated that the application of the Product Determination Rules could vary depending on the particular regulatory instrument under consideration. For instance, the following is stated in CSA Consultation Paper 91-301 – *Model Provincial Rules – Derivatives Product Determination and Trade*:

> "The Committee expects that elements of the Scope Rule, subject to necessary amendments, will also be made applicable to certain provisions of securities legislation, and to additional derivatives rules that will be brought into force, including but not limited to rules relating to over-the-counter central counterparty clearing, end-user exemptions, trading platforms, capital and collateral, and registration. However, there may be variations in the application of the Scope Rule for these other rules. In particular, certain contracts or instruments that are prescribed to be securities or derivatives for the purposes of the TR Rule may be treated differently in other rules." [emphasis added]

3. *If portfolio managers are not fully exempted from the application of the Proposed Rules and NI 31-103 is not modified, then portfolio managers should only be subject to the fundamental requirements in Part 3 Division 1 of the Business Conduct Rule*

If portfolio managers are not fully exempted from the application of the Proposed Rules, then they should only be required to comply with the fundamental obligations of Part 3 Division 1 of the Business Conduct Rule (i.e., fair dealing, conflict of interest management and general/gatekeeper know-your-derivatives party).

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Application of the Proposed Rules to Foreign (Exempt) Portfolio Managers

We propose that NI 31-103, or alternatively, the Proposed Rules (to the extent that they will apply to portfolio managers), should simply include adviser registration exemptions that mirror the International Adviser Exemption and the International Sub-Adviser Exemption.

1. *The foreign derivatives adviser exemptions in the Proposed Rules are overly burdensome and not sufficiently harmonized with existing international exemptions available under NI 31-103*

Section 43 of the Business Conduct Rule and Sections 59 and 61 of the Registration Rule provide exemptions for foreign derivatives advisers from the Proposed Rules if certain conditions are met, including that the foreign derivatives adviser is subject to, and in compliance with, the laws of a specified foreign jurisdiction (to be set out in an appendix to each rule). Other conditions of certain of these exemptions include that the foreign derivatives adviser promptly notifies the applicable Canadian regulator of each instance of material non-compliance with a requirement or guideline of the foreign jurisdiction. A foreign derivatives adviser relying on one of these exemptions must still comply with certain of the requirements of the Proposed Rules, despite being subject to the regulation of the foreign jurisdiction.

For no clearly identified reason, the exemptions under the Proposed Rules are much more limited than the International Adviser Exemption and the International Sub-Adviser Exemption, as well as the corresponding discretionary exemptions under commodity futures legislation.

Further, these exemptions are premised on the concept of substantial compliance, which is a novel concept in the Canadian securities regulatory landscape, 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. With respect to the foregoing, we encourage the CSA to 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).

For these reasons, NI 31-103 or alternatively the Proposed Rules (to the extent that they will apply to portfolio managers) should include adviser registration exemptions that mirror the International Adviser Exemption and the International Sub-Adviser Exemption. One appropriate outcome we see from this approach is that an SEC-registered investment adviser whose principal office is outside of Canada would not be subject to the Proposed Rules when it provides investment advisory services which include OTC derivatives to Canadian funds and clients that are eligible derivatives parties. This outcome would be consistent with the approach to securities regulation under NI 31-103.

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Finally, we reiterate that it is difficult to comment on the appropriateness of the foreign derivatives adviser exemptions in the Proposed Rules because the appendices of foreign jurisdictions have yet to be identified for comment. Foreign firms are not able to fully and properly assess how the Proposed Rules will apply to them, as they do not yet know the full extent of the requirements to which they will be subject. A process should also be built into each appendix to update the list of acceptable foreign jurisdictions in an efficient manner (with appropriate industry consultation and comment process) to avoid the appendices becoming static. This is important as regulation constantly evolves, often at a quick pace. A third round of consultation and comments on the Business Conduct Rule is necessary, as well as further consultation and comments on the Registration Rule.

2. The International Sub-Adviser Exemption should be available to firms with respect to OTC derivatives activities

It is critical that an equivalent of the International Sub-Adviser Exemption be available to firms with respect to OTC derivatives activities. It defies market efficiency and notions of cross-border harmonization to require a firm that is exempt from registration in Canada under the International Sub-Adviser Exemption for securities law purposes to have to both register as a derivatives adviser, and be subject to extensive business conduct requirements, simply for sub-advising on a mandate that includes OTC derivatives. The application of the International Sub-Adviser Exemption to OTC derivatives activities would help to address our harmonization concerns, as well as our concerns with respect to the compliance burdens. Failing to include such an exemption may also severely limit the participation of foreign firms in the Canadian marketplace.

The terms of the International Sub-Adviser Exemption available to firms with respect to OTC derivatives activities should be identical to the terms found in section 8.26.1 of NI 31-103. Therefore, if a firm qualifies under the International Sub-Adviser Exemption, it should not be subject to further Canadian securities regulatory requirements. This is justifiable from a policy perspective, as an international sub-adviser may only advise a registered Canadian adviser or dealer, specifically where that registered firm has agreed to be responsible for the losses arising out of the failure of international sub-adviser to fulfill its fundamental obligations.

3. The International Adviser Exemption should be available to firms with respect to OTC derivatives activities

Similarly, an equivalent of the International Adviser Exemption should be available to firms with respect to OTC derivatives activities. The terms of the International Adviser Exemption should mirror the terms found in section 8.26 of NI 31-103. No policy reason has been identified why such an exemption should not be available to firms that advise on OTC derivatives. Adopting such an approach promotes cross-border harmonization and marketplace efficiency.

4. If the International Sub-Adviser Exemption and the International Adviser Exemption are not available to firms with respect to OTC derivatives activities, then foreign derivatives advisers should only be subject to the fundamental requirements in Part 3 Division 1 of the Business Conduct Rule

If the International Sub-Adviser Exemption and/or the International Adviser Exemption are not included in NI 31-103 or the Proposed Rules, then foreign portfolio managers, who may be able to avail themselves

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of the foreign derivatives adviser exemptions in the Proposed Rules, should only be required to comply with the fundamental obligations of Part 3 Division 1 of the Business Conduct Rule (i.e., fair dealing, conflict of interest management and general/gatekeeper know-your-derivatives party).

Specifically, section 61 of the Registration Rule should be deleted in its entirety and section 59 of the Registration Rule and section 43 of the Business Conduct Rule should be modified to reflect that only the fundamental obligations of Part 3 Division 1 of the Business Conduct Rule apply to foreign derivatives firms relying on such exemptions.

Transition Periods Must Provide a Fair and Reasonable Opportunity for Derivatives Firms to Comply

Given that it is not yet clear what final obligations and requirements will apply to portfolio managers under the Proposed Rules, it is very difficult for us to comment on the reasonableness of the proposed one year transition period in the Business Conduct Rule. This is particularly true for portfolio managers in foreign jurisdictions yet to be identified in appendices to be published in the future. Given this, a one year transition period is not reasonable. Once the final obligations and requirements are known, we will be in a better position to comment on the appropriate length of the transition periods, one that will provide our members sufficient time to meet any new applicable requirements in the Proposed Rules.

C. Specific comments with respect to the Business Conduct Rule

As those foreign jurisdictions have yet to be identified for "substituted compliance" purposes, SIFMA AMG believes that the Business Conduct Rule should be published for a further comment period. SIFMA AMG may have additional comments on any future publications.

1. Derivatives Advisers should not be required to provide relationship disclosure information and tied selling disclosures or derivatives party statements

The requirements in section 17 and section 18 of the Business Conduct Rule should not apply to derivatives advisers because derivatives advisers that are registered portfolio managers are already subject to similar obligations under NI 31-103. These obligations will also result in unnecessarily duplicative information being provided to derivatives parties by derivatives advisers and derivatives dealers because where an adviser transacts in derivatives on behalf of its investor client, the transaction is executed between the investor and the dealer, not the derivatives adviser. Therefore, derivatives dealers are the appropriate entity to provide this information to derivatives parties.

Likewise, Section 28 of the Business Conduct Rule should not apply to derivatives advisers because derivatives advisers that are registered portfolio managers are already subject to similar obligations under NI 31-103. This obligation will also result in duplicative information being provided to derivatives parties by derivatives advisers and derivatives dealers because where an adviser transacts in derivatives on behalf of its investor client, the transaction is executed between the investor and the dealer, not the derivatives adviser. Therefore, derivatives dealers are the appropriate entity to provide this information to derivatives parties.

2. Division 2 – Derivatives party assets should be modified to take into account industry practice with respect to rehypothecation of collateral and margin

We have concerns with the CSA's approach to collateral generally and in the Business Conduct Rule in particular. Section 23 specifically contemplates an exception from the application of Division 2 if a

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derivatives firm is subject to, and complies with, National Instrument 81-102 *Investment Funds* (**"NI 81-102**") in respect of derivatives party assets. We also note that the recent custody amendments to NI 31-103 have introduced similar rules with respect to collateral and margin applicable to registered firms.

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, including NI 81-102 and NI 31-103.

We believe that the future rule dealing with margin and collateral requirements for non-centrally cleared derivatives is the more appropriate instrument to address collateral and margin requirements.

3. We continue to have serious concerns with the requirement for derivatives firms to have senior derivatives managers

Foreign advisers with a small number of Canadian clients will be reluctant to incur the cost and complexity of implementing such a regime solely for Canadian activities. This requirement does not exist on the securities side in Canada. While certain major jurisdictions, such as the United Kingdom, have a role similar to that of the senior derivatives manager, it is important to keep in mind the unique Canadian regulatory environment. Unlike the United Kingdom, NI 31-103 (and the Registration Rule) prescribe (or will prescribe) categories that require firms to register individuals in oversight and compliance roles. In such a regulatory environment, it is unduly onerous and unnecessarily duplicative to then require a firm to designate an additional un-registered individual who fulfils substantially the same role as these registered individuals.

To the extent that these multiple overlapping roles are maintained in the Proposed Rules, a Canadian derivatives adviser that is an affiliate of a global/foreign derivatives adviser, which maintains individuals in some of the proposed roles who act on a global basis, should be able to rely on such individuals to meet the requirements of the Proposed Rules.

D. Specific comments with respect to the Registration Rule

As the Proposed Rules have yet to identify which foreign jurisdictions satisfy "substituted compliance," foreign advisers have not been adequately informed as to which provisions of the Registration Rule they will be subject, SIFMA AMG may have additional comments on the next publication for comment of the Registration Rule.

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We would be happy to further discuss the issues identified herein at your convenience. If you have any questions, please contact Tim Cameron at 202-962-7447 or tcameron@sifma.org, Jason Silverstein at 212-313-1176 or jsilverstein@sifma.org, or Andrew Ruggiero at 212-313-1128 or aruggiero@sifma.org.

Respectfully submitted,

/s/ Timothy W. Cameron
Timothy W. Cameron, Esq.
Managing Director
Asset Management Group – Head
Securities Industry and Financial Markets Association

/s/ Jason Silverstein
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Asset Management Group – Managing Director and Associate General Counsel
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/s/ Andrew Ruggiero
Andrew Ruggiero
Asset Management Group – Associate
Securities Industry and Financial Markets Association

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Appendix "A"

Specific Feedback on the Business Conduct Rule

Definition of "eligible derivatives party"

Paragraphs (m), (n) and (o) provide that certain persons and companies are eligible derivatives parties if they meet certain criteria, including meeting certain financial thresholds. Are these criteria appropriate? Please explain your response.

Response: SIFMA AMG reiterates that it is important that the definition of "eligible derivatives party" include all persons and entities that qualify as "permitted clients" under NI 31-103. We do not believe a justification has been identified for excluding any category of "permitted client" from the definition of eligible derivatives party. A burden is imposed on the market by creating another investor status essentially identical to an existing one. We strongly urge that a new paragraph should be added to the definition of "eligible derivatives party" in each Proposed Rule that refers to the definition of "permitted client" under NI 31-103.

Further, specific knowledge and experience requirements should not apply in order for persons to qualify as eligible derivatives parties. This is not in line with international standards and will make it onerous for firms to onboard clients. We believe financial thresholds are sufficient to identify derivatives parties who are not in need of extra protections.

We also believe that the CSA should reconsider the $25 million net asset threshold in paragraph (m)(ii) of that definition and lower such threshold to $10,000,000. This approach would be consistent with the "eligible contract participant" definition under the US Commodity Exchange Act, which uses a USD $10,000,000 total asset test. This would help to address cross-border harmonization concerns and help to ensure that Canadian market participants are not placed at a competitive disadvantage.

Handling complaints

The obligations in section 16, as proposed, do not apply if a derivatives firm is dealing with (i) an eligible derivatives party that is not an individual or a specified commercial hedger, or (ii) an eligible derivatives party who is an individual or a specified commercial hedger that has waived these protections. Should the obligations in section 16 be expanded towards all derivatives parties? Please explain your response.

Response: No, the obligations in section 16 should not apply to eligible derivatives parties and should not apply to any foreign derivatives adviser relying on an exemption from the Business Conduct Rule. Further, the obligations in section 16 should not apply to registered portfolio managers, who are subject to the complaint handling obligations in NI 31-103.

Policies, procedures and controls

Subparagraph 30(1)(c)(iii) requires a derivatives firm to have policies, procedures and controls that are sufficient to assure that an individual who transacts or advises on derivatives for a derivatives firm, conducts themselves with integrity. Please provide any comments you may have relating to this requirement, specifically about any issues relating to the implementation of the requirement in its current form. We will consider these comments in assessing the impact of this requirement on derivatives firms.

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Response: We are concerned that the regulatory burden associated with this new requirement will reduce the number of foreign portfolio managers willing to provide advisory services to Canadian clients. To that end, foreign derivatives advisers relying on an exemption from the Business Conduct Rule should not be subject to this requirement. Further, this obligation should not apply to registered portfolio managers, who are subject to the obligations in Part 11 of NI 31-103. Portfolio managers, both Canadian and foreign, are subject to extensive regulation, including the requirement to have appropriate policies, procedures and controls in place.

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Appendix "B"

Specific Feedback on the Registration Rule

1) Methodology for determining "notional amount"

Annex I describes two different methodologies for determining notional amount for derivatives that reference a notional quantity (or volume) of an underlying asset: (i) the methodology based on the CDE Guidance, set out in Column 1 of Annex I, and (ii) the Regulatory Notional Amount methodology set out in Column 2 of Annex I.

> **(a) Please provide any comments relating to the constituent elements (price, quantity, etc.) of the proposed methodologies.**
>
> **(b) Please provide comments on the most appropriate approach to determining the notional amount, for the purpose of regulatory thresholds, of a derivative with a notional amount schedule, including a schedule with notional amounts not denominated in Canadian dollars.**
>
> **(c) Please provide comments on the most appropriate approach to determining notional amount for a multi-leg derivative.**

For example, in a multi-leg derivative with multiple legs that are exercisable, deliverable or otherwise actionable and that are not mutually exclusive, is it appropriate to determine the notional amount for the derivative by summing the notional amount for each such leg that is exercisable, deliverable or otherwise actionable and that is not mutually exclusive?

Other multi-leg derivatives may have multiple legs that are not exercisable, deliverable or otherwise actionable or that are mutually exclusive. For these types of multi-leg derivatives, is it appropriate to determine the notional amount for the derivative by using a weighted average of the notional amount of each such leg that is not exercisable, deliverable or otherwise actionable or that is mutually exclusive?

> **(d) Please provide any general comments on determining notional amount for the purpose of regulatory thresholds, including relating to implementation of the proposed methodologies.**

<u>**Response**</u>: The "notional amount" methodology that is ultimately adopted for purposes of the Registration Rule may not necessarily be appropriate in other contexts or rulemakings. The appropriate methodology for determining "notional amount" should be tailored to the specific rule in which it is applied, with appropriate industry consultation prior to introduction of the methodology in that rule.

Definition of "eligible derivatives party"

Paragraphs (m), (n) and (o) provide that certain persons and companies are eligible derivatives parties if they meet certain criteria, including meeting certain financial thresholds. Are these criteria appropriate? Please explain your response.

<u>**Response**</u>: Please see the response above in Appendix "A".

Application of the derivatives adviser registration requirement to registered advisers/portfolio managers under securities legislation

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Under the Proposed Instrument, a person or company engaging in or holding himself, herself or itself out as engaging in the business of advising others in derivatives will be required to register as a derivatives adviser unless an exemption from registration is available.

We understand that a registered adviser under securities or commodity futures legislation may provide advice in relation to derivatives or strategies involving derivatives, or may manage an account for a client and make trading decisions for the client in relation to derivatives or strategies involving derivatives. If the performance of these activities in relation to derivatives is limited in nature so that it could reasonably be considered incidental to the performance of their activities as a registered adviser for securities, we may consider the registered adviser/portfolio manager to not be "in the business of advising others in relation to derivatives".

> **(a) Do you agree with this approach? If not, why not? Alternatively, should we consider including an express exemption from the derivatives adviser registration requirement for a registered adviser under securities or commodity futures legislation? If yes, what if any conditions should apply to this exemption?**
>
> **(b) When should the provision of advice by a registered adviser/portfolio manager in relation to derivatives be considered incidental to the performance of their activities as a registered adviser/portfolio manager? What factors should we consider in distinguishing between registered advisers who need to register as derivatives advisers from registered advisers that do not need to register as derivatives advisers?**

Response: We have addressed this comment extensively in the body of our comment letter above. Portfolio managers should be exempt from the application of the Proposed Rules. In particular, please refer to "Section B. Comments applicable to both of the Proposed Rules - 1. Applying this new regime to portfolio managers is unnecessary and 2. Registered portfolio managers should be fully exempted from the application of the Proposed Rules and, to the extent that portfolio managers advising on OTC derivatives pose an identified risk to Canadian capital markets, appropriate revisions should be made to NI 31-103 to address such risks" above.

Exemption from the individual registration requirements for derivatives dealing representatives and derivatives advising representatives

Subsection 16(3) and subsection 16(4) provide an exemption from the requirement to register an individual as a derivatives dealing representative or as a derivatives advising representative in certain circumstances. Are the exemptions appropriate? In subparagraph 16(4)(b)(iii), individuals that act as an adviser for a managed account are not eligible for the exemption from the requirement to register as a derivatives advising representative. Is this carve out appropriate where an individual has discretionary authority over the account of an eligible derivatives party?

Response: SIFMA AMG supports the inclusion of these exemptions. Consistent with the removal of subsection 7(3) from the initial version of the Business Conduct Rule, which required managed accounts of eligible derivatives parties to be treated as those of non-eligible derivatives parties, subparagraph 16(4)(b)(iii) should be removed from the Registration Rule.

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Specific proficiency requirements for individual registrants

Subsections 18(2) through (6) of the Instrument establish specific proficiency requirements for each individual registration category. Are these specific requirements appropriate? If not what specific exams, designations or experience are appropriate?

Response: The specific proficiency requirements for each individual registration category should be aligned with the corresponding specific proficiency requirements found in NI 31-103. In the alternative, individuals currently registered under securities or commodity futures legislation should be grandfathered under any new requirements under the Registration Rule.

Derivatives ultimate designated person

Subparagraph 27(3)(c)(i) requires a derivatives firm's ultimate designated person to report any instance of non-compliance with securities legislation, including the Instrument, relating to derivatives or the firm's risk management policies if the non-compliance creates a risk of material harm to any derivatives party. Is this requirement appropriate?

Response: No. This requirement is out of step with the obligations of the ultimate designated person under NI 31-103. It is not clear to us why this requirement would be introduced for firms dealing in or advising on OTC derivatives when it is not required for firms dealing in or advising on securities.

Requirements, roles and responsibilities of ultimate designated persons, chief compliance officers and chief risk officers

Sections 27 through 29 of the Instrument establish requirements, roles, and responsibilities of individuals registered as the ultimate designated person, the chief compliance officer and the chief risk officer for each registered firm. Considering the obligations imposed on senior derivatives managers in the Business Conduct Instrument, are the requirements, roles and responsibilities in sections 27 through 29 of the Instrument appropriate?

Response: Foreign advisers with a small number of Canadian clients will be reluctant to incur the cost and complexity of implementing such a regime, and hiring required individuals for these overlapping roles, solely for Canadian activities. Further, this additional compliance overlay is inappropriate for portfolio managers, which will be arranging for transactions through dealers, which are or will be required to have such personnel. Applying similar requirements to portfolio managers creates unnecessary duplication. Please also see the body of our response where we express concerns with these multiple overlapping roles under "Section C. Specific comments with respect to the Business Conduct Rule - 4. We continue to have serious concerns with the requirement for derivatives firms to have senior derivatives managers".

Minimum requirements for risk management policies and procedures

Section 39 sets out the minimum requirements for risk management policies and procedures. Are any of the requirements inappropriate? Are the requirements for an independent review of risk management systems appropriate?

Response: The requirement that risk management policies and procedures be approved by the derivatives firm's board of directors, or individuals acting in a similar capacity for the firm, is inappropriate. While we acknowledge that this requirement is similar to what swap dealers are subject to in the United States, it

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is inappropriate as directors do not have the necessary qualifications or experience to assess such policies and procedures. To meaningfully meet this requirement, the directors would have to be risk management professionals. Directors, very likely being non-risk management professionals, will have to extensively consult the firm's risk management personnel to be in a position to meaningfully review and approve these policies and procedures. The board's role should properly be to ensure that an appropriate risk management system is in place and supervise this system (receiving regular reports from appropriate risk management personnel) but it should not be to approve risk management policies and procedures. Directors do not have the experience or expertise to appropriately provide such approval. The review and approval of risk management policies and procedures is the proper domain of risk management professionals, who have the necessary experience and expertise to conduct such a review.

The requirement for an independent review of risk management systems is unnecessary as firms will update and review such systems when appropriate (given their internal risk management processes and business and operating environment) and in line with their general duties and obligations, including to clients. This requirement is also out of line with the requirements applicable to compliance systems generally (i.e., there is no requirement for an independent review of compliance systems).

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BY ELECTRONIC MAIL: comments@osc.gov.on.ca, consultation-en-cours@lautorite.qc.ca

September 20, 2018

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Authorité des marchés financiers
Financial and Consumer Services Commission of New Brunswick
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Superintendent of Securities, Nunavut

The Secretary
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Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
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C.P. 246, tour de la Bourse
Montreal (Québec) H4Z 1G3

Dear Sirs / Madames:

Re: Proposed National Instrument 93-102 *Derivatives: Registration* ("Proposed NI 93-102") and Proposed Companion Policy to National Instrument 93-102 ("Proposed Companion Policy", and together with Proposed NI 93-102, the "Proposed Instrument")

A. Introduction

Thank you for the opportunity to provide comments to the Canadian Securities Administrators (the "**CSA**") on the Proposed Instrument.

Fidelity Investments Canada ULC ("**Fidelity**") is the fourth largest asset management company in Canada. Fidelity manages approximately $136 billion in retail mutual funds and institutional assets.

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B. Comments

1. *Introduction*

Fidelity does believe that a robust regime for derivatives trading, including oversight and proficiency, is important and we are supportive of the overarching goals of the CSA in coming up with a regime that is effective. The use and risks of derivatives must be employed, monitored and controlled appropriately and prudently with appropriate expertise.

However, we think the regime being proposed is incrementally too onerous. It creates an entirely new regime on top of an existing and effectively functioning regime for the advising of securities. It is also in many ways duplicative in an unnecessary fashion.

In particular, an advisor like Fidelity will need to be registered in three categories – portfolio manager, commodity futures and now derivatives adviser. It strikes us that these regimes cry out for one regime under National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("**NI 31-103**"), rather than creating three separate regimes for essentially the oversight of all advising activities. This is also true for individual portfolio manager registrants. We are now looking at registering portfolio managers in three different categories with different proficiency and experience requirements depending on the regime.

Further, under the Proposed Instrument, and in conjunction with proposed National Instrument 93-101 *Derivatives: Business Conduct*, an investment advisor who advises on derivatives would be required to have a Derivatives Chief Compliance Officer ("**CCO**"), a Senior Derivatives Manager, a Derivatives Chief Risk Officer ("**CRO**") and a Derivatives Ultimate Designated Person. We think this is excessive and certainly finding people with expertise required in the Proposed Instrument will be extremely difficult.

In addition, while investment advisors, like Fidelity, have the resources to recruit people with experience, we believe you would be putting smaller investment advisors at a significant disadvantage by requiring such an extensive regime.

Specific comments are set out below.

2. *Derivatives Adviser Registration*

As currently drafted, the Proposed Instrument requires portfolio managers that advise on over-the-counter ("**OTC**") derivatives to register under the Proposed Instrument (the "**Derivatives Registration Requirement**").

Fidelity is of the view that the Derivatives Registration Requirement should not apply to portfolio managers advising on OTC derivatives that are registered pursuant to NI 31-103, as they are already subject to similarly robust registration requirements under NI 31-103. Moreover, the general "business trigger" analysis contained in the Proposed Instrument does not include an explicit exemption for portfolio managers advising on OTC derivatives that are otherwise registered under other Canadian securities legislation.

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As such, and in line with the CSA's aim of reducing the regulatory burden on firms, Fidelity strongly suggests that the CSA revise the Proposed Instrument to clarify that portfolio managers advising on OTC derivatives that are already registered under NI 31-103 are exempt from the Derivatives Registration Requirement. We would be supportive of incrementally adding requirements for proficiency and experience, without an entirely new regime in NI 31-103 for derivatives.

3. *International Adviser and Sub-Adviser Exemption*

The Proposed Instrument contains an exemption for foreign dealers from the requirement to register as a derivatives dealer. However, this exemption, as drafted, contains additional conditions that are not found in the international adviser exemption contained in NI 31-103, such as the requirement to comply with requirements in the foreign jurisdiction and notify the regulator of instances of material non-compliance with such requirements. Moreover, the Proposed Instrument does not include a similar exemption for international sub-advisers.

As such, Fidelity strongly suggests that the CSA consider revising the Proposed Instrument to include the equivalent of the international sub-adviser exemption in Section 8.26.1 of NI 31-103 and international adviser exemption in Section 8.26 of NI 31-103. Alternatively, the CSA could just simply add sections to NI 31-103 for existing registrants who also advise on derivatives.

4. *Proficiency Requirements*

Fidelity appreciates the CSA's interest in having appropriately qualified market participants. However, Fidelity is of the view that the proficiency requirements set out in Item 18 of the Proposed Instrument for a CCO and CRO are unduly burdensome and restrictive, particularly the requirements for significant derivatives experience.

Fidelity strongly suggests that the CSA consider aligning the proficiency requirements for a CCO and CRO with the proficiency requirements set out in NI 31-103. Alternatively, the CSA should consider grandfathering proficiency for individuals otherwise registered under NI 31-103. Without such changes to the Proposed Instrument, firms may otherwise face significant challenges in recruiting suitable individuals for the roles of CCO and CRO.

We would therefore strongly urge a staged-in approach to these requirements, or, as stated above, grandfathering for existing CCOs who can demonstrate that an adequate oversight compliance program is already in existence at the firm.

Lastly, some firms may have access to derivatives expertise at foreign affiliates. We urge you to explicitly state that equivalent exams in foreign jurisdictions are acceptable for purposes of registration.

5. *Time Limits on Examination Requirements*

The above-mentioned proficiency requirements include a 36 month time limit (the "**Designation Time Limit**") on the validity of examinations prescribed in Section 18 of

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Proposed NI 93-102. The Proposed Companion Policy further states that the Designation Time Limit does not apply to the CFA Charter or the Risk Manager Designation. However, the Proposed Instrument does not include a similar exemption for the Canadian Investment Manager Designation (the "**CIM Designation**").

Fidelity strongly suggests that the CSA revise the Proposed Companion Policy to include an exemption from the Designation Time Limit for the CIM Designation, consistent with a similar exemption for the CIM Designation contained in the Companion Policy to NI 31-103.

Fidelity also believes that the requirement for a CFA is excessive for the CCO and CRO. Lastly, the rules give a significant advantage to those who have worked for a Canadian financial institution with derivatives experience. Certainly that experience can be obtained outside of a financial institution and still be very relevant.

C. Conclusion

We appreciate the opportunity to comment on the Proposed Instrument. If you wish to discuss any of the foregoing, please contact the undersigned.

Yours very truly,

Fidelity Investments Canada ULC

"W. Sian Burgess"

W. Sian Burgess
Senior Vice President, Fund Oversight