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Notices

1.1 Notices

1.1.1 CSA Staff Notice 81-334 ESG-Related Investment Fund Disclosure

CSA STAFF NOTICE 81-334
ESG-RELATED INVESTMENT FUND DISCLOSURE

January 19, 2022

A. Introduction

The purpose of this Canadian Securities Administrators (the **CSA**) Staff Notice (the **Notice**) is to provide guidance on the disclosure practices of investment funds as they relate to environmental, social and governance (**ESG**) considerations, particularly funds whose investment objectives reference ESG factors (**ESG Funds**) and other funds that use ESG strategies (**ESG Strategy Funds**, and together with ESG Funds, **ESG-Related Funds**). This Notice also provides guidance on the types of investment funds that may market themselves as being focused on ESG.

The guidance provided in this Notice is based on existing securities regulatory requirements and does not create any new legal requirements or modify existing ones. This Notice clarifies and explains how the current securities regulatory requirements apply to ESG-related investment fund disclosure. It also includes best practices that, while not required, staff of the CSA (**staff** or **we**) are of the view would enhance ESG-related disclosure and sales communications.[1] The Notice aims to bring greater clarity to ESG-related fund disclosure and sales communications to enable investors to make more informed investment decisions.

Interest in ESG investing has grown considerably in Canada for both retail and institutional investors, including in the investment fund industry. According to a 2020 report from the Global Sustainable Investment Alliance, compared to other regions such as the United States, Japan and Australasia, Canada experienced the largest increase in "sustainable investment" assets over the preceding two years, with 48% growth, and at the time of the report, Canada was the market with the highest proportion of sustainable investment assets at 62%.[2] Similarly, according to a report from the Responsible Investment Association, as of November 2020, retail "responsible investing" mutual fund assets had increased from $11.1 billion to $15.1 billion, an increase of 36% over two years.[3] In 2021, the value of "sustainable funds" in Canada was $18 billion at the end of the first quarter, representing a 160% increase from 2020, and there were 156 sustainable funds at the end of March 2021 as compared to 105 at the same time the prior year.[4]

As the investment fund industry has responded to investor demand by creating new ESG-Related Funds and incorporating ESG considerations into existing funds, there has been an increased potential for "greenwashing", whereby a fund's disclosure or marketing intentionally or inadvertently misleads investors about the ESG-related aspects of the fund. In addition to leading investors to invest in funds that do not meet their objectives or needs, greenwashing may also have the effect of causing investor confusion and negatively impacting investor confidence in ESG investing, including ESG-Related Funds.

The growth of interest in ESG investing and the increased potential for greenwashing have led securities regulators and international organizations to address issues related to ESG investing, including ESG-Related Funds. In particular, the International Organization of Securities Commissions (**IOSCO**) has recently published a final report setting out recommendations for securities regulators and policymakers to improve sustainability-related practices, policies, procedures and disclosure in the asset management industry (the **IOSCO Report**).[5]

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1 Where this Notice provides best practices, staff have used the language "staff encourage".
2 Global Sustainable Investment Alliance, "Global Sustainable Investment Review 2020", accessible at: http://www.gsi-alliance.org/wp-content/uploads/2021/08/GSIR-20201.pdf.
3 Responsible Investment Association, "2020 Canadian Responsible Investment Trends Report" (November 2020), accessible at: https://www.riacanada.ca/content/uploads/2021/01/2020-RI-Trends-Report-FINAL-Jan-21-UPDATED.pdf.
4 The Globe and Mail, "Investment firms are shifting their businesses as interest in ESG rises" (June 30, 2021), accessible at: https://www.theglobeandmail.com/investing/globe-advisor/advisor-news/article-investment-firms-are-shifting-their-businesses-as-interest-in-esg/.
5 International Organization of Securities Commissions, "Recommendations on Sustainability-Related Practices, Policies, Procedures and Disclosure in Asset Management: Final Report" (November 2021), accessible at: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD688.pdf.

Considering these global developments and the increased potential for greenwashing, staff are providing guidance in this Notice on ESG-related disclosure practices by investment funds, particularly in relation to ESG-Related Funds. We encourage investment funds, investment fund managers (**IFMs**) and portfolio advisers to review this Notice.

B. Purpose

This Notice

- provides an overview of common ESG-related terms and strategies,
- briefly summarizes key international and domestic developments in this area, including the recommendations from the IOSCO Report relating to investment product-level disclosure, and
- provides relevant and practical guidance for investment funds, particularly ESG-Related Funds, and their IFMs to enhance the ESG-related aspects of the funds' regulatory disclosure documents and ensure that the sales communications of such funds are not untrue or misleading and are consistent with the funds' regulatory offering documents.

Any examples provided in this Notice are for illustrative purposes only and are not meant to be exhaustive of all potential scenarios or approaches.

C. ESG-Related Terms and Strategies

While this Notice uses the term "ESG", there are other related terms that are commonly used by ESG-Related Funds and more broadly throughout the investment fund industry. Those terms include the following:

- sustainable
- responsible investing or RI
- socially responsible investing or SRI
- ethical
- green

ESG-Related Funds, whether they are ESG Funds or ESG Strategy Funds, generally consider ESG factors in their investment decision-making processes, although ESG-Related Funds may focus on only one or two of the three areas of ESG. ESG-Related Funds may even only focus on one or a small group of factors in one of the areas of ESG, such as a fund that is focused only on board diversity. For illustrative purposes, the following is a non-exhaustive list of ESG factors that may be considered by such funds in their investment decision-making processes:

Environmental	Social	Governance
Air and water pollution	Community relations	Audit committee structure
Biodiversity	Data protection and privacy	Board diversity
Climate change and carbon emissions	Diversity	Bribery and corruption
Deforestation	Employee engagement	Executive compensation
Energy efficiency	Human rights	Lobbying
Waste management	Indigenous inclusion and reconciliation[6]	Political contributions
Water scarcity	Labour standards	Whistleblower schemes

ESG-Related Funds incorporate ESG factors into their investment decision-making processes using one or more ESG strategies. While many ESG strategies are widely used across the industry, there is currently a lack of consistency in ESG-related terminology and definitions used to describe these ESG strategies throughout the industry.

[6] Some stakeholders are of the view that, given the importance of Indigenous inclusion and reconciliation in Canada, the concept of "ESG" should be expanded to "ESGI", with Indigenous inclusion and reconciliation being included as a separate area.

The following are some of the most common ESG strategies:

Negative screening (sometimes referred to as exclusionary screening or ESG exclusions)	The fund excludes certain types of securities or companies from its portfolio based on certain ESG-related activities, business practices, or business segments.
ESG integration	The fund explicitly considers ESG-related factors that are material to the risk and return of the investment, alongside traditional financial factors, when making investment decisions.
Best-in-class (sometimes referred to as positive screening or inclusionary screening)	The fund aims to invest in companies that perform better than their peers on one or more performance metrics related to ESG matters.
Thematic investing	The fund aims to invest in sectors, industries, or companies that are expected to benefit from long-term macro or structural ESG-related trends.
Impact investing	The fund seeks to generate a positive, measurable social or environmental impact alongside a financial return.
Stewardship (sometimes referred to as active ownership)	The fund uses rights and position of ownership to influence the activities or behaviour of underlying portfolio companies in relation to ESG matters. This may include the use of ESG strategies such as proxy voting and/or shareholder engagement, which are explained below.
Proxy voting	The fund votes on management and/or shareholder resolutions in accordance with certain ESG-related considerations or aims.
Shareholder engagement	The fund interacts with the management of the company through meetings and/or written dialogue in accordance with certain ESG-related considerations or aims.

The above terms and definitions have been included for illustrative purposes only, and the Notice does not require or endorse the use of the above names and definitions for these ESG strategies, or the ESG strategies themselves. As further discussed under "Investment objectives and fund names", an ESG-Related Fund's description of these ESG strategies must be written using plain language so that investors can understand the fund's investment strategies.[7]

D. Key international and domestic developments

There have been a number of key international and domestic developments regarding ESG-related issues in asset management.

I. International developments

A number of securities regulators around the world have developed and implemented regulatory requirements or published policy recommendations and guidance pertaining to ESG or sustainability-related disclosure for investment funds.[8]

In addition, IOSCO has established the Sustainable Finance Task Force (the **STF**) with the aims of: (a) improving sustainability-related disclosures made by issuers and asset managers; (b) collaborating with other international organizations to avoid duplicative efforts and enhance coordination of relevant regulatory and supervisory approaches; and (c) conducting case studies and analyses of transparency, investor protection and other relevant issues within sustainable finance. The STF has three workstreams, with Workstream 2 being focused on sustainability-related practices, policies, procedures and disclosure in the asset management industry.[9]

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7 Subsection 4.1(1) of National Instrument 81-101 *Mutual Fund Prospectus Disclosure*; General Instruction (5) to Form 41-101F2 *Information Required in an Investment Fund Prospectus* (**Form 41-101F2**); subsection 3B.2(1) of National Instrument 41-101 *General Prospectus Requirements*. Also see, amongst others, subsection 113(1) of the *Securities Act* (Alberta), subsection 63(1) of the *Securities Act* (British Columbia), subsection 56(1) of the *Securities Act* (Ontario) and section 13 of the *Securities Act* (Québec).

8 For example, see the European Union's "Sustainable Finance Disclosure Regulation" (Regulation 2019/2088, accessible at: https://eur-lex.europa.eu/eli/reg/2019/2088/oj), France's "Information to be Provided by Collective Investment Schemes Incorporating Non-Financial Approaches" (AMF Position DOC-2020-03, accessible at: https://www.amf-france.org/en/regulation/policy/doc-2020-03), Hong Kong's "Circular to management companies of SFC-authorized unit trusts and mutual funds – ESG funds" (accessible at: https://apps.sfc.hk/edistributionWeb/gateway/EN/circular/products/product-authorization/doc?refNo=21EC27) and Malaysia's "Guidelines on Sustainable and Responsible Investment Funds" (SC-GL/4-2017, accessible at: https://www.sc.com.my/api/documentms/download.ashx?id=9a455914-71db-4982-a34b-9a8fc7df79b5). For an overview of regulatory requirements and guidance pertaining to sustainability-related product disclosure, see Chapter 3 of the IOSCO Report.

9 The Ontario Securities Commission is the co-lead of Workstream 2, along with the Securities and Futures Commission of Hong Kong. Workstream 1 is focused on sustainability-related disclosures for corporate issuers while Workstream 3 is focused on ESG ratings and data providers. The Ontario Securities Commission is a member of Workstream 1 and the Autorité des marchés financiers is a member of Workstream 3.

As mentioned above, the IOSCO Report, which was produced by Workstream 2, sets out recommendations for securities regulators and policymakers, as applicable, in order to improve sustainability-related practices, policies, procedures and disclosure in the asset management industry.

One of the recommendations relates to the improvement of product-level disclosure in order to help investors better understand sustainability-related products and material sustainability-related risks for all products (the **IOSCO Product Disclosure Recommendation**). The IOSCO Product Disclosure Recommendation covers ten areas relating to product disclosure: (a) product authorization; (b) naming; (c) labelling and classification; (d) investment objectives disclosure; (e) investment strategies disclosure; (f) proxy voting and shareholder engagement disclosure; (g) risk disclosure; (h) marketing materials and website disclosure; (i) monitoring of compliance and sustainability-related performance; and (j) periodic sustainability-related reporting.

Another one of the recommendations in the IOSCO Report is that securities regulators and/or policymakers, as applicable, consider encouraging industry participants to develop common sustainable finance-related terms and definitions to ensure consistency throughout the global asset management industry (the **IOSCO Terminology Recommendation**, and together with the IOSCO Product Disclosure Recommendation, the **IOSCO Recommendations**).[10]

Lastly, in November 2021, the CFA Institute published the CFA Institute Global ESG Disclosure Standards for Investment Products to provide greater transparency and comparability to investors by enabling asset managers to clearly communicate the ESG-related features of their investment products.[11]

II. Domestic developments

Staff have conducted continuous disclosure reviews of the regulatory disclosure documents and sales communications of ESG-Related Funds and other funds that market themselves as ESG-Related Funds (the **ESG CD Reviews**). These reviews are discussed further below.

In addition, in October 2020, the Canadian Investment Funds Standards Committee (**CIFSC**) proposed a framework to identify Canadian investment funds that practice responsible investing (the **RI Fund Identification Framework**).[12] The goal of the RI Fund Identification Framework is to provide an objective, comprehensive list of Canadian responsible investing funds. In March 2021, following a comment period, the CIFSC published a response to the comments received and announced that it will be releasing a second version of the RI Fund Identification Framework for further comment.[13]

E. ESG CD Reviews

I. Scope and purpose

The purpose of the ESG CD Reviews was to assess, through reviews of each fund's regulatory disclosure documents and sales communications, the quality of the ESG-related aspects of the fund's disclosure, including whether the fund's disclosure of how ESG factors are integrated into its investment objectives and/or strategies in the fund's prospectus met the standard of full, true and plain disclosure of all material facts, and whether the fund's sales communications were misleading.

The ESG CD Reviews were also aimed at evaluating how well the current disclosure requirements address ESG-Related Funds and ESG-related disclosure and determining whether regulatory guidance is needed to explain how the current disclosure requirements apply to ESG-Related Funds and ESG-related disclosure.

The ESG CD Reviews included 32 funds managed by 23 different IFMs. Staff selected funds that referenced ESG in their investment objectives or strategies and/or that marketed themselves in online sales communications as ESG-Related Funds.

For each selected fund, staff reviewed: (a) the fund's prospectus and, where applicable, annual information form (**AIF**); (b) the fund facts document (**Fund Facts**) or ETF facts document (**ETF Facts**), as applicable; (c) the fund's annual and interim management reports of fund performance (**MRFPs**); and (d) some of the fund's online sales communications, including the fund's website.

[10] The other recommendations relate to: (a) asset manager practices, policies, procedures and firm-level disclosure; (b) supervision and enforcement; and (c) financial and investor education.

[11] CFA Institute, "Global ESG Disclosure Standards for Investment Products" (2021), accessible at: https://www.cfainstitute.org/-/media/documents/ESG-standards/Global-ESG-Disclosure-Standards-for-Investment-Products.pdf.

[12] Canadian Investment Funds Standards Committee, "CIFSC Responsible Investment Identification" (October 2020), accessible at: https://www.cifsc.org/the-cifsc-proposes-to-adopt-an-ri-fund-identification-framework/.

[13] Canadian Investment Funds Standards Committee, "RE: CIFSC response to public comments regarding the RI Fund Identification Proposal" (March 19, 2021), accessible at: https://www.cifsc.org/wp-content/uploads/2021/03/CIFSC-response-to-comments-regarding-RI-fund-identification-proposal-1.pdf.

II. Findings

The findings of the ESG CD Reviews are summarized below. Staff note, however, that some of these findings are observations rather than findings related to compliance with disclosure requirements. For guidance on how the disclosure requirements relate to each of the topics covered in the findings, see "Guidance" below.

(a) Investment objectives

One of the funds referenced ESG in its name and investment strategies disclosure but did not reference ESG in its investment objectives.

(b) Investment strategies

Most of the funds reviewed use ESG factors as part of their investment strategies. However, more than half of those funds lacked detailed disclosure in their investment strategies about the specific ESG factors considered by the fund, including failing to identify or explain the ESG factors. These funds also failed to disclose how the factors are evaluated.

In addition, around two-thirds of the funds reviewed use negative screening as an investment strategy, but a small portion of those funds did not provide an explanation of the negative screening factors where they were not self-explanatory.

A small number of the funds reviewed use multiple ESG strategies outside of negative screening but did not provide disclosure about how the various strategies work together, including the order in which they are applied during the investment selection process.

Slightly over a third of the funds held investments in industries that, according to their exclusionary investment strategies, should not have been permitted. In addition, a fifth of the funds had portfolio holdings that appeared to be inconsistent with the fund's name, investment objectives or investment strategies.[14]

(c) Risks

Almost half of the funds disclosed ESG-specific risks in their prospectuses.

(d) Proxy voting

More than half of the funds reviewed use proxy voting as a strategy to achieve their ESG-related investment objectives. However, more than half of those funds did not disclose this in their investment strategies disclosure.

In addition, of the funds that use proxy voting as an ESG strategy, more than half of those funds did not disclose their ESG-specific proxy voting policies and procedures in their prospectuses or AIFs, as applicable.

(e) Continuous disclosure

Around three-quarters of the funds reviewed did not report on the changes in the composition of their investment portfolios due to the ESG-related aspects of their investment objectives and investment strategies.

In addition, the vast majority of the funds reviewed did not report on their progress or status with regard to meeting their ESG-related investment objectives.

(f) Sales communications

One fund marketed itself as an ESG-Related Fund and identified itself as being suitable for investors that wish to invest primarily in companies that operate in accordance with ESG-related values, but its name, investment objectives and investment strategies did not reference ESG.

Around one-third of the funds reviewed provided more detailed disclosure of their investment strategies in their sales communications than they did in their prospectuses.

In addition, for a number of funds, there were discrepancies between their prospectuses and sales communications in the way that they described their investment strategies.

(g) Conclusion

In general, staff consider the current disclosure requirements to be broad enough in scope to address ESG-Related Funds and other ESG-related disclosure. However, in staff's view, regulatory guidance is needed to clarify how the current disclosure

[14] Staff note that a fund that references ESG in its name or investment objectives may be permitted to invest in companies that appear to be inconsistent with ESG values; see the discussion below under G. III. Investment strategies disclosure.

requirements apply to ESG-Related Funds and other ESG-related disclosure in order to improve the quality of ESG-related disclosure and sales communications. In addition, in staff's view, the ESG CD Reviews indicated that the disclosure of ESG-Related Funds would benefit from greater detail about the ESG-related aspects of the fund, particularly regarding investment strategies disclosure, proxy voting disclosure and continuous disclosure.

F. ESG-related changes to existing funds

In addition to the findings from the ESG CD Reviews, staff note that there have been a number of recent prospectus amendment filings by existing funds that wish to add references to ESG factors to their names and investment strategies without referencing ESG factors in their investment objectives.

G. Guidance

Based on the findings of the ESG CD Reviews, staff's observations of ESG-related changes to existing funds, and the IOSCO Recommendations, staff are providing guidance on how existing securities regulatory requirements apply to investment funds as they relate to ESG considerations, particularly ESG-Related Funds, in the following areas: (i) investment objectives and fund names; (ii) fund types; (iii) investment strategies disclosure; (iv) proxy voting and shareholder engagement policies and procedures; (v) risk disclosure; (vi) suitability; (vii) continuous disclosure; (viii) sales communications; (ix) ESG-related changes to existing funds; and (x) ESG-related terminology.

I. Investment objectives and fund names

An investment fund is required to disclose, in its prospectus, the fundamental investment objectives of the fund, including information that describes the fundamental nature or fundamental features of the fund that distinguish it from other funds.[15] Similarly, an investment fund is required to include, in its Fund Facts or ETF Facts, as applicable, a description of the fundamental nature or fundamental features of the fund that distinguish it from other funds.[16]

A fund's name and investment objectives play a role in identifying the primary focus of the fund and distinguishing it from other funds. A fund's name and investment objectives should therefore accurately reflect the primary focus of the fund. To prevent greenwashing, it is important that the name and investment objectives of a fund accurately reflect the extent to which the fund is focused on ESG, where applicable, including the particular aspect(s) of ESG that the fund is focused on.

Staff note that funds that do not have ESG-related investment objectives may still use ESG strategies. However, a fund that uses one or more ESG strategies as a material or essential aspect of the fund, as evidenced by the name of the fund or the manner in which it is marketed, is required to disclose such ESG strategies as an investment objective in its prospectus[17] and in its Fund Facts or ETF Facts, as applicable.[18] As discussed above, staff remind funds that the description of these ESG strategies must be written using plain language so that investors can understand the fund's investment objectives, in accordance with the requirement that the prospectus provide full, true and plain disclosure of all material facts.

Furthermore, a fund that primarily invests or intends to primarily invest, or whose name implies that it will primarily invest, in a type of issuer or industry segment associated with ESG is required to indicate this in its fundamental investment objectives,[19] as well as in its Fund Facts or ETF Facts, as applicable.[20] For example, this may include a fund that intends to primarily invest in companies that are transitioning to a low-carbon economy or a fund whose name implies that it will primarily invest in the water conservation industry.

Staff note that the existing requirements draw a link between a fund's name and its investment objectives in order to ensure that there is consistency between them, given the importance of a fund's name in distinguishing it from other funds. Accordingly, in staff's view, where a fund's name references ESG or other related terms such as sustainability, green, social responsibility, etc., the fundamental investment objectives of the fund are required to reference the aspect of ESG included in the name of the fund. This is illustrated in Figure 1 below.

Staff acknowledge that not all ESG-related investment objectives relate to a measurable ESG outcome. However, where an ESG Fund intends to generate a measurable ESG outcome, staff encourage such funds to clearly state the intended outcome as part of their investment objectives in order to allow investors to identify funds that match their own ESG-related goals. For example,

15 Item 4(1) of Part B of Form 81-101F1 *Contents of Simplified Prospectus* (**Form 81-101F1**); Item 5.1(1) of Form 41-101F2.

16 Item 3(1) of Part I of Form 81-101F3 *Contents of Fund Facts Document* (**Form 81-101F3**); Item 3(1) of Part I of Form 41-101F4 *Information Required in an ETF Facts Document* (**Form 41-101F4**).

17 Instruction (3) to Item 4 of Part B of Form 81-101F1 states that if a particular investment strategy is a material aspect of the fund, as evidenced by the name of the fund or the manner in which it is marketed, this strategy must be disclosed as an investment objective. Similarly, Instruction (3) to Item 5 of Form 41-101F2 states that if a particular investment strategy is an essential aspect of the fund, as evidenced by the name of the fund or the manner in which it is marketed, this strategy must be disclosed as an investment objective

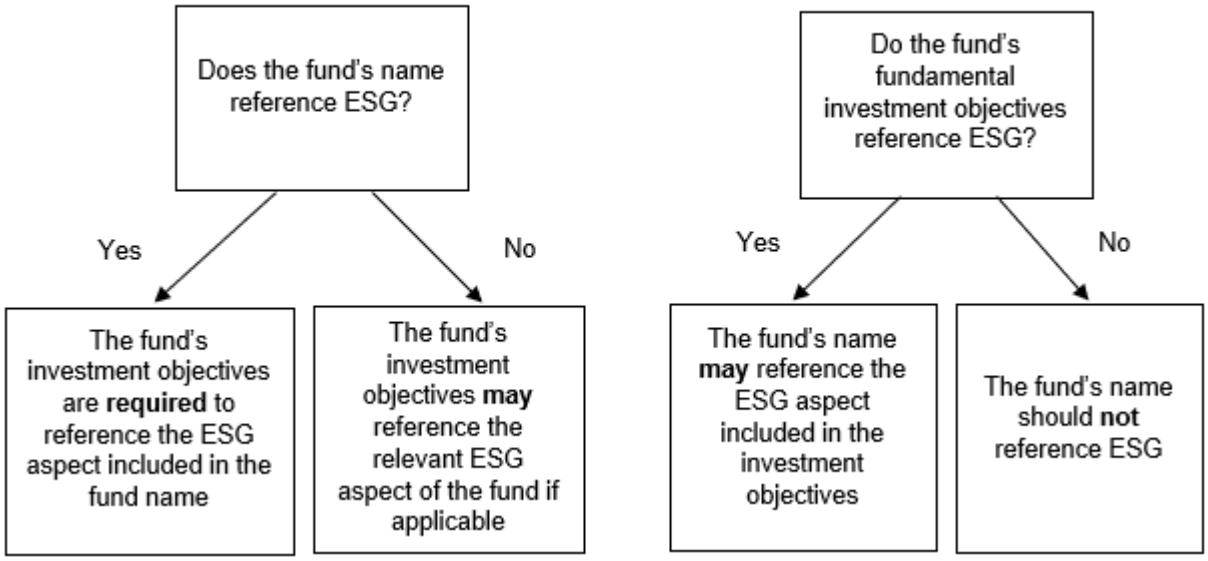
18 Instruction (2) to Item 3 of Part I of Form 81-101F3; Instruction (2) to Item 3 of Part I of Form 41-101F4.

19 Instruction (2) to Item 4 of Part B of Form 81-101F1 states that a mutual fund's fundamental investment objectives must indicate if the mutual fund primarily invests, or intends to primarily invest, or if its name implies that it will primarily invest, in a particular type of issuer or industry segment. Similarly, Instruction (2) to Item 5 of Form 41-101F2 states that if a fund primarily invests, or intends to primarily invest, or if its name implies that it will primarily invest, in a particular type of issuer or particular industry segment, the fundamental investment objectives should so indicate.

20 Instruction (1) to Item 3 of Part I of Form 81-101F3; Instruction (1) to Item 3 of Form 41-101F4.

staff encourage funds that aim to reduce carbon emissions to disclose a measurable carbon emissions reduction target in their investment objectives. The inclusion of a measurable ESG outcome in a fund's investment objectives would also allow funds to provide meaningful continuous disclosure that reports on whether the fund is achieving its intended ESG outcome.

Figure 1.



II. Fund types

A mutual fund that is not an ETF is required to identify, in its prospectus, the type of mutual fund that the fund is best characterized as.[21] Examples of types of mutual funds may include money market, equity, bond or balanced funds related, if appropriate, to a geographical region, or any other description that accurately identifies the type of mutual fund.[22]

Similar to fund names and investment objectives, the fund type identified in a fund's prospectus plays a role in identifying the focus of the fund.

While it is not a requirement, a mutual fund that includes ESG in its fundamental investment objectives may wish to characterize itself as a fund that is focused on ESG in addition to its primary fund type. For example, an ESG Fund may wish to identify itself as an ESG Canadian equity fund.

However, staff's view is that a fund that does not include ESG in its fundamental investment objectives should not characterize itself as a fund that is focused on ESG as it would not be an accurate identification of the fund type.

III. Investment strategies disclosure

An investment fund is required to disclose, in its prospectus, the principal investment strategies that the fund intends to use in achieving its investment objectives and the process by which the fund's portfolio adviser selects securities for the fund's portfolio, including any investment approach, philosophy, practices and techniques used.[23] In addition, as mentioned above, a prospectus must provide full, true and plain disclosure of all material facts.

Investment strategies disclosure provides clarity to investors about how the fund will achieve its investment objectives, including the nature and extent of the strategies employed by the fund, the investment universe from which the fund will select its investments, and which countries, industries, sectors or companies the fund may invest in. Full, true and plain ESG-related investment strategies disclosure enables investors to understand the ways in which the fund will meet its ESG-related investment objectives (if the fund is an ESG Fund) and the types of investments that the fund may make.

A fund that uses one or more ESG strategies, either as principal investment strategies or as part of its investment selection process, is required to provide disclosure about the ESG-related aspects of its investment selection process and strategies.

For both funds that use one or more ESG strategies as part of their principal investment strategies and those that use one or more ESG strategies as part of their investment selection process, the description of these ESG strategies must be written using plain

[21] Item 3(a) of Part B of Form 81-101F1.
[22] Instruction (2) to Item 3(a) of Part B of Form 81-101F1.
[23] Item 5(1)(a) and (b) of Part B of Form 81-101F1; Item 6.1(1)(a) and (c) of Form 41-101F2.

language in order to ensure that investors are able to understand the fund's investment strategies, in accordance with the requirement that the prospectus provide full, true and plain disclosure of all material facts.

In addition, in staff's view, the investment strategies disclosure should include identifying any ESG factors used and explaining the meaning of each ESG factor and how the ESG factors are evaluated and monitored. This may include an explanation of whether the evaluation of the ESG factor is quantitative or qualitative and whether the evaluation is conducted using third-party data. Some ESG factors may be more complicated for investors to understand and may require further explanation, such as "involvement in severe controversial events" and "clean air", which are examples of some of the factors that were identified but not explained in the regulatory disclosure documents reviewed as part of the ESG CD Reviews.

If a fund's use of one or more ESG strategies includes the use of targets for specific ESG-related metrics, such as carbon emissions, staff encourage such funds to disclose those targets as part of their investment strategies and identify if those targets may evolve or change over time in response to changing circumstances.

Staff note that funds that reference ESG in their names or investment objectives may invest in companies that appear to be inconsistent with ESG values. For example, some investors may expect funds that reference ESG in their names or investment objectives to exclude investments in companies involved in thermal coal and weapons. However, a fund's disclosed ESG-related investment objectives and strategies may permit such holdings. For example, some of these funds may be permitted to invest in such companies up to a certain percentage of their portfolios or in order to use shareholder engagement to improve the ESG practices of those companies. Alternatively, a fund's ESG-related investment objectives and strategies may be focused only on a particular aspect of ESG that would not preclude investments in such companies.[24] To provide greater clarity to investors and in line with the principle of full, true and plain disclosure of all material facts, staff's view is that an ESG Fund should disclose whether it may, at any point in time, hold such investments, what those holdings would include (including examples), and how such holdings meet the fund's investment objectives. If an ESG Fund is not permitted to hold such investments at any point in time, this should be disclosed in its investment strategies along with information about the monitoring process used by the fund to screen out such investments, and the fund should ensure that its portfolio does not include any such investments.

Staff have observed that the prospectuses of some funds state that the fund "may" exclude certain types of investments from their portfolios. If a fund has discretion over whether a type of investment is excluded from its portfolio, this should be clearly disclosed.

Staff note that the above guidance relating to investment strategies disclosure applies to all investment funds, including index-tracking funds. The following guidance applies specifically to funds that use any of the following: (a) proxy voting or shareholder engagement as an ESG strategy; (b) multiple ESG strategies; and (c) ESG ratings, scores, indices or benchmarks.

(a) Use of proxy voting or shareholder engagement as an ESG strategy

Some ESG-Related Funds use proxy voting or shareholder engagement as ESG strategies. If a fund uses proxy voting or shareholder engagement as a principal investment strategy, the fund is required to disclose this in its investment strategies. Furthermore, funds that use proxy voting or shareholder engagement as a part of their investment selection process are required to disclose how they are used by the fund.

For both scenarios, in staff's view, the disclosure should include the criteria used by the proxy voting or shareholder engagement strategy, the goal of the proxy voting or shareholder engagement strategy and the extent of the monitoring process used to assess the success of the proxy voting or shareholder engagement strategy.

For example, a portfolio adviser may choose to invest in a company that has poor environmental practices in order to improve those practices by way of shareholder engagement. In this scenario, the use of shareholder engagement should be disclosed in the fund's investment strategies, along with the criteria used to determine whether a company has poor environmental practices, the aim of improving those practices through shareholder engagement and the extent of the monitoring process used to assess the success of the shareholder engagement strategy in improving the environmental practices of the company.

While staff acknowledge that for some IFMs, proxy voting and shareholder engagement are conducted at the IFM level rather than at the fund level, the above guidance is intended to apply specifically to funds that use proxy voting or shareholder engagement as an ESG investment strategy.

(b) Use of multiple ESG strategies

Funds that use multiple ESG strategies are required to provide disclosure explaining how the different ESG strategies are applied during the investment selection process. In staff's view, this disclosure should include the order in which the strategies are applied, if the strategies are not applied simultaneously. For example, a fund that uses negative screening as an initial filter on the fund's investment universe and then uses an ESG integration strategy to evaluate the potential investments should disclose this in its prospectus.

[24] However, staff's view is that such a focus should be clearly disclosed in the investment objectives and strategies disclosure; also see the discussion below under G. VI. Suitability.

(c) Use of ESG ratings, scores, indices or benchmarks

An ESG rating or score is an assessment of an organization or product's relative ESG characteristics, effectiveness and performance, including its exposure to ESG risks and/or opportunities.

In staff's view, where an ESG-Related Fund uses internal or third-party company-level ESG ratings or scores, or ESG-related indices or benchmarks, as part of its principal investment strategies or investment selection process, the fund should explain how those ratings, scores, indices or benchmarks are used.

Staff's view is that, for funds that use ESG-related indices or benchmarks as part of their principal investment strategies or investment selection process, the fund should identify the index or benchmark used.[25] For funds that use third-party, company-level ESG ratings or scores as part of their principal investment strategies or investment selection process, the fund should identify the provider of the ratings or scores.

In staff's view, the disclosure should also include a description of the methodology used to create the company-level ESG ratings or scores, or ESG-related indices or benchmarks, including, for example, whether the methodology is based on quantitative or qualitative data and the level of subjectivity involved in the methodology.

IV. Proxy voting and shareholder engagement policies and procedures

(a) Proxy voting

An investment fund must include in its prospectus and/or AIF, as applicable, a summary of the policies and procedures that the fund follows when voting proxies relating to portfolio securities.[26]

Further, an investment fund is also required to promptly send the most recent copy of its proxy voting policies and procedures to any securityholder upon request.[27]

Disclosure of a fund's proxy voting policies and procedures can provide clarity to investors about the ways in which proxy voting is used by ESG Funds to achieve their ESG-related investment objectives, including the scope and limits of their use.

If a fund uses proxy voting as an ESG investment strategy, the prospectus and/or AIF, as applicable, is required to include a summary of the ESG aspects of the fund's proxy voting policies and procedures. This summary would provide clarity about how the voting rights attached to the fund's portfolio securities will be used to further the fund's ESG-related investment objectives, or in the case of a fund that does not have ESG-related investment objectives but that uses proxy voting as an ESG strategy, how the ESG-related proxy voting strategy is implemented.

In order to provide investors with greater transparency, staff also encourage investment funds to make the most recent copy of their proxy voting policies and procedures available on their designated websites.

(b) Shareholder engagement

Staff recognize that there is currently no requirement for investment funds to make their shareholder engagement policies and procedures publicly available. However, staff encourage all funds that use shareholder engagement as an ESG strategy to do so in order to provide investors with greater transparency into the scope and nature of the fund's use of shareholder engagement as an ESG strategy.

As stated above, while staff acknowledge that for some IFMs, proxy voting and shareholder engagement are conducted at the IFM level rather than at the fund level, the above guidance is intended to apply specifically to funds that use proxy voting or shareholder engagement as an ESG investment strategy.

V. Risk disclosure

An investment fund is required to describe, in its prospectus, any material risks associated with an investment in the fund,[28] including any risks associated with any particular aspect of the fundamental investment objectives and investment strategies.[29]

Risk disclosure enables investors to better understand the potential material risks associated with investing in the fund, including the impact of those risks on a fund's performance.

[25] Staff also remind funds and their IFMs that index mutual funds are required to, as part of their fundamental investment objectives, (a) disclose the name or names of the permitted index or permitted indices on which the investments of the index mutual fund are based and (b) briefly describe the nature of that permitted index or those permitted indices, under Item 4(5) of Part B of Form 81-101F1.

[26] Item 30.1 of Form 41-101F2; Item 4.15(5) of Part A of Form 81-101F1; Item 12(7) of Form 81-101F2.

[27] Subsection 10.4(3) of National Instrument 81-106 *Investment Fund Continuous Disclosure* (**NI 81-106**).

[28] Item 9 of Part B of Form 81-101F1; Item 12 of Form 41-101F2.

[29] Instruction (2) to Item 9 of Part B of Form 81-101F1; Item 12.1(1) of Form 41-101F2.

(a) Risk disclosure by ESG-Related Funds

The risk disclosure of ESG-Related Funds enables investors to better understand the challenges faced by the fund in meeting its ESG-related investment objectives, if applicable, or using its ESG strategies.

An ESG-Related Fund should consider whether there are any material risk factors that are applicable to the fund as a result of the fund's ESG-related investment objectives and/or its use of ESG strategies and disclose such risk factors where applicable. Examples may include concentration risk, risk of underperformance due to the fund's ESG-related focus, and risk arising from potential over-reliance on third-party ESG ratings in assessing the ESG performance of underlying holdings.

(b) ESG-related risk disclosure by all funds

The disclosure of material ESG-related risks by all types of funds, regardless of whether they are ESG-Related Funds, may assist investors with making informed investment decisions about how ESG issues can impact their investments.

All investment funds, regardless of whether they are ESG-Related Funds, should consider whether there are any material ESG-related risk factors that are applicable to the fund and disclose such risk factors where applicable. Examples of such risk factors may include climate change risk and bribery and corruption risks.

In order to be able to provide useful ESG-related risk disclosure, staff remind IFMs to ensure that their risk management framework takes ESG-related risks into account.

VI. Suitability

An investment fund must include, in its Fund Facts or ETF Facts, as applicable, a brief statement of the suitability of the fund for particular investors, including describing the characteristics of the investor for whom the fund may or may not be an appropriate investment, and the portfolios for which the fund is and is not suited.[30] If the fund is particularly suitable for investors who have particular investment objectives, this can be disclosed.[31]

Similar to fund names, investment objectives and fund types, in order to avoid greenwashing, the suitability statement should accurately reflect the extent of the fund's focus on ESG as well as the particular aspect(s) of ESG that the fund is focused on, but only if applicable.

Where appropriate, an ESG Fund may wish to state that it is particularly suitable for investors who have ESG-related investment objectives. However, if the fund is only focused on a particular aspect of ESG, such as gender diversity in leadership or the reduction of carbon emissions, staff's view is that any suitability statement that indicates that the fund is particularly suitable for investors who have ESG-related investment objectives should accurately reflect the particular aspect of ESG that the fund is focused on.

However, staff's view is that an ESG Strategy Fund should not state that the fund is particularly suitable for investors who have ESG-related investment objectives, as the fund does not have ESG-related investment objectives.

VII. Continuous disclosure

An investment fund must include, in its MRFP, a summary of the results of operations of the investment fund for the financial year to which the MRFP pertains, including a discussion of how the composition and changes to the composition of the investment portfolio relate to the fund's fundamental investment objective and strategies.[32] Staff note, however, that funds are only required to disclose information that is material.[33]

Continuous disclosure, including the MRFP, enables investors to monitor a fund's performance and evaluate its ability to meet its objectives on an ongoing basis. For funds that have ESG-related investment objectives, continuous disclosure can help prevent greenwashing by allowing investors to monitor the fund's ESG performance and therefore evaluate the fund's progress in terms of meeting its ESG-related investment objectives.

An ESG-Related Fund is required to disclose in its MRFP how the composition and changes to the composition of the investment portfolio relate to the fund's ESG-related investment objectives and/or strategies. For example, if a fund that excludes companies that have had severe ESG-related controversies divests of its holdings in a company because the company has recently had a harassment scandal that is deemed by the fund to be a severe ESG-related controversy, the fund should disclose its divestment and the reason for the divestment in the MRFP. Another example would be a fund that uses a best-in-class strategy that has divested its holdings in a company that no longer meets the fund's criteria. In addition to divestment, a fund may also choose to

30 Item 7(1) of Part I of Form 81-101F3; Item 7(1) of Part I of Form 41-101F4.
31 Instruction to Item 7 of Part I of Form 81-101F3; Instruction (1) to Item 7 of Part I of Form 41-101F4.
32 Items 2.3(1) of Part B and 2.1 of Part C of Form 81-106F1 *Contents of Annual and Interim Management Report of Fund Performance* (**Form 81-106F1**).
33 Item 1(d) of Part A of Form 81-106F1.

increase or decrease its holdings in a company in order to meet the fund's ESG-related investment objectives and this should be disclosed.

Funds with ESG-related investment objectives, unlike other types of funds, typically aim to achieve ESG-related outcomes in addition to financial performance. In order to provide investors with meaningful disclosure about those ESG-related outcomes, staff encourage funds that have ESG-related investment objectives to disclose, as part of the summary of the results of the fund's operations in the MRFP, the ESG-related aspects of those operations. This would include the fund's progress or status with regard to meeting its ESG-related investment objectives. For example, in the case of a fund whose investment objectives state that the fund will invest in companies that contribute to the fight against climate change, investors would benefit from continuous disclosure that explains which companies the fund has invested in during the relevant period and how they have contributed to the fight against climate change.

In addition, staff encourage funds that intend to generate a measurable ESG outcome to report in their MRFPs on whether the fund is achieving that outcome. For example, where a fund's investment objectives refer to the reduction of carbon emissions, investors would benefit from disclosure in the fund's MRFP that includes the quantitative key performance indicators for carbon emissions.

Staff acknowledge that websites and non-regulatory documents are being increasingly used to provide ongoing information about the ESG performance and metrics of funds, as well as other ESG-related information. In addition to the required disclosure in the MRFP, staff encourage funds to provide investors with additional periodic information on how they are meeting their ESG-related investment objectives. We remind funds that websites and such non-regulatory documents are considered sales communications under National Instrument 81-102 *Investment Funds* (**NI 81-102**), which are discussed further below under "Sales communications".

In order to be able to provide useful disclosure about the fund's progress or status with regard to meeting its ESG-related investment objectives, staff encourage IFMs to regularly assess, measure and monitor the ESG performance of the funds that they manage.

(a) Funds that use proxy voting as an ESG strategy

An investment fund is required to maintain a proxy voting record[34] and make its most recent annual proxy voting record available on its designated website, as well as promptly send it to any securityholder upon request.[35]

Staff acknowledge that a fund is only required to make its most recent annual proxy voting record available on its designated website and to promptly send it to any securityholder upon request. However, staff encourage all funds, particularly funds that use proxy voting as an ESG strategy, to make all of their annual proxy voting records, including historical records from previous years, available on their designated websites. For funds that use proxy voting as an ESG strategy to meet their ESG-related investment objectives, such disclosure would provide greater transparency into how the fund has historically used proxy voting to meet the fund's ESG-related investment objectives. In the case of a fund that does not have ESG-related investment objectives but that uses proxy voting as an ESG strategy, this disclosure would provide greater transparency into how the fund's ESG-related proxy voting strategy has historically been implemented.

In addition, for the reasons stated above, staff encourage all funds that use proxy voting as an ESG strategy to include, as part of the summary of the results of the fund's operations in the MRFP, disclosure about how the past proxy voting records during that period align with the ESG-related investment objectives and/or strategies of the fund.

(b) Funds that use shareholder engagement as an ESG strategy

Staff acknowledge that there are currently no continuous disclosure requirements relating to a fund's past shareholder engagement activities.

However, staff encourage all funds that use shareholder engagement as an ESG strategy to provide disclosure about their past shareholder engagement activities on their designated websites, for the same reasons discussed above in relation to the disclosure of past proxy voting records.

In addition, similarly, staff encourage all funds that use shareholder engagement as an ESG strategy to include, as part of the summary of the results of the fund's operations in the MRFP, disclosure about how the fund's past shareholder engagements during that period align with the ESG-related investment objectives and/or strategies of the fund.

[34] Section 10.3 of NI 81-106.
[35] Section 10.4 of NI 81-106.

VIII. Sales communications

A sales communication pertaining to an investment fund is prohibited from including a statement that conflicts with information that is contained in the fund's regulatory offering documents.[36] In addition, a sales communication pertaining to an investment fund is also prohibited from being untrue or misleading.[37]

The Companion Policy to NI 81-102 lists some of the circumstances in which, in the view of the Canadian securities regulatory authorities, a sales communication would be misleading. One such circumstance is if the sales communication contains a statement that lacks explanations, qualifications, limitations or other statements necessary or appropriate to make the statement in the sales communication not misleading.[38] Another circumstance is if the sales communication contains a statement about the characteristics or attributes of an investment fund that makes exaggerated or unsubstantiated claims about management skill or techniques, characteristics of the investment fund or an investment in securities issued by the fund.[39]

In addition, staff are of the view that sales communications should not contain statements that are vague or exaggerated, or that cannot otherwise be verified.[40]

Sales communications, including websites, play a key role in providing information about the investment objectives, investment strategies and performance of funds that investors may consider investing in. Therefore, sales communications relating to ESG that are not untrue or misleading and that are consistent with a fund's regulatory offering documents are important in order to prevent greenwashing.

(a) Sales communications that indicate that the fund is focused on ESG

A sales communication pertaining to an investment fund should accurately reflect the extent to which the fund is focused on ESG, as well as the particular aspect(s) of ESG that the fund is focused on.

In staff's view, a fund should not include statements in its sales communications that indicates that it is focused on ESG unless the fund references ESG in its investment objectives.

A fund that does not reference ESG in its investment objectives but that discloses in its investment strategies prospectus disclosure that it uses an ESG strategy may include statements in its sales communications that accurately reflect the extent to which that strategy is used. However, such funds should not exaggerate the extent of the fund's focus on ESG in their sales communications.

In contrast, while a fund that does not reference ESG in either its investment objectives or investment strategies may provide factual information about the ESG characteristics of its portfolio (such as fund-level ESG ratings, scores or rankings), it should not include any ESG-related claims about what the fund is trying to achieve. In staff's view, such sales communications would both conflict with the investment objectives and investment strategies disclosure in the fund's regulatory offering documents, which do not reference ESG at all, and be misleading.

In general, in staff's view, a sales communication that does not accurately reflect the extent to which a fund is focused on ESG, as well as the particular aspect(s) of ESG that the fund is focused on, would both be misleading and conflict with the information in the fund's regulatory offering documents. Examples of such sales communications may include those that do any of the following:

- suggest that a fund is focused on ESG when it is not;
- suggest that a fund is focused on all three components of ESG when it is only focused on one component, such as governance;
- misrepresent the extent and nature of the fund's use of ESG strategies, including:
    - in the case of a fund that has a discretionary or optional screening strategy, stating that the fund uses a negative or exclusionary screening strategy without clearly disclosing that the screening is discretionary or optional; or
    - failing to:
        - disclose that there is a maximum limit to the fund's use of those strategies;

[36] Paragraph 15.2(1)(b) of NI 81-102.
[37] Paragraph 15.2(1)(a) of NI 81-102.
[38] Paragraph 13.1(1)1 of Companion Policy 81-102CP to National Instrument 81-102 *Investment Funds* (**81-102CP**).
[39] Subparagraph 13.1(1)3(b) of 81-102CP.
[40] OSC Staff Notice 81-720 *Report on Staff's Continuous Disclosure Review of Sales Communications by Investment Funds.*

- actually use the advertised ESG strategies, including using different types of ESG strategies altogether; or
- prominently disclose material aspects of the ESG strategies.

Staff have noticed that some ESG-Related Funds provide more detail about the fund's ESG strategies in their sales communications than they do in their prospectuses. Staff remind funds that a prospectus must provide full, true and plain disclosure of all material facts, including the investment strategies of the fund.

(b) Sales communications that reference a fund's ESG performance

A fund must not include misleading statements in its sales communications about the ESG performance of the fund. Examples of such sales communications may include those that:

- make inaccurate claims about the fund's ESG performance or results;
- make inaccurate claims about the existence of a direct causal link between the fund's investment strategies and ESG performance or results; or
- manipulate elements of disclosure to present the fund's ESG performance or results in a positive light, such as cherry-picking data.

(c) Sales communications that include fund-level ESG ratings, scores or rankings

Staff understand that some IFMs may wish to include fund-level ESG ratings, scores or rankings on their websites or other sales communications. These would include, but are not limited to, fund-level ESG ratings or scores that are primarily weighted averages of the company-level ESG ratings or scores of the underlying portfolio holdings of the fund (**Portfolio-Based ESG Ratings**), and fund-level ESG rankings based solely on Portfolio-Based ESG Ratings (**Portfolio-Based ESG Rankings**).

While staff are of the view that the Portfolio-Based ESG Ratings and Portfolio-Based ESG Rankings that staff have observed to date are not "performance data" and "performance ratings or rankings" within the context of Part 15 of NI 81-102 (**Part 15**), other types of fund-level ESG ratings, scores and rankings that are not Portfolio-Based ESG Ratings and Portfolio-Based ESG Rankings may be considered "performance data" or "performance ratings or rankings". Similarly, while staff are of the view that the comparison of Portfolio-Based ESG Ratings and Portfolio-Based ESG Rankings that staff have observed to date are not comparisons of performance within the context of Part 15,[41] the comparison of other types of fund-level ESG ratings, scores and rankings that are not Portfolio-Based ESG Ratings and Portfolio-Based ESG Rankings may be considered to be comparisons of performance.

If a type of fund-level ESG rating, score or ranking is considered "performance data" or a "performance rating or ranking", or a comparison of that type of fund-level ESG rating, score or ranking is considered to be a comparison of performance, sales communications that include this type of fund-level ESG rating, score or ranking, or a comparison thereof, may not be able to comply with some of the provisions of Part 15 that relate to "performance data", "performance ratings or rankings" and comparisons of performance (the **Performance Requirements**). Staff remind IFMs to review and consider the Performance Requirements to determine whether such sales communications are in compliance and encourage IFMs that wish to include other types of fund-level ESG ratings, scores and rankings in their sales communications to contact staff of their principal regulator as needed.

In addition, any sales communication that includes fund-level ESG ratings, scores or rankings, including Portfolio-Based ESG Ratings and Portfolio-Based ESG Rankings, must not be misleading. In staff's view, a sales communication that includes fund-level ESG ratings, scores or rankings may be misleading for a number of reasons, including any of the following:

- there are conflicts of interest involving the provider that prepares the fund-level ESG rating, score or ranking;
- the selection of the specific fund-level ESG rating, score or ranking is the result of cherry-picking fund-level ESG ratings, scores or rankings in order to present the fund's ESG characteristics or performance in a positive light;
- the selected fund-level ESG rating, score or ranking is not representative of the ESG characteristics or performance of the fund;
- the sales communication does not include explanations, qualifications, limitations or other statements necessary or appropriate to make the inclusion of the fund-level ESG ratings, scores or rankings in the sales communication not misleading.

Guidance on how to avoid these four issues is provided below.

[41] See, for example, subsection 15.3(1) and sections 15.7 and 15.7.1 of NI 81-102.

Staff note, however, that a sales communication that includes fund-level ESG ratings, scores or rankings may also be misleading for reasons that have not been identified in this Notice and remind IFMs to review and consider the requirements under Part 15 when preparing sales communications.

Conflicts of interest

To address conflicts of interest, staff's view is that the fund-level ESG rating, ranking or score that is included in the sales communication should be prepared by a provider that:

(a) rates, scores or ranks the ESG characteristics or performance of the fund through an objective methodology that is (i) applied consistently to all funds rated, scored or ranked by it, and (ii) disclosed on the provider's website;

(b) is not a member of the organization of the fund;[42] and

(c) is not paid to assign a fund-level ESG rating, score or ranking to the fund by the promoter, manager, portfolio adviser, principal distributor or participating dealer of any fund or any of their affiliates.

In addition, for a fund-level ESG ranking, the ranking should be based on a published category of funds, such as Canadian equity funds, that is not established or maintained by a member of the organization of the fund.

Selection of fund-level ESG rating, score or ranking

To help ensure that the selection of the fund-level ESG rating, score or ranking is not the result of cherry-picking, staff are of the view that the selection of the rating, score or ranking should be consistent with the following parameters:

(a) the IFM should consider whether the selected fund-level ESG rating, score or ranking is an accurate representation of the fund (and its portfolio, if the fund-level ESG rating, score or ranking is based on the fund's portfolio) during the time period that the sales communication appears or is in use and therefore, whether the inclusion of the selected fund-level ESG rating, score or ranking in a sales communication may be misleading;

(b) for a fund-level ESG ranking, the ranking should be based on a published category of funds, such, as for example, Canadian fixed income funds, that provides a reasonable basis for evaluating the ESG characteristics or performance of the fund;

(c) if a fund-level ESG rating, score or ranking is disclosed on the website of a fund that is not an ESG Fund, the IFM should disclose the same type of fund-level ESG rating, score or ranking from the same provider, if available, for all of the funds that it manages; and

(d) if a fund-level ESG rating, score or ranking is disclosed on the website of an ESG Fund, the IFM should disclose the same type of fund-level ESG rating, score or ranking from the same provider, if available, for all of the ESG Funds that it manages.

However, staff would not view paragraph (d) as applicable to an ESG Fund that has a specialized ESG focus, such as a fund focused on climate change, if the fund-level ESG rating, score or ranking that is being disclosed is specific to the specialized ESG focus of the fund, such as a rating relating to carbon emissions.

In addition, staff encourage funds that wish to disclose fund-level ESG ratings, scores or rankings in their sales communications to disclose fund-level ESG ratings, scores or rankings from at least 2 different providers.

Representativeness of fund's ESG characteristics or performance

Furthermore, for a Portfolio-Based ESG Rating, if only a certain percentage of a fund's underlying portfolio is covered by the Portfolio-Based ESG Rating (i.e. if less than 100% of the fund's underlying portfolio has been rated), staff's view is that the IFM should consider whether the portion of the portfolio that has not been rated has substantially similar ESG characteristics to the rest of the portfolio and therefore, whether the Portfolio-Based ESG Rating is an accurate representation of the ESG characteristics or performance of the entire portfolio. If the portion of the portfolio that has not been rated does not have substantially similar ESG characteristics as compared to the rest of the portfolio, the Portfolio-Based ESG Rating may not be an accurate representation of the entire portfolio and therefore, the inclusion of the Portfolio-Based ESG Rating in a sales communication may be misleading.

The above also applies to Portfolio-Based ESG Rankings that are based on Portfolio-Based ESG Ratings where less than 100% of the fund's underlying portfolio has been rated.

[42] See the definition of "member of the organization" in section 1.1 of National Instrument 81-105 *Mutual Fund Sales Practices*.

Accompanying disclosure

Finally, to avoid being misleading, staff are of the view that a sales communication that includes fund-level ESG ratings, scores or rankings should include the following disclosure:

(a) the name of the provider that prepared the fund-level ESG rating, score or ranking;

(b) the date or time period covered by the fund-level ESG rating, score or ranking:

  (i) if the fund-level ESG rating, score or ranking is as of a specific point in time, the date of the specific point in time;

  (ii) if the fund-level ESG rating, score or ranking covers a time period:

    (A) the period of time; and

    (B) a brief explanation of how the fund-level ESG rating, score or ranking was determined for the specified time period (e.g. if the fund-level ESG rating, score or ranking is based on an average of the monthly fund-level ESG ratings, scores or rankings from the past 12 months);

(c) how often the fund-level ESG rating, score or ranking is updated by the provider (e.g. on a monthly basis);

(d) cautionary language stating that the fund's ESG characteristics and performance may differ from time to time;

(e) for Portfolio-Based ESG Ratings, the percentage of the fund's underlying portfolio holdings that has been rated;

(f) for Portfolio-Based ESG Rankings, the percentage of the fund's underlying portfolio holdings that has been rated for the purpose of the Portfolio-Based ESG Rating on which the Portfolio-Based ESG Ranking is based;

(g) for fund-level ESG ratings or scores, the range of the fund-level ESG rating or score (e.g. AAA to CCC);

(h) for fund-level ESG rankings:

  (i) the classification of the peer group used for the ranking (e.g. Canadian equity); and

  (ii) the number of funds in the peer group;

(i) if the fund is not an ESG Fund, cautionary language that states that the fund does not have ESG-related investment objectives;

(j) if applicable, cautionary language that states that the fund-level ESG rating or score (or in the case of a fund-level ESG ranking, the fund-level ESG rating or score on which the ranking is based) does not evaluate the ESG-related investment objectives of, or any ESG strategies used by, the fund and is not indicative of how well ESG factors are integrated by the fund;

(k) a one or two sentence summary explaining what the fund-level ESG rating, score, or ranking measures or assesses, including:

  (i) for a fund-level ESG ranking, language identifying the fund-level ESG rating or score that the ranking is based on;

  (ii) for a Portfolio-Based ESG Rating or Portfolio-Based ESG Ranking, language that states that the fund-level ESG rating or score (or in the case of a fund-level ESG ranking, the fund-level ESG rating or score on which the ranking is based) is a weighted average ESG rating or score of the company-level ESG ratings or scores of the underlying portfolio holdings of the fund; and

  (iii) for a fund-level ESG rating, score or ranking that is not a Portfolio-Based ESG Rating or Portfolio-Based ESG Ranking, an explanation of what the fund-level ESG rating or score (or in the case of a fund-level ESG ranking, the fund-level ESG rating or score on which the ranking is based) measures or assesses;

(l) if the sales communication is online, a link to the full methodology of the fund-level ESG rating or score (or in the case of a fund-level ESG ranking, the fund-level ESG rating or score on which the ranking is based);

(m) if the sales communication is not an online sales communication, language explaining how to easily access, free of charge, the full methodology of the fund-level ESG rating or score (or in the case of a fund-level ESG ranking, the fund-level ESG rating or score on which the ranking is based);

(n) if applicable, a statement indicating that other providers may also prepare fund-level ESG ratings or scores (or in the case of fund-level ESG rankings, the fund-level ESG ratings or scores on which the rankings are based) using their own methodologies, which may differ from the methodology used by the provider;

(o) if the sales communication is online, a link to the fund's website containing the same type of fund-level ESG ratings, scores or rankings for the fund on the same periodic basis as updated by the provider over the past 12 months;

(p) if the sales communication is not an online sales communication, language explaining how to easily access, free of charge, the same type of fund-level ESG ratings, scores or rankings for the fund on the same periodic basis as updated by the provider over the past 12 months; and

(q) a cross-reference to the fund's prospectus for further information about the fund's investment objectives and strategies.

In addition, staff encourage funds to disclose separate fund-level ratings, scores or rankings, as applicable, for each of the three components of ESG.

The above accompanying disclosure should be clear and not buried within fine print.

Staff note that while the above list of accompanying disclosure has been provided to assist IFMs in the preparation of sales communications for their funds, the list is non-exhaustive and a sales communication that includes fund-level ESG ratings, scores or rankings and the above accompanying disclosure may still be misleading for other reasons.

IX. ESG-related changes to existing funds

As noted above under "Investment objectives and fund names", where a fund's name references ESG, the fundamental investment objectives of the fund are required to reference the aspect of ESG included in the name of the fund.

Accordingly, where a fund intends to change its name to add or remove a reference to ESG, the fund should consider whether it is also required to change its fundamental investment objectives.

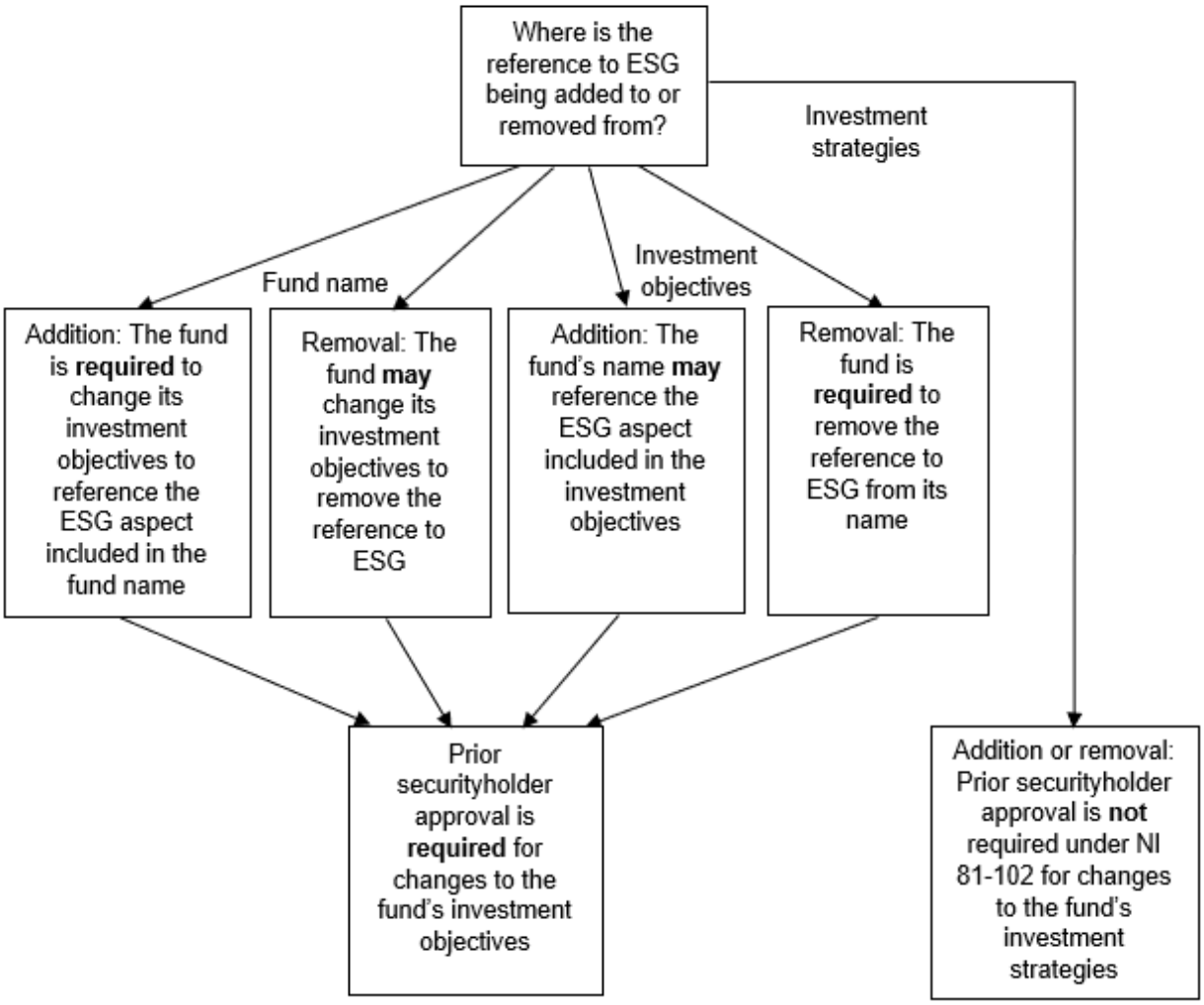
Staff remind funds that an investment fund that changes its fundamental investment objectives is required to obtain the prior approval of its securityholders.[43] Consequently, the addition or removal of references to ESG in the fundamental investment objectives of a fund is subject to the requirement to obtain prior securityholder approval.

Staff note that a fund that does not have ESG-related investment objectives may still use ESG strategies and may therefore reference ESG in its investment strategies disclosure without referencing ESG in its name or indicating that the fund is focused on ESG in its sales communications. Where an ESG strategy is not a material or essential aspect of a fund and is therefore not included in the fund's fundamental investment objectives, a fund that adds or removes disclosure about the ESG strategy in its investment strategies disclosure is not subject to the securityholder approval requirement in NI 81-102.

[43] Paragraph 5.1(1)(c) of NI 81-102.

The guidance above is illustrated in Figure 2.

Figure 2.



X. ESG-related terminology

As discussed earlier, there is currently a lack of consistency in ESG-related terminology and definitions used throughout the investment fund industry, especially with regard to ESG strategies, which increases the potential for investor confusion around ESG-Related Funds.

A fund's description of the ESG strategies that it uses must be written using plain language in order to ensure that investors are able to understand the fund's investment strategies. In addition, if a fund's prospectus includes other ESG-related terms that are not commonly understood, it should provide a clear explanation of those terms using plain language in accordance with the requirement that the prospectus provide full, true and plain disclosure of all material facts.

Staff encourage industry participants, including IFMs, to develop common ESG-related terms and definitions, particularly with regard to ESG strategies, which would enable investors to better understand ESG-Related Funds and make informed investment decisions about them.

XI. IFM-level commitments to ESG-related initiatives

Staff recognize that some IFMs are signatories to international or regional ESG-related entity-level initiatives, such as the United Nations Principles for Responsible Investment and Task Force on Climate-related Financial Disclosures, and publicly disclose this information. For IFMs that are signatories to such initiatives, it is important for the disclosure of their signatory status or commitment to these initiatives to be clear that the commitment is at the entity-level rather than at the fund-level and where applicable, that the funds managed by the IFM may not be focused on ESG.

H. Conclusion

Full, true and plain disclosure is essential to maintaining and strengthening investor confidence and efficient capital markets. In addition, it is important that investment funds be marketed to investors using sales communications that are not untrue or misleading, and that are consistent with a fund's regulatory offering documents. Staff will continue to monitor the regulatory disclosure documents and sales communications of ESG-Related Funds and any other funds that market themselves as being focused on ESG and consider future policy initiatives as needed.

We encourage IFMs to consider the guidance in this Notice when preparing the regulatory disclosure documents and sales communications of investment funds, particularly ESG-Related Funds.

Questions

Please refer your questions to any of the following:

British Columbia Securities Commission

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1.1.2 OSC Staff Notice 51-733 Extension of Comment Period – Consultation: Climate-related Disclosure Update and CSA Notice and Request for Comment Proposed National Instrument 51-107 Disclosure of Climate-related Matters

OSC STAFF NOTICE 51-733 *EXTENSION OF COMMENT PERIOD*

CONSULTATION

CLIMATE-RELATED DISCLOSURE UPDATE AND
CSA NOTICE AND REQUEST FOR COMMENT
PROPOSED NATIONAL INSTRUMENT 51-107 *DISCLOSURE OF CLIMATE-RELATED MATTERS*

January 20, 2022

On October 18, 2021, the Canadian Securities Administrators (**CSA**) published for comment Consultation Climate-related Disclosure Update and CSA Notice and Request for Comment Proposed National Instrument 51-107 *Disclosure of Climate-related Matters* (the **Notice**). The Notice provided an update on recent developments regarding climate-related disclosure and solicited comments on climate-related disclosure requirements contained in Proposed National Instrument 51-107 *Disclosure of Climate-related Matters*.

The comment period was scheduled to close on January 17, 2022. Due to the ongoing impacts of the Omicron variant on stakeholders, the CSA is extending the comment period for its proposed climate-related disclosure requirements for 30 days. Comments will be accepted until February 16, 2022.

Questions

If you have any questions, please contact any of the OSC staff listed below.

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1.4 Notices from the Office of the Secretary

1.4.1 Aux Cayes Fintech Co. Ltd.

FOR IMMEDIATE RELEASE
January 13, 2022

AUX CAYES FINTECH CO. LTD.,
File No. 2021-29

TORONTO – The Commission issued an Order in the above named matter.

A copy of the Order dated January 13, 2022 is available at www.osc.ca.

OFFICE OF THE SECRETARY
GRACE KNAKOWSKI
SECRETARY TO THE COMMISSION

For Media Inquiries:

media_inquiries@osc.gov.on.ca

For General Inquiries:

1-877-785-1555 (Toll Free)
inquiries@osc.gov.on.ca

1.4.2 Mughal Asset Management Corporation and Usman Asif

FOR IMMEDIATE RELEASE
January 13, 2022

MUGHAL ASSET MANAGEMENT CORPORATION AND
USMAN ASIF,
File No. 2021-36

TORONTO – The Commission issued an Order in the above named matter.

A copy of the Order dated January 13, 2022 is available at www.osc.ca.

OFFICE OF THE SECRETARY
GRACE KNAKOWSKI
SECRETARY TO THE COMMISSION

For Media Inquiries:

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Chapter 2

Decisions, Orders and Rulings

2.1 Decisions

2.1.1 Mackenzie Financial Corporation

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – approval of investment fund reorganization because the reorganization does not meet all the pre-approval criteria – relief granted to permit top funds to invest in reorganized and continuing funds that hold securities of a fund established for tax deferral purposes post-reorganization – subject to conditions.

Applicable Legislative Provisions

National Instrument 81-102 Investment Funds, ss. 2.1(1), 2.5(2)(b), 5.5(1)(b), 5.6(1) and 19.1(2).

December 22, 2021

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the Jurisdiction)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF APPLICATIONS
IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
MACKENZIE FINANCIAL CORPORATION
(the Filer)

DECISION

Background

The principal regulator in the Jurisdiction has received an application from the Filer for a decision under the securities legislation of the Jurisdiction of the principal regulator (the **Legislation**) for:

(i) on behalf of the Reorganizing Funds (as defined below), approval under clause 5.5(1)(b) of National Instrument 81-102 *Investment Funds* (**NI 81-102**) for the proposed reorganizations (the **Reorganizations**) of certain series of the Reorganizing Funds as set out below (the **Affected Series**) with the applicable Canada Life Funds (as defined below)(the **Approval Sought**);

(ii) on behalf of the Filer's current and future mutual funds managed by the Filer or an affiliate of the Filer (the **Top Funds**), an exemption from the prohibition in paragraph 2.5(2)(b) of NI 81-102 to permit the Top Funds to purchase and hold a security of the Reorganizing Funds or the Canada Life Funds that hold more than 10% of its NAV in securities of its corresponding LP Funds and other investment funds in the aggregate (the **Three-Tier Relief**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

(a) the Ontario Securities Commission is the principal regulator for this application; and

(b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in each of the provinces and territories of Canada, other than Ontario (together with Ontario, the **Canadian Jurisdictions**).

Interpretation

Terms defined in National Instrument 14-101 Definitions and MI 11-102 have the same meaning if used in this decision, unless otherwise defined. The following additional terms shall have the following meanings:

Canada Life Funds means Canada Life Global Growth Opportunities Fund, Canada Life U.S. Small-Mid Cap Growth Fund, Canada Life Emerging Markets Equity Fund, Canada Life European Equity Fund, and Canada Life Precious Metals Fund;

CLIML means Canada Life Investment Management Ltd., an affiliate of the Filer, subsidiary of The Canada Life Assurance Company and manager and trustee and manager of the Canada Life Funds;

LP Funds means Mackenzie CL Global Growth LP, Mackenzie CL US Small-Mid Cap Growth LP, Mackenzie CL Ivy European LP, and Mackenzie CL Precious Metals LP;

Meeting Materials means the notice of meeting and management information circular in respect of the Meeting dated January 11, 2022;

Reorganizing Funds means Mackenzie Global Growth Fund; Mackenzie US Small-Mid Cap Growth Fund, Mackenzie Emerging Markets Fund II, Mackenzie Ivy European Fund and Mackenzie Precious Metals Fund;

Tax Act means the *Income Tax Act* (Canada)

Representations

This decision is based on the following facts represented by the Filer:

The Filer

1. The Filer is a corporation governed by the laws of Ontario and is registered as follows: as an investment fund manager in Ontario, Quebec and Newfoundland and Labrador; as a portfolio manager and exempt market dealer in the Canadian Jurisdictions; as an adviser in Manitoba; and as a commodity trading manager in Ontario.

2. The Filer, with its head office in Toronto, Ontario, is or will be the trustee and manager of the Reorganizing Funds, the LP Funds and the Top Funds that are not managed by its affiliates.

3. Neither the Filer, the Reorganizing Funds, the LP Funds nor the Top Funds are in default of securities legislation in any of the Canadian Jurisdictions.

CLIML

4. CLIML is a corporation governed under the laws of Canada.

5. CLIML is registered as a portfolio manager in each province and territory of Canada, as an investment fund manager in each of Ontario, Quebec and Newfoundland and Labrador, and as a commodity trading manager in Ontario.

6. CLIML will act as manager and trustee for the Canada Life Funds.

The Reorganizing Funds, Canada Life Funds and the LP Funds

7. The Reorganizing Funds are, and the Canada Life Funds are expected to be, a mutual fund established under the laws of Ontario. The Reorganizing Funds are, and the Canada Life Funds are expected to be, reporting issuers under the securities legislation of the Canadian Jurisdictions.

8. Units of the Affected Series of the Reorganizing Funds and Canada Life Funds generally are, or will be, qualified for sale under one or more simplified prospectuses, annual information forms and fund facts documents (collectively, **the Offering Documents**).

9. Series S units of the Reorganizing Funds and the corresponding Canada Life Funds will be offered only on an exempt distribution basis.

10. Each of the other series of units of each of the Canada Life Funds that correspond to the Affected Series will be newly created and will be qualified for distribution under a prospectus.

11. Each of the LP Funds will be a reporting issuer under the applicable securities legislation of the Province of Ontario.

12. Other than circumstances in which the securities regulatory authority of a province or territory of Canada has expressly exempted the Reorganizing Fund therefrom, each of the Reorganizing Funds follows the standard investment restrictions and practices established under NI 81-102.

13. The NAV for each series of the Funds and the LP Funds is, or will be, calculated on a daily basis in accordance with that fund's valuation policy and as described in the applicable Offering Documents.

The Top Funds

14. Each Top Fund is, or will be, a mutual fund established under the laws of Ontario. Each Top Fund is, or will be, a reporting issuer under the securities legislation of the Canadian Jurisdictions.

15. Each Top Fund distributes, or will distribute, some or all of its securities pursuant to a prospectus, annual information form and fund facts or ETF facts documents (as applicable).

16. Other than circumstances in which the securities regulatory authority of a province or territory of Canada has expressly exempted a Reorganizing Fund therefrom, each Top Fund follows, or will follow the standard investment restrictions and practices established under NI 81-102.

17. Each Top Fund is, or will be, subject to National Instrument 81-107 Independent Review Committee for Investment Funds (**NI 81-107**).

The Proposed Reorganizations and the Approval Sought

18. Pursuant to the Reorganizations, unitholders of each of the Reorganizing Funds would become unitholders of the Canada Life Fund, as follows:

Reorganizing Fund	**Canada Life Fund**	**Affected Series**	**Nature of Reorganization**	**Expected Reorganization Date**
Mackenzie Global Growth Fund	Canada Life Global Growth Opportunities Fund	Q, L, N, QF, H, QFW, HW, S, CL	Tax Deferred	January 28, 2022
Mackenzie US Small-Mid Cap Growth Fund	Canada Life U.S. Small-Mid Cap Growth Fund	Q, L, N, QF, H, QFW, HW, S, CL	Tax Deferred	January 28, 2022
Mackenzie Emerging Markets Fund II	Canada Life Emerging Markets Equity Fund	Q, L, N, QF, H QFW, HW, S	Tax Deferred	January 28, 2022
Mackenzie Precious Metals Fund	Canada Life Precious Metals Fund	Q, L, N, QF, H, QFW, HW, S	Tax Deferred	March 11, 2022
Mackenzie Ivy European Fund	Canada Life European Equity Fund	Q, L, N, QF, H, QFW, HW	Tax Deferred	March 11, 2022

19. In the opinion of the Filer, the Qualifying Dispositions (as defined below) satisfies all of the criteria for pre-approved reorganizations and transfers set forth in section 5.6 of NI 81-102 except that:

    (i) The Qualifying Dispositions are not "qualifying exchanges" within the meaning of section 132.2 of the Tax Act or tax deferred transactions under subsection 85(1), 85.1(1), 86(1) or 87(1) of the Tax Act;

    (ii) The Reorganizations do not contemplate the wind-up of the Reorganizing Funds as soon as reasonably possible following the Reorganizations; and

    (iii) Unitholders of the Reorganizing Funds will not be provided with a fund facts document prior to the time they are asked to approve the Reorganizations for the reasons described below.

The Qualifying Dispositions

20. The proposed Reorganizations are in connection with a larger set of transactions that were announced on December 31, 2020. Although the Affected Series of the Reorganizing Funds are presently offered under the Filer's Mackenzie Canada Life Mutual Funds simplified prospectus and set out below, except those offered on an exempt distribution basis as

described above, the Reorganizing Funds also offer series of units under the Filer's Mackenzie Investments simplified prospectus.

21. Causing the Affected Series unitholders to redeem their units (in cash or in kind) in which they are invested and using the redemption proceeds to subscribe for units of the corresponding Canada Life Funds (each, a **Redemption Transaction**) would in some instances trigger the realization of significant capital gains by the Affected Series unitholders.

22. The Filer intends to carry out "qualifying dispositions" with respect to the transfer of property from each Reorganizing Fund to a newly created Canada Life Fund under section107.4 of the Tax Act. That provision exempts transfers of property from one trust to another (each a **Qualifying Disposition**) from being a taxable event for the transferring trust (i.e., a Reorganizing Fund) and its unitholders (essentially allowing for a pro-rata partition of the Reorganizing Fund on a tax deferred basis).

23. Each Canada Life Fund will have the same investment objectives as the Reorganizing Fund and substantially the same investment objectives as the LP Fund.

24. Each Canada Life Fund and corresponding LP Fund will have substantially the same investment strategies and valuation procedures and, in the case of each Canada Life Fund, the same fee structure as its corresponding Reorganizing Fund. No fees or expenses will be charged at the LP Fund level other than expenses that otherwise would have been borne at the Reorganizing Fund level had the Reorganizations not occurred.

25. The chart immediately below paragraph 18 sets out the Affected Series of the Reorganizing Fund.

Details of the Proposed Reorganizations

26. On completion of the Reorganizations, the Filer will become sub-advisor of the Canada Life Funds in accordance with the terms of a sub-advisory agreement between the Filer and CLIML.

27. No sales charges will be payable in connection with the transfer to a Canada Life Fund or LP Fund of the investment portfolio by its applicable Reorganizing Fund.

28. Unitholders of each Affected Series of each Reorganizing Fund will continue to have the right to redeem their units or exchange such units for units of any other mutual fund offered under the applicable Offering Documents at any time up to close of business on the day of the Reorganizations.

29. In accordance with National Instrument 81-106 – *Investment Fund Continuous Disclosure* (**NI 81-106**), press releases in respect to the proposed Reorganizations were issued and filed via SEDAR on November 13, 2021. A material change report and amendment to the Offering Documents with respect to the proposed Reorganizations were filed in accordance with NI 81-106.

30. By way of order dated October 21, 2016, the Filer was granted relief (the **Notice-and-Access Relief**) from the requirement set out in paragraph 12.2(2)(a) of NI 81-106 to send a printed management information circular to unitholders while proxies are being solicited, and, subject to certain conditions, instead allows a notice-and-access document (as described in the Notice-and-Access Relief) to be sent to such unitholders. Pursuant to the requirements of the Notice-and-Access Relief, the notice-and-access document and a form of proxy in connection with each special meeting of unitholders of the Affected Series of the Reorganizing Fund will be mailed to unitholders of the Affected Series of the Reorganizing Fund commencing on or about December 2, 2021 and will be concurrently filed on SEDAR. The Meeting Materials will also appear on the SEDAR website at www.sedar.com. If approved, unitholders of Affected Series of the Reorganizing Funds will receive fund facts document(s) for the corresponding Canada Life Fund in their first confirmation statement following the Reorganizations.

31. The Meeting Materials describe all relevant facts concerning the Reorganizations, including Qualifying Dispositions, the tax implications and other consequences of the Reorganizations, as well as the view of the Reorganizing Funds' Independent Review Committee (the **IRC**) that the Reorganizations achieve a fair and reasonable result for the Reorganizing Funds, so that unitholders of the Affected Series of the Reorganizing Funds may consider this information before voting on the Reorganization.

32. All of the series of the Canada Life Funds (other than Series S) and the single series of the LP Funds will be newly created and will be qualified for distribution under a prospectus.

33. In order to effect the Reorganizations, Series S units of the Canada Life Funds will be distributed to the Canada Life Unitholders currently in the corresponding Reorganizing Fund in reliance on the prospectus exemption contained in section 2.11 of National Instrument 45-106 – *Prospectus Exemptions*.

34. A current simplified prospectus and fund facts documents are not available in respect of the Canada Life Funds as those funds are new. Instead of delivering these documents, the Filer has included information in respect of the Canada Life Funds and the LP Funds in the Meeting Materials. This will include the fact that the investment objective of each Canada Life Fund and each corresponding LP Fund, will be the same as that of the Reorganizing Fund. The management fees and administration fees of the Canada Life Fund will be the same as those of the Reorganizing Funds. It will also disclose that the investment strategies and valuation procedures of the Canada Life Funds and the LP Funds will be substantially the same as those of the Reorganizing Funds. The fact that the LP Funds will not charge management fees, administration fees or other expenses (other than expenses that otherwise would have been borne at the Reorganizing Fund level had the Reorganizations not occurred) will also be disclosed. The Filer believes that with this information, together with the information contained in the fund facts of the relevant series of the Reorganizing Fund that each unitholder of the Affected Series of the Reorganizing Fund received when their initial investment was made, unitholders in the Reorganizing Fund have access to prospectus-level disclosure with respect to the applicable Canada Life Fund.

35. If the necessary unitholder approval is obtained and the Filer decides to proceed with the Reorganizations, it will occur at or about the close of business on or about January 11, 2022, and March 11, 2022.

36. The Filer and CLIML will pay for the costs of the proposed Reorganizations. No management fees, administration fees or other expenses (other than expenses that would have been borne at the Reorganizing Fund level had the Reorganizations not occurred) will be charged at the LP Fund level. There are no charges payable by unitholders in the Reorganizing Funds who acquire units of the corresponding Canada Life Funds as a result of the Reorganizations.

37. The LP Funds will dispose of their assets as expeditiously as is consistent with prudent portfolio management and it is not anticipated that it will accept new money or assets by way of subscription after the completion of the Reorganizations. With the exception of the Reorganizing Funds and Canada Life Funds no other unitholders will be allowed to invest in the LP Funds.

38. As required by NI 81-107, the IRC has been appointed for the Reorganizing Funds. The Canada Life mutual funds established their own independent review committee and appointed their initial members on December 22, 2020. The IRC of the LP Funds will be comprised of the same members as the IRC of the Reorganizing Funds.

39. The Filer presented the potential conflict of interest matters related to the proposed Reorganizations to the IRC for a recommendation. On November 12,s 2021, the IRC reviewed the potential conflict of interest matters related to the proposed Reorganizations and provided its positive recommendation for each of the Reorganizations, after determining that each proposed Reorganization, if implemented, would achieve a fair and reasonable result for each applicable Reorganizing Fund.

Reasons for the Approval Sought

40. The purpose of the Qualifying Dispositions in respect of each of the Reorganizing Funds is to allow the Affected Series unitholders to be moved to the corresponding Canada Life Fund in the most cost and/or tax-efficient manner.

41. Proceeding by way of Redemption Transactions would cause the realization of significant capital gains by certain taxable investors in the Reorganizing Funds.

42. The Reorganizations are not expected to have any material impact on the unitholders in the Reorganizing Funds other than Affected Series unitholders. The Reorganizations will not negatively affect any unitholder's interest in the assets and liabilities of the relevant Reorganizing Fund and each Reorganizing Fund's investment objectives will be the same as its corresponding Canada Life Fund and substantially the same as its corresponding LP Fund. The Qualifying Dispositions are being structured to be a non-taxable event to the Affected Series unitholders and the remaining unitholders of the Reorganizing Funds.

43. Affected Series unitholders will continue to have the right to redeem units of each Reorganizing Fund for cash at any time up to the close of business on the last business day before the Reorganizations. Units so redeemed will be redeemed at a price equal to their NAV per unit on the redemption date.

Required Relief for the LP Funds

44. One of the requirements to effecting the Reorganizations as Qualifying Dispositions is that each asset (or group of identical assets) of each Reorganizing Fund must be capable of being divided into a precise percentage allocable to each unitholder or class of unitholders (the Transfer Percentage). In recognition of the fact that it may not always be practicable to effect such a division, the Tax Act contains a "safe harbour" exception to this requirement. The "safe harbour" provides that the Canada Life Funds may receive as part of the Qualifying Dispositions, in lieu of a fractional interest in a share that would otherwise be required, a disproportionate amount of money or interest in the share, provided that its value does not exceed the lesser of $200 and the fair market value of the fractional interest. This "safe harbour" only applies

in respect of equity securities (and specifically equity securities that do not exceed the specified value threshold) and does not adequately address the difficulties that the precise Transfer Percentage requirement poses more generally.

45. In addition, certain assets (or group of identical assets) may not be readily divisible for other reasons. In order to meet this condition, certain assets (or groups of identical assets) will be transferred on a tax deferred basis by the Reorganizing Funds to the LP Funds in exchange for units of the LP Funds. The units of the LP Funds will then become an asset (or group of identical assets) of the corresponding Reorganizing Funds and a portion of those units will be transferred to the corresponding Canada Life Fund based on the Transfer Percentage.

46. In summary, where it would otherwise be difficult or impossible to effect a transfer in the required precise Transfer Percentage of certain assets of the Reorganizing Funds, those assets will be transferred to the LP Funds, whose units are readily capable of being transferred in the required Transfer Percentage.

The Three-Tier Relief

47. As the LP Funds are being qualified by prospectus, a Reorganizing Fund or a Canada Life Fund may invest up to 100% of their NAV in the LP Fund under section 2.5 of NI 81-102.

48. However, if any of the Reorganizing Funds or Canada Life Funds invests more than 10% of their NAV in other investment funds and the LP Funds in aggregate, it would preclude other investment funds managed by the Filer or its affiliates from investing in that Reorganizing Fund or Canada Life Fund under paragraph 2.5(2)(b) of NI 81-102.

49. Prior to the Reorganizations, the Top Funds would have been permitted to invest in the Reorganizing Funds and Canada Life Funds in accordance with section 2.5 of NI 81-102.

50. The Reorganizations may result in certain of the Reorganizing Funds and/or the Canada Life Funds holding more than 10% of its NAV in other investment funds due to these funds holding securities of the corresponding LP Fund(s).

51. The Three-Tier Relief is required for the Top Funds to continue investing in one or more of the Reorganizing Funds or the Canada Life Funds that invest more than 10% of its NAV in other investment funds, which includes holdings of its corresponding LP Funds that were received as a result of the Reorganizations, in order for the Top Funds to further their investment objectives and investment strategies (the **Three-Tier Structure**).

52. Except for paragraph 2.5(2)(b) of NI 81-102, a Fund's use of the Three-Tier Relief will be made in accordance with the provisions of section 2.5 of NI 81-102.

53. Each Reorganizing Fund and Canada Life Fund that is part of a Three-Tier Structure will not invest more than 10% of its NAV in other investment funds, excluding investments in (i) one or more money market funds, (ii) one or more index participation units as defined in NI 81-102 (**IPUs**) and (iii) corresponding LP Fund(s).

54. The LP Funds are being introduced into the structure to further the best interests of unitholders in the Reorganizing Funds.

55. The LP Funds will dispose of their assets as expeditiously as is consistent with prudent portfolio management and it is not anticipated that they will accept new money or assets by way of subscription after the completion of the Reorganizations.

56. There will be no duplication of fees between each tier of the Three-Tier Structure. The prospectus of each Top Fund, Reorganizing Fund and Canada Life Fund will disclose that fees and expenses will not be duplicated as a result of investments in underlying funds.

57. To ensure investors continue to have transparency into the portfolio securities attributable to the Reorganizing Fund and/or Canada Life Fund mandates, the Filer and CLIML intend to disclose the individual LP Fund positions within the quarterly portfolio disclosures, MRFP holdings disclosure and manager website holdings disclosure at the Reorganizing Fund level.

58. Each Top Fund will comply with the requirement under NI 81-106 relating to the top 25 positions portfolio holdings disclosure in its management report of fund performance and the requirements of Form 81-101F3 *Contents of Fund Facts Document* relating to top 10 position portfolio holdings disclosure in its fund facts documents as if the Top Fund were investing directly in the LP Fund held by the corresponding Reorganizing Fund or Canada Life Fund.

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision. The decision of the principal regulator under the Legislation is that:

1. the Approval Sought is granted, provided that the Filer obtains the prior approval of the applicable unitholders of the Reorganizing Funds for the Reorganizations at a special meeting held for that purpose;

2. the Three-Tier Relief is granted, provided that:

    a. an investment by a Top Fund in securities of the Reorganizing Fund or the Canada Life Fund is in accordance with the investment objectives of the Top Fund;

    b. each Reorganizing Fund and Canada Life Fund which are part of a Three-Tier Structure do not invest more than 10% of NAV in other investment funds, excluding investments in (i) one or more money market funds; (ii) one or more IPUs; and (ii) in its corresponding LP Fund(s);

    c. each Reorganizing Fund and Canada Life Fund will not make additional investments in its LP Fund(s) after the Reorganization is completed;

    d. the investment of each Top Fund in securities of a Reorganizing Fund or Canada Life Fund is otherwise made in compliance with all other requirements of section 2.5 of NI 81-102, except to the extent that discretionary relief has been granted from any such requirement;

    e. each Top Fund complies with the requirements under NI 81-106 relating to top 25 positions portfolio holdings disclosure in its management reports of fund performance and the requirements of Form 81-101F3 Contents of Fund Facts Document relating to top 10 position portfolio holdings disclosure in its fund facts documents as if the Reorganizing Fund or Canada Life Fund was investing directly in the LP Funds; and

    f. the prospectus of each Top Fund discloses, or will disclose in the next renewal of its prospectus following the date of this decision, the fact that the Top Fund has obtained the Exemption Sought.

“Darren McKall”
Manager
Investment Funds and Structured ProductsOntario Securities Commission

Application File #: 2021/0656
Sedar #: 3297822

2.1.2 Partner Jet Corp.

Headnote

Multilateral Instrument 11-102 Passport System and National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – National Instrument 51-102 Continuous Disclosure Obligations – Information Circular – An issuer requires relief from the requirement to include prospectus-level disclosure in an information circular to be circulated in connection with an arrangement, reorganization, acquisition or amalgamation – the issuer is required to include historical financial statements for a business it is acquiring; it would be extremely difficult, if not impossible, to prepare certain of the historical financial statements because information to support an audit cannot be obtained and personnel with the historical information are not available; alternate financial information that is available will be provided about the business; information will be provided about the parties to the transaction sufficient for shareholders to assess the transaction as a whole; and National Instrument 52-107 Acceptable Accounting Principles and Auditing Standards, ss. 3.3(1)(a) and 5.1 – An issuer requires relief from the requirement that financial statements required by securities legislation to be audited must be accompanied by an auditor's report that expresses an unmodified opinion – The auditors were not in attendance at the physical inventory taking and not able to satisfy themselves by other auditing procedures as to the opening inventory quantities; the inventory reservation relates to the financial statements of a non-reporting issuer whose business is not seasonal; the issuer is providing a subsequent audited period of at least six months for which the auditor's report expresses an unmodified opinion; the qualification is not imposed by, and could not reasonably be eliminated by management; the qualification will not recur in future; the auditor's report will be unmodified except for the qualification related to opening inventory and, since inventory affects the calculation of financial performance and cash flows, the net cash flows from operating activities.

Applicable Legislative Provisions

Form 51-102F5 Information Circular, Item 14.2.
National Instrument 52-107 Acceptable Accounting Principles and Auditing Standards, ss. 3.12(2) and 5.1.

November 11, 2021

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the Jurisdiction)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF APPLICATIONS
IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
PARTNER JET CORP.
(the "Filer")

DECISION

Background

The principal regulator in the Jurisdiction has received an application from the Filer for a decision under the securities legislation of the Jurisdiction of the principal regulator (the **Legislation**) for relief (the **Exemptions Sought**) from (i) National Instrument 51-102 – *Continuous Disclosure Obligations* (**NI 51-102**), specifically that the Filer is exempt from the requirement in section 14.2 of Form 51-102F5 *Information Circular* (**Form 51-102F5**) to include certain predecessor financial statement or combined financial statements in a management information circular (the **Circular**) to be sent to current holders (**Shareholders**) of common shares in the capital of the Filer (the **Filer Shares**) in connection with a special meeting (the **Meeting**) of the Shareholders to consider and approve an amalgamation of the Filer and Volatus Aerospace Corp. (**Volatus**) pursuant to the *Business Corporations Act* (Ontario) (the **Amalgamation**) and (ii) National Instrument 52-107 – *Acceptable Accounting Principles and Auditing Standards* (**NI 52-107**), specifically that the Filer is exempt from the requirement that financial statements required by the Legislation to be audited must be accompanied by an auditor's report that expresses an unmodified opinion in respect of the audited annual financial statements for Volatus' subsidiary Omniview Tech Corp. (**Omniview**) for the fiscal year ending August 31, 2020, together with unaudited comparable figures for the fiscal year ending August 31, 2019, to be included in the Circular.

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

1. the Ontario Securities Commission is the principal regulator for this application; and

2. the Filer has provided notice that Section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in British Columbia and Alberta.

Interpretation

Terms defined in National Instrument 14-101 – *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Filer:

The Filer

1. The Filer was incorporated on December 17, 1987 under the *Business Corporations Act* (Ontario) (the **OBCA**) and its head office is located in Mississauga, Ontario.

2. The Filer is a reporting issuer in Alberta, British Columbia and Ontario.

3. The Filer is not in default of securities legislation in any jurisdiction of Canada.

4. The common shares of the Filer are listed and posted for trading on the TSX Venture Exchange (the **Exchange**) under the symbol "PJT".

5. The financial year-end of the Filer is November 30.

6. The Filer carries on the business of providing full-service aircraft management, private aircraft charter sales and flight support services capable of operating a wide range of corporate aircraft.

Volatus

7. Volatus was incorporated on November 8, 2019 under the *Canada Business Corporations Act* (the **CBCA**) and its head office is located in Pointe-Claire, Quebec.

8. The financial year end of Volatus is December 31.

9. Volatus and its subsidiaries are not a reporting issuer in any jurisdiction in Canada and are not in default of securities legislation in any jurisdiction of Canada.

10. Shares of Volatus and its subsidiaries are not traded in Canada or another country on a marketplace as defined in National Instrument 21-101 *Marketplace Operation* or any other facility for bringing together buyers and sellers of securities where trading data is publicly reported.

11. Volatus is a drone solution provider, providing sales and service of drones and drone parts and related equipment, pilot training, aerial inspection and survey services and other drone related services. Volatus is also developing its own line of unmanned aircraft for sale.

12. Volatus has the following four direct subsidiaries (together the **Volatus Direct Subsidiaries**):

    (i) Volatus Unmanned Services Inc., incorporated pursuant to the provisions of the CBCA on October 26, 2020 (**VUS**). Volatus holds 72% of the votes attaching to all voting securities of VUS;

    (ii) Volatus Flight Systems Inc., incorporated pursuant to the provisions of the CBCA on May 11, 2020 (**VFS**). Volatus holds 70% the votes attaching to all voting securities of VFS;

    (iii) Volatus Technologies Inc., incorporated pursuant to the provisions of the CBCA on January 10, 2021 ("**VTI**"). Volatus holds 100% of the votes attaching to all voting securities of VTI; and

    (iv) Volatus Aerospace USA Corp, incorporated pursuant to the laws of Delaware (**Volatus US**). Volatus holds 90% of the votes attaching to all voting securities of Volatus US.

13. Volatus US holds 100% of the shares of ConnexiCore LLC, incorporated pursuant to the laws of Pennsylvania, which was acquired by Volatus US on July 31, 2021.

14. VUS has the following six wholly owned subsidiaries (together with ConnexiCore LLC the **Acquired Volatus Subsidiaries**):

    (i) M3 Drone Services Ltd., incorporated pursuant to the provisions of the CBCA on April 5, 2020, which was acquired by VUS on December 31, 2020;

    (ii) M3 Drone Training Zone Inc., incorporated pursuant to the provisions of the CBCA on November 22, 2016, which was acquired by VUS on December 31, 2020;

    (iii) SkyGate Videography Inc., incorporated pursuant to the provisions of the *Business Corporations Act* (Prince Edward Island) on December 3, 2018, which was acquired by VUS on December 31, 2020;

    (iv) UAViation Aerial Solutions Limited, incorporated pursuant to the provisions of the *Business Corporations Act* (British Columbia) on August 1, 2015, which was acquired by VUS on December 31, 2020;

    (v) OmniView, incorporated pursuant to the provisions of the CBCA on September 23, 2015, which was acquired by VUS on March 31, 2021; and

    (vi) Canadian UAV Solutions Inc, incorporated pursuant to the provisions of the CBCA on September 12, 2017, which was acquired by VUS on March 31, 2021.

15. Volatus holds approximately 45.4% of the Filer Shares having acquired such shares in 2020.

16. There is a written agreement in place which provides that Ian McDougall controls the voting of the Filer Shares held by Volatus.

17. Ian McDougall does not control Volatus and, as such, Volatus and the Filer are not under common control prior to the Amalgamation.

The Amalgamation

18. The Filer and Volatus entered into the Amalgamation Agreement on June 30, 2021, pursuant to which it is proposed that they will amalgamate and continue as one corporation. The Amalgamation will constitute a Reverse Takeover (as such term is defined under the Exchange Policies) of the Filer by Volatus, since Volatus shareholders will hold more than 50% of the issued and outstanding voting securities of the amalgamated entity (the **Resulting Issuer**) after closing of the Amalgamation. The head office of the Resulting Issuer will be located in Oro-Medonte, Ontario.

19. The Amalgamation Agreement provides, among other things, that at the effective time of the Amalgamation:

    (i) each one (1) common share in the capital of Volatus (each, a **Volatus Share**) shall be exchanged for one (1) common share in the capital of the Resulting Issuer (each, a **Resulting Issuer Common Share**);

    (ii) each one (1) Class A preferred share in the capital of Volatus (each, a **Class A Volatus Share**), but excluding Class A Volatus Shares held by holders that have validly exercised their dissent rights, shall be exchanged for one (1) preferred share in the capital of the Resulting Issuer;

    (iii) each Filer Share, but excluding Filer Shares held by Volatus or by holders that have validly exercised their dissent rights, shall be exchanged for Resulting Issuer Common Shares on the basis of one (1) Resulting Issuer Common Share for each 2.95454 Filer Shares; and

    (iv) each outstanding Filer Share held by Volatus shall be cancelled without any repayment.

20. Pursuant to the Filer's constating documents, the OBCA, Exchange Policies and applicable securities laws, the Filer Shareholders will be required to approve the Amalgamation at the Meeting. The Meeting is expected to be held on or about December 14, 2021, at 10:00 a.m. (Toronto time).

21. The Amalgamation must be approved by a special resolution passed by (i) at least 66⅔% of the votes cast at the Meeting by the Filer Shareholders present virtually or by proxy at the Meeting and (ii) at least a majority of the votes cast at the Meeting other than those cast by Volatus and other Filer Shareholders required to be excluded pursuant to Multilateral Instrument 61-101 – *Protection of Minority Shareholders in Special Transactions* (**MI 61-101)**, voting as a single class, present virtually or by proxy and entitled to vote at the Meeting.

22. The Amalgamation will be subject to the related party transaction requirements under MI 61-101 and the Exchange Policies, as Volatus currently holds approximately 45.4% of the issued and outstanding common shares of the Filer. As a result, the Meeting is required pursuant to MI 61-101 and Exchange Policies.

23. The Amalgamation will be a "restructuring transaction" as such term is used in NI 51-102 in respect of the Filer and therefore the Circular is subject to the requirements of item 14.2 of Form 51-102F5.

24. The Filer is relying on the prospectus exemption in section 2.11(b) of National Instrument 45-106 *Prospectus Exemptions* for the distribution of shares of the Resulting Issuer in connection with the Amalgamation.

Disclosure Requirements

25. Item 14.2 of Form 51-102F5 requires, among other items, that the Circular contain the disclosure (including financial statements) prescribed under securities legislation and described in the form of prospectus that Volatus would be eligible to use immediately prior to the filing and sending of the Circular to Filer Shareholders for a distribution of Volatus Shares; therefore, the Circular must contain the disclosure in respect of Volatus prescribed by NI 41-101 and Form 41-101F1 *Information Required in a Prospectus* (**Form 41-101F1**).

26. Item 32 of Form 41-101F1 requires a prospectus of a venture issuer to include financial statements of a business acquired by an issuer within two years before the date of the prospectus if a reasonable investor reading the prospectus would regard the primary business of the issuer to be the business acquired.

27. A reasonable investor would regard the Acquired Volatus Subsidiaries to be part of the primary business of Volatus.

28. The Filer is required under Form 41-101F1 to include in the Circular the following financial statements:

    a. Consolidated audited annual financial statements for Volatus, including the Acquired Volatus Subsidiaries, for each of the financial years ended December 31, 2020 and 2019; and

    b. Consolidated unaudited interim financial statements of Volatus, including the Acquired Volatus Subsidiaries, for the interim periods ended June 30, 2021 and 2020;

    c. Consolidated audited annual financial statements for the Filer for each of the financial years ended November 30, 2020 and November 30, 2019;

    d. Consolidated unaudited interim financial statements of the Filer for the three months ended August 31, 2021; and

    e. pro forma statements of the Filer, as at August 31, 2021, that give effect to the Amalgamation as if it had taken place as at that date.

    (together the **Required Financial Statements**).

29. The Acquired Volatus Subsidiaries were not reporting issuers, or equivalent, during any of the periods in question and, as such, although Volatus has basic source documents, it would be extremely difficult if not impossible to conduct an audit related to all periods in question prior to Volatus' acquisition of such Acquired Volatus Subsidiaries in most cases due to the inability to ensure proper cut-off procedures and completeness of records. In some cases, the records of the Acquired Subsidiary are insufficiently detailed to extract the information that would be required to produce the Required Financial Statements and, in Volatus' view, it is impracticable to do so in respect of most of the Acquired Volatus Subsidiaries.

30. Omniview is the only Acquired Subsidiary that has assets or revenues that represent a material portion of the consolidated assets or revenue of Volatus.

31. Following the acquisitions of the Acquired Volatus Subsidiaries, Volatus has integrated the Acquired Volatus Subsidiaries into its existing organization structure, which will have a different cost structure than such Acquired Volatus Subsidiaries had prior to acquisition by Volatus.

32. The Filer is also required under Form 41-101F1 to include in the Circular the restated combined financial statements of the Volatus and any other entity with which Volatus completed a transaction within three years before the date of the Circular, if Volatus accounted for or will account for the transaction as a combination in which all of the combining entities or businesses ultimately are controlled by the same party or parties both before and after the combination, and that control is not temporary.

33. Volatus and the Filer were not under common control before and after Volatus' acquisition of Filer Shares in 2020 and, as such, restated combined financial statements of Volatus and the Filer are not required to be included in the Circular.

34. Omniview has not previously had its financial statements audited.

35. The auditors of Volatus were not appointed as auditors of Omniview until after March 31, 2021 and were not able to observe the counting of physical inventories of Omniview as at August 31, 2019 or August 31, 2020.

36. As a result, Volatus' auditors will be required to express a modified opinion in their audit opinion in respect of the Omniview financial statements for the financial year ended August 31, 2020, concerning the inventory quantities held at August 31, 2019 and 2020, as well as the opening retained earnings.

37. A modified opinion is contrary to subsection 3.3(1) of NI 52-107, which requires that an auditor's report on financials statements expresses an unmodified opinion.

38. Section 5.1 of NI 52-107, together with paragraph 3.4 of the companion policy thereto, contemplates that relief may be granted from the requirements of NI 52-107, including the requirement that an auditor's report express an unmodified opinion.

39. Paragraph 5.8(2) of the companion policy to NI 41-101 contemplates that relief may be granted from NI 52-107 to non-reporting issuers in appropriate circumstances to permit the auditor's report on financial statements to contain a qualified opinion relating to opening inventory if there is a subsequent audited period of at least six months on which the auditor's report expresses an unmodified opinion and the business is not seasonal.

40. Audited financial statements prepared for Omniview for the 7-month period ending March 31, 2021 will not contain a modified auditors opinion.

41. The business of Omniview is not seasonal.

Alternative Disclosure

42. In lieu of the Required Financial Statements, the Filer will include in the Circular the following financial statements (the **Alternate Disclosure**):

    a. consolidated audited annual financial statements for Volatus for the financial years ended December 31, 2020 and 2019;

    b. audited annual financial statements for Omniview for the financial year ended August 31, 2020 together with unaudited comparable figures for the financial year ended August 31, 2019, with a modified opinion in the audit opinion concerning the inventory quantities held at August 31, 2019 and 2020, as well as the opening retained earnings;

    c. consolidated unaudited interim financial statements for Volatus for the 3 and 6-month period ended June 30, 2021, which have been subject to a review engagement;

    d. Audited interim financial statements for Omniview for the 7-month period ended March 31, 2021 together with unaudited comparable figures for the 7-month period ended March 31, 2020;

    e. consolidated audited annual financial statements for the Filer for the financial years ended November 30, 2020 and November 30, 2019;

    f. consolidated unaudited interim financial statements of the Filer for the three months ended August 31, 2021; and

    g. pro forma statements of the Filer, as at August 31, 2021, that give effect to the Amalgamation as if it had taken place as at that date.

43. The Filer will not include restated combined financial statements of Volatus and the Filer in the Circular.

44. The Alternate Disclosure will provide the Filer's Shareholders with sufficient information to make an informed investment decision regarding the Amalgamation.

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemptions Sought are granted provided that the Circular:

(a) is filed and mailed to the Filer's Shareholders by November 17, 2021;

(b) includes the Alternate Disclosure in the Circular;

(c) otherwise complies with the Legislation.

"Jo-Anne Matear"
Manager, Corporate Finance
Ontario Securities Commission

"Cameron McInnis"
Chief Accountant
Ontario Securities Commission

OSC File #: 2021/0594

2.1.3 Brookfield Infrastructure Partners L.P.

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – Filer wants to put in place a credit support issuer structure, but is unable to rely on the exemptions for credit support issuers in applicable securities legislation – Relief granted from continuous disclosure requirements, certification requirements, insider reporting requirements, audit committee requirements and corporate governance requirements – Relief also granted from short form prospectus requirements, incorporation by reference requirements, earnings coverage requirements and subsidiary credit supporter requirements – Filer unable to rely on exemption for credit support issuers in applicable securities legislation since Filer only owns 70.5% of an intermediate holding entity (a limited partnership) that indirectly owns the voting securities of the Issuers – The characteristics of the partnership units of the holding limited partnership are such that control and direction of the holding limited partnership is held by the Filer – Filer unable to rely on the exemption since the Issuers propose to issue convertible preferred shares that are convertible into other preferred shares of the Issuers – Relief subject to conditions, including conditions as to who may obtain ownership of the voting securities of the holding limited partnership.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S.5, ss. 107 and 121(2)(a)(ii).
National Instrument 44-101 Short Form Prospectus Distributions, s. 8.1.
National Instrument 51-102 Continuous Disclosure Obligations, ss. 13.1 and 13.4.
National Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings, s. 8.6.
National Instrument 52-110 Audit Committees, s. 8.1.
National Instrument 55-102 System for Electronic Disclosure by Insiders (SEDI), s. 6.1.
National Instrument 55-104 Insider Reporting Requirements and Exemptions, s. 10.1(2).
National Instrument 58-101 Disclosure of Corporate Governance Practices, ss. 1.3(c) and 3.1.

October 20, 2021

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the Jurisdiction)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF APPLICATIONS
IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
BROOKFIELD INFRASTRUCTURE PARTNERS L.P.
(the Filer)

DECISION

Background

The principal regulator in the Jurisdiction has received an application from the Filer for a decision under the securities legislation of the Jurisdiction of the principal regulator (the **Legislation**) exempting:

(a) the Issuers (as defined below) from the requirements of National Instrument 51-102 - C*ontinuous Disclosure Obligations* (**NI 51-102**) (the **Continuous Disclosure Requirements**);

(b) the Issuers from the requirements of National Instrument 52-109 - *Certification of Disclosure in Issuers' Annual and Interim Filings* (**NI 52-109**) (the **Certification Requirements**);

(c) insiders of the Issuers from the insider reporting requirement (as defined in National Instrument 14-101 - *Definitions* (**NI 14-101**)) (the **Insider Reporting Requirements**);

(d) the Issuers from the requirements of National Instrument 52-110 *Audit Committees* (**NI 52-110**) (the **Audit Committee Requirements**);

(e) the Issuers from the requirements of National Instrument 58-101 - *Disclosure of Corporate Governance Practices* (**NI 58-101**) (the **Corporate Governance Requirements**);

(f) the CDN Pref Issuer (as defined below) from the qualification requirements (the **Qualification Requirements**) of Part 2 of National Instrument 44-101 - *Short Form Prospectus Distributions* (**NI 44-101**), such that the CDN Pref Issuer is qualified to file a prospectus in the form of a short form prospectus;

(g) the Issuers from the requirement to incorporate by reference into a short form prospectus the documents under paragraphs 1 to 4 and 6 to 8 of subsection 11.1(1) of Form 44-101F1 - *Short Form Prospectus* (**Form 44-101F1**) (the **Incorporation by Reference Requirements**);

(h) the Issuers from the requirement to include in a short form prospectus the earnings coverage ratios under Item 6 of Form 44-101F1 (the **Earnings Coverage Requirements**); and

(i) the Issuers from the requirement to include in a short form prospectus the disclosure of one or more subsidiary credit supporters required by Item 12 of Form 44-101F1 (the **Subsidiary Credit Supporter Requirements** and together with the Incorporation by Reference Requirements and the Earnings Coverage Requirements, the **Prospectus Disclosure Requirements**),

in each case to accommodate: (a) the issuance by the Debt Issuers (as defined below) of debt securities guaranteed by the Debt Guarantors (as defined below); and (b) the issuance by the CDN Pref Issuer of preferred shares guaranteed by the Preferred Share Guarantors (as defined below) (collectively, the **Exemption Sought**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

(a) the Ontario Securities Commission is the principal regulator for this application; and

(b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 - *Passport System* (**MI 11-102**) is intended to be relied upon in British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, the Northwest Territories, Yukon and Nunavut.

Interpretation

Terms defined in NI 14-101 and MI 11-102 have the same meaning if used in this decision, unless otherwise defined. In this decision, "**Filer's Related Entities**" means, collectively, the Holding LP (as defined below) and subsidiary entities (as this term is defined in Multilateral Instrument 61-101 - *Protection of Minority Security Holders in Special Transactions* (**MI 61-101**)) of the Holding LP.

Representations

This decision is based on the following facts represented by the Filer:

The Filer

1. The Filer is a Bermuda exempted limited partnership that was established on May 21, 2007.

2. The limited partnership units (the **Units**) of the Filer are listed on the New York Stock Exchange and the Toronto Stock Exchange under the symbols "BIP" and "BIP.UN", respectively. The Filer's authorized capital also includes Class A preferred limited partnership units (the **Class A Preferred Units**), issuable in series, and general partnership units.

3. The Filer is a reporting issuer in all of the provinces and territories of Canada (collectively, the **Jurisdictions**) and is an SEC foreign issuer within the meaning of section 1.1 of National Instrument 71-102 - *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers* (**NI 71-102**) and satisfies its continuous disclosure obligations by complying with U.S. federal securities laws as is permitted under NI 71-102.

4. The Filer's sole asset is its managing general partnership interest and preferred limited partnership interest in Brookfield Infrastructure L.P. (the **Holding LP**), a Bermuda exempted limited partnership that was established on August 17, 2007.

5. Brookfield Infrastructure Partners Limited (the **BIP General Partner**), a Bermuda company, holds the general partner interest in the Filer and is wholly-owned by Brookfield (as defined below).

6. The Filer, the Holding LP and certain of their subsidiaries have retained Brookfield Asset Management Inc. (together with its subsidiaries other than the Filer and its subsidiaries, **Brookfield**) and its related entities to provide management, administrative and advisory services under a master services agreement.

7. The Filer is not in default of any requirement of the Legislation or equivalent legislation in any of the Jurisdictions.

8. The Filer applied for and was granted substantially the same exemptive relief as the Exemption Sought pursuant to a February 28, 2014 decision document (the **February 2014 Decision**).

The Issuers and the Holding LP

9. The Debt Issuers have issued and outstanding $2.6 billion aggregate principal amount of debt securities (the **Existing Debt Securities**) guaranteed by the Filer, the Holding LP, each of the Holding Entities (as defined below) and BIPC Holdings Inc. (**BIPC Holdings**). The Debt Issuers may, subject to market conditions, issue additional debt securities (the **New Debt Securities,** and together with the Existing Debt Securities, the **Debt Securities**), any new series of which will be guaranteed by the Filer, the Holding LP, each of the Holding Entities and BIPC Holdings.

10. The Existing Debt Securities were jointly issued, and any New Debt Securities will be jointly issued, by Brookfield Infrastructure Finance ULC, an Alberta unlimited liability company (the **CDN Debt Issuer**), Brookfield Infrastructure Finance LLC, a Delaware limited liability company (the **US Issuer**), Brookfield Infrastructure Finance Pty Ltd, a proprietary company limited by shares incorporated in Australia (the **AUS Issuer**) and Brookfield Infrastructure Finance Limited, a Bermuda corporation (the **BRM Issuer**, together with the CDN Debt Issuer, the US Issuer and the AUS Issuer, the **Debt Issuers**), each an entity that is in effect an indirect subsidiary of the Filer.

11. The CDN Debt Issuer has issued and outstanding US$250 million aggregate principal amount of subordinated notes (the **Hybrid Debt Securities**) that were issued in the United States on May 24, 2021. The Filer, the Holding LP, each of the Holding Entities and BIPC Holdings have provided full and unconditional joint and several guarantees of the payments to be made by the CDN Debt Issuer in respect of the Hybrid Debt Securities, as stipulated in agreements governing the rights of holders of the Hybrid Debt Securities.

12. Brookfield Infrastructure Preferred Equity Inc. (the **CDN Pref Issuer**, and together with the Debt Issuers, the **Issuers**) will be an issuer of preferred shares (the **Preferred Shares** and together with the Debt Securities, the **Securities**), which will be guaranteed by the Filer, the Holding LP and each of the Holding Entities. No Preferred Shares are currently outstanding.

13. The Issuers were formed under the laws of their respective jurisdictions in May 2012 prior to the filing of a preliminary short form prospectus for an offering of Securities and are currently reporting issuers in all of the Jurisdictions and not in default of any requirement of the Legislation or equivalent legislation in any of the Jurisdictions.

14. BIPC Holdings is a wholly-owned subsidiary of Brookfield Infrastructure Corporation (**BIPC**).

15. BIPC is a corporation existing and in good standing under the *Business Corporations Act* (British Columbia) and is a controlled subsidiary of the Filer. BIPC is a reporting issuer in the Jurisdictions and is not in default of any requirement of securities legislation in the Jurisdictions.

16. BIPC's authorized share capital consists of an unlimited number of: (i) class A exchangeable subordinate voting shares (the **Exchangeable Shares**); (ii) class B multiple voting shares (the **Class B Shares**); (iii) class C non-voting shares (the **Class C Shares**); (iv) class A senior preferred shares (issuable in series); and (v) class B junior preferred shares (issuable in series). The only voting securities of BIPC are the Exchangeable Shares and the Class B Shares. Holders of Exchangeable Shares are entitled to one (1) vote per Exchangeable Share held and holders of Class B Shares are entitled to cast, in the aggregate, a number of votes equal to three (3) times the number of votes attached to the Exchangeable Shares. Neither the Exchangeable Shares nor the Class B Shares carry a residual right to participate in the assets of BIPC upon liquidation or winding-up of BIPC, and accordingly, are not equity securities under the Legislation. The Class C Shares are the only equity securities of BIPC.

17. The Exchangeable Shares are the economic equivalent of, and exchangeable for, Units.

18. The Filer indirectly owns (i) all of the issued and outstanding Class B Shares, which represent a 75% voting interest in BIPC, and (ii) all of the issued and outstanding Class C Shares, which entitle the Filer to all of the residual value in BIPC after payment in full of the amount due to holders of Exchangeable Shares and Class B Shares and subject to the prior rights of holders of BIPC preferred shares. BIPC will therefore continue to be, in effect, a wholly-owned subsidiary of the Filer for so long as the Filer owns all the equity securities of BIPC.

19. The CDN Pref Issuer is a wholly-owned subsidiary of Brookfield Infrastructure Holdings (Canada) Inc., a company incorporated under the laws of the Province of Ontario (**Can Holdco**); the US Issuer is an indirect wholly-owned subsidiary of Brookfield Infrastructure US Holdings I Corporation, a corporation incorporated under the laws of the State of Delaware (**US Holdco**); and the CDN Debt Issuer, the AUS Issuer and the BRM Issuer are each wholly-owned subsidiaries of BIP Bermuda Holdings I Limited, a company incorporated under the laws of Bermuda (**BRM Holdco**, and together with Can Holdco and US Holdco, the **Holding Entities**).

20. The Holding LP owns, directly or indirectly, all of the issued and outstanding common shares of all the Holding Entities and BIPC Holdings and Brookfield owns all of the issued and outstanding preferred shares of all the Holding Entities (the **Holdco Preferred Shares**). The Holdco Preferred Shares are redeemable for cash at the option of the Holding Entities, subject to certain limitations, and, except for the preferred share of US Holdco (the **US Holdco Preferred Share**), are not entitled to vote, except as required by law. The US Holdco Preferred Share is entitled to one vote because of certain US tax implications. The Holdco Preferred Shares are not equity securities as such term is defined in the Act.

21. All of the outstanding voting securities of each Issuer are held directly or indirectly by the respective Holding Entity that is its parent.

22. The Filer is the managing general partner of the Holding LP and holds an approximate 70.5% managing general partnership interest in the Holding LP. Brookfield holds a 29.1% limited partnership interest in the Holding LP and an additional 0.4% special general partnership interest in the Holding LP.

23. The limited partnership units of the Holding LP owned by Brookfield (the **Redemption-Exchange Units**) are subject to a redemption-exchange mechanism pursuant to which Brookfield has the right to require that the Holding LP redeem all or a portion of its Redemption-Exchange Units for a cash amount equal to the fair market value of one Unit multiplied by the number of Redemption-Exchange Units to be redeemed. In connection with the redemption, the Filer has the right to purchase all the Redemption-Exchange Units to be redeemed in exchange for Units on a one for one basis. The characteristics of the redemption-exchange mechanism associated with Brookfield's Redemption-Exchange Units are such that the economic interest of Brookfield represented by the Redemption-Exchange Units is an economic interest in the Filer rather than the Holding LP.

24. Brookfield Infrastructure Special L.P. (**Infrastructure Special LP**) is the special general partner of the Holding LP. The special general partnership units of the Holding LP that are owned by Infrastructure Special LP (the **Special General Partnership Units**) are not redeemable or exchangeable. The holder of the Special General Partnership Units is entitled to receive distributions in proportion to its 0.4% special general partnership interest, plus additional incentive distributions from the Holding LP. Infrastructure Special LP has delegated to the Filer, as managing general partner of the Holding LP, all of the rights, powers and authority granted to it as a general partner under applicable law. Accordingly, all management powers over the activities and affairs of the Holding LP are exclusively vested in the Filer, except as expressly otherwise provided in the limited partnership agreement of the Holding LP.

25. The Filer, the Holding LP, the Holding Entities and BIPC Holdings are "credit supporters" (as defined in Part 13.4 of NI 51-102).

26. Each Issuer is or will be a "credit support issuer" (as defined in Part 13.4 of NI 51-102).

27. The Filer does not technically satisfy the definition of "parent credit supporter" (as defined in Part 13.4 of NI 51-102) as a result of the indirect ownership of the Issuers through the Holding LP. Therefore, the Securities are not "designated credit support securities" (as defined in Part 13.4 of NI 51-102). If the Exemption Sought is granted, the Filer and each Issuer will: (a) treat the Filer as a "parent credit supporter" and comply with the conditions in section 13.4(2.1) of NI 51-102 that apply to parent credit supporters; and (b) treat the Debt Securities, the Preferred Shares and the Resulting Preferred Shares (as defined below) as "designated credit support securities" and comply with the conditions in section 13.4(2.1) of NI 51-102 that apply to designated credit support securities, in accordance with the terms and conditions of this decision.

28. The Preferred Shares will be issuable in one or more series having such rights, restrictions and privileges determined by the directors of the CDN Pref Issuer.

29. The Preferred Shares will satisfy the definition of "designated credit support securities" (as defined in Part 13.4 of NI 51-102), but for the fact that: (a) the Filer does not technically satisfy the definition of "parent credit supporter" (as defined in Part 13.4 of NI 51-102); and (b) the Preferred Shares may be convertible, in certain circumstances, at the option of the holder or the CDN Pref Issuer, into Preferred Shares of another series (the **Resulting Preferred Shares**).

30. The Preferred Shares and the Resulting Preferred Shares may also be convertible, in certain circumstances, into: (a) Units; (b) non-convertible Class A Preferred Units; or (c) Class A Preferred Units that are convertible into Class A Preferred Units of another series (the **Convertible Preferred Units**). All of the Units, non-convertible Class A Preferred Units and Convertible Preferred Units are securities of the Filer and the Convertible Preferred Units are only convertible into non-convertible securities of the Filer or convertible securities of the Filer that are in turn only convertible into other securities of the Filer.

31. The CDN Pref Issuer does not directly satisfy the eligibility criteria in Part 2 of NI 44-101 (and thus the shelf qualification requirements in Part 2 of National Instrument 44-102 – *Shelf Distributions* (**NI 44-102**) in order to be able to file a prospectus in the form of a short form prospectus (and thus a short form base shelf prospectus) for Preferred Shares that are convertible into Resulting Preferred Shares.

32. For Preferred Shares that are convertible into Resulting Preferred Shares or Convertible Preferred Units, the CDN Pref Issuer will not satisfy the requirement in Item 13.3(d) of Form 44-101F1, which requires that Preferred Shares only be convertible into non-convertible securities of the Filer.

33. The Filer does not meet the test set forth in section 13.4(2)(a) of NI 51-102 as it does not technically satisfy the definition of "parent credit supporter" (as defined in Part 13.4 of NI 51-102) and, by virtue of section 13.4(4) of NI 51-102, the Filer is unable to meet the test set forth in section 13.4(2)(b)(ii) of NI 51-102 as it satisfies its continuous disclosure obligations by complying with U.S. federal securities law as is permitted under NI 71-102. Therefore, the Requested Relief is required in order for the provisions of section 13.4 of NI 51-102 to apply to the Issuers, and the relationship between the Issuers and the Filer.

34. The Debt Issuers have filed a short form base shelf prospectus dated December 11, 2020 in each of the Jurisdictions, in reliance upon section 2.4 of NI 44-101 and NI 44-102, which qualifies for distribution to the public C$3,000,000,000 of Securities. Any future prospectus will be prepared pursuant to the short form procedures contained in NI 44-101 and, if applicable, NI 44-102 and will comply with the requirements set out in Form 44-101F1 and, if applicable, NI 44-102, other than the Prospectus Disclosure Requirements.

35. The Debt Securities are governed by a trust indenture dated as of October 10, 2012 among the Debt Issuers and Computershare Trust Company of Canada, as trustee, as supplemented (the **Indenture**). Under the terms of the Indenture, the Debt Issuers are jointly and severally liable for the Debt Securities.

36. The Filer, the Holding LP, each of the Holding Entities and BIPC Holdings will, and other subsidiary entities (as defined in MI 61-101) of the Holding LP (collectively with the Filer, the Holding LP, each of the Holding Entities and BIPC Holdings, the **Debt Guarantors**) may, provide full and unconditional joint and several guarantees (collectively, the **Debt Guarantees**) of the payments to be made by the Debt Issuers in respect of the Debt Securities, as stipulated in agreements governing the rights of holders of the Debt Securities. In addition, the Filer, the Holding LP and each of the Holding Entities will, and other subsidiary entities (as defined in MI 61-101) of the Holding LP (collectively with the Filer, the Holding LP and each of the Holding Entities, the **Preferred Share Guarantors** and together with the Debt Guarantors, the **Guarantors**) may, provide full and unconditional joint and several guarantees (collectively, the **Preferred Share Guarantees**) of the payments to be made by the CDN Pref Issuer in respect of the Preferred Shares and the Resulting Preferred Shares (if applicable), as stipulated in agreements governing the rights of holders of the Preferred Shares and the Resulting Preferred Shares (if applicable). The Debt Guarantees and the Preferred Share Guarantees result in the holders of such securities being entitled to receive payment from the Guarantors within 15 days of any failure by the Issuers to make a payment, as contemplated by paragraph (d) of the definition of "designated credit support security" in NI 51-102.

Offering of Securities

37. At the time of the filing of any short form prospectus or shelf prospectus supplement in connection with an offering of Securities:

    (a) each Issuer will comply with all of the filing requirements and procedures set out in NI 44-101, other than the Qualification Requirements in the case of the CDN Pref Issuer, and, if applicable, NI 44-102, except as permitted by the Legislation;

    (b) the prospectus will be prepared in accordance with the short form prospectus requirements of NI 44-101 and, if applicable, NI 44-102 other than the Prospectus Disclosure Requirements, except as permitted by the Legislation;

    (c) the Filer will continue to be a reporting issuer under the Legislation;

    (d) the prospectus will incorporate by reference the documents of the Filer set forth under Item 11.1 of Form 44-101F1;

    (e) the prospectus disclosure required by Item 11 of Form 44-101F1 will be addressed by incorporating by reference the Filer's public disclosure documents referred to in paragraph 37(d) above; and

    (f) the Filer will continue to satisfy all of the criteria in section 2.2 of NI 44-101, as applicable, pursuant to Part 4 of NI 71-102.

38. Prior to issuing any New Debt Securities:

    (a) the Filer will provide its Guarantee in respect of the New Debt Securities; and

    (b) the Issuers will be jointly and severally liable for the New Debt Securities under the Indenture.

39. Prior to issuing any Preferred Shares, the Filer will provide its Guarantee in respect of such Preferred Shares and any Resulting Preferred Shares (if applicable).

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted provided that:

1. in respect of the Continuous Disclosure Requirements, each Issuer and the Filer continue to satisfy the conditions set out in subsection 13.4(2.1) of NI 51-102, except as modified as follows:

    (a) any reference to parent credit supporter in section 13.4 shall be deemed to include the Filer notwithstanding its indirect ownership of the Issuers through the Holding LP,

    (b) any reference to subsidiary credit supporter in section 13.4 of NI 51-102 shall be deemed to include the Holding Entities, BIPC Holdings and their affiliates, including the Filer's Related Entities, notwithstanding the Filer's indirect ownership of such entities through the Holding LP,

    (c) the Filer does not have to comply with the conditions in section 13.4(2)(a) and section 13.4(2.1)(b) of NI 51-102 if:

        (i) no party other than the Filer, Brookfield and Infrastructure Special LP will have any direct or indirect ownership of, or control or direction over, voting securities of the Holding LP,

        (ii) no party other than the Filer, Brookfield, Infrastructure Special LP, the Holding LP and the Filer's Related Entities will have any direct or indirect ownership of, or control or direction over, voting securities of the Holding Entities or BIPC Holdings,

        (iii) no party other than the Filer, Brookfield, Infrastructure Special LP, the Holding LP, the Holding Entities, BIPC Holdings and their affiliates, including the Filer and the Filer's Related Entities, will have any direct or indirect ownership of, or control or direction over, voting securities of the Issuers,

        (iv) the Filer consolidates in its financial statements the Holding LP, the Holding Entities, BIPC Holdings and the Issuers as well as any entities consolidated by any of the foregoing and, if any Issuer has issued Debt Securities, Preferred Shares or Resulting Preferred Shares that remain outstanding, files its financial statements pursuant to Part 4 of NI 51-102, except that the Filer does not have to comply with the conditions in section 4.2 of NI 51-102 if it files such financial statements on or before the date that it is required to file its Form 20-F with the U.S. Securities and Exchange Commission (**SEC**),

        (v) other than the US Holdco Preferred Share owned by Brookfield, the issued and outstanding voting securities of the Holding Entities, BIPC Holdings and the Issuers are 100% owned, directly or indirectly, by their respective parent companies or entities, and

        (vi) Brookfield does not have any direct or indirect ownership of, or control or direction over, any securities of the Holding LP other than Redemption-Exchange Units, Special General Partnership Units and non-voting securities of the Holding LP,

    (d) section 13.4(4) of NI 51-102 does not apply to the Filer (the **SEC Foreign Issuer Relief**) if:

        (i) the Filer continues to be a reporting issuer,

        (ii) the Filer continues to be a SEC foreign issuer (as defined in NI 71-102) and only relies on the exemptions in Part 4 of NI 71-102,

        (iii) to the extent that the Filer complies with the foreign private issuer disclosure regime under U.S. securities law, it does not rely on any exemption from that regime,

        (iv) if any Issuer has issued Debt Securities, Preferred Shares or Resulting Preferred Shares that remain outstanding, the summary financial information referred to in section 13.4(2.1)(c) of NI 51-102 will be reconciled to the consolidated financial statements of the Filer, including any minority interest adjustments,

(v) if any Issuer has issued Debt Securities, Preferred Shares or Resulting Preferred Shares that remain outstanding, the Filer files a material change report as set out in Part 7 of NI 51-102 in respect of any material change in the affairs of the Filer that is not reported or filed by the Filer on SEC Form 6-K,

(vi) if any Issuer has issued Debt Securities, Preferred Shares or Resulting Preferred Shares that remain outstanding, the Filer files an interim financial report as set out in Part 4 of NI 51-102 and the Management Discussion and Analysis as set out in Part 5 of NI 51-102 for each period commencing on the first day of the financial year and ending nine, six or three months before the end of the financial year, and

(vii) the Filer includes in any prospectus of each Issuer financial statements or other information about any acquisition that would have been or would be a significant acquisition for the purposes of Part 8 of NI 51-102 that the Filer has completed or has progressed to a state where a reasonable person would believe that the likelihood of the Filer completing the acquisition is high if the inclusion of the financial statements is necessary for the prospectus to contain full, true and plain disclosure of all material facts relating to the securities being distributed. The requirement to include financial statements or other information must be satisfied by including or incorporating by reference (a) the financial statements or other information as set out in Part 8 of NI 51-102, or (b) satisfactory alternative financial statements or other information, unless at least 9 months of the operations of the acquired business or related businesses are incorporated into the Filer's current annual financial statements included or incorporated by reference in the prospectus of each Issuer,

(e) the Issuers do not have to comply with the conditions in section 13.4(2)(c) of NI 51-102 if each Issuer does not issue any securities and does not have any securities outstanding other than:

(i) designated credit support securities,

(ii) securities issued to and held by the Filer or the Filer's Related Entities,

(iii) non-voting securities held by Brookfield,

(iv) debt securities issued to and held by banks, loan corporations, loan and investment corporations, savings companies, trust corporations, treasury branches, saving or credit unions, financial services cooperatives, insurance companies or other financial institutions,

(v) securities issued under exemptions from the prospectus requirements in section 2.35 of National Instrument 45-106 - *Prospectus and Registration Exemptions*, and

(vi) Debt Securities or Preferred Shares and Resulting Preferred Shares, provided that (A) the Filer has provided Debt Guarantees and Preferred Share Guarantees, as applicable, in respect of such securities, and (B) such Preferred Shares and Resulting Preferred Shares are not convertible into any security other than Resulting Preferred Shares, Preferred Shares, Units, Class A Preferred Units and/or Convertible Preferred Units.

2. in respect of the Certification Requirements, the Audit Committee Requirements and the Corporate Governance Requirements, the Filer and each Issuer continue to satisfy the conditions for relief from the Continuous Disclosure Requirements set forth above.

3. in respect of the Insider Reporting Requirements, an insider of an Issuer can only rely on the Exemption Sought so long as:

(a) the insider complies with the conditions in sections 13.4(3)(b) and (c) of NI 51-102, and

(b) the Filer and each Issuer continue to satisfy the conditions for relief from the Continuous Disclosure Requirements set forth above.

4. in respect of the Qualification Requirements and the Prospectus Disclosure Requirements so long as:

(a) any preliminary short form prospectus of the Issuers is in respect of an offering of Securities,

(b) the Issuers are qualified to file a preliminary short form prospectus under section 2.4 of NI 44-101, except modified as follows:

(i) the CDN Pref Issuer does not have to comply with the condition in section 2.4 of NI 44-101 that the securities being distributed be non-convertible preferred shares if, on completion of any offering of Preferred Shares, such Preferred Shares are only convertible into Resulting Preferred Shares, Units,

Class A Preferred Units and/or Convertible Preferred Units, the Issuer meets the conditions in paragraph 1(e) of this decision above, and the Filer will continue to satisfy all of the criteria in section 2.2 of NI 44-101, as applicable, pursuant to Part 4 of NI 71-102,

(c) the Issuers remain, so long as any of the Securities issued to the public remain outstanding, electronic filers under National Instrument 13-101 — *System for Electronic Document Analysis and Retrieval* (**SEDAR**),

(d) the Issuers continue to maintain profiles on SEDAR,

(e) the Issuers and the Filer satisfy the conditions set out in section 13.3 of Form 44-101F1, except as modified as follows:

(i) any reference to parent credit supporter in section 13.3 of Form 44-101F1 shall be deemed to include the Filer notwithstanding its indirect ownership of the Issuers through the Holding LP,

(ii) any reference to subsidiary credit supporter in section 13.3 of Form 44-101F1 shall be deemed to include the Holding Entities, BIPC Holdings and their affiliates, including the Filer's Related Entities, notwithstanding the Filer's indirect ownership of such entities through the Holding LP,

(iii) the Filer does not have to comply with the conditions in sections 13.3(1)(e) and 13.3(1)(f) of Form 44-101F1 if it meets the conditions in paragraph 1(c) of this decision above,

(iv) the CDN Pref Issuer does not have to comply with the condition in section 13.3(1)(d) of Form 44-101F1 if, on completion of any offering of Preferred Shares, it meets the conditions in paragraph 1(e) of this decision above, and

(v) the summary financial information referred to in section 13.3(1)(g) of Form 44-101F1 will be reconciled to the consolidated financial statements of the Filer, including any minority interest adjustments,

(f) any preliminary short form prospectus and final short form prospectus of the Issuers contains (or incorporates by reference a document containing) a corporate organizational chart showing the ownership and control relationships among Brookfield, the Filer, the BIP General Partner, Infrastructure Special LP, the Holding LP, the Holding Entities, BIPC Holdings and the Issuers,

(g) the Filer and each Issuer continue to satisfy the conditions for relief from the Continuous Disclosure Requirements set forth above,

(h) the Issuers and the Filer, as applicable, comply with paragraphs 37, 38 and 39 above, as applicable, and

(i) the Issuers will issue a news release and file a material change report as set out in Part 7 of NI 51-102 in respect of any material change in the affairs of the Issuers that is not also a material change in the affairs of the Filer.

The further decision of the principal regulator is that the February 2014 Decision is replaced by this decision.

As to the Exemption Sought (other than from the Insider Reporting Requirements in the *Securities Act* (Ontario)).

"Michael Balter"
Manager, Corporate Finance
Ontario Securities Commission

As to the Exemption Sought from the Insider Reporting Requirements in the *Securities Act* (Ontario).

"Craig Hayman"	"Cecilia Williams"
Commissioner	Commissioner
Ontario Securities Commission	Ontario Securities Commission

OSC File #: 2021/0429

2.2 Orders

2.2.1 Aux Cayes Fintech Co. Ltd.

File No. 2021-29

IN THE MATTER OF
AUX CAYES FINTECH CO. LTD.

Lawrence P. Haber, Commissioner and Chair of the Panel

January 13, 2022

ORDER

WHEREAS the Ontario Securities Commission held a hearing in writing to consider a schedule for certain steps in this proceeding;

ON READING the joint submissions of Staff of the Commission and the representatives for Aux Cayes Fintech Co. Ltd. (the **Respondent**);

IT IS ORDERED THAT:

1. pursuant to section 5.1 of the *Statutory Powers Procedure Act,* RSO 1990, c S.22 and Rule 23(3) of the *Commission's Rules of Procedure and Forms,* (2019) 42 OSCB 9714 the hearing of the attendance scheduled for January 13, 2022 is held in writing;

2. by 4:30 p.m. on February 11, 2022, the Respondent shall:

   a. serve and file a witness list,

   b. serve a summary of each witness' anticipated evidence, and

   c. indicate any intention to call an expert witness, including providing the expert's name and the issues on which the expert will give evidence; and

3. a further attendance in this matter is scheduled for March 14, 2022 at 10:00 a.m., by teleconference, or on such other date and time as may be agreed to by the parties and set by the Office of the Secretary.

"Lawrence P. Haber"

2.2.2 Mughal Asset Management Corporation and Usman Asif – ss. 127(8), 127(1)

File No. 2021-36

IN THE MATTER OF
MUGHAL ASSET MANAGEMENT CORPORATION AND USMAN ASIF

Lawrence P. Haber, Commissioner and Chair of the Panel

January 13, 2022

ORDER
(Subsection 127(8) and 127(1) of the *Securities Act,* RSO 1990, c S.5)

WHEREAS the Ontario Securities Commission held a hearing in writing to consider when to schedule an application by Staff of the Commission to further extend a temporary order dated December 17, 2021 against Mughal Asset Management Corporation (**Mughal**) and Usman Asif (**Asif**) (together, the **Respondents**);

ON READING the correspondence from the parties, and on considering that the parties consent to the hearing date for Staff's application and to extend the temporary order until that time;

IT IS ORDERED THAT

1. Staff's application to extend the temporary order is scheduled for March 10, 2022 at 10:00 a.m., by videoconference, or on such other date and time as may be agreed to by the parties and set by the Office of the Secretary;

2. pursuant to subsection 127(8) and paragraph 2 of subsection 127(1) of the *Securities Act*, RSO 1990, c S.5 (the **Act**), all trading in securities of Mughal shall cease until March 11, 2022;

3. pursuant to subsection 127(8) and paragraph 2 of subsection 127(1) of the Act, trading in any securities by Asif and Mughal, or by any person on their behalf, including but not limited to any act, advertisement, solicitation, conduct, or negotiation, directly or indirectly in furtherance of a trade, shall cease until March 11, 2022; and

4. pursuant to subsection 127(8) and paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Asif or Mughal until March 11, 2022.

"Lawrence P. Haber"

2.2.3 Aquila Resources Inc. – s. 1(6) of the OBCA

Headnote

Applicant deemed to have ceased to be offering its securities to the public under the Business Corporations Act (Ontario).

Statutes Cited

Business Corporations Act, R.S.O. 1990, c. B.16 as am., s. 1(6).

IN THE MATTER OF
THE *BUSINESS CORPORATIONS ACT* (ONTARIO),
R.S.O. 1990, c. B.16, AS AMENDED
(the OBCA)

AND

IN THE MATTER OF
AQUILA RESOURCES INC.
(the Applicant)

ORDER
(Subsection 1(6) of the OBCA)

UPON the application of the Applicant to the Ontario Securities Commission (the **Commission**) for an order pursuant to subsection 1(6) of the OBCA to be deemed to have ceased to be offering its securities to the public;

AND UPON the Applicant representing to the Commission that:

1. The Applicant is an "offering corporation" as defined in subsection 1(1) of the OBCA;

2. The Applicant's head office is located in Ontario;

3. The Applicant has no intention to seek public financing by way of an offering of securities;

4. On January 6, 2022 the Applicant was granted an order (the **Reporting Issuer Order**) pursuant to subclause 1(10)(a)(ii) of the *Securities Act* (Ontario) that it is not a reporting issuer in Ontario and is not a reporting issuer or equivalent in any other jurisdiction in Canada in accordance with the simplified procedure set out in National Policy 11-206 *Process for Cease to be a Reporting Issuer Applications*; and

5. The representations set out in the Reporting Issuer Order continue to be true.

AND UPON the Commission being satisfied that to grant this order would not be prejudicial to the public interest;

IT IS HEREBY ORDERED pursuant to subsection 1(6) of the OBCA, that the Applicant be deemed to have ceased to be offering its securities to the public.

DATED at Toronto this 12th day of January, 2022.

"Mary Anne De Monte-Whelan"
Commissioner
Ontario Securities Commission

"Cecilia Williams"
Commissioner
Ontario Securities Commission

OSC File #: 2021/0767

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Chapter 4

Cease Trading Orders

4.1.1 Temporary, Permanent & Rescinding Issuer Cease Trading Orders

Company Name	Date of Temporary Order	Date of Hearing	Date of Permanent Order	Date of Lapse/Revoke
THERE IS NOTHING TO REPORT THIS WEEK.				

Failure to File Cease Trade Orders

Company Name	Date of Order	Date of Revocation
Chemesis International Inc.	January 11, 2022	

4.2.1 Temporary, Permanent & Rescinding Management Cease Trading Orders

Company Name	Date of Order	Date of Lapse
THERE IS NOTHING TO REPORT THIS WEEK.		

4.2.2 Outstanding Management & Insider Cease Trading Orders

Company Name	Date of Order or Temporary Order	Date of Hearing	Date of Permanent Order	Date of Lapse/Expire	Date of Issuer Temporary Order
Performance Sports Group Ltd.	19 October 2016	31 October 2016	31 October 2016		

Company Name	Date of Order	Date of Lapse
Agrios Global Holdings Ltd.	September 17, 2020	
Reservoir Capital Corp.	May 5, 2021	
Cronos Group Inc.	November 16, 2021	
GreenBank Capital Inc.	November 30, 2021	
High Fusion Inc.	December 31, 2021	

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Chapter 6

Request for Comments

6.1.1 CSA Notice and Third Request for Comment – Proposed National Instrument 93-101 Derivatives: Business Conduct, Proposed Companion Policy 93-101CP Derivatives: Business Conduct

CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

CSA NOTICE AND THIRD REQUEST FOR COMMENT

PROPOSED NATIONAL INSTRUMENT 93-101
DERIVATIVES: BUSINESS CONDUCT

PROPOSED COMPANION POLICY 93-101CP
DERIVATIVES: BUSINESS CONDUCT

January 20, 2022

Introduction

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

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

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

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

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

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

Substance and Purpose

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

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

During the financial crisis of 2008, the inappropriate sale of financial instruments had a substantial impact on global financial markets and led to major losses for retail and institutional participants. The International Organization of Securities Commissions (**IOSCO**) noted in 2012 that "until recently, OTC derivatives markets have not been subject to the same level of regulation as securities markets. Insufficient regulation allowed certain participants to operate in a manner that created risks to the global

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

economy that manifested during the financial crisis of 2008."[2] Moreover, since the financial crisis, there have been numerous cases of serious market misconduct in the global derivatives market and short-term FX market; for example, misconduct relating to the manipulation of benchmarks and front-running of customer orders, breaches of client confidentiality and failure to adequately manage conflicts of interest. In addition, the International Monetary Fund reported in 2019 that Canada's "[o]ngoing reforms in the areas of conduct of business of over-the-counter (OTC) derivatives and duties towards clients should be completed."[3]

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

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

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

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

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

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

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

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

- certain obligations apply in all cases when a derivatives firm is dealing with or advising a derivatives party, regardless of the level of sophistication or financial resources of the derivatives party; and
- certain additional obligations:
    - apply if the derivatives firm is dealing with or advising a derivatives party that is not an eligible derivatives party (i.e., a "non-eligible derivatives party"), and
    - apply but may be waived if the derivatives firm is dealing with or advising a derivatives party who is an eligible derivatives party that is an individual or a specified commercial hedger.

The term "eligible derivatives party" (**EDP**) is used to refer to those derivatives parties that do not require the full set of protections afforded to "retail" customers or investors, either because they may reasonably be considered sophisticated or because they have

2 https://www.iosco.org/library/pubdocs/pdf/IOSCOPD381.pdf (DMI Report) at p 1.
3 Financial System Stability Assessment of Canada, published on June 24, 2019 (Country Report No.19/177).
4 https://www.iosco.org/library/pubdocs/pdf/IOSCOPD497.pdf (DMI Implementation Review) at p. 13.

sufficient financial resources to purchase professional advice, or otherwise protect themselves through contractual negotiation with the derivatives firm.

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

Background

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

- On April 18, 2013, CSA Consultation Paper 91-407 *Derivatives: Registration,* which outlined a proposed registration and business conduct regime for participants in the OTC derivatives markets was published for comment;
- On April 4, 2017, Proposed National Instrument 93-101 *Derivatives: Business Conduct* and Proposed Companion Policy 93-101 *Derivatives: Business Conduct* was published for a first comment period;
- On June 14, 2018, Proposed National Instrument 93-101 *Derivatives: Business Conduct* and Proposed Companion Policy 93-101 *Derivatives: Business Conduct* was published for a second comment period (the **second consultation**).

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

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

Summary of Written Comments Received by the CSA

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

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

- the Alberta Securities Commission at www.albertasecurities.com
- the Autorité des marchés financiers at www.lautorite.qc.ca
- the Ontario Securities Commission at www.osc.gov.on.ca

Summary of Changes to the Proposed Instrument

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

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

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

- added a new foreign liquidity provider exemption for foreign dealers when they transact with derivatives dealers in Canada;
- added a new exemption for foreign sub-advisers that is similar to the exemption for international sub-advisers in NI 31-103;

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

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

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

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

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

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

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

Foreign liquidity provider exemption

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

Foreign Derivatives Dealer and Foreign Derivatives Adviser Exemptions

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

Foreign Derivatives Sub-Adviser Exemption

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

Eligible Derivatives Party (EDP) Definition

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

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

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

Registered Advisers

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

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

- exempting registered advisers from certain requirements of the Proposed Instrument if they comply with corresponding requirements in NI 31-103 in respect of their derivatives activity;
- including a transition period that allows registered advisers to treat permitted clients as EDPs for up to five years.

Exemptions from the Designation and Responsibilities of a Senior Derivatives Manager

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

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

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

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

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

Business Trigger

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

Short-Term Foreign Exchange Contracts in the Institutional FX Market

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

Handling Complaints—Core Conduct Obligation Towards All Derivatives Parties

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

Tied Selling—Core Conduct Obligation Towards All Derivatives Parties

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

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

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

Transition Period

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

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

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

List of Annexes

This notice contains the following annexes:

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

Comments

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

1) Foreign Liquidity Provider Exemption

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

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

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

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

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

3) Foreign Derivatives Dealer Exemption—Requirements

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8) Conflicts of Interest

Section 9 of the Instrument was developed with the intention that it would be generally consistent with the conflicts of interest provisions of NI 31-103. The Client Focused Reforms amended the conflicts of interest provisions of NI 31-103 (through amendments to section 13.4 and the addition of section 13.4.1) and adopted related companion policy changes. We are considering further changes to conform the conflicts of interest requirements so that they are consistent with those in NI 31-103, along with other changes to conform the requirements to be consistent with the requirements found in Client Focused Reforms. Please provide any comments relating to the inclusion of such corresponding changes to the Proposed Instrument.

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

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

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

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

Thank you in advance for your comments.

Please address your comments to each of the following:

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Ontario Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

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

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
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

Questions

Please refer your questions to any of:

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

ANNEX A

LIST OF COMMENTERS

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

ANNEX B

SUMMARY OF COMMENTS AND RESPONSES

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

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

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

"CSA" means the Canadian Securities Administrators

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

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

"IIROC" means the Investment Industry Regulatory Organization of Canada

"IOSCO" means the International Organization of Securities Commissions

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

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

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

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

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

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

"Product Determination Rules" means

- in Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan and Yukon, Multilateral Instrument 91-101 *Derivatives: Product Determination*,
- in Manitoba, Manitoba Securities Commission Rule 91-506 *Derivatives: Product Determination*,
- in Ontario, Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination*, and
- in Québec, *Regulation 91-506 respecting Derivatives Determination*

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

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

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

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

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

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

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

1. General comments and themes

General support for the initiative

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

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

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

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

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

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

CSA Response

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

Overview of comments and concerns with the initiative

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

- Comments on the importance of harmonizing Canadian OTC derivatives rules with the rules in larger markets outside Canada, as well as concerns with the potential impact of the proposed rules on foreign dealers and with the potential impact of the proposed rules on liquidity
- Concerns with the definition of "eligible derivatives party" (**EDP**), and particularly
    - differences between the EDP definition and the "permitted client" definition in NI 31-103
    - the financial thresholds in the "commercial hedger" category

- the knowledge and experience representations
- the need for a reasonable transition period to deal with customers who are permitted clients under NI 31-103 or eligible contract participants under CFTC rules

- Concerns with the potential impact of the proposed rules on registered advisers (portfolio managers (**PMs**) and registered advisers under commodity futures legislation)
- Concerns with the application of the business conduct rule to unregistered entities, such as
  - Canadian financial institutions that are subject to prudential regulation, and
  - entities that may be able to rely on the *de minimis* exemptions under the proposed registration rule
- Concerns over the timing of implementation and the need for a reasonable transition period
- Comments and concerns in response to the specific requests for comment
- Miscellaneous other comments and concerns (by Part and section of the rule)

CSA Response

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

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

- We have added a new foreign liquidity provider exemption for foreign dealers that trade with derivatives dealers in Canada. This exemption is in addition to the foreign dealer exemption but contains fewer conditions than are found in the foreign dealer exemption. The foreign dealer exemption remains available for when foreign dealers trade with derivatives parties that are not derivatives dealers in Canada.
- We have significantly streamlined the foreign dealer exemption and the foreign adviser exemption so that they more closely conform to the international dealer and international adviser exemptions in NI 31-103; consequently, a foreign dealer or adviser that complies with the conditions of the exemption will receive a complete exemption from the business conduct rule rather than a more limited exemption from specific provisions of the business conduct rule based on tables in the appendices for each foreign jurisdiction.
- We have added a new exemption for foreign sub-advisers similar to the exemption for international sub-advisers in NI 31-103.
- We have included additional guidance on the application of the business trigger test as it relates to dealers that conduct activities in Canada and in foreign jurisdictions as well as on the availability of exemptions from business conduct requirements, including the foreign liquidity provider exemption, the end-user exemption, the foreign dealer exemption and the foreign adviser exemption.
- We have made significant changes to the EDP definition including
  - eliminating the $10 million financial threshold in the non-individual commercial hedger category (from $10 million to $0); and
  - including a transition period to allow derivatives firms to treat permitted clients, qualified parties, accredited counterparties and eligible contract participants under CFTC and SEC rules, as EDPs for up to five years;

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

  We acknowledge that the removal of the financial threshold in the non-individual commercial hedger category of the EDP definition for entities that trade or advise others in relation to *OTC* derivatives potentially creates a significant regulatory differential for registered firms and international firms that trade or advise others in related to *listed* derivatives (i.e., exchange-traded options and futures), since the definition of “permitted client” in NI 31-

103 and the IIROC definition of "institutional customer" does not currently include a non-individual commercial hedger category. We intend to consult with CSA and IIROC staff with a view to addressing this regulatory differential as between OTC derivatives and listed derivatives.

- We have made significant changes to the business conduct rule to reduce its impact on registered advisers and to allow registered advisers to leverage their existing compliance systems. These changes include the following:
    - revising various provisions of NI 93-101, such as the senior derivatives manager provisions in Part 5 of NI 93-101, so that they apply to derivatives dealers but not to derivatives advisers;
    - exempting registered advisers from certain requirements of NI 93-101 if they comply with corresponding requirements in NI 31-103; and
    - including a transition period to allow registered firms to treat non-individual permitted clients as EDPs for up to five years.
- We have added an exemption from certain requirements in the business conduct rule, including an exemption from the senior derivatives manager requirements in Part 5 of the rule, for persons and companies eligible to rely on the *de minimis* exemptions in NI 93-102 (the threshold is set at $250 million for the general *de minimis* exemption available to all derivatives dealers and at $3 billion for *de minimis* exemption available to commodity derivatives dealers).
- We have expanded the exemption for derivatives traded on a derivatives trading facility where the identity of the counterparty is unknown (s. 41).
- We have included a delayed effective date of one year from the date of the final publication of the rule, together with transition provisions to allow registered firms to treat permitted clients, qualified parties, accredited counterparties, and eligible contract participants in the context of similar CFTC rules, as EDPs for up to five years.

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

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

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

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

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

CSA Response

We have made significant changes to the business conduct rule to minimize the potential impact of the proposed rules on foreign dealers and advisers, and therefore access to liquidity these firms provide, including

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

(i) New foreign liquidity provider exemption

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- eliminating the $10 million financial threshold in the non-individual commercial hedger category (from $10 million to $0); and
- including a transition period to allow derivatives firms to treat non-individual permitted clients, qualified parties, accredited counterparties, and eligible contract participants under CFTC rules, as EDPs for up to five years;

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

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

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

- that a foreign dealer will be a derivatives dealer in a local jurisdiction (and therefore subject to the proposed rules in that local jurisdiction) if it conducts trading or advising activities with a derivatives party located in the local jurisdiction;
- a non-dealer counterparty (i.e., a customer of a derivatives dealer) will be in a local jurisdiction if its head office or principal place of business is located in such local jurisdiction or if it maintains an office or place of business in the local jurisdiction and receives trading or advising services through that office or place of business;
- the assessment of whether a firm is a derivatives dealer or derivatives adviser is based on a holistic assessment of the firm's activities and the manner in which it holds itself out to Canadian counterparties; accordingly, the activities of the firm in one jurisdiction may, depending on the facts, affect the characterization of its activities in another jurisdiction; for example, a U.S. firm that is registered as a swap dealer with the CFTC will generally be considered to be a derivatives dealer when it transacts with a counterparty in Canada;

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

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

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

3. Comments on the definition "eligible derivatives party"

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

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

- certain core obligations (fair dealing, conflict of interest, know your derivatives party, handling complaints, compliance and recordkeeping) apply in all cases when a derivatives firm is dealing with or advising a derivatives party, regardless of the level of sophistication or financial resources of the derivatives party; and
- certain additional obligations (e.g., a suitability determination):
    - do not apply if the derivatives firm is dealing with or advising a derivatives party that is an EDP and is neither an individual nor an eligible commercial hedger, and
    - apply but may be waived if the derivatives firm is dealing with or advising a derivatives party who is an EDP that is an individual or an eligible commercial hedger.

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

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

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

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

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

Summary Comments and Responses in relation to the EDP Definition	
Comments and concerns	CSA response
Preference by some commenters for existing "permitted client" definition in NI 31-103 A number of commenters expressed concern that the CSA was developing a new definition for sophisticated customers and proposed either that the CSA instead use the existing "permitted client" definition or amend the definition of EDP to	We remain of the view that the proposed rules should include a definition of "eligible derivatives party" that is based on the definition of "permitted client" in NI 31-103 but is tailored to reflect the different nature of derivatives markets and participants. As currently drafted, the definition of "eligible derivatives

Summary Comments and Responses in relation to the EDP Definition	
include "any 'permitted client' (as defined in NI 31-103) that is not an individual". These commenters noted that the "permitted client" definition is an established definition for sophisticated investors. If a registered adviser has already determined that a client is a permitted client, it is an unnecessary regulatory burden to force the registered firm to "repaper" the client as an EDP – particularly if the registered firm now has to obtain representations from the client that the client has sufficient "knowledge and experience" to trade derivatives. One commenter argued that all derivatives transactions with "permitted clients", "accredited counterparties" or "qualified parties" that pre-exist the effective date of NI 93-101 should be grandfathered to ease regulatory burden without any corresponding deleterious impact to markets or EDPs. In the alternative, the application of requirements with respect to EDPs should be delayed for such preexisting transactions for a period of 4 years.	party" is generally consistent with the current regulatory regimes in the U.S. and Canada in relation to OTC derivatives. In addition, the eligible derivatives party concept is generally similar to the definition of "permitted client" in NI 31-103. We have amended the proposed rules to include a transition period (i.e., of up to five years) that would • allow a derivatives firm to rely on an existing documentation that establishes that a client is a permitted client and to treat that client as an EDP during the transition period, and • obtain new documentation confirming that the client is an EDP after the transition period has expired.
Non-individual Commercial hedgers – $10 million financial threshold A number of commenters expressed concerns with the commercial hedger category of the definition of "eligible derivatives party" (clause (n) reproduced above) and suggested that the financial threshold of $10 million net assets should be reduced or eliminated. Several commenters argued that a financial threshold is not a good proxy for sophistication as it relates to para. (n). A new company with limited financial resources may be run by experienced and educated personnel. Such counterparties may be special purpose vehicles, intentionally structured to minimize net assets. If they do not qualify as EDPs, many hedgers will not be able to have the benefit of a key risk management tool where derivatives dealers make a decision only to deal with EDPs, particularly with respect to foreign exchange forwards, swaps and options, and interest rate swaps. Several commenters argued that if there is to be a financial threshold, $10 million in net assets is not appropriate and it should be significantly lowered to be no more than $1 million. If the threshold of $10 million is to be maintained, it was suggested that total assets and not net assets should be used. One commenter argued that commercial hedger should not be subject to a financial requirement twice as onerous as that required of individuals, and the requirement should be structured to allow parties who own financial assets with an aggregate realizable value before tax but net of any related liabilities of less than $5 million with the ability to be categorized as EDPs, if they can demonstrate they are commercial hedgers. One commenter argued the hedging exemption should be similar to the "hedger" category under the "accredited counterparty" definition in the QDA and the hedger	We have removed the financial threshold for the non-individual commercial hedger category of the EDP definition. The removal of the financial threshold for this category is consistent with the current regulatory regimes in Canada in relation to OTC derivatives and represents a lower threshold than the $1 million in net assets for hedgers in the U.S. As a result of these changes, we have significantly expanded the class of persons and companies with whom a foreign dealer or foreign adviser may deal on an exempt basis in reliance on the foreign dealer, adviser and sub-adviser exemptions. In the case of registered firms and other firms that are subject to the business conduct requirements, these changes allow these firms to deal with these derivatives parties on a "light touch" basis, as set out in section 7 of the rule. We acknowledge that the removal of the financial threshold in the non-individual commercial hedger category of the EDP definition for entities that trade or advise others in relation to *OTC* derivatives potentially creates a regulatory differential for registered firms and international firms that trade or advise others in related to *listed* derivatives (i.e., exchange-traded options and futures), since the definition of "permitted client" in NI 31-103 and the IIROC definition of "institutional client" in IIROC Rule subsection 1201(2) does not currently include a non-individual commercial hedger category. We intend to consult with CSA and IIROC staff and relevant stakeholders with a view to addressing this regulatory differential as between OTC derivatives and listed derivatives.

Summary Comments and Responses in relation to the EDP Definition	
exemption included as a class of "qualified party" in the various provincial OTC derivatives blanket orders currently in force.	
A number of commenters proposed that the financial thresholds under paras. (m), (n) and (o) be harmonized with the thresholds for an "eligible contract participant" under CFTC rules (i.e., for a non-individual counterparty, total assets of USD 10 million, and for a non-individual counterparty that is a hedger, net worth of USD 1 million). Two commenters proposed that the definition of EDP be amended to include "any derivatives party that is an eligible contract participant under CFTC rules".	As noted above, we have removed the financial threshold for the non-individual commercial hedger category of the EDP definition. As a result of this change, the financial thresholds for a non-individual commercial hedger will be lower in Canada than under CFTC rules. We have also included a transition period in section 47 of the proposed business conduct rule relating to derivatives parties that are eligible contract participants. Specifically, a derivatives firm that has previously confirmed a derivatives party's status as a permitted client or eligible contract participant prior to the effective date of NI 93-101 (for example, in documentation such as an ISDA master agreement, account opening documentation or an investment management agreement) is able to treat that representation as if the derivatives party had represented to the derivatives firm that it qualifies as an "eligible derivatives party" for the purposes of NI 93-101. This transition provision is only available for use by a derivatives firm with respect to non-individual permitted clients. Please refer to Section 47 of the Companion Policy for additional guidance on this transition period for existing customers.
Commercial hedgers – knowledge and experience representations A number of commenters expressed concern over the knowledge and experience representations in clauses (m), (n) and (o) and suggested these should be removed. These commenters noted there is no corresponding requirement in the definitions of "permitted client" in NI 31-103 or "eligible contract participant" in the U.S. Two commenters argued that no knowledge and experience requirement should apply to paras. (m), (n) and (o), similar to NI 31-103 where a bright line financial resources test is used. Under the *Quebec Derivatives Act* (**QDA**), a knowledge and experience test only applies to the accredited counterparty definition under paragraph (7) and not the hedger branch of the definition under paragraph (12). In addition, creating an affirmative obligation on dealers and advisers to assess the reasonableness of representations from counterparties who satisfy the financial thresholds in paragraphs (m), (n) or (o) of the EDP definition imposes a significant burden with no meaningful benefit to derivatives parties.	The modifications to the "eligible derivatives party" definition, including the proposed $0 financial threshold for a entity to qualify as an eligible commercial hedger, represents a departure from the traditional delineation between "permitted client" and retail clients in the context of the securities regime to ensure the derivatives regime is tailored appropriately to derivatives markets. The rationale for using financial thresholds as a proxy to assess the degree of sophistication is generally based a combination of the customer's ability to withstand the risk loss and their ability to understand the risks. OTC derivatives are complex financial products; therefore, this representation remains necessary to ensure that the counterparties who wish to qualify as "eligible derivatives parties" under paragraphs (m), (n) or (o) are required to assess their ability to understand the risks and therefore, could be treated as a retail customer for the purposes of the rule in circumstances where they do not believe they have sufficient knowledge and experience to transact in derivatives (or a particular derivative) without the benefit of the additional customer protections in the rule. Further, by removing the financial threshold for commercial hedgers to qualify as an "eligible derivatives party", it is especially important for those entities that wish to qualify under that category of "eligible derivatives party" to assess their ability to understand the risks of transacting in derivatives.

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

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

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

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

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

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

Exemption for registered advisers

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

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

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

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

CSA Response

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

- create regulatory gaps and uncertainty,[2]
- result in inconsistent treatment between different categories of registered firms (such as derivatives dealers and portfolio managers) that perform similar activities,[3] and
- result in an increased regulatory burden for registered advisers.[4]

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

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

- revising certain requirements (such as the senior derivatives manager requirements in Part 5 of NI 93-101) so that they apply to "derivatives dealers" rather than "derivatives firms"
- including a provision similar to section 9.3 [*Exemptions from certain requirements for IIROC members*] of NI 31-103 to exempt, where appropriate, a registered adviser from a requirement in the derivatives rules if they comply with the similar requirement in NI 31-103
- explaining through Companion Policy guidance how compliance with certain requirements of NI 31-103 could reasonably be viewed as also satisfying similar requirements for derivatives in the derivatives rules.

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

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

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

These comments focused on the following types of entities:

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

Canadian financial institutions

One commenter suggested that, if the CSA used an outcomes-based approach in determining substituted compliance taking into account OSFI Guideline B-7 and other OSFI prudential rules, Canadian financial institutions that are subject to OSFI supervision would be exempt from all the requirements under NI 93-101.

This commenter noted that substituted compliance extended to Canadian banks by the CFTC recognizes the absence of the need to address the requirements set out in the IOSCO DMI Report[5] because of the presence of prudential regulation by OSFI through extensive and effective regulations and guidance. Accordingly, IOSCO's recommendations recognize that appropriate prudential

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

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

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

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

regulation in a particular jurisdiction can easily provide sufficient regulatory coverage. Existing OSFI regulations and guidance are effective and supply the basis to exempt Canadian financial institutions from the requirements under NI 93-101. However, if the CSA does not accept this approach, the commenter referred the CSA to the completed Appendix A of the Initial Draft of NI 93-101 for foreign derivatives dealers and Appendix C for Canadian federally regulated financial institutions (**FRFIs**) showing which specific sections should be given substituted compliance.

FX Transactions

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

Entities that may be exempt from registration under de minimis exemptions

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

CSA Response

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

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

Response re Canadian financial institutions

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

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

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

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

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

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

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

9 *Re Royal Bank of Canada* (August 30, 2019) https://www.osc.ca/en/tribunal/tribunal-proceedings/royal-bank-canada-re and *The Toronto-Dominion Bank* (August 30, 2019) https://www.osc.ca/en/tribunal/tribunal-proceedings/toronto-dominion-bank-re https://www.osc.gov.on.ca/en/Proceedings_enr_20190830_the-toronto-dominion-bank.htm

Response re FX Transactions

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

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

We remain of the view that entities that trade OTC derivatives with regularity and that engage in dealer-like activities (such that they do not come within the conditions of the end-user exemption in section 37 of the business conduct rule) should be subject to the core business conduct obligations of the rule, including the fair-dealing, gatekeeper KYC and conflicts of interest provisions in Division 1 of Part 3 of the rule and the basic record-keeping requirements in Part 5 of the rule.

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

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

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

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

- Harmonization of NI 93-101 to US rules, taking into account the smaller market size in Canada, is critically important, and the implementation of NI 93-101 should be delayed until the later of the date on which the complete revised CFTC business conduct rules are in force and the date on which the SEC`s business conduct rules are in force.
- A transition period of at least three years, starting with the date the rules come into force, should be provided and NI 93-101 and NI 93-102 should take effect concurrently.
- At least a one-year implementation period, after date of final publication, is reasonable. This includes with respect to energy commodity derivatives market participants.
- A one-year transition period is not reasonable. At least a two-year transition period in required to provide time to meet the new requirements.
- Further to section 45(3), clarification is required to determine under what circumstances sections 20 and 28 will need to be complied with. When relying on the representations as set out in section 45(3)(b), only section 8 should need to be complied with as it relates to such individual EDPs and commercial hedgers.
- The CSA should assess the impact of the proposed amendments to NI 31-103 (the Client Focused Reforms) on the CSA's investor protection and market efficiency concerns prior to implementation of this regime.

CSA Response

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

Response re effective date

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

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

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

Response re transition periods

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

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

- allow a derivatives firm to rely on an existing documentation that establishes that a client is a permitted client and to treat that client as an EDP during the transition period, and
- obtain new documentation confirming that the client is an EDP after the transition period has expired.

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

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

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

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

8. Responses to Specific Requests for Comment

a) Definition of Affiliate

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

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

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

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

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

CSA Response

While we acknowledge that a consistent definition of "affiliated entity" across all OTC derivatives rules may be desirable, we note that certain rules that apply to derivatives markets that are primarily aimed at addressing systemic risk are based on accounting concepts of consolidation (which is consistent with similar rules domestically and globally that are aimed at addressing systemic risk). Yet, we are also concerned about creating inconsistencies with other rules that may apply to the derivatives firms, such as NI 31-103 and NI 52-107 *Acceptable Accounting Principles and Auditing Standards*, as well as corporate legislation.

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

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

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

9. Miscellaneous other comments (by Part and Section)

Part 1 Definitions and Interpretation

Definitions – Canadian financial institution

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

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

> *"More specifically, it is reflective of the definition of NI 45-106, but this definition has legacy language which requires updating. Paragraph (a) of this definition refers to credit union centrals as central cooperative credit societies under s. 473(1) of the Cooperative Credit Associations Act (Canada) (CCAA). Section 473(1) of the CCAA provided a mechanism for provincially regulated centrals to "opt in" to federal regulation under the Part XVI of the CCAA. However, in its 2014 Economic Action Plan, the federal government signaled its intention to repeal Part XVI of the CCAA (including s. 473(1)). That repeal was effective on January 15, 2017 and the five provincial / regional centrals returned to being wholly provincially regulated.*
>
> *The definition should be amended as follows:*
>
> > *"Canadian financial institution" means any of the following:*
> >
> > > *(a) a federal financial institution as defined in the Bank Act (Canada); or*
> > >
> > > *(b) a loan corporation, trust company, trust corporation, insurance company, treasury branch, credit union, credit union central, caisse populaire, financial services cooperative, or league that is incorporated and regulated by or under an Act of the legislature of a province."*

CSA Response

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

[10] Section 4 provides as follows:

Application – affiliated entities

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

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

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

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

Definitions – Derivatives dealer – business trigger test

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

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

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

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

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

CSA Response

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) regularly entering into swaps or security-based swaps with counterparties as an ordinary course of business for one's own account, or

(iv) engaging in any activity causing oneself to be commonly known in the trade as a dealer or market maker in swaps or security-based swaps.

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

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

Definitions – Derivatives dealer – proprietary trading firms

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

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

CSA Response

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

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

Definitions – Derivatives adviser – energy market participants

One commenter suggested that guidance specific to energy market participants should be provided to prevent activities of energy market participants from inadvertently moving out of the "end user" category into the "derivatives adviser" category. A longer transitional period is essential were a former end user energy market participant be required to transition to the derivatives adviser category.

CSA Response

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

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

Definitions – derivatives party assets

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

CSA Response

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

Definitions – commercial hedger

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

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

CSA Response

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

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

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

Part 2 Application and Exemption

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

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

CSA Response

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

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

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

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

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

CSA Response

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

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

- certain obligations:
    - do not apply if the derivatives firm is dealing with or advising a derivatives party that is an EDP and is neither an individual nor an eligible commercial hedger, and
    - apply but may be waived if the derivatives firm is dealing with or advising a derivatives party who is an EDP that is an individual or an eligible commercial hedger.

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

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

Part 3 Dealing with or advising derivatives parties

Division 1 – General Obligations towards all Derivatives Parties

Section 8 – Fair dealing

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

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

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

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

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

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

CSA Response

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

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

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

Section 10 – Know your derivatives party

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

CSA Response

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

Section 11 – Handling complaints

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

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

CSA Response

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

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

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

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

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

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

Section 12 – Tied selling

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

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

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

CSA Response

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

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

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

Section 14 – Suitability

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

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

CSA Response

We have responded to these comments as follows:

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

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

- **does not apply** if the derivatives party is an EDP and is not an individual or a non-individual commercial hedger, and
- **applies but may be waived** if the derivatives party is an EDP and is an individual or a non-individual commercial hedger.

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

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

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

The fair-dealing obligation is similar to the fair-dealing obligation that currently applies to registered firms and registered individuals.[15] We have included a fair-dealing obligation in the business conduct rule to ensure that entities that may be exempt

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

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

from registration in some jurisdictions, such as Canadian financial institutions, are nevertheless subject to minimum standards of business conduct. This will ensure a level-playing field in terms of business conduct standards between firms that are registered and firms that are exempt from registration.

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

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

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

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

Section 17 –Disclosing referral arrangements to a derivatives party

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

CSA Response

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

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

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

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

Part 4 Derivatives Party Accounts

Division 1 – Disclosure to derivatives parties

Section 18 – Relationship disclosure information

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

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

CSA Response

The relationship disclosure obligations in section 18 of the business conduct rule conduct rule are generally similar to the corresponding relationship disclosure obligations in section 14.2 of NI 31-103 and as such should be familiar to firms that are

section 90 of the *Securities Act* (Nunavut), S.Nu. 2008, c. 12 **[Nunavut Act]**; section 90 of the *Securities Act* (Northwest Territories), S.N.W.T. 2008, c. 10 **[N.W.T. Act]**; and section 90 of the *Securities Act* (Yukon), S.Y. 2007, c. 16 **[Yukon Act]**.

registrants. This obligation does not apply to a registered adviser firm if the firm complies with the corresponding provisions in NI 31-103 in respect of its derivatives activity with its clients.

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

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

- does not apply if the derivatives party is an EDP and is not an individual or a non-individual commercial hedger, and
- applies but may be waived if the derivatives party is an EDP and is an individual or a non-individual commercial hedger.

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

Section 19 – Pre-transaction disclosure

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

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

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

CSA Response

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

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

- does not apply if the derivatives party is an EDP and is not an individual or a non-individual commercial hedger, and
- applies but may be waived if the derivatives party is an EDP and is an individual or a non-individual commercial hedger.

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

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

Section 20 – Daily reporting

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

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

CSA Response

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

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

- does not apply if the derivatives party is an EDP and is not an individual or a non-individual commercial hedger, and
- applies but may be waived if the derivatives party is an EDP and is an individual or a non-individual commercial hedger.

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

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

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

CSA Response

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

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

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

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

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

- does not apply if the derivatives party is an EDP and is not an individual or a non-individual commercial hedger, and
- applies but may be waived if the derivatives party is an EDP and is an individual or a non-individual commercial hedger.

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

Division 2 – Derivatives party assets

Section 23 – Interaction with other instruments

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

CSA Response

Section 23 provides as follows:

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

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

Section 24 – Segregating derivatives party assets

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

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

CSA Response

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

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

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

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

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

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

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

CSA Response

As noted above, section 23 provides as follows:

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

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

In addition, the obligations in sections 25 and 26

- do not apply if the derivatives party is an EDP and is not an individual or a non-individual commercial hedger, and
- apply but may be waived if the derivatives party is an EDP and is an individual or a non-individual commercial hedger.

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

Division 3 – Reporting to Derivatives Party

Section 27 – Content and delivery of transaction information

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

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

CSA Response

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

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

The specific disclosure obligations in subsection 27(2)

- do not apply if the derivatives party is an EDP and is not an individual or a non-individual commercial hedger, and
- apply but may be waived if the derivatives party is an EDP and is an individual or a non-individual commercial hedger.

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

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

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

Section 28 – Derivatives party statements

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

CSA Response

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

Part 5 Compliance and Recordkeeping

Division 1 – Compliance

Section 30 – Policies and procedures

Section 30 of the business conduct rule provides as follows:

Policies and procedures

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

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

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

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

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

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

(iii) has conducted themselves with integrity.

We received the following comments on section 30.

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

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

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

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

CSA Response

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

In the case of the comments relating to the requirement in subsection 30(1)(c)(iii) that a derivatives firm establish, maintain and apply policies, procedures, controls and supervision sufficient to provide reasonable assurance that individuals that act on their behalf conduct themselves with integrity, this requirement is intended to ensure that derivatives firms that are not registered firms are subject to similar obligations as registered firms in this regard.

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

Responsibilities of a sponsoring derivatives firm

A registered derivatives firm is responsible for the conduct of the individuals who act on its behalf.

A registered derivatives firm

- must undertake due diligence before sponsoring an individual to be registered to act on its behalf (see further guidance in Part 4 of the Companion Policy to NI 33-109), and
- has an ongoing obligation under section 38 [*Compliance policies and procedures*] to establish, maintain and apply written policies and procedures that are reasonably designed to establish a system of controls and supervision sufficient to ensure that the registered derivatives firm and each individual acting on its behalf in relation to derivatives complies with securities legislation.

These obligations apply even when the individual may be exempted from the requirement to register under subsection 16(3) or 16(4).

Failure of a registered derivatives firm to fulfill these responsibilities may be relevant to the firm's continued fitness for registration.

Fitness for registration

We will only register an individual applicant if they appear to be fit for registration. Following registration, an individual must maintain their fitness in order to remain registered. If we determine that a registrant has become unfit for registration, we may suspend or revoke the registration. See Division 2 of Part 5 of this Companion Policy for guidance on suspension and revocation of an individual's registration.

Assessing fitness for registration – individuals

We use three fundamental criteria to assess whether an individual is or remains fit for registration:

- proficiency
- integrity, and
- solvency

(a) Proficiency

…

(b) Integrity

Registered individuals must conduct themselves with integrity and honesty. We will assess the integrity of individuals through the information they are required to provide on registration application forms and other forms required to be filed under securities legislation, including forms required under NI 33-109, and through compliance reviews. For example, applicants are required to disclose information about conflicts of interest, such as other employment or partnerships, service as a member of a board of directors, or relationships with affiliates, and about any regulatory or legal actions against them.

…

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

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

- Events that led to the development of the (voluntary) FX Code of Conduct by the Bank for International Settlements, various central banks and FX market participants,[16]
- Recent OSC settlement agreements with two Canadian banks related to compliance failures in the banks' foreign exchange (FX) trading businesses. [17] These failures allowed FX traders to share confidential customer information in chatrooms with FX traders at competitor firms, and
- Recent events that have led the federal government to expand the Financial Consumer Agency of Canada (FCAC) oversight of banks' internal business processes and procedures including ensuring that a bank's product and service offerings are appropriate for, and take into consideration, the customer's needs and circumstances. The FCAC will also have the right to ensure that remuneration paid to bank staff, including benefits, do not impede any policies and procedures implemented to ensure the "appropriateness" of offered products or services.

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

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

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

Six commenters argued that it is onerous to require an additional individual in the role of senior derivatives manager who is tasked with fulfilling substantially the same role as the Ultimate Designated Person (UDP), the Chief Risk Officer (CRO) and the Chief Compliance Officer (CCO). While the UK has a similar role to that of the senior derivatives manager, there is no prescription of categories that require firms to register individuals in oversight and compliance roles. Furthermore, the CCO may be impeded in

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

[17] *Re Royal Bank of Canada* (August 30, 2019) https://www.osc.ca/en/tribunal/tribunal-proceedings/royal-bank-canada-re and *The Toronto-Dominion Bank* (August 30, 2019) https://www.osc.ca/en/tribunal/tribunal-proceedings/toronto-dominion-bank-re https://www.osc.gov.on.ca/en/Proceedings_enr_20190830_the-toronto-dominion-bank.htm

the performance of his or her functions if the senior derivatives manager is required to "respond, in a timely matter, to any material non-compliance" rather than to promptly escalate the matter outside the derivatives business unit and report it to the CCO.

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

CSA Response

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

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

- Events that led to the development of the (voluntary) FX Code of Conduct by the Bank for International Settlements, various central banks and FX market participants[18]
- Recent OSC settlement agreements with two Canadian banks related to compliance failures in the banks' foreign exchange (FX) trading businesses.[19] These failures allowed FX traders to share confidential customer information in chatrooms with FX traders at competitor firms.
- Recent events that have led the federal government to expand the Financial Consumer Agency of Canada (FCAC) oversight of banks' internal business processes and procedures including ensuring that a bank's product and service offerings are appropriate for, and take into consideration, the customer's needs and circumstances. The FCAC will also have the right to ensure that remuneration paid to bank staff, including benefits, do not impede any policies and procedures implemented to ensure the "appropriateness" of offered products or services.

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

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

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

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

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

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

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

Comments included the following.

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

[19] *Re Royal Bank of Canada* (August 30, 2019) https://www.osc.ca/en/tribunal/tribunal-proceedings/royal-bank-canada-re and *The Toronto-Dominion Bank* (August 30, 2019) https://www.osc.ca/en/tribunal/tribunal-proceedings/toronto-dominion-bank-re https://www.osc.gov.on.ca/en/Proceedings_enr_20190830_the-toronto-dominion-bank.htm

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

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

One commenter argued self-reporting requirements may be inconsistent, for example, in the financial crimes area under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* as administered by the Financial Transactions and Reports Analysis Centre of Canada. Reporting firms are subject to specific restrictions against disclosure of suspicious transactions or activities.

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

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

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

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

CSA Response

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

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

In response to the comments, we note the following:

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

In particular, we note the following:

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

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

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

Similarly, many of the largest FRFIs are also reporting issuers (public companies) under Canadian securities legislation and subject to periodic and timely disclosure requirements, including prospectus, annual information form (AIF) disclosure and material change reporting requirements. Accordingly, to the extent information that may be the subject of a section 32 notification filing

constitutes a material fact or a material change, the FRFIs may already be subject to disclosure obligations under Canadian securities legislation. In the case of a section 32 notification to the regulator, this would be a confidential filing to the regulator rather than public disclosure by the FRFI in a prospectus, AIF or material change report.

Finally, we note that the Financial Consumer Agency of Canada (FCAC) supervises federally regulated financial institutions to ensure they comply with their legislative obligations, voluntary codes of conduct and public commitments (collectively, "market conduct obligations") that are overseen by FCAC.

As stipulated in FCAC's Supervision Framework, the FCAC requires financial institutions to report to the FCAC breaches of a market conduct obligation that would normally be reported to the institution's compliance division if the breach meets, at a minimum, one of the following:

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

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

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

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

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

Division 2 -- Recordkeeping

Section 33 – Derivatives party agreement

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

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

CSA Response

We have added Companion Policy guidance to reflect these comments.

Section 33 – Derivatives party agreement (continued)

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

CSA Response

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

Section 33 of the business conduct rule is principles-based in that it requires a derivatives firm before transacting in a derivative with, for or on behalf of a derivatives party, enters into an agreement with that derivatives party. We have included Companion Policy guidance to clarify we intend for this provision to be interpreted flexibly to accommodate substantially equivalent harmonized disclosure, reporting and documentary practices that may be developed from time to time by global trade associations in standard industry documentation based on requirements applicable in the major global markets. And we have also included guidance to address the timing sequence involved in the process of reaching an agreement with a new counterparty, as well as guidance

about what we would consider an acceptable agreement in the context of certain types of foreign exchange transactions that are not typically documented under standard form industry documentation.

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

Section 34 – Records

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

CSA Response

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

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

We believe these requirements are consistent with the following:

- the record-keeping requirements applicable to existing registered firms under Part 11 of NI 31-103;
- the record-keeping requirements applicable to derivatives dealers under comparable international regimes, such as the record-keeping requirements applicable to swap dealers under CFTC regulation 23.202 and 23.203.

Part 6 – Exemptions

Division 1 – Exemptions from this Instrument

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

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

One commenter suggested that an inter-dealer exemption from the application of NI 93-101 should be given to all derivatives dealers when transacting with another derivatives dealer or with a clearing agency with no conditions attached. Equivalence for foreign dealers is insufficient to address concerns, including that foreign dealers, particularly those whose home jurisdiction does not appear on Appendices A and D, may be led to exit or not enter the Canadian market due to a unique Canadian regulatory burden.

CSA Response

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

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

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

Division 1 – Exemptions from this Instrument (Continued)

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

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

CSA Response

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

(b) an insurance or annuity contract entered into,

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

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

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

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

Division 1 – Exemptions from the Instrument (Continued)

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

CSA Response

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

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

Section 38 – Foreign derivatives dealers

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

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

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

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

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

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

CSA Response

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

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

One important difference as between the foreign dealer and adviser exemptions in NI 93-101 and the international dealer and adviser exemptions in NI 31-103 is that the exemptions in NI 93-101 are limited to foreign dealers and advisers in a "specified foreign jurisdiction", namely any of Australia, Brazil, Hong Kong, Japan, South Korea, New Zealand, Singapore, Switzerland, United States of America, United Kingdom of Great Britain and Northern Ireland, any member country of the European Union, and any other jurisdiction that is recognized or designated by the securities regulatory authority or, except in Ontario and Quebec, the regulator.

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

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

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

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

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

CSA Response

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

(d) the derivatives dealer reports to the regulator or, in Québec, the securities regulatory authority in a timely manner any circumstance in which the derivatives dealer is not or was not in compliance with the laws of the foreign jurisdiction relating to trading in derivatives to which the derivatives dealer is subject if any of the following apply:

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

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

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

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

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

Section 38 – Foreign dealers trading with Canadian derivatives dealers

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

CSA Response

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

Section 40 – Canadian financial institutions

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

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

CSA Response

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

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

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

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

obligations in the U.S. when dealing with U.S. counterparties but were not similarly subject to conduct obligations when dealing with derivatives parties in Canada.

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

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

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

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

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

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

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

Comments included the following:

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

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

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

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

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

CSA Response

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

Additionally, when a dealer is transacting with a counterparty and the transaction is being negotiated on behalf of the counterparty by an adviser in respect of a managed account, there are circumstances where even though a dealer is arranging the transaction with the adviser, the dealer will not necessarily know the identity of the ultimate counterparty the transaction will be allocated to under a particular derivatives agreement. In accordance with subsection 1(6) of the rule, the intention in this rule is that an adviser

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

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

of a managed account will be viewed from the perspective of the dealer as an EDP for the purposes of the Instrument and therefore, the very basic core principles (fair dealing, delivering a trade confirm, ensuring that a dealer has in place adequate compliance framework in place to disclose identifiable conflicts (if any), as well as having in place a complaints handling procedure) would be extended to the adviser, as the agent on behalf of the ultimate counterparty. As a result, we do not believe it would be fair or appropriate to provide an additional exemption in the instrument specific to the circumstance where the identity of the derivatives party is unknown because the transaction in question involves a block trade.

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

Division 3 – Exemptions for Derivatives Advisers

Section 42 – Advising generally

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

CSA Response

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

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

A comparison of the two provisions is as follows:

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

Section 8.25 [*Advising generally*] of NI 31-103	Proposed section 42 [*Advising generally*] of NI 93-101
following has a financial or other interest, the person or company must disclose the interest concurrently with providing the advice: (a) the person or company; (b) any partner, director or officer of the person or company; (c) any other person or company that would be an insider of the first-mentioned person or company if the first-mentioned person or company were a reporting issuer.	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) where the person is an individual, the spouse or child of the individual; (d) any other person or company that would be an insider of the first mentioned person or company if the first mentioned person or company were a reporting issuer.
(4) If the financial or other interest of the person or company includes an interest in an option described in paragraph (b) of the definition of "financial or other interest" in subsection (1), the disclosure required by subsection (3) must include a description of the terms of the option.	
(5) This section does not apply in Ontario.	

Section 43 – Foreign derivatives advisers

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

These comments included the following:

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

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

CSA Response

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

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

Section 43 – Foreign derivatives advisers (continued)

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

CSA Response

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

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

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

CSA Response

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

Appendix A

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

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

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

Obligation	Approach under NI 31-103	Approach under NI 93-101
Fair dealing[22]	Applies in respect of all clients	Applies in respect of all derivatives parties (s. 8)
Identifying and responding to conflicts of interest	Applies in respect of all clients (s. 13.4) However, client relationship disclosure obligations in relation to conflicts of interest do not apply in respect of a permitted client that is not an individual (s. 14.2(6))	Applies in respect of all derivatives parties (s. 9) However, relationship disclosure obligations in Part 4 in relation to conflicts of interest do not apply in respect of • an EDP that is not an individual • an EDP that is an individual that has waived in writing this obligation • an EDP that is an eligible commercial hedger that has waived in writing this obligation (ss. 7 and 18)
Gatekeeper KYC (AML, etc.)	Applies in respect of all clients (s. 13.2) However, this does not apply if the client is a registered firm, Canadian financial institution or Schedule III bank (s. 13.2(5))	Applies in respect of all derivatives parties (s. 10) However, this does not apply if the derivatives party is a registered firm or a Canadian financial institution (including a Schedule III bank) (s. 10(5)).
Client-specific KYC (investment needs and objectives, etc.) Suitability	Applies in respect of all clients (ss. 13.2(2)(c) and 13.3) May be waived in writing by a permitted client (including an individual permitted client) if registrant does not act as an adviser in respect of a managed account for the client (ss. 13.2(6) and 13.3(4))	Applies in respect of all derivatives parties other than • an EDP that is not an individual • an EDP that is an individual that has waived in writing this obligation • an EDP that is an eligible commercial hedger that has waived in writing this obligation (ss. 7, 13 and 14)
Complaints Handling	Applies in respect of all clients (s. 13.15)	Applies in respect of all derivatives parties (s. 11)
Tied Selling	Applies in respect of all clients (ss. 11.7 and 11.8)	Applies in respect of all derivatives parties (s. 12)
Miscellaneous other obligations	Do not apply to a permitted client • Disclosure when recommending the use of borrowed money – s. 13.13(2)	Apply in respect of all derivatives parties other than • an EDP that is not an individual

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

Obligation	Approach under NI 31-103	Approach under NI 93-101
	• When the firm has a relationship with a financial institution – s. 14.4(3)	• an EDP that is an individual that has waived in writing this obligation • an EDP that is an eligible commercial hedger that has waived in writing this obligation (ss. 7 and 19)
Miscellaneous other obligations	Do not apply to a permitted client that is not an individual • Relationship disclosure information – s. 14.2(6) • Pre-trade disclosure of charges – s. 14.2.1(2), • Restriction on self-custody and qualified custodian requirement – s. 14.5.2 • Additional statements – s. 14.14.1 • Security position cost information – s. 14.14.2 • Report on charges and other compensation – s. 14.17 • Investment performance report – s. 14.18	Apply in respect of all derivatives parties other than • an EDP that is not an individual • an EDP that is an individual that has waived in writing this obligation • an EDP that is an eligible commercial hedger that has waived in writing this obligation (See ss. 7 and Part 4)

ANNEX C

PROPOSED NATIONAL INSTRUMENT 93-101 *DERIVATIVES: BUSINESS CONDUCT*

PART 1
DEFINITIONS AND INTERPRETATION

Definitions and interpretation

1. (1) In this Instrument

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

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

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

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

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

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

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

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

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

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

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

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

"derivatives adviser" means

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

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

"derivatives dealer" means

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

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

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

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

"derivatives party" means,

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

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

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

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

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

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

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

(a) a derivatives adviser;

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

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

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

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

(a) a Canadian financial institution;

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

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

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

(i) a derivatives dealer;

(ii) a derivatives adviser;

(iii) an adviser;

(iv) an investment dealer;

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

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

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

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

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

(j) a trust company or trust corporation registered or authorized to carry on business under the *Trust and Loan Companies Act* (Canada) or under comparable legislation in a jurisdiction of Canada or a foreign jurisdiction, acting on behalf of a managed account managed by the trust company or trust corporation, as the case may be;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(q) a qualifying clearing agency;

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

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

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

"managed account" means an account of a derivatives party for which another person or company makes the trading decisions if that person or company has discretion to transact derivatives for the account without requiring the derivatives party's express consent to the transaction;

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

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

(a) a Canadian financial institution;

(b) a qualifying clearing agency;

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

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

(e) a person or company

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"transaction" means either of the following:

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

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

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

(2) In this Instrument, "adviser" includes

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

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

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

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

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

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

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

(c) all of the following apply:

(i) the second party is a limited partnership;

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

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

(d) all of the following apply:

(i) the second party is a trust;

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

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

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

(a) the person or company is controlled by

(i) the other person or company,

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

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

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

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

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

PART 2
APPLICATION AND EXEMPTION

Application to registered and unregistered persons or companies

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

Application – scope of Instrument

3. This Instrument applies to,

(a) in Manitoba,

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

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

(b) in Ontario,

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

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

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

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

Application – short-term foreign exchange contract or instrument

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

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

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

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

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

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

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

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

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

Application – affiliated entities

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

Application – qualifying clearing agencies

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

Application – governments, central banks and international organizations

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

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

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

(c) the Bank for International Settlements;

(d) the International Monetary Fund.

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

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

(a) is an eligible derivatives party, and

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

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

(a) is an eligible derivatives party,

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

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

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

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

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

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

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

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

- *Foreign derivatives dealers that trade with derivatives dealers (s. 36)*
- *Certain derivatives end-users (s. 37)*
- *Foreign derivatives dealers (s. 38)*
- *Investment dealers (s. 39)*
- *Canadian financial institutions (s. 40)*
- *Derivatives traded on a derivatives trading facility where the identity of the derivatives party is unknown (s. 41)*
- *Advising generally (s. 42)*
- *Foreign derivatives advisers (s. 43)*
- *Foreign derivatives sub-advisers (s. 44)*
- *Registered advisers under securities or commodity futures legislation (s. 45)*

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

PART 3
DEALING WITH OR ADVISING DERIVATIVES PARTIES

DIVISION 1 – GENERAL OBLIGATIONS TOWARDS ALL DERIVATIVES PARTIES

Fair dealing

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

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

Conflicts of interest

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

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

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

Know your derivatives party

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Handling complaints

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

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

Tied selling

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

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

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

Derivatives-party-specific needs and objectives

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

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

(b) the derivatives party's financial circumstances;

(c) the derivatives party's risk tolerance;

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

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

Suitability

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

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

Permitted referral arrangements

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

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

(b) the derivatives firm records all referral fees;

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

Verifying the qualifications of the person or company receiving the referral

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

Disclosing referral arrangements to a derivatives party

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

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

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

(c) any conflicts of interest resulting from the relationship between the parties to the referral arrangement and from any other element of the referral arrangement;

(d) the method of calculating the referral fee and, to the extent possible, the amount of the fee;

(e) the category of registration, or exemption from registration relied upon, of each derivatives firm and individual acting on behalf of the derivatives firm that is a party to the referral arrangement with a description of the activities that the derivatives firm or individual is authorized to engage in under that category or exemption and, giving consideration to the nature of the referral, the activities that the derivatives firm or individual is not permitted to engage in;

(f) any other information that a reasonable derivatives party would consider important in evaluating the referral arrangement.

(2) If there is a change to the information set out in subsection (1), the derivatives firm must ensure that written disclosure of that change is provided to each derivatives party affected by the change as soon as possible and no later than the 30th day before the date on which a referral fee is next paid or received.

PART 4
DERIVATIVES PARTY ACCOUNTS

DIVISION 1 – DISCLOSURE TO DERIVATIVES PARTIES

The obligations in this Division 1 of Part 4 apply if a derivatives firm is dealing with (i) a non-eligible derivatives party or (ii) an eligible derivatives party who is either an individual or eligible commercial hedger that has not waived these protections – see section 7.

Relationship disclosure information

18. (1) Before transacting with, for or on behalf of a derivatives party for the first time, or advising a derivatives party for the first time, a derivatives firm must deliver to the derivatives party all information that a reasonable person would consider important about the derivatives party's relationship with the derivatives firm, and each individual acting on behalf of the derivatives firm, that is providing derivatives-related services to the derivatives party.

(2) Without limiting subsection (1), the information delivered to a derivatives party under that subsection must include all of the following:

(a) a description of the nature or type of the derivatives party's account;

(b) a description of the conflicts of interest that the derivatives firm is required to disclose to a derivatives party under securities legislation;

(c) disclosure of the fees or other charges the derivatives party might be required to pay related to the derivatives party's account;

(d) a general description of the types of transaction fees or other charges the derivatives party might be required to pay in relation to derivatives;

(e) a general description of any compensation paid to the derivatives firm by any other party in relation to the different types of derivatives that a derivatives party may transact in through the derivatives firm;

(f) a description of the content and frequency of reporting for each account or portfolio of a derivatives party;

(g) disclosure of the derivatives firm's obligations if a derivatives party has a complaint contemplated under section 11 [*Handling complaints*];

(h) a statement that the derivatives firm has an obligation to assess whether a derivative is suitable for a derivatives party prior to executing a transaction or at any other time or a statement identifying the exemption the derivatives firm is relying on in respect of this obligation;

(i) the information a derivatives firm must collect about the derivatives party under sections 10 [*Know your derivatives party*] and 13 [*Derivatives-party-specific needs and objectives*]

(j) a general explanation of how performance benchmarks might be used to assess the performance of a derivatives party's derivatives and any options for benchmark information that might be available to the derivatives party from the derivatives firm;

(k) in the case of a derivatives firm that holds or has access to derivatives party assets, a general description of the manner in which the assets are held, used or are invested by the derivatives firm and a description of the risks and benefits to the counterparty arising from the derivatives firm holding or having access to use or invest the derivatives party assets in that manner.

(3) A derivatives firm must deliver the information required under subsection (1) to the derivatives party in writing before the derivatives firm does either of the following:

(a) transacts in a derivative with, for or on behalf of the derivatives party;

(b) advises the derivatives party in respect of a derivative.

(4) If there is a significant change in respect of the information delivered to a derivatives party under subsections (2), the derivatives firm must take reasonable steps to notify the derivatives party of the change in a timely manner and, if possible, before the derivatives firm next does either of the following:

(a) transacts in a derivative with, for or on behalf of the derivatives party;

(b) advises the derivatives party in respect of a derivative.

(5) A derivatives firm must not impose any new fee or other charge in respect of an account of a derivatives party, or increase the amount of any fee or other charge in respect of an account of a derivatives party, unless written notice of the new or increased fee or charge is provided to the derivatives party at least 60 days before the date on which the imposition or increase becomes effective.

(6) Subsections (1) to (4) do not apply to a derivatives dealer in respect of a derivatives party for whom the derivatives dealer transacts in a derivative only as directed by a derivatives adviser acting for the derivatives party.

(7) A derivatives dealer referred to in subsection (6) must deliver the information required under paragraphs (2)(a) to (g) to the derivatives party in writing before the derivatives dealer first transacts in a derivative for the derivatives party.

Pre-transaction disclosure

19. (1) Before transacting in a type of derivative with, for or on behalf of a derivatives party for the first time, a derivatives dealer must deliver each of the following to the derivatives party:

(a) a general description of the type of derivatives and services related to derivatives that the derivatives firm offers;

(b) a document designed to reasonably enable the derivatives party to assess each of the following:

(i) the types of risks that a derivatives party should consider when making a decision relating to types of derivatives that the derivatives dealer offers, including the material risks relating to the type of derivatives transacted and the derivatives party's potential exposure under the type of derivatives;

(ii) the material characteristics of the type of derivative, including the material economic terms and the rights and obligations of the counterparties to the type of derivative;

(c) a statement in writing that is substantially similar to the following:

"A characteristic of many derivatives is that you are only required to deposit funds that correspond to a portion of your total potential obligations when entering into the derivative. However, your profits or losses from the derivative are based on changes in the total value of the derivative. This means the leverage characteristic magnifies the profit or loss under a derivative, and losses can greatly exceed the amount of funds deposited. We may require you to deposit additional funds to cover your obligations under a derivative as the value of the derivative changes. If you fail to deposit these funds, we may close out your position without warning. You should understand all of your obligations under a derivative, including your obligations where the value of the derivative declines.

Using borrowed money to finance a derivatives transaction involves greater risk than using cash resources only. If you borrow money, your responsibility to repay the loan and pay interest as required by its terms remains the same even if the value of the derivative declines."

(2) Before transacting in a derivative with, for or on behalf of a derivatives party, a derivatives dealer must advise the derivatives party of all of the following:

(a) any material risks or material characteristics that are materially different from those described in the disclosure required under subsection (1);

(b) if applicable, the price of the derivative to be transacted and the most recent valuation;

(c) any compensation or other incentive payable by the derivatives party relating to the derivative or the transaction.

Daily reporting

20. (1) On each business day, a derivatives dealer must make available to a derivatives party a valuation for each derivative that it has transacted with, for or on behalf of the derivatives party and with respect to which contractual obligations remain outstanding on that day.

(2) On a monthly basis, a derivatives adviser must make available to a derivatives party a valuation for each derivative that it has transacted for or on behalf of the derivatives party, unless a derivatives adviser and a derivatives party agree otherwise.

Notice to derivatives parties by non-resident derivatives dealers

21. A derivatives dealer whose head office or principal place of business is not in Canada must not transact in a derivative with a derivatives party in the local jurisdiction unless it has delivered to the derivatives party a statement in writing disclosing all of the following:

(a) the foreign jurisdiction in which the head office or the principal place of business of the derivatives dealer is located;

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

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

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

DIVISION 2 – DERIVATIVES PARTY ASSETS

Sections 23 and 24 apply when a derivatives firm is dealing with any derivatives party; the remaining sections in this Division only apply if a derivatives firm is dealing with (i) a non-eligible derivatives party or (ii) an eligible derivatives party who is either an individual or eligible commercial hedger that has not waived these protections – see section 7.

Definition – initial margin

22. In this Division, "initial margin" means any derivatives party assets delivered by a derivatives party to a derivatives firm as collateral to cover potential changes in the value of a derivative over an appropriate close-out period in the event of a default.

Application and interaction with other instruments

23. A derivatives firm is exempt from the provisions in this Division if any of the following apply:

(a) the derivatives firm is subject to and complies with or is exempt from sections 3 to 8 of National Instrument 94-102 Derivatives: Customer Clearing and Protection of Customer Collateral and Positions in respect of derivatives party assets;

(b) the derivatives firm is subject to and complies with Guideline E-22 *Margin Requirements for Non-Centrally Cleared Derivatives* issued by the federal Office of the Superintendent of Financial Institutions (OSFI);

(c) the derivatives firm is subject to and complies with a regulation as may be prescribed by the securities regulatory authority in respect of derivatives party assets;

(d) the derivatives firm is subject to and complies with National Instrument 81-102 *Investment Funds* in respect of derivatives party assets.

Segregating derivatives party assets

24. A derivatives firm must segregate derivatives party assets and derivatives positions from the property and derivatives positions of the derivatives firm and other persons or companies.

Holding initial margin

25. A derivatives firm must hold initial margin in an account at a permitted depository.

Investment or use of initial margin

26. (1) A derivatives firm must not use or invest initial margin without receiving written consent from the derivatives party.

(2) A derivatives firm must not use or invest, for any purpose, the initial margin of a derivatives party unless the derivatives firm has entered into a written agreement with the derivatives party to assume all losses resulting from the investment or use of initial margin by the derivatives firm.

DIVISION 3 – REPORTING TO DERIVATIVES PARTIES

This Division, other than subsection 27(1), applies if a derivatives firm is dealing with (i) a non-eligible derivatives party or (ii) an eligible derivatives party who is either an individual or eligible commercial hedger that has not waived these protections – see section 7.

Content and delivery of transaction information

27. (1) A derivatives dealer that transacts with, for or on behalf of a derivatives party must promptly deliver a written confirmation of the transaction to the following, as applicable:

(a) the derivatives party;

(b) if the derivatives party has consented in writing, a derivatives adviser acting for the derivatives party.

(2) If a derivatives dealer has transacted with, for or on behalf of a non-eligible derivatives party, the written confirmation required under subsection (1) must include all of the following, if applicable:

(a) a description of the derivative;

(b) a description of the agreement that governs the transaction;

(c) the notional amount, quantity or volume of the underlying asset of the derivative;

(d) the number of units of the derivative;

(e) the total price paid for the derivative and the per unit price of the derivative;

(f) the commission, sales charge, service charge and any other amount charged in respect of the transaction;

(g) whether the derivatives dealer acted as principal or agent in relation to the derivative;

(h) the date and the name of the trading facility on which the transaction took place;

(i) the name of each individual acting on behalf of the derivatives firm that provided advice relating to the derivative or the transaction;

(j) the date of the transaction;

(k) the name of the qualifying clearing agency where the derivative was cleared.

Derivatives party statements

28. (1) A derivatives firm must deliver a statement to a derivatives party referred to in subsection (2), at the end of each quarterly period, if either of the following applies:

(a) within the quarterly period the derivatives firm transacted a derivative with, for or on behalf of the derivatives party;

(b) the derivatives party has an outstanding derivatives position resulting from a transaction where the derivatives firm acted as a derivatives dealer.

(2) A statement delivered under this section must include all of the following information for each transaction made with, for or on behalf of the derivatives party by the derivatives firm during the period covered by the statement, if applicable:

(a) the date of the transaction;

(b) a description of the transaction, including the notional amount, the number of units of the transaction, the per unit price and the total price;

(c) information sufficient to identify the agreement that governs the transaction.

(3) A statement delivered under this section must include all of the following information as at the date of the statement, if applicable:

(a) a description of each outstanding derivative to which the derivatives party is a party;

(b) the valuation, as at the statement date, of each outstanding derivative referred to in paragraph (a);

(c) the final valuation, as at the expiry or termination date, of each derivative that expired or terminated during the period covered by the statement;

(d) a description of all derivatives party assets held or received by the derivatives firm as collateral;

(e) any cash balance in the derivatives party's account;

(f) a description of any other assets of a derivatives party held or received by the derivatives firm;

(g) the total market value of all cash, outstanding derivatives and other derivatives party assets in the derivatives party's account, other than assets held or received as collateral.

PART 5
COMPLIANCE AND RECORDKEEPING

DIVISION 1 – COMPLIANCE

Definitions

29. In this Division,

"chief compliance officer" means the officer or partner of a derivatives firm who is responsible for establishing, maintaining and applying written policies and procedures to monitor and assess compliance, by the derivatives firm and individuals acting on its behalf, with securities legislation relating to derivatives;

"derivatives business unit" means, in respect of a derivatives firm, a division or other organizational unit that transacts in, or provides advice in relation to, a type of derivative, or a class of derivatives, on behalf of the derivatives firm;

"senior derivatives manager" means, in respect of a derivatives business unit of a derivatives firm, an individual designated by the derivatives dealer under subsection 31(1).

Policies and procedures

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

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

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

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

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

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

(iii) has acted with and continues to act with integrity.

31. (1) A derivatives dealer must do the following:

(a) designate an individual as a senior derivatives manager in respect of each derivatives business unit;

(b) identify to the regulator or, in Québec, the securities regulatory authority, upon request, each individual designated as the senior derivatives manager in respect of each derivatives business unit.

(2) A senior derivatives manager must do the following:

(a) supervise the derivatives-related activities conducted in the derivatives business unit directed towards ensuring compliance by the derivatives business unit, and each individual working in the derivatives business unit, with this Instrument, applicable securities legislation and the policies and procedures required under section 30 [*Policies and procedures*];

(b) respond by addressing, in a timely manner, any material non-compliance by an individual working in the derivatives business unit with this Instrument, applicable securities legislation or the policies and procedures required under section 30 [*Policies and procedures*], including reporting to the chief compliance officer.

(3) At least once every calendar year, the senior derivatives manager in respect of each derivatives business unit must,

(a) prepare a report containing the following, as applicable:

(i) a description of

(A) each incident of material non-compliance with this Instrument, securities legislation relating to trading in derivatives or the policies and procedures required under section 30 [*Policies and procedures*] by the derivatives business unit or an individual in the derivatives business unit, and

(B) the steps taken to respond to each incidence of material non-compliance;

(ii) a statement to the effect that the derivatives business unit is in material compliance with this Instrument, securities legislation relating to trading and advising in derivatives and the policies and procedures required under section 30 [*Policies and procedures*]; and

(b) submit the report referred to in paragraph (a) to the board of directors of the derivatives firm.

(4) The obligation of the senior derivatives manager under paragraph (3)(b) may be fulfilled by the derivatives firm's chief compliance officer.

Exemptions from the designation and responsibilities of a senior derivatives manager

31.1 (1) A derivatives dealer is exempt from subsection 31(1) and a senior derivatives manager is exempt from subsections 31(2) to 31(4) if all of the following apply:

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

(b) the derivatives dealer does not, in respect of derivatives or transactions, advise a non-eligible derivatives party, other than in accordance with section 42 [*Advising generally*];

(c) either of the following applies:

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

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

(2) A derivatives dealer is exempt from subsection 31(1) and a senior derivatives manager is exempt from subsections 31(2) to 31(4) if all of the following apply:

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

(b) the derivatives dealer does not, in respect of derivatives or transactions, advise a non-eligible derivatives party, other than in accordance with section 42 [*Advising generally*];

(c) the derivatives dealer, and each affiliated entity of the derivatives dealer that is also a derivatives dealer, is a derivative dealer solely as a result of transactions in respect of commodity derivatives;

(d) either of the following applies:

(i) the derivatives dealer has its head office or principal place of business in a jurisdiction of Canada and the derivatives dealer, together with each affiliated entity of the derivatives dealer, excluding investment funds, and excluding derivatives between these affiliated entities, has not had, in any of the previous 24 calendar months, an aggregate month-end gross notional amount under outstanding commodity derivatives, exceeding $3 000 000 000;

(ii) the derivatives dealer has its head office and principal place of business in a foreign jurisdiction and the derivatives dealer, together with each affiliated entity of the derivatives dealer, excluding investment funds, and excluding derivatives between these affiliated entities, has not had, in any of the previous 24 calendar months, an aggregate month-end gross notional amount under outstanding commodity derivatives with one or more Canadian counterparties that have a head office or principal place of business in Canada, exceeding $3 000 000 000.

Responsibility of a derivatives dealer to report to the regulator or the securities regulatory authority

32. A derivatives dealer must report to the regulator or, in Québec, the securities regulatory authority in a timely manner any circumstance in which a derivatives dealer is not or was not in compliance with this Instrument or other securities legislation relating to trading in derivatives if any of the following applies:

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

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

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

DIVISION 2 – RECORDKEEPING

Derivatives party agreement

33. (1) A derivatives firm must ensure that the derivatives firm, before transacting in a derivative with, for or on behalf of a derivatives party, enters into an agreement with the derivatives party.

(2) The agreement referred to in subsection (1) must establish all of the material terms governing the relationship between the derivatives firm and the derivatives party including the rights and obligations of the derivatives firm and the derivatives party.

Records

34. A derivatives firm must keep records of its derivatives transactions and advising activities, including all of the following, as applicable:

(a) records containing a general description of its derivatives business and activities conducted with, for or on behalf of, derivatives parties, and compliance with applicable provisions of securities legislation, including

(i) records of derivatives party assets, and

(ii) records documenting the derivatives firm's compliance with internal policies and procedures;

(b) for each derivative, records demonstrating the existence and nature of the derivative, including

(i) records of communications with the derivatives party relating to transacting in the derivative,

(ii) documents provided to the derivatives party to confirm the derivative, the terms of the derivative and each transaction relating to the derivative,

(iii) correspondence relating to the derivative and each transaction relating to the derivative,

(iv) records made by staff relating to the derivative and each transaction relating to the derivative, including notes, memos and journals;

(v) records relating to pre-execution activity for each transaction including all communications relating to quotes, solicitations, instructions, transactions and prices, however they may be communicated,

(vi) reliable timing data for the execution of each transaction relating to the derivative,

(vii) records relating to the execution of the transaction, including

(A) information obtained to determine whether the counterparty qualifies as an eligible derivatives party,

(B) fees or commissions charged,

(C) any other information relevant to the transaction, and

(D) information used in calculating the derivative's valuation;

(viii) an itemized record of post-transaction processing and events, including a record in relation to the calculation of margin and exchange of collateral; and

(ix) the price and valuation of the derivative.

Form, accessibility and retention of records

35. (1) The records required to be maintained in this Instrument must be kept in a safe location, readily accessible and in a durable form for a period of,

(a) except in British Columbia and Manitoba, 7 years following the date on which the derivative expires or is terminated, and

(b) in British Columbia and Manitoba, 8 years following the date on which the derivative expires or is terminated.

(2) A record required to be provided to the regulator or, in Québec, the securities regulatory authority must be provided in a format that is capable of being read by the regulator or, in Québec, the securities regulatory authority.

PART 6
EXEMPTIONS

DIVISION 1 – EXEMPTION FROM THIS INSTRUMENT

Exemption for foreign liquidity providers – transactions with derivatives dealers

36. A person or company is exempt from the provisions of this Instrument in respect of a transaction if all of the following apply:

(a) the transaction is made with either an investment dealer registered in accordance with National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* or a derivatives dealer, that, in each case, is transacting as principal for its own account;

(b) the person or company is registered, licensed or authorized, or otherwise operates under an exemption or exclusion from a requirement to be registered, licensed or authorized under the securities, commodity futures or derivatives legislation of a foreign jurisdiction in which its head office or principal place of business is located to carry on the activities in that jurisdiction that registration as a derivatives dealer would permit it to carry on in the local jurisdiction;

(c) the person or company is not any of the following:

(i) a derivatives dealer whose head office or principal place of business is in Canada**;**

(ii) a derivatives dealer that is a Canadian financial institution.

Exemption for certain derivatives end-users

37. (1) A person or company is exempt from the provisions of this Instrument if all of the following apply:

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

(b) the person or company does not, in respect of any derivative or transaction, advise a non-eligible derivatives party, other than general advice that is provided in accordance with the conditions of section 42 [*Advising generally*];

(c) the person or company does not regularly make or offer to make a market in a derivative with a derivatives party;

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

(e) the person or company does not facilitate the clearing of a derivative through the facilities of a qualifying clearing agency for another person or company.

(2) The exemption in subsection (1) is not available to a person or company if either of the following applies:

(a) the person or company is a registered derivatives firm or a registered securities firm in any jurisdiction of Canada or is registered under the commodity futures legislation of any jurisdiction of Canada;

(b) the person or company is registered under the securities, commodity futures or derivatives legislation of a foreign jurisdiction in which its head office or principal place of business is located in a category of registration to carry on the activities in that jurisdiction that registration as a derivatives dealer or derivatives adviser would permit it to carry on in the local jurisdiction.

Exemption for foreign derivatives dealers

38. (1) A derivatives dealer whose head office or principal place of business is in a foreign jurisdiction specified in Appendix A is exempt from the provisions in this Instrument if all of the following apply:

(a) the derivatives dealer transacts only with, for or on behalf of, a person or company in the local jurisdiction that is an eligible derivatives party;

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

(c) the derivatives dealer is subject to and complies with the laws of the foreign jurisdiction applicable to the derivatives dealer relating to the activities being conducted with a derivatives party whose head office or principal place of business is in Canada;

(d) the derivatives dealer reports to the regulator or, in Québec, the securities regulatory authority in a timely manner any circumstance in which the derivatives dealer is not or was not in compliance with the laws of the foreign jurisdiction relating to trading in derivatives to which the derivatives dealer is subject, if any of the following apply:

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

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

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

(e) the derivatives dealer provides the regulator or, in Québec, the securities regulatory authority with prompt access to its books and records upon request with respect to any matter relating to the activities being conducted with a derivatives party whose head office or principal place of business is located in Canada.

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

(a) the derivatives dealer engages in the business of a derivatives dealer in the foreign jurisdiction in which its head office or principal place of business is located;

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

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

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

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

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

(c) the derivatives dealer has submitted to the regulator or, in Québec, the securities regulatory authority a completed Form 93-101F1 *Submission to Jurisdiction and Appointment of Agent for Service of Process.*

(3) Paragraphs (1) (a) to (e) do not apply in respect of an affiliated entity of the person or company unless the affiliated entity is an investment fund.

(4) Paragraph (2)(b) does not apply if the derivatives party is an affiliated entity unless the affiliated entity is an investment fund.

DIVISION 2 – EXEMPTIONS FROM SPECIFIC PROVISIONS IN THIS INSTRUMENT

Investment dealers

39. A derivatives dealer that is a dealer member of IIROC is exempt from the provisions set out in Appendix B if both of the following apply:

(a) the derivatives dealer is subject to and complies with the corresponding conduct and other regulatory provisions of IIROC in connection with a transaction or other related activity;

(b) the derivatives dealer promptly notifies the regulator or, in Québec, the securities regulatory authority of each instance of material non-compliance with a provision that is set out in Appendix B.

Canadian financial institutions

40. A derivatives dealer that is a Canadian financial institution is exempt from the provisions set out in Appendix C if both of the following apply:

(a) the derivatives dealer is subject to and complies with the corresponding conduct and other regulatory provisions of its prudential regulator in connection with a transaction or other related activity;

(b) the derivatives dealer promptly notifies the regulator or, in Québec, the securities regulatory authority of each instance of material non-compliance with a provision that is set out in Appendix C.

Derivatives transacted on a derivatives trading facility where the identity of the derivatives party is unknown

41. A derivatives dealer is exempt from the provisions in this Instrument, except for section 8 [*Fair dealing*], section 11 [*Handling complaints*], and Part 5 [*Compliance and recordkeeping*], in respect of a transaction to which all of the following apply:

(a) the execution of the transaction is on and subject to the rules of a derivatives trading facility;

(b) the derivatives dealer does not know the identity of the derivatives party prior to and at the time of execution of the transaction.

DIVISION 3 – EXEMPTIONS FOR DERIVATIVES ADVISERS

Advising generally

42. (1) For the purpose of subsection (3), “financial or other interest” in relation to a derivative or a transaction includes the following:

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

(b) ownership of, beneficial or otherwise, or another interest in, a derivative that has the same underlying interest as the derivative;

(c) a commission or other compensation received or expected to be received from any person or company in relation to a transaction, an underlying interest in the derivative or a derivative that has the same underlying interest as the derivative;

(d) a financial arrangement in relation to the derivative, an underlying interest in the derivative or a derivative that has the same underlying interest as the derivative;

(e) any other interest that relates to the transaction.

(2) A person or company that acts as a derivatives adviser is exempt from the provisions of this Instrument applicable to a derivatives adviser if the advice that the person or company provides does not purport to be tailored to the needs of the person or company receiving the advice.

(3) If the person or company referred to in subsection (2) recommends a transaction involving a derivative, a class of derivatives or the underlying interest of a derivative or class of derivatives in which any of the following has a financial or other interest, the person or company must disclose the interest, including a description of the nature of the interest, concurrently with providing the advice:

(a) the person or company;

(b) any partner, director or officer of the person or company;

(c) if the person is an individual, the spouse or child of the individual;

(d) any other person or company that would be an insider of the first mentioned person or company if the first mentioned person or company were a reporting issuer.

Foreign derivatives advisers

43. (1) A derivatives adviser whose head office or principal place of business is in a foreign jurisdiction specified in Appendix D is exempt from the provisions of this Instrument in respect of advice provided to a derivatives party if all of the following apply:

(a) the derivatives party to whom the advice is being provided is an eligible derivatives party;

(b) the derivatives adviser is registered, licensed or authorized, or otherwise operates under an exemption from registration, under the securities, commodity futures or derivatives legislation of a foreign jurisdiction specified in Appendix D to conduct the derivatives activities in the foreign jurisdiction that it proposes to conduct with the derivatives party;

(c) the derivatives adviser is subject to and complies with the laws of the foreign jurisdiction applicable to the derivatives adviser relating to the activities being conducted with a derivatives party whose head office or principal place of business is in Canada;

(d) the derivatives adviser provides the regulator or, in Québec, the securities regulatory authority with prompt access to its books and records upon request with respect to any matter relating to the activities being conducted with a derivatives party whose head office or principal place of business is in Canada.

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

(a) the derivatives adviser engages in the business of a derivatives adviser in the foreign jurisdiction in which its head office or principal place of business is located;

(b) the derivatives adviser has delivered to the derivatives party a statement in writing disclosing the following:

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

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

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

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

(c) the derivatives adviser has submitted to the regulator or, in Québec, the securities regulatory authority a completed Form 93-101F1 *Submission to Jurisdiction and Appointment of Agent for Service of Process*;

(3) A derivatives adviser that relied on the exemption under subsection (1) during the 12-month period preceding December 1 of a year must notify the regulator or, in, in Québec, the securities regulatory authority of that fact by December 1 of that year.

(4) In Ontario, subsection (3) does not apply to a derivatives adviser that complies with the filing and fee payment provisions applicable to an unregistered exempt international firm under Ontario Securities Commission Rule 13-502 *Fees*.

(5) A person or company is exempt from subsections (2) and (3) if the person or company is registered as a derivatives adviser in the local jurisdiction.

(6) Paragraphs (1) (a) to (d) do not apply in respect of an affiliated entity of the person or company unless the affiliated entity is an investment fund.

(7) Paragraph (2)(b) does not apply if the derivatives party is an affiliated entity unless the affiliated entity is an investment fund.

Foreign derivatives sub-advisers

44. (1) A derivatives sub-adviser whose head office or principal place of business is in a foreign jurisdiction specified in Appendix E is exempt from the provisions of this Instrument if all of the following apply:

(a) the obligations and duties of the sub-adviser are set out in a written agreement with the derivatives adviser or derivatives dealer;

(b) the derivatives adviser or derivatives dealer has entered into a written agreement with its derivatives parties on whose behalf derivatives advice is or portfolio management services are to be provided, agreeing to be responsible for any loss that arises out of the failure of the derivatives sub-adviser to do any of the following:

(i) exercise the powers and discharge the duties of its office honestly, in good faith and in the best interests of the derivatives firm and each derivatives party of the derivatives firm for whose benefit the derivatives advice is, or portfolio management services are, to be provided;

(ii) exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.

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

(a) the derivatives sub-adviser's head office or principal place of business is in a foreign jurisdiction;

(b) the derivatives sub-adviser is registered in a category of registration, or operates under an exemption from registration, under the securities, commodity futures or derivatives legislation of the foreign jurisdiction in which its head office or principal place of business is located;

(c) the legislation of the foreign jurisdiction referred to in paragraph (b) permits the derivatives sub-adviser to carry on the activities in that jurisdiction that registration as a derivatives adviser would permit it to carry on in the local jurisdiction;

(d) the derivatives sub-adviser engages in the business of a derivatives adviser in the foreign jurisdiction in which its head office or principal place of business is located.

Registered advisers under securities or commodity futures legislation

45. A derivatives adviser that is registered as an adviser under securities legislation or, in Ontario and Manitoba commodity futures legislation, is exempt from the provisions set out in Appendix F if the derivatives adviser complies with the corresponding business conduct provisions of securities or commodity futures legislation in connection with a transaction or other related derivatives activity with a derivatives party.[2]

PART 7
GRANTING AN EXEMPTION

Granting an exemption

46. (1) The regulator or, in Québec, the securities regulatory authority may grant an exemption from this Instrument, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.

(2) 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.

[2] For final publication, Appendix F will list the specific corresponding provisions found in NI 31-103.

PART 8
TRANSITION AND EFFECTIVE DATE

Transition for existing non-individual derivatives parties

47. (1) In this section "transition period" means the period commencing on [*insert effective date*] and expiring on [*insert effective date + 5 years*]

(2) During the transition period, for the purposes of this Instrument, an "eligible derivatives party", as defined in section 1(1) [*Definitions and interpretation*], includes a person or company, other than an individual, that is any of the following:

(a) a permitted client, as that term is defined in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*;

(b) in Quebec, an accredited counterparty, as that term is defined in the *Derivatives Act* (Québec);

(c) a qualified party, as that term is defined in any of the following:

(A) in Alberta, Blanket Order 91-507 *Over-the-Counter Derivatives*;

(B) in British Columbia, Blanket Order 91-501 *Over-the-Counter Derivatives*;

(C) in Manitoba, Blanket Order 91-501 *Over-the-Counter Trades in Derivatives*;

(D) in New Brunswick, Local Rule 91-501 *Derivatives*;

(E) in Nova Scotia, Blanket Order 91-501 *Over-the-Counter Trades in Derivatives*;

(F) in Saskatchewan, General Order 91-908 *Over-the-Counter Derivatives*;

(d) an eligible contract participant as that term is defined under Section 1(a)(18) of the United States *Commodity Exchange Act*.

(3) Despite subsection (2), if either of the following circumstances apply, the definition of "eligible derivatives party", as set out in subsection 1(1), applies to that circumstance:

(a) the derivatives firm has obtained a representation from the derivatives party in writing, that the derivatives party is considered to be an eligible derivatives party on the basis of any of paragraphs (2)(a) to (d);

(b) the representation referred to in paragraph (a) was made prior to the effective date of this Instrument.

Transition for existing transactions

48. Other than section 8 [*Fair dealing*], the provisions of this Instrument do not apply in respect of a transaction if both of the following apply:

(a) the transaction was entered into before the effective date of this Instrument;

(b) the derivatives firm has taken reasonable steps to determine that the derivatives party is one or more of the following, as applicable:

(i) a permitted client, as that term is defined in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*;

(ii) in Quebec, an accredited counterparty, as that term is defined in the *Derivatives Act* (Quebec);

(iii) a qualified party, as that term is defined in any of the following:

(i) in Alberta Blanket Order 91-507 *Over-the-Counter Derivatives*;

(ii) in British Columbia Blanket Order 91-501 *Over-the-Counter Derivatives*;

(iii) in Manitoba Blanket Order 91-501 *Over-the-Counter Trades in Derivatives*;

(iv) in New Brunswick Local Rule 91-501 *Derivatives*;

(v) in Nova Scotia Blanket Order 91-501 *Over-the-Counter Trades in Derivatives*;

(vi) in Saskatchewan General Order 91-908 *Over-the-Counter Derivatives*;

(iv) an "eligible contract participant" as that term is defined in Section 1(a)(18) of the United States Commodity Exchange Act.

Effective date

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

(2) In Saskatchewan, despite subsection (1), if this Instrument is filed with the Registrar of Regulations after [*insert date of final publication + one year*], this Instrument comes into force on the day on which it is filed with the Registrar of Regulations.

APPENDIX A
TO
NATIONAL INSTRUMENT 93-101 *DERIVATIVES: BUSINESS CONDUCT*

FOREIGN DERIVATIVES DEALERS
(Section 38)

LIST OF SPECIFIED FOREIGN JURISDICTIONS

Australia

Brazil

Hong Kong

Japan

Republic of Korea

New Zealand

Singapore

Switzerland

United States of America

United Kingdom of Great Britain and Northern Ireland

Any member country of the European Union

Any other jurisdiction that is recognized or designated by the securities regulatory authority or, except in Ontario and Quebec, the regulator

APPENDIX B
TO
NATIONAL INSTRUMENT 93-101 *DERIVATIVES: BUSINESS CONDUCT*

DEALER MEMBERS
(Section 39)

Section 10, Know your derivatives party

Section 11, Handling complaints

Section 13, Derivatives-party-specific needs and objectives

Section 14, Suitability

Section 18(2)(a)-(k) to (4), Relationship disclosure information

Section 19, Pre-transaction disclosure

Section 20, Daily reporting

Section 24, Segregating derivatives party assets

Section 25, Holding initial margin

Section 26, Investment or use of initial margin

Section 27, Content and delivery of transaction information

Section 28, Derivatives party statements

Section 31, Designation and responsibilities of senior derivatives managers

Section 32, Responsibility of derivatives dealer to report to the regulator or the securities regulatory authority

APPENDIX C
TO
NATIONAL INSTRUMENT 93-101 *DERIVATIVES: BUSINESS CONDUCT*

CANADIAN FINANCIAL INSTITUTIONS
(Section 40)

Section 10, Know your derivatives party

Section 12, Tied selling

Section 24, Segregating derivatives party assets

Section 25, Holding initial margin

Section 26, Investment or use of initial margin

Section 33, Derivatives party agreement

APPENDIX D
TO
NATIONAL INSTRUMENT 93-101 *DERIVATIVES: BUSINESS CONDUCT*

FOREIGN DERIVATIVES ADVISERS
(Section 43)

LIST OF SPECIFIED FOREIGN JURISDICTIONS

Australia

Brazil

Hong Kong

Japan

Republic of Korea

New Zealand

Singapore

Switzerland

United States of America

United Kingdom of Great Britain and Northern Ireland

Any member country of the European Union

Any other jurisdiction that is recognized or designated by the securities regulatory authority or, except in Ontario and Quebec, the regulator

APPENDIX E
TO
NATIONAL INSTRUMENT 93-101 *DERIVATIVES: BUSINESS CONDUCT*

FOREIGN DERIVATIVES SUB-ADVISERS
(Section 44)

LIST OF SPECIFIED FOREIGN JURISDICTIONS

Australia

Brazil

Hong Kong

Japan

Republic of Korea

New Zealand

Singapore

Switzerland

United States of America

United Kingdom of Great Britain and Northern Ireland

Any member country of the European Union

Any other jurisdiction that is recognized or designated by the securities regulatory authority or, except in Ontario and Quebec, the regulator

APPENDIX F
TO
NATIONAL INSTRUMENT 93-101 *DERIVATIVES: BUSINESS CONDUCT*

REGISTERED ADVISERS UNDER SECURITIES AND COMMODITY FUTURES LEGISLATION
(Section 45)

Section 11, Handling complaints

Section 12, Tied-selling

Division 2 [*Additional obligations when dealing with or advising certain derivatives parties*] of Part 3 [*Dealing with or advising derivatives parties*];

Part 4 [*Derivatives party accounts*]

Part 5 [*Compliance and recordkeeping*], other than section 30 [*Policies and procedures]*

FORM 91-101F1
SUBMISSION TO JURISDICTION AND APPOINTMENT OF AGENT FOR SERVICE OF PROCESS
(sections [X] [*foreign derivatives dealer*] and [X] [*foreign derivatives adviser*])

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

2. If the Foreign Firm was previously assigned an NRD number as a registered firm or an unregistered exempt international firm, provide the NRD number of the firm.

3. Jurisdiction of incorporation of the Foreign Firm:

4. Head office address of the Foreign Firm:

5. The name, email address, phone number and fax number of the Foreign Firm's chief compliance officer, or equivalent.

   Name:

   Email address:

   Phone:

   Fax:

6. Section of National Instrument 93-101 *Derivatives: Business Conduct* the Foreign Firm is relying on:

   ☐ Section **[X]** [*foreign derivatives dealer*]

   ☐ Section **[X]** [*foreign derivatives adviser*]

   ☐ Other [specify] [e.g *exemptive relief decision – please explain]*

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

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

9. The Foreign Firm designates and appoints the Agent for Service at the address stated above as its agent upon whom may be served a notice, pleading, subpoena, summons or other process in any action, investigation or administrative, criminal, quasi-criminal or other proceeding (a "**Proceeding**") arising out of or relating to or concerning the Foreign Firm's activities in the local jurisdiction and irrevocably waives any right to raise as a defence in any such Proceeding any alleged lack of jurisdiction to bring such Proceeding.

10. The Foreign Firm irrevocably and unconditionally submits to the non-exclusive jurisdiction of the judicial, quasi-judicial and administrative tribunals of the local jurisdiction in any Proceeding arising out of or related to or concerning the Foreign Firm's activities in the local jurisdiction.

11. Until 7 years after the Foreign Firm ceases to rely on section **[X]** [*foreign derivatives dealer*] or section **[X]** [*foreign derivatives adviser*], the Foreign Firm must submit to the securities regulatory authority

    a. a new Submission to Jurisdiction and Appointment of Agent for Service in this form no later than the 30th day before the date this Submission to Jurisdiction and Appointment of Agent for Service is terminated;

    b. an amended Submission to Jurisdiction and Appointment of Agent for Service no later than the 30th day before any change in the name or above address of the Agent for Service; and

    c. a notice detailing a change to any information submitted in this form, other than the name or above address of the Agent for Service, no later than the 20th day after the change.

12. This Submission to Jurisdiction and Appointment of Agent for Service is governed by and construed in accordance with the laws of the local jurisdiction

Dated:

(Signature of the Foreign Firm or authorized signatory)

(Name of signatory)

(Title of signatory)

Acceptance

The undersigned accepts the appointment as Agent for Service of _____ [*Insert name of Foreign Firm*] under the terms and conditions of the foregoing Submission to Jurisdiction and Appointment of Agent for Service.

Dated:

(Signature of the Agent for Service or authorized signatory)

(Name of signatory)

(Title of signatory)

ANNEX D

PROPOSED COMPANION POLICY 93-101 *DERIVATIVES: BUSINESS CONDUCT*

TABLE OF CONTENTS

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 93-101 *Derivatives: Business Conduct* (the **Instrument**) and related securities legislation.

Numbering system

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.

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*,
- 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.

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 NI 14-101.[1] The definition of this term in NI 14-101 does not include a Schedule III bank. Schedule III banks are distinct legal entities that are organized in foreign jurisdictions and maintain a branch in Canada. To the extent a Schedule III bank enters into a derivatives transaction with a derivatives party in the local jurisdiction, we would consider that entity to be a foreign derivatives dealer for the purposes of the Instrument.

With respect to the Canadian financial institutions that are Schedule I or Schedule II banks, the definition of Canadian financial institution encompasses both domestic and foreign branches (if the bank in fact operates a foreign branch) – a branch does not have a legal identity apart from its principal entity. However, the definition of Canadian financial institutions does not include an affiliate of a bank that is established, incorporated or organized as a separate legal entity in a foreign jurisdiction.

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. For example, this could include, 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 could also include derivatives that are intended to eliminate or reduce currency risk associated with international commercial transactions (for example, when a company's functional currency or currency of index prices referenced in its transactions and the currency of settlement are not the same currency). It is not, however, intended to include a circumstance

[1] Final publication expected to reference the definition of "Canadian financial institution" in NI 14-101. See CSA Notice and Request for Comment, Proposed Amendments to National Instrument 14-101 *Definitions*, Consequential Amendments and Consequential Policy Changes.

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 that are being hedged.

The definition of "commercial hedger" is used in paragraph (n) of the definition of "eligible derivatives party". If a person or company, other than an individual, is a commercial hedger for the purposes of a derivatives transaction and the person or company has the requisite knowledge and experience as described in clause (i) of that paragraph, the person or company is an "eligible derivatives party" for the purposes of that transaction. We refer to this type of eligible derivatives party as a "eligible commercial hedger". Pursuant to subsection 7(2) of NI 93-101, the eligible commercial hedger may "waive" certain protections under NI 93-101. In addition, as an eligible derivatives party, the eligible commercial hedger comes within the class of derivatives parties a foreign derivatives dealer or adviser may deal with under an available exemption.

The Instrument does not provide a definition of hedge; generally, we would expect that the hedge relating to a derivative would qualify for hedge accounting under applicable accounting standards.

Section 1 – Definition of derivatives adviser and derivatives dealer

A person or company that meets the definition of "derivatives adviser" or "derivatives dealer" in a local jurisdiction is subject to the Instrument in that jurisdiction, whether or not it is registered or exempted from the requirement to be registered in that jurisdiction.

A person or company will be subject to the requirements of the Instrument if it is either of the following:

- in the business of trading derivatives or in the business of advising others in respect of derivatives;
- otherwise required to register as a derivatives dealer or a derivatives adviser under securities legislation.

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 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 quotes or it is 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".

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 quotes to derivatives parties or potential derivatives parties that are not provided in response to a request. This also 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 as a result of the contact. For example, a person or company that wishes to hedge a specific risk is not necessarily 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.

- *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 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.

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 but would be exempt if it meets the conditions in section 42 [*Advising generally*].

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 purposes 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.

Where dealing or advising activities are provided to derivatives parties in a local jurisdiction or where dealing or advising activities are otherwise conducted within a local jurisdiction, regardless of the location of the derivatives party, we would generally consider a person or company to be a derivatives dealer or derivatives adviser (unless an exemption is otherwise available). However, where the person or company that is a derivatives dealer or adviser is not located in the local jurisdiction (e.g., is a foreign derivatives dealer or a foreign derivatives adviser), the obligations in the Instrument only apply to its dealing or advising activities with a derivatives party that is located in the local jurisdiction.

Note that a person or company that may be in the business of transacting derivatives may nevertheless be exempt from requirements of the Instrument; see the following Part 6 [*Exemptions*]:

- *Foreign derivatives dealers that trade with derivatives dealers (s. 36)*
- *Certain derivatives end-users (s. 37)*
- *Foreign derivatives dealers (s. 38)*
- *Investment dealers (s. 39)*
- *Canadian financial institutions (s. 40)*
- *Derivatives traded on a derivatives trading facility where the identity of the derivatives party unknown (s. 41)*
- *Advising generally (s. 42)*
- *Foreign derivatives advisers (s. 43)*
- *Foreign derivatives sub-advisers (s. 44)*
- *Registered advisers under securities or commodity futures legislation (s. 45)*

Section 1 – Definition of derivatives party assets

"Derivatives party assets" includes all assets of a derivatives party that are received or held by a derivatives firm for or on behalf of the derivatives party for any purpose relating to derivatives transactions.

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 those derivatives parties that have the requisite knowledge and experience to evaluate the information about derivatives that has been provided to the derivatives party by the derivatives firm. These persons or companies generally may not require the full set of protections that are provided to other derivatives parties that are not eligible derivatives parties. As a result, only the following requirements in the Instrument apply to transactions with an eligible derivatives party (subject to the limitation discussed below for transactions with an eligible derivatives party that is an individual or eligible commercial hedger):

- Division 1 of Part 3 (fair dealing, conflicts of interest, know your derivatives party, handling complaints, tied selling);
- Sections 23 and 24 relating to derivatives party assets;
- Subsection 27(1) requirement to deliver a transaction confirmation; and
- Part 5 relating to compliance and recordkeeping requirements.

When a derivatives firm is dealing with or advising a derivatives party that is either an individual or a commercial hedger, all applicable additional protections in the Instrument are presumed to apply unless that derivatives party has provided the derivatives firm with the necessary representations and waived, in writing, some or all of the additional protections in the Instrument. Section 7 of this Policy provides additional guidance relating to this waiver.

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. For example, such grounds may include

- a situation where a derivatives dealer has information in its possession (e.g. financial statements) that raise material questions with respect to a derivatives party's status as an eligible derivatives party; or
- a situation where a company represents that it is an eligible derivatives party on the basis of the commercial hedger category, however, the derivatives dealer is aware that the derivative in question is not being used to hedge risks of that company or is aware that the derivative is not linked to the business of the company).

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

Under paragraphs (m) to (p) 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 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 is 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.

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

A person or company is only an eligible derivative party under paragraph (n) if the person or company has, at the time the transaction occurs, represented that it 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 in Canadian dollars (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 and unconditionally supported (under a letter of credit or credit support agreement) by one or more eligible derivatives parties, other than an eligible derivatives party qualifying as such under paragraphs (n) (an individual) or (o) (an eligible commercial hedger).

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 and/or training in derivatives and risk management, or
- whether the derivatives party has retained independent advice in relation to its derivatives, and
- publicly available financial information.

A derivatives party's representation, if applicable, can relate to a specific derivative, a class of derivatives or all derivatives.

Section 1 – Definition of permitted depository

In recognition of the international nature of the derivatives market, paragraph (e) of the definition of "permitted depository" permits a foreign bank or trust company with a minimum amount of reported shareholders' equity to act as a permitted depository and hold derivatives party assets, provided its head office or principal place of business is located in a permitted jurisdiction and it is regulated as a bank or trust company in the permitted jurisdiction.

Section 1 – Definition of permitted jurisdiction

Paragraph (a) of the definition of "permitted jurisdiction" captures jurisdictions where foreign banks authorized under the *Bank Act* to carry on business in Canada, subject to supervision by the Office of the Superintendent of Financial Institutions (**OSFI**), are located.[2] As of the time of the publication of the Instrument, the following countries and their political subdivisions are permitted jurisdictions: Belgium, France, Germany, Ireland, Japan, Netherlands, Singapore, Switzerland, United Kingdom, and the United States of America.

For paragraph (b) of the definition of "permitted jurisdiction," in the case of the euro, where the currency does not have a single "country of origin", the provision will be read to include all countries in the euro area and countries using the euro under a monetary agreement with the European Union.[3]

Section 1 – Definition of segregate

While the term "segregate" means to separately hold or separately account for derivatives party assets or positions, consistent with the PFMI Report and National Instrument 94-102 *Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* (**NI 94-102**), accounting segregation is acceptable (i.e., customer collateral is segregated by maintaining records that allow the positions and the value of collateral delivered by each customer to be identified).

The PFMI Report is the April 2012 final report entitled *Principles for financial market infrastructures* published by the Bank for International Settlements' Committee on Payments and Market Infrastructure (formerly the Committee on Payment and Settlement Systems) and the Technical Committee of the International Organization of Securities Commissions, as amended from time to time.

[2] For a list of authorized foreign banks regulated under the *Bank Act* and subject to OSFI supervision, see: Office of the Superintended of Financial Institutions, *Who We Regulate* (available: http://www.osfi-bsif.gc.ca/Eng/wt-ow/Pages/wwr-er.aspx?sc=1&gc=1#WWRLink11).

[3] European Union, Economic and Financial Affairs, *What is the euro area?*, February 12, 2020, online: European Union (http://ec.europa.eu/economy_finance/euro/adoption/euro_area/index_en.htm).

Section 1 – Definition of valuation

The term "valuation" is defined to mean the value of a derivative 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.

PART 2
APPLICATION

Section 2 – Application to registered and unregistered derivatives firms

The Instrument applies to "derivatives advisers" and "derivatives dealers" as defined in subsection 1(1) of the Instrument. These definitions include a person or company that, under securities legislation is

- registered as a "derivatives dealer" or "derivatives adviser",
- exempt from the requirement to register as a "derivatives dealer" or "derivatives adviser", and
- excluded from registration as a "derivatives dealer" or "derivatives adviser".

Accordingly, derivatives firms that may be exempt from the requirement to register in a jurisdiction, such as Canadian financial institutions and individuals acting on their behalf in relation to transacting in, or providing advice in relation to, a derivative, will nevertheless be subject to the same standard of conduct towards their derivatives parties that apply to registered derivatives firms and their registered representatives.

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 purposes of the Instrument.

Section 3 – Application – Scope of Instrument

General principle

Section 3.1(1) provides that the Instrument applies to short-term foreign exchange contracts or instruments in the wholesale foreign exchange market, which are typically settled within two business days or less (**short-term FX**) and, which include, for greater certainty, transactions in this market that are commonly referred to as spot FX.

Inclusion of certain short-term FX transactions in the institutional foreign exchange market

The wholesale foreign exchange market is a global over-the-counter market made up of a broad sub-set of market participants, including, derivatives parties referred to in paragraphs (a) to (m) and (q) of the definition of eligible derivatives party. Specifically, this includes banks, central banks, supranational and quasi-government organizations, investment funds, pension funds, insurance companies, investment dealers, payment remittance and money services businesses, proprietary trading firms, benchmark and trading execution providers, as well as large multinational corporates with global treasury operations (**wholesale FX market participants**). These wholesale FX market participants transact short-term FX with other wholesale FX market participants. As wholesale FX market participants, Canadian financial institutions typically transact short-term FX as market maker, as well as for hedging, speculation and operational purposes.

The obligations in the Instrument relating to fair dealing, conflicts of interest, complaints handling, as well as compliance and recordkeeping obligations (including the obligations related to senior managers) will apply to a derivatives dealer that is also a Canadian financial institution with respect to short-term FX transactions it enters into with its counterparties that are also wholesale FX market participants. These obligations, however, will only apply to a derivatives dealer that is a Canadian financial institution if its notional exposure under all outstanding derivatives – calculated on the basis of outstanding derivatives that are reportable derivatives under the trade reporting rules – exceeds $500 billion (i.e., short-term FX transactions are excluded from this calculation).

Applying these obligations to cover the short-term FX transactions of this population of derivatives dealers in the wholesale foreign exchange market is generally consistent with expectations already laid out in a voluntary code of conduct that certain wholesale FX market participants, including derivatives dealers that are Canadian financial institutions, already adhere to. In addition to currency-linked derivatives that are covered by the Instrument, our intention is that this provision covers the same short-term FX activity that is covered by these voluntary codes of conduct. Therefore, we expect these derivatives dealers will already have in

place an existing compliance framework (i.e., policies, procedures, and controls) to address this activity and would generally expect that existing framework will meet section 30 compliance obligations and the other limited sub-set of obligations of the Instrument that apply to short-term FX transactions.

If a derivatives party qualifies under paragraph (m) as an eligible derivatives party (e.g. a corporation) and would not typically be considered a wholesale FX market participant that transacts in the wholesale FX market with a Canadian financial institution, including under a voluntary code of conduct that covers short-term FX activity, we would not interpret such transaction as a short-term FX transaction that was included for the purposes of section 3.1.

The wholesale foreign exchange market does not include retail foreign currency exchange transactions, including retail foreign currency exchange transactions conducted at the branch level.

Section 6 – Governments, central banks and international organizations

Section 6 provides that the Instrument does not apply to certain governments, central banks and international organizations specified in the section. Section 6 does not, however, exclude derivatives firms that deal with or advise these entities from the application of the Instrument.

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

We are of the view that, because of their nature, regulatory oversight, financial resources or experience, eligible derivatives parties do not require the full set of protections afforded to other derivatives parties. Other derivatives parties are referred to in this Policy as **non-eligible derivatives parties**.

The obligations of a derivatives firm and the individuals acting on its behalf towards a derivatives party differ depending on whether the derivatives party is an eligible derivatives party and on the nature of the eligible derivatives party.

Dealing with or advising a derivatives party that is a non-eligible derivatives party

If a derivatives firm is dealing with or advising a non-eligible derivatives party, no exemption is available from the requirements in Parts 3, 4 and 5.

Dealing with or advising an eligible derivatives party that is not an individual or an eligible commercial hedger

A derivatives firm is exempt from the requirements of the Instrument if it is dealing with or advising a derivatives party that is an eligible derivatives party that is not an individual or an eligible commercial hedger, other than the following requirements (the **core requirements**):

- in Part 3 [*Dealing with or advising derivatives parties*], all of the requirements in Division 1 [*General obligations towards all derivatives parties*]:
    - section 8 [*Fair dealing*],
    - section 9 [*Conflicts of interest*],
    - section 10 [*Know your derivatives party*], and
    - section 11 [*Handling complaints*]
    - section 12 [*Tied selling*]
- in Part 4, Division 2 [*Derivatives party assets*]:
    - section 23 [*Interaction with other instruments*], and
    - section 24 [*Segregating derivatives party assets*];
- in Part 4, Division 3 [*Reporting to derivatives parties*]:
    - section 27(1) [Content and delivery of transaction information]

- in Part 5 [*Compliance and recordkeeping*]:
    - all of Division 1 – [*Compliance*], and
    - all of Division 2 – [*Recordkeeping*].

Dealing with or advising an eligible derivatives party that is an individual or an eligible commercial hedger

Under subsection 7(2), when a derivatives firm is dealing with or advising a derivative party that is an individual or eligible commercial hedger, all applicable additional protections in the Instrument are presumed to apply unless that derivatives party has provided the derivatives firm with the requisite representations indicating that they qualify as an eligible derivatives party and the eligible derivatives party waives, in writing, some or all of the additional protections in Instrument. As specified in subsection 7(3), the core requirements cannot be waived by the eligible derivatives party.

An eligible derivatives party that is an individual or eligible commercial hedger can waive specific requirements for a derivative, a type of derivatives or for all derivatives. For example, a producer of a certain commodity may choose to waive certain requirements in relation to derivatives where the underlying asset is a commodity that they produce but may not want to waive protections in relation to other types of derivatives.

We do not consider there to be an obligation under the Instrument to update the "waiver" after it is made. However, it is always open to an eligible derivatives party that is an individual or an eligible commercial hedger to withdraw, in whole or in part, any waiver it has made to a derivatives firm. A "waiver" can apply to a specific derivative, a class of derivatives or all derivatives involving the derivatives party.

There is no prescribed form for the waiver provided by subsection 7(2). For example, it may be appropriate for the waiver to be given by an eligible derivatives party that is an individual or an eligible commercial hedger as part of account-opening documentation, in master trading agreements or protocols amending master trading agreements. A derivatives firm may also wish to use a form of waiver that is similar to the typical forms of waivers used by securities market participants when certain permitted clients provide a waiver from certain suitability/disclosure obligations under NI 31-103.

However, consistent with the derivatives firm's obligation to deal fairly, honestly and in good faith with derivatives parties, we expect the waiver to be presented to the derivatives party in a clear and meaningful manner in order to ensure the derivatives party understands the information presented and the significance of the protections being waived. We would consider it to be a breach of section 8 [*Fair dealing*] to put unreasonable pressure on any derivatives party to waive any requirements. We also expect the derivatives firm to remind the derivatives party that it has the option to obtain independent advice before signing the waiver.

PART 3
DEALING WITH OR ADVISING DERIVATIVES PARTIES

DIVISION 1 – GENERAL OBLIGATIONS TOWARDS ALL DERIVATIVES PARTIES

Section 8 – Fair dealing

General Principle

The obligation in section 8 (the **fair dealing obligation**) is a principles-based obligation and is intended to be similar to the duty to act fairly, honestly and in good faith applicable to registered firms and registered individuals under securities legislation (the **registrant fair dealing obligation**).[4]

The fair dealing obligation should be interpreted flexibly and in a manner sensitive to context

We recognize that there are important differences between derivatives markets and securities markets. The fair dealing obligation under the Instrument may not always apply to derivatives market participants in the same manner as the registrant fair dealing obligation would apply to securities market participants. Accordingly, we believe that the fair dealing obligation in section 8, as a principles-based obligation, should be interpreted flexibly and in a manner that is sensitive to context and to derivatives market participants' reasonable expectations. For this reason, prior CSA guidance and case law on the registrant fair dealing obligation

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

may not necessarily be relevant in interpreting the fair dealing obligation under the Instrument. Similarly, the guidance in this Policy is not necessarily applicable to registrants in their conduct with securities market participants.

We take the view that the concept of fairness when applied to derivatives market participants is context-specific. Conduct that may be considered unfair when dealing with a derivatives party that is not an eligible derivatives party may be considered fair and part of ordinary commercial practice when dealing with an eligible derivatives party. For example, the fair dealing obligation may be interpreted differently if the derivatives party is an individual or small business than from how it would be interpreted if the derivatives party is a sophisticated market participant, such as a global financial institution. Similarly, conduct that may be considered to be unfair when acting as an agent to facilitate a derivatives transaction with a third-party may be considered fair when entering into a derivative as principal, where it would be expected that each party negotiating the derivative is seeking to ensure favourable financial terms.

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

We take the view that abusive practices, including fraud, price fixing, spoofing and layering, manipulation of benchmark rates, and front-running of trades would be a severe breach of the fair dealing obligation.

Derivatives firms have an obligation to transact with a derivatives party under terms that are fair. What constitutes "fair" will vary depending on the particular circumstances. Misrepresenting the nature of the product and related risks, or deliberately selling a derivative that is not appropriate 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 expect a derivatives firm to ensure a derivatives party is reasonably made aware of the implications of terminating a transaction prior to maturity, including potential exit costs. However, depending on the level of sophistication of the derivatives party, as well as the nature of the derivatives party, we recognize that this may not be necessary and therefore, the obligation to be "fair" is this context is minimal. For example, it would be appropriate for this information to be provided to an eligible commercial hedger; whereas, we would generally not expect this information to be disclosed between two banks. We recognize that implications of termination, including costs, are wholly dependent on market conditions at the time of termination and therefore, the more specific details relating to such costs would only be disclosed when actual termination of the transaction is being discussed or negotiated.

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 and that these policies and procedures are reviewed regularly and amended as required.

We interpret the fair dealing obligation to include determining prices for derivatives transacted with derivatives parties in a fair and equitable manner. We expect there to be a rational basis for a discrepancy in price where essentially the same derivative is transacted with different derivatives parties. Factors that indicate a rational basis could include the level of counterparty risk of a derivatives party, the derivatives party's trading activity, or relationship pricing. Lack of sophistication, knowledge or understanding of a derivatives product should never be a factor in providing less advantageous pricing. Both the compensation component and the market value or price component of the derivative are relevant in determining whether the price for a derivatives party is fair. A derivatives firm's policies and procedures under section 30 must address pricing practices, as well as how the reasonableness of compensation is determined. A derivatives party should be given an opportunity, at their option, to obtain independent advice before transacting in a derivative.

Derivatives firms are expected to obtain information from each derivatives party to allow them to meet their fair dealing obligation.

Section 9 – Conflicts of interest

We consider a conflict of interest to be any circumstance where the interests of a derivatives party and those of a derivatives firm or its representatives are inconsistent or divergent.

We believe that the conflict of interest provisions in section 9 should be interpreted flexibly and in a manner that is sensitive to context and to derivatives market participants' reasonable expectations. For example, a derivatives firm and the derivatives party with which it transacts bilaterally hold opposing positions under the same derivative and this may represent an inherent conflict of interest in the narrow context of that specific derivative. We recognize, therefore, that it may not necessarily be appropriate to apply the conflict of interest provisions under the Instrument to derivatives market participants in the same manner as the relevant conflict of interest provisions would apply to securities market participants.

We take the view that a conflict of interest, when applied to derivatives market participants, is context-specific. Circumstances that may be considered to give rise to a conflict of interest when dealing with a derivatives party that is not an eligible derivatives party may be considered fair and part of ordinary commercial practice when dealing with an eligible derivatives party. For example, conflicts of interests may be viewed differently when dealing with a non-eligible derivative party that is an individual or a small business than they would be viewed if the derivatives party were an eligible derivatives party, which may be different again from

how conflicts of interest would be viewed if the derivatives party were a sophisticated market participant such as a global financial institution.

In addition, the circumstances that may give rise to a conflict of interest when acting as an intermediary on behalf of an eligible derivatives party, may not represent a conflict of interest when entering into a derivative as principal, provided the eligible derivatives party is reasonably aware that the derivatives firm is seeking terms favourable to its own interests. One way to generally address this conflict would be to provide a representation to that effect in a master trading agreement; however, such standard representation may not necessarily address all of the circumstances that would give rise to a conflict of interest that ought to be disclosed to a derivatives party.

Subsection 9(2) – Responding to conflicts of interest

We expect that a derivatives firm's policies and procedures for managing conflicts to allow the firm and its staff to

- identify conflicts of interest,
- determine the level of risk, to both the derivatives firm and a derivatives party, that a conflict of interest raises, and
- respond appropriately to conflicts of interest.

When responding to any conflict of interest, we expect the derivatives firm to consider the fair dealing obligation in section 8 as well as any other standard of care that may apply when dealing with or advising a derivatives party.

We are of the view that there are three methods that are generally reasonable to respond to a conflict of interest, depending on the circumstances: avoidance, control and disclosure.

We expect that if there is a risk of material harm to a derivatives party or the integrity of the markets, the derivatives firm will take all reasonable steps to avoid the conflict of interest. If there is not a risk of material harm and the derivatives firm does not avoid the conflict of interest, we expect that it will take steps to either control or disclose the conflict, or both. We also expect the derivatives firm to consider what internal structures or policies and procedures it should implement to reasonably respond to such a conflict of interest.

Avoiding conflicts of interest

A derivatives firm must avoid all conflicts of interest that are prohibited by law. If a conflict of interest is not prohibited by law, we expect the derivatives firm to avoid the conflict if it is sufficiently contrary to the interests of a derivatives party that there can be no other reasonable response. We are generally of the view that conflicts that have a lesser impact on the interests of a derivatives party can be managed through controls or disclosure.

Where conflicts of interest between a derivatives party and a derivatives firm cannot be managed using controls or disclosure, we expect the derivatives firm to avoid the conflict. This may require the derivatives firm to stop providing the service or stop transacting derivatives with, or providing advice in relation to derivatives to, the derivatives party.

Controlling conflicts of interest

We expect that a derivatives firm would design its organizational structures, lines of reporting and physical locations to, where appropriate, control conflicts of interest effectively. For example, the following situations would likely raise a potential conflict of interest that could be controlled in this manner:

- advisory staff reporting to marketing staff,
- compliance or internal audit staff reporting to a business unit, and
- individuals acting on behalf of a derivatives firm and investment banking staff in the same physical location.

Depending on the conflict of interest, a derivatives firm may be able to reasonably respond to the conflict of interest by controlling the conflict in an appropriate way. This may include

- assigning a different individual to provide a service to the derivatives party,
- creating a group or committee to review, develop or approve responses to a type of conflict of interest,
- monitoring trading activity, or
- using information barriers for certain internal communication.

Where a conflict of interest is such that no control is effective, we expect the conflict to be avoided or disclosed.

Subsection 9(3) – Disclosing conflicts of interest

When disclosure is appropriate

We expect a derivatives firm to inform each derivatives party it transacts derivatives with, or provides advice in relation to derivatives to, about any conflicts of interest that could affect the services the firm provides to the derivatives party.

Timing of disclosure

Under subsection 9(3), a derivatives firm and individuals acting on its behalf must disclose a conflict of interest in a timely manner. We expect a derivatives firm and its representatives to disclose the conflict to a derivatives party before or at the time they recommend the transaction or provide the service that gives rise to the conflict to enable the derivatives party to decide beforehand whether or not they wish to proceed with the transaction or service.

Where this disclosure is provided to a derivatives party before the transaction takes place, we expect the disclosure to be provided shortly before the transaction takes place. For example, if it was initially provided with the derivative party's account-opening documentation months or years previously, we expect that an individual acting on behalf of a derivatives firm to also disclose this conflict to the derivatives party shortly before the transaction or at the time the transaction is recommended.

When disclosure is not appropriate

Disclosure may not be appropriate if a conflict of interest involves confidential or commercially-sensitive information, or the information amounts to "inside information" under insider trading provisions in securities legislation. In these situations, a derivatives firm will need to assess whether there are other methods to adequately respond to the conflict of interest. If not, the firm may have to decline to provide the service to avoid the conflict of interest. We also expect a derivatives firm to have specific procedures for responding to conflicts of interest that involve inside information and for complying with insider trading provisions.

How to disclose a conflict of interest

Subsection 9(3) provides that a derivatives firm must provide disclosure about a material conflict of interest to a derivatives party. When a derivatives firm provides this disclosure, we expect that the disclosure would

- be prominent, specific, clear and meaningful to the derivatives party, and
- explain the conflict of interest and how it could affect the service the derivatives party is being offered.

We expect that a derivatives firm would not

- provide only generic disclosure,
- provide only partial disclosure that could mislead the derivatives party, or
- obscure conflicts of interest in overly detailed disclosure.

More specifically, we generally expect that disclosures are separated into two categories:

(i) general conflicts of interest disclosures applicable to all counterparties (those which affect all counterparties and transaction types, addressed in a written general disclosure) that could be disclosed to counterparties on an annual basis, and

(ii) disclosures specific to a counterparty or a specific contemplated transaction (i.e., disclosure regarding specific conflicts of interest that are material and specific to a counterparty or a particular transaction prior to entering into a transaction) by providing written notice of or disclosing the conflict to a trader of their derivatives party over a taped line prior to trading.

We recognize that it may be appropriate in some circumstances for a derivatives firm to disclose a conflict where it arises after the original transaction has taken place. This might arise, for example, in the case of an equity total return swap where subsequent to entering into a transaction with a derivatives party, the derivatives dealer becomes an a mergers and acquisitions adviser in respect of the equity underlier (where the proposed merger and acquisitions activity has been announced).

Examples of conflicts of interest

Specific situations where a derivatives firm could be in a conflict of interest and how to manage the conflict are described below.

Acting as both dealer and counterparty

When a derivatives firm enters into a transaction with or recommends a transaction to a derivatives party, and the derivatives firm or an affiliated entity of the derivatives firm is the counterparty to the derivatives party in the transaction, we expect that the derivatives firm would respond to the resulting conflict of interest by disclosing it to the derivatives party.

Competing interests of derivatives parties

If a derivatives firm deals with or provides advice to multiple derivatives parties, we expect the derivatives firm to make reasonable efforts to be fair to all such derivatives parties. We expect that a derivatives firm will have internal policies and procedures to evaluate the balance of these interests.

Acting on behalf of derivatives parties

When a derivatives firm, or the individuals acting on its behalf, exercise discretionary authority over the accounts of its derivatives parties to enter into transactions on their behalf, we expect the derivatives firm to have policies and procedures to address the potential conflicts of interest ensuing from the contractual relationship governing the exercise of discretionary authority.

Compensation practices

We expect that a derivatives firm would consider whether any benefits, compensation or remuneration practices are inconsistent with their obligations to derivatives parties, especially if the firm relies heavily on commission-based remuneration. For example, if there is a complex product that carries a high commission but may not be appropriate for the derivatives firm's derivatives parties, the derivatives firm may decide that it is not appropriate to offer that product.

Section 10 – Know your derivatives party

Derivatives firms act as gatekeepers of the integrity of the derivatives markets. They should not, by act or omission, facilitate conduct that brings the market into disrepute. As part of their gatekeeper role, derivatives firms are required to establish the identity of, and conduct due diligence on, their clients or counterparties under the know-your-derivatives party obligation in section 10 (the "**KYDP obligation"**). Complying with this obligation can help ensure that derivatives transactions are completed in accordance with securities laws.

The KYDP obligation requires derivatives firms to take reasonable steps to obtain and periodically update information about their derivatives parties. In the ordinary course, an annual request to a derivatives party from a derivatives dealer to confirm that nothing has changed in relation to the gatekeeper KYDP information in section 10 would satisfy this obligation.

Section 41 provides an exemption for derivatives firms from the obligations under this section for transactions that are executed on a derivatives trading facility where the identity of the counterparty is unknown prior to and at the time the transaction is executed.

Section 11 – Handling Complaints

General duty to document and respond to complaints

Section 11 requires a derivatives firm to document complaints in respect of its derivatives business and to effectively, fairly and promptly respond to them. We expect that a derivatives firm would document and respond to all complaints received from a derivatives party who has dealt with the derivatives firm in respect of the derivatives activity at issue (in this section, a "complainant").

Complaint handling

We are of the view that an effective complaint system would deal with all formal and informal complaints or disputes in a timely and fair manner. To achieve the objective of handling complaints fairly, we expect the derivatives firm's compliance system to include standards allowing for objective factual investigation and analysis of the matters specific to the complaint.

We expect a derivatives firm to take a balanced approach to the gathering of facts that objectively considers the interests of

- the complainant,
- the individual or individuals acting on behalf of the derivatives firm, and
- the derivatives firm.

We also expect a derivatives firm to limit its consideration and handling of complaints for the purposes of the Instrument to those relating to possible violations of securities legislation.

Complaint monitoring

We expect a derivatives firm's complaint system to provide for specific procedures for reporting the complaints to superiors, in order to allow the detection of frequent and repetitive complaints made with respect to the same matter which may, on a cumulative basis, indicate a serious problem. We also expect the derivatives firm to take appropriate measures to promptly address the cause of a problem that is the subject of a complaint, particularly a serious problem.

Responding to complaints

Types of complaints

We expect a derivatives firm to provide an appropriate response to all complaints, including complaints relating to one of the following matters, by providing an initial and substantive response, promptly in writing:

- a trading or advising activity,
- a breach of the derivatives party's confidentiality,
- theft, fraud, misappropriation or forgery,
- misrepresentation,
- the fair dealing obligation,
- an undisclosed or prohibited conflict of interest, or
- personal financial dealings with a derivatives party.

A derivatives firm may determine that a complaint relating to matters other than the matters listed above is nevertheless of a sufficiently serious nature to be responded to in the manner described below. This determination should be made, in all cases, by considering if a derivatives party, acting reasonably, would expect a written response to its complaint.

Timeline for responding to complaints

We expect that a derivatives firm would

- promptly send an initial written response to a complainant within 5 business days of receipt of the complaint, and
- provide a substantive response to all complaints relating to the matters listed under "Types of complaints" above, indicating the derivatives firm's decision on the complaint.

A derivatives firm may also wish to use its initial response to seek clarification or additional information from the derivatives party.

We encourage derivatives firms to respond to and resolve complaints relating to the matters listed above within a reasonable timeframe depending on the nature of the dispute (in the ordinary course, within 90 days would be considered reasonable).

Section 12 – Tied selling

Section 12 prohibits a derivatives firm from imposing undue pressure on or coercing a person or company to obtain a product or service from a particular person or company, including the derivatives firm or any of its affiliates, as a condition of obtaining another product or service from the derivatives firm. These types of practices are known as "tied selling". In our view, this section would be contravened if, for example, a financial institution agreed to lend money to a derivatives party on the condition that the derivatives party hedged their loan through the same financial institution. In this example, we would take the view that a derivatives firm would not contravene section 12 if it required the derivatives party to enter into an interest rate derivative in connection with a loan agreement as long as the derivatives party were permitted to transact in this derivative with the counterparty of their choice.

Section 12 is not intended to prohibit relationship pricing or other beneficial selling arrangements similar to relationship pricing. Relationship pricing refers to the practice of industry participants offering financial incentives or advantages to certain derivatives parties.

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

The obligations in Division 2 of Part 3 do not apply if a derivatives firm is dealing with or advising an eligible derivatives party that is not an individual or an eligible commercial hedger or an eligible derivatives party that is an individual or eligible commercial hedger that has waived these obligations.

Section 13 – Derivatives-party-specific needs and objectives

Information on a derivatives party's specific needs and objectives (referred to below as "**derivatives-party-specific KYC information**") forms the basis for determining whether transactions are suitable for a derivatives party. The obligations in section 13 require a derivatives firm to take reasonable steps to obtain and periodically update information about their derivatives parties.

The derivatives-party-specific KYC information may also be relevant in complying with policies and procedures that are aimed at ensuring fair terms of a derivative for a derivatives party under subsection 8(1).

Derivatives parties may have a variety of execution priorities. For example, a derivatives party may have as their primary objective executing the transaction 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.

If the derivatives party chooses not to provide the necessary information that would enable the derivatives firm to assess suitability, or if the derivatives party provides insufficient information, we expect the derivatives party to be notified. The derivatives firm would be expected to advise the derivatives party that

- this information is required to determine whether the derivative is suitable for the derivatives party, and
- without this information there is a strong risk that it 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.

Derivatives-party-specific KYC information for suitability depends on circumstances

The extent of derivatives-party-specific KYC information that a derivatives firm needs in order to determine the suitability of a transaction or a derivatives party's priorities when transacting in the derivative will depend on factors that include

- the derivatives party's circumstances and objectives,
- the type of derivative,
- the derivatives party's relationship to the derivatives firm, and
- the derivatives firm's business model.

In some cases, a derivatives firm will need extensive derivatives-party-specific KYC information, for example, where the derivatives party would like to enter into a derivatives strategy to hedge a commercial activity in a range of asset classes. In these cases, we expect the derivatives firm to have a comprehensive understanding of the derivatives party's

- needs and objectives when entering into a derivative, including the derivatives party's time horizon for their hedging or speculative strategy,
- overall financial circumstances, and
- risk tolerance for various types of derivatives, taking into account the derivative party's knowledge of derivatives.

In other cases, a derivatives firm may need to obtain less derivatives-party-specific KYC information, for example, if the derivatives firm enters into a single derivative with a derivatives party who needs to hedge a loan that the derivatives firm extended to the derivatives party.

Subsection 13(2) corresponds to subsection 10(4) of NI 93-101 and subsection 13.2(4) of NI 31-103. In the context of NI 31-103, CSA Staff have generally interpreted this to mean the firms has to refresh the client specific KYC information at least once a year. Pursuant to subsection 13(1) of 93-101, any time that a derivatives firm makes a recommendation or accepts an order, it is required to make a suitability determination unless the derivatives party is an eligible derivatives party (that is not an individual) or the derivatives party is an eligible derivatives party that is an individual or an eligible commercial hedger that has waived this requirement. Consequently, any time a firm makes a recommendation or accepts an order, the firm needs to know whether the client is an eligible derivatives party or a retail counterparty in order to know whether it has to satisfy the suitability obligation. As long as the firm complies with its obligation in section 10(2) to keep its client specific KYDP information current, and as long as the firm does not know otherwise, the firm can rely on existing representations.

Section 14 – Suitability

Subsection 14(1) requires a derivatives firm to take reasonable steps to ensure that a proposed transaction is suitable for a derivatives party before making a recommendation or accepting instructions from the derivatives party to transact in a derivative.

Suitability obligation

To meet the suitability obligation, a derivatives firm should have in-depth knowledge of all derivatives that it transacts with or for, or recommends to, its derivatives party. This is often referred to as the "know your product" or KYP obligation.

We expect a derivatives firm to know each derivative well enough to understand and explain to the derivatives party the derivative's risks, key features, and initial and ongoing obligations. The decision by a derivatives firm to include a type of derivative on its product shelf or approved list of products does not necessarily mean that the derivative will be suitable for each derivatives party. Individuals acting on behalf of a derivatives firm must still determine the suitability of each transaction for every derivatives party.

When assessing suitability, we expect a derivatives firm to take all reasonable steps to determine whether the derivatives party has the capability to understand the particular type of derivative and the risks involved.

In all cases, we expect a derivatives firm to be able to demonstrate a process for making suitability determinations that are appropriate under the circumstances.

Any direction from a derivatives party to override a suitability determination made by a derivatives firm should be made in writing or otherwise documented by the firm/individual acting on its behalf.

Suitability obligations cannot be delegated

A derivatives firm should not

- delegate its suitability obligations to anyone other than an officer or employee of the derivatives firm, or
- satisfy the suitability obligation by simply disclosing the risks involved with a transaction.

Section 13 and 14 - Use of online services to determine derivatives party specific needs and objectives and suitability

The conduct obligations set out in the Instrument, including the derivatives-party-specific KYC and suitability obligations in sections 13 and 14, are intended to be "technology neutral". This means that these obligations are the same for derivatives firms that interact with derivatives parties on a face-to-face basis or through an online platform.

Where the information necessary to fulfill a derivatives firm's obligations pursuant to sections 13 and 14 is solicited through an online service or questionnaire, we expect that this process would amount to a meaningful discussion with the derivatives party.

An online service or questionnaire is expected to achieve this objective if it

- uses a series of behavioural questions to establish risk tolerance and elicit other derivatives-party-specific KYC information,
- prevents a derivatives party from progressing further until all questions have been answered,
- tests for inconsistencies or conflicts in the answers and will not let the derivatives party complete the questionnaire until the inconsistencies or conflicts are resolved,
- offers information about the terms and concepts involved, and
- reminds the derivatives party that an individual from the derivatives firm is available to help them throughout the process.

Section 15 – Permitted referral arrangements

Subsection 1(1) defines a "referral arrangement" in broad terms. Referral arrangement means an arrangement in which a derivatives firm agrees to pay or receive a referral fee. The definition is not limited to referrals for providing derivatives, financial services or services requiring registration. It also includes receiving a referral fee for providing a derivatives party's name and contact information to an individual or a firm. "Referral fee" is also broadly defined. It includes any benefits received from referring a derivatives party, including sharing or splitting any commission resulting from a transaction.

Under section 15, parties to a referral arrangement are required to set out the terms of the arrangement in a written agreement. This is intended to ensure that each party's roles and responsibilities are made clear. This includes obligations for a derivatives

firm involved in referral arrangements to keep records of referral fees (this includes records of all fees relating to referrals that were either paid by the derivatives firm to another person or company or received by the derivatives firm from another person or company). Payments do not necessarily have to go through a derivatives firm, but a record of all payments related to a referral arrangement must be kept.

We expect referral agreements to include

- the roles and responsibilities of each party,
- limitations on any party that is not a derivatives firm,
- the specific contents of the disclosure to be provided to referred derivatives parties, and
- who provides the disclosure to referred derivatives parties.

If the person or company receiving the referral is a derivatives firm or an individual acting on behalf of that derivatives firm, they would be responsible for carrying out all obligations of a derivatives firm towards the referred derivatives party in respect of the derivatives-related activities for which the derivatives party is referred and communicating with the referred derivatives party. However, if the referring person or company is a derivatives firm, the referring derivatives firm is still required to comply with sections 15 [*Permitted referral arrangements*], 16 [*Verifying the qualifications of the person or company receiving the referral*] and 17 [*Disclosing referral arrangements to a derivatives party*].

If a derivatives party is referred by or to an individual acting on behalf of a derivatives firm, we expect the derivatives firm to be a party to the referral agreement. This ensures that the derivatives firm is aware of these arrangements so it can adequately supervise the individuals acting on its behalf and monitor compliance with the agreements. It does not preclude the individual acting on behalf of the derivatives firm from also being a party to the agreement.

A party to a referral arrangement may need to be registered depending on the activities that the party carries out. A derivatives firm cannot use a referral arrangement to assign, contract out of or otherwise avoid its regulatory obligations.

In making referrals, a derivatives firm should ensure that the referral itself does not constitute an activity that the derivatives firm is not authorized to engage in.

We generally are of the view that the compliance practices of investment dealers with respect to referral arrangements under NI 31-103 could similarly be employed to meet the requirements under the Instrument with respect to referral arrangements.

Section 16 – Verifying the qualifications of the person or company receiving the referral

Section 16 requires the derivatives firm, or individual acting on its behalf, making a referral to satisfy itself that the party receiving the referral is appropriately qualified to perform the services, and, if applicable, is appropriately registered. The derivatives firm, or individual acting on its behalf, is responsible for determining the steps that are reasonable in the circumstances. For example, this may include an assessment of the types of derivatives parties that the referred services would be appropriate for.

Section 17 – Disclosing referral arrangements to a derivatives party

The disclosure of information to a derivatives party required under section 17 is intended to help the derivatives party make an informed decision about the referral arrangement and to assess any conflicts of interest. We expect the disclosure to be provided to a derivatives party before or at the time the referred services are provided. We also expect a derivatives firm, and any individuals acting on behalf of the derivatives firm who is directly participating in the referral arrangement, to take reasonable steps so that a derivatives party understands

- which entity it is dealing with,
- what it can expect that entity to provide to it,
- the derivatives firm’s key responsibilities to it,
- if applicable, the limitations of the derivatives firm’s registration category or exemptive relief,
- if applicable, any relevant terms and conditions imposed on the derivatives firm’s registration or exemptive relief,
- the extent of the referrer’s financial interest in the referral arrangement, and
- the nature of any potential or actual conflict of interest that may arise from the referral arrangement.

PART 4
DERIVATIVES PARTY ACCOUNTS

DIVISION 1 – DISCLOSURE TO DERIVATIVES PARTIES

The obligations in this Division do not apply if a derivatives firm is dealing with or advising an eligible derivatives party that is not an individual or an eligible commercial hedger or an eligible derivatives party that is an individual or an eligible commercial hedger that has waived these obligations.

Section 18 – Relationship disclosure information

Content of relationship disclosure information

The Instrument does not prescribe a form for the relationship disclosure information required under section 18. A derivatives firm may provide this information in a single document, or in separate documents, which together give the derivatives party the prescribed information.

We expect that relationship disclosure information would contain accurate, complete, and up-to-date information. We suggest that derivatives firms review their disclosures annually or more frequently, as necessary. A derivatives firm must take reasonable steps to notify a derivatives party, in a timely manner, of significant changes in respect of the relationship disclosure information that has been provided.

To satisfy their obligations under subsection 18(1), an individual acting on behalf of a derivatives firm must spend sufficient time with a derivatives party in a manner consistent with their operations to adequately explain the relationship disclosure information that is delivered to the derivatives party. We expect a derivatives firm to have policies and procedures that reflect the derivatives firm's practices when preparing, reviewing, delivering and revising relationship disclosure documents.

Disclosure should occur before entering into an initial transaction, prior to advising a derivatives party in respect of a derivative and when there is a significant change in respect of the information delivered to a derivatives party. We expect that the derivatives firm will maintain evidence of compliance with their disclosure requirements.

Paragraphs 18(2)(a) to (k) – Required relationship disclosure information

Description of the nature or type of the derivative party's account

Under paragraph 18(2)(a), a derivatives firm must provide derivatives parties with a description of the nature or type of account that the derivatives party holds with the derivatives firm. In particular, we expect that a derivatives firm would provide sufficient information to enable the derivatives party to understand the manner in which transactions will be executed and any applicable contractual obligations. We also expect a derivatives firm to provide information regarding margin and collateral requirements, if applicable. Under paragraph 18(2)(k) the derivatives firm must disclose how the derivatives party assets will be held, used and invested.

We expect that the relationship disclosure information would also describe any related services that may be provided by the derivatives firm. If the firm is advising in derivatives, and the adviser has discretion over the derivatives party's account, we also expect this to be disclosed.

Describe the conflicts of interest

Under paragraph 18(2)(b) a derivatives firm must provide a description of the conflicts of interest that the derivatives firm is required to disclose under securities legislation. One such requirement is in section 9, which provides that a firm must take reasonable steps to identify and then respond to existing and potential material conflicts of interest between the derivatives firm and the derivatives party. This includes disclosing the conflict, where appropriate.

Disclosure of charges, fees and other compensation

Paragraphs 18(2)(c), (d) and (e) require a derivatives firm to provide a derivatives party information on fees and costs they might be charged when entering into a transaction. These requirements ensure that a derivatives party receives all relevant information to evaluate the costs associated with the products and services they receive from the derivatives firm. We expect this disclosure to include information related to compensation or other incentives that the derivatives party may pay relating to a transaction.

We also expect a derivatives firm to provide the derivatives party with general information on any transaction and other charges that a derivatives party may be required to pay, including general information about potential break costs if a derivative is terminated prior to maturity, as well as other compensation the derivatives firms may receive from a third party as a result of their business relationship.

We recognize that a derivatives firm may not be able to provide all information about the costs associated with a particular derivative or transaction until the terms of the derivative have been agreed upon. However, before entering into an initial transaction, a derivatives firm must meet the applicable pre-transaction disclosure requirements in section 19.

Description of content and frequency of reporting

Under paragraph 18(2)(f) a derivatives firm is required to provide a description of the content and frequency of reporting to the derivatives party. Reporting to derivatives parties includes, as applicable

- daily reporting under section 20,
- transaction confirmations under section 27, and
- derivatives party statements under section 28.

Further guidance about a derivatives firm's reporting obligations to a derivatives party is provided in Division 3 of this Part.

Know your derivatives party information

Paragraph 18(2)(i) requires a derivatives firm to disclose the type of information that it must collect from the derivatives party. We expect this disclosure will also indicate how this information will be used in assessing and determining the suitability of a derivatives party transaction.

Section 19 – Pre-transaction disclosure

The Instrument does not prescribe a form for the pre-transaction disclosure that must be provided to a derivatives party under section 19. The derivatives firm may provide this information in a single document, or in separate documents, which together give the derivatives party the prescribed information.

The disclosure document required under subsection 19(1) must be delivered to the derivatives party at a reasonably sufficient time prior to entering into the first transaction with the derivatives firm to allow the derivatives party to assess the material risks and material characteristics of the type of derivative transacted. This disclosure document may be communicated by email or other electronic means.

Identify the derivatives-related products or services the derivatives firm offers

Under paragraph 19(1)(a), a derivatives firm must provide a general description of the derivatives products and services related to derivatives that the derivatives firm offers to a derivatives party. We expect the relationship disclosure information to explain which asset classes the derivatives firm deals in and explain the different types of derivative products that the derivatives firm can transact with the derivatives party. The information required to be delivered under paragraph 19(1)(a) may be provided orally or in writing.

Describe the types of risks that a derivatives party should consider

Subparagraph 19(1)(b)(i) requires a derivatives firm to provide an explanation of the risks associated with the derivatives products being transacted, including any specific risks relevant to the derivatives offered and strategies recommended to the derivatives party. The risks disclosed may include market, credit, liquidity, operational, legal and currency risks, as applicable.

The information required to be delivered under paragraph 19(1)(b) may be provided orally or in writing.

Describe the risks of using leverage to finance a derivative to a derivatives party

Paragraph 19(1)(c) contemplates that a derivatives firm will disclose the risk of leverage to all derivatives parties, regardless of whether or not the derivatives party uses leverage or the derivatives firm recommends the use of borrowed money to finance any part of a transaction. Using leverage means that derivatives parties are only required to deposit a percentage of the total value of the derivative when entering into a transaction. This effectively amounts to a loan by the derivatives firm to the derivatives party. However, the derivatives party's profits or losses are based on changes in the total value of the derivative. Leverage magnifies a derivatives party's profit or loss on a transaction, and losses can exceed the amount of funds deposited.

Posting of the disclosure on a derivative firm's website in a readily accessible location will be sufficient for purposes of ensuring the relevant disclosure has been provided (and refreshed as appropriate) provided the derivatives firm directs the relevant derivatives party to the website before executing a transaction with or on behalf of a derivatives party.

Subsection 19(2) – Disclosure before transacting in a derivative

We understand that the use of the term "price" is not always appropriate in relation to a derivative or transaction in a derivative. Therefore, under paragraph 19(2)(b), disclosure with respect to spreads, premiums, costs, etc., could be more appropriate than the price.

Section 20 – Daily reporting

In respect of a transaction involving a managed account, we expect the derivatives dealer to make the information required under subsection 20(1) available to the derivatives adviser that is acting on behalf of the managed account. Whereas in respect of the same transaction, the derivatives adviser that is acting for a managed account is only required to make the information required under subsection 20(2) available to the derivatives party on a monthly basis.

We do not expect a derivatives dealer under subsection 20(1) to make the daily mid-market mark (or valuation) available to a derivatives party for a derivative that is cleared through a regulated clearing agency because we expect that derivatives parties will already be able to access valuation information from the clearing agency. However, we do expect the derivatives dealer to notify the derivatives party of its right to request and receive the clearing agency's daily mid-market mark.

We expect this information to be available to a derivatives party in an electronic form (such as through an online platform that allows the derivatives party to see the value of its derivatives position). The derivatives firm should provide its derivatives parties with guidance on how to access this information before executing a transaction with or on behalf of a derivatives party and whenever the derivatives firm makes a change to the way the information is provided to a derivatives party.

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

The notice required under section 21 may be provided by a derivatives firm to a derivatives party in standard form industry documentation; a separate statement is not required to be provided to satisfy the obligations of this section.

DIVISION 2 – DERIVATIVES PARTY ASSETS

The obligations in this Division, other than sections 23 [*Interaction with other Instruments*] and 24 [*Segregating derivatives party assets*], do not apply if a derivatives firm is dealing with or advising an eligible derivatives party that is not an individual or an eligible commercial hedger, or an eligible derivatives party that is an individual or an eligible commercial hedger that has waived these obligations.

Section 23 – Interaction with other instruments

A derivatives firm is exempt from the requirements of this Division in respect of derivatives party assets if the derivatives firm is subject to and complies with or is exempt from sections 3 to 8 of NI 94-102 in respect of the derivatives party assets. The exemption from the requirements of this Division set out in paragraph (a) also extends to derivatives firms that rely on substituted compliance under NI 94-102.

A derivatives firm is exempt from the requirements of this Division in respect of derivatives party assets if the derivatives firm is subject to and complies with securities legislation relating to margin and collateral requirements or National Instrument 81-102 *Investment Funds* in respect of derivatives party assets. The exemption from the requirements of this Division on this basis extends to derivatives firms that rely on exemptions from the requirements under securities legislation relating to margin and collateral requirements.

Section 24 – Segregating derivatives party assets

A derivatives firm is required to segregate derivatives party assets from its own property and from the property of the firm's other derivatives parties either by separately holding or accounting for derivatives party assets.

Section 25 – Holding initial margin

We expect a derivatives firm to take reasonable efforts to confirm that the permitted depository holding initial margin

- qualifies as a permitted depository under the Instrument,
- has appropriate rules, policies and procedures, including robust accounting practices, to help ensure the integrity of the derivatives party assets and minimize and manage the risks associated with the safekeeping and transfer of the derivatives party assets,
- maintains securities in an immobilized or dematerialized form for their transfer by book entry,

- protects derivatives party assets against custody risk through appropriate rules and procedures consistent with its legal framework,
- employs a robust system that ensures segregation between the permitted depository's own property and the property of its participants and segregation among the property of participants and ,where supported by the legal framework, supports operationally the segregation of property belonging to a derivative party on the participant's books and facilitates the transfer of derivatives party assets,
- identifies, measures, monitors, and manages its risks from other activities that it may perform, and
- facilitates prompt access to initial margin, when required.

If a derivatives firm is a permitted depository, as defined in the Instrument, it may hold derivatives party assets itself and is not required to hold derivatives party assets at a third-party depository. For example, a Canadian financial institution that acts as a derivatives firm would be permitted to hold derivatives party assets provided it did so in accordance with the requirements of the Instrument. Where a derivatives firm deposits derivatives party assets with a permitted depository, the derivatives firm is responsible for ensuring the permitted depository maintains appropriate books and records to ensure the derivatives party assets can be attributed to the derivatives party.

Section 26 – Investment or use of initial margin

Section 26 requires that a derivatives firm receive written consent from a derivatives party before investing or otherwise using collateral provided as initial margin. In order to provide consent a derivatives party needs to be made aware of and agree to any potential investment or use. If applicable, we expect such disclosure to take the form of the disclosures provided by paragraph 18(2)(k) [*Relationship disclosure information*], which requires the derivatives firm to disclose the manner in which the assets are used or invested and to provide a description of the risks and benefits to the derivatives party that arises from the derivatives firm having access to use or invest derivatives party assets.

DIVISION 3 – REPORTING TO DERIVATIVES PARTIES

The obligations in this Division, other than subsection 27(1) [*Content and delivery of transaction information*], do not apply if a derivatives firm is dealing with or advising an eligible derivatives party that is not an individual or an eligible commercial hedger, or an eligible derivatives party that is an individual or an eligible commercial hedger that has waived these obligations.

Section 27 – Content and delivery of transaction information

Requirement to deliver a confirmation to all derivatives parties

The requirement to provide a written confirmation under subsection 27(1) can be satisfied by electronic confirmations (including SWIFT confirmations) as well as confirmations (or certain provisions within a confirmation) that are otherwise capable of being represented in computer code in accordance with standards developed by relevant industry associations from time to time.

Paragraph 27(1)(b) allows for a confirmation to be delivered to a derivatives adviser on behalf of a derivatives party, provided the derivative party has consented to this in writing. A client typically authorizes or gives consent to its derivatives adviser to receive the transaction confirmation on its behalf in an investment management agreement. In our view, this practice is consistent with the requirement in paragraph 27(1)(b). We do not intend to alter the market practice for a derivatives dealer to deliver the confirmation to the derivatives adviser as agent for the derivatives party and we do not expect a derivatives adviser to obtain an entirely new and separate written direction from a derivatives party.

Where a transaction is executed on a derivatives trading facility (or analogous trading venue), we understand the trade confirmation will be provided by the derivatives trading facility pursuant to the terms in its rulebook to each of the counterparties to the transaction and therefore, we would not expect a derivatives firm in this scenario to provide a separate and additional trade confirmation to a derivatives party.

Additional requirements, where applicable, for confirmations delivered to non-eligible derivatives parties

Subsection 27(2) applies only to transactions with a non-eligible derivatives party. This subsection is intentionally flexible – it requires information to be disclosed only to the extent that information applies to the transaction in question. We are of the view that the written description of the derivative transacted required by paragraph 27(2)(a) for transactions would be fulfilled by providing a plain language description of the asset class of the derivative and the features of the derivative (e.g., fixed for floating interest rate swap with CDOR as the reference rate).

Section 28 – Derivatives party statements

We interpret "delivery" of a statement referred to in subsection 28(1) to include a statement that is made available to a derivatives party through the derivatives firm website or that is posted to a derivative's party's online account with the derivatives firm.

We are of the view that the description of the derivative transacted required by paragraphs 28(2)(b) and (3)(a) would be fulfilled by providing a plain language description of the asset class of the derivative and the features of the derivative (e.g., fixed for floating interest rate swap with CDOR as reference rate).

PART 5
COMPLIANCE AND RECORDKEEPING

DIVISION 1 – COMPLIANCE

The objective of this Division is to further a culture of compliance and personal accountability within a derivatives firm. Section 31 imposes certain obligations on a senior derivatives manager of a derivatives dealer, further discussed below, with respect to ensuring compliance by individuals performing activities relating to transacting in, or advising in relation to, derivatives within the area of the business the senior derivatives manager is responsible for, which is referred to in the Instrument and below as a "derivatives business unit".

Sections 30 and 32 set out certain obligations on the derivatives dealer regarding policies and procedures relating to compliance and responding to material non-compliance. We are of the view that a derivatives dealer should be afforded flexibility with respect to who fulfills these obligations of the derivatives dealer. The obligations on the derivatives dealer under these sections may be carried out by, for example, one or more senior derivatives managers designated by the derivatives dealer.

Section 30 also sets out certain obligations on the derivatives adviser regarding policies and procedures relating to compliance; however, the "senior derivatives manager" requirements in this Division (sections 31 and 32) are not applicable to derivatives advisers.

Section 29 – Definitions

Derivatives business unit

The definition of "derivatives business unit" is not intended to dictate that a derivatives dealer must organize its derivatives activity in any particular organizational structure. Depending on the size of the derivatives dealer, a derivatives business unit could relate to, for example, a class of derivatives, an asset class or sub-asset class, a business line or a division of the derivatives department of the derivatives dealer.

Senior derivatives manager

The definition of "senior derivatives manager" refers to the individual designated as primarily responsible for a particular derivatives business unit and who manages or has significant influence over its activity on a day-to-day basis. This definition is intended to lead to the designation of the individual responsible for

- the management or conduct of a derivatives business unit, including implementing, within the derivatives business unit, management of business priorities, risk management and operational efficiency and streamlining processes with respect to a class of derivatives, an asset class or sub-asset class, a business line or a division of the derivatives department, and,
- operationalizing, within the derivatives business unit, policies and procedures relating to compliance established by the department that is responsible for compliance of the derivatives dealer.

In a large financial institution, a "senior derivatives manager" may refer to a business manager.

Section 30 – Policies and procedures

General principle

A strong culture of compliance, which focuses not only on compliance with applicable rules and regulations but also emphasizes the importance of personal integrity and the need to deal with a derivatives party fairly, honestly and in good faith, is the responsibility of each individual acting on behalf of a derivatives firm in its derivatives operations with respect to derivatives activity.

Establishing a compliance system

Toward that end, section 30 requires a derivatives firm to establish, maintain and apply policies and procedures and a system (i.e., a "**compliance system**") of controls and supervision sufficient to provide reasonable assurance that

- the derivatives firm and those acting for it, as applicable, comply with applicable securities legislation,
- the derivatives firm and each individual acting on its behalf manage derivatives-related risks prudently,
- individuals performing a derivatives-related activity on behalf of the firm, prior to commencing the activity and on an ongoing basis,
  - possess the experience, education and training that a reasonable person would consider necessary to perform these activities in a competent manner, and
  - conduct themselves with integrity.

We expect that the policies, procedures and controls referred to in section 30 include internal controls and monitoring that are reasonably likely to identify non-compliance at an early stage and would allow the derivatives firm to correct non-compliance in a timely manner.

We do not expect that the policies, procedures and controls referred to in section 30 be applicable to derivatives firm's activities other than its activities relating to transacting in, or advising in relation to, derivatives. For example, a derivatives dealer may also be a reporting issuer. The policies, procedures and controls established to monitor compliance with the Instrument would not necessarily reference matters related only to the derivatives firm's status as a reporting issuer. Nevertheless, a derivatives firm would not be precluded from establishing a single set of policies, procedures and controls (i.e., a firm-wide policy) related to the derivatives firm's compliance with all applicable securities laws.

We expect a derivatives firm, from time to time, to review, assess and update its policies, procedures and controls to adapt to or reflect changes in applicable securities laws, as well as industry practices/norms (including, the adoption of voluntary codes of conduct).

We interpret "risks relating to its derivatives activities" in paragraph 30(1)(b) to include the risks inherent in derivatives trading (including credit risk, counterparty risk, and market risk) that relate to a derivatives firm's overall financial viability.

Paragraph 30(c) – Policies and procedures relating to individuals

Paragraph 30((c) establishes a reasonable person standard with respect to proficiency, rather than prescribing specific courses or other training requirements. However, we note that a derivatives firm and an individual transacting in, or providing advice in relation to, a derivative on behalf of the derivatives firm may be subject to more specific education, training and experience requirements, including under other securities legislation, if applicable.

Subparagraph 30(c)(i) contemplates that industry experience can be a substitute for formal education and training. We are of the view that this is particularly relevant in respect of formal education and training prior to commencing an activity on behalf of the derivatives firm relating to transacting in, or providing advice in relation to, a derivative. However, we expect that all individuals who perform such activity receive appropriate training on an ongoing basis. We expect training program to include compliance training, periodic training sessions on fundamentals and other relevant developments to the derivatives market, as well as training on new derivatives products and services.

Subparagraph 30(c)(iii) relates to integrity of the individuals who perform an activity on behalf of the derivatives firm relating to transacting in, or providing advice in relation to, a derivative. We expect individuals performing such activities to conduct themselves with integrity, which includes honesty and good faith, particularly in dealing with clients.

Prior to employing an individual in a derivatives business unit, we expect that a derivatives firm will assess the integrity of the individual by having regard to the following:

- references provided by previous employers, including any relevant complaint of fraud or misconduct against the individual;
- if the individual has been subject to disciplinary action by its previous employer or to any adverse finding or settlement in civil proceedings;
- whether the individual has been refused the right to carry on a trade, business or profession requiring a licence, registration or other professional designation;

- in light of the individual's responsibility, whether the individual's reputation may have an adverse impact on the firm for which the activity is to be performed.

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

Section 31 – Designation and Responsibilities of a senior derivatives manager[5]

Paragraph 31(1)(a) imposes an obligation on a derivative dealer to designate a senior derivatives manager in respect of a derivatives business unit (unless the derivatives dealer is exempt from this obligation under section 31.1 - Exemptions from the designation and responsibilities of a senior derivatives managers).

Depending on its size, level of derivatives activity and organizational structure, a derivatives dealer may have a number of different derivatives business units and therefore, it would be appropriate to designate a senior derivatives manager for each business unit. For example, a large dealer with multiple trading desks covering different products may have a number of different senior managers. The specific title or job description of the individual designated as "senior derivatives manager" for a derivatives business unit could vary between derivatives dealers, depending once again on their size, level of derivatives activity and organizational structures. In general, we would not expect that the same individual would be designated as the senior derivatives manager for more than one derivatives business unit.

Except in a small derivatives dealer operating a single derivatives business unit, a senior derivatives manager should not be the same individual as the chief executive officer of the derivatives dealer, or another individual registered under securities legislation.

It is the responsibility of the derivatives dealer to identify within the organizational structure of their business the individual that should be designated as the senior derivatives manager of a derivatives business unit.

Following implementation of the Instrument, we expect to monitor the process derivatives dealers use to identify the individual or individuals that are designated as senior derivatives managers.

Paragraph 31(1)(b) – responsibilities of senior derivatives manager

Under paragraph 31(1)(b), an appropriate response to non-compliance is a contextual determination, depending on the harm or potential harm, of the non-compliance. We are of the view that an appropriate response could include one or more of the following, depending on the circumstances:

- rectifying the non-compliance;
- disciplining one or more individuals who perform an activity on behalf of the derivatives firm relating to transacting in, or providing advice in relation to, a derivative;
- working with a chief compliance officer or other person responsible for the policies, to improve (or recommending improvements to) processes, policies and procedures aimed at ensuring compliance with the Instrument, applicable securities legislation and the policies and procedures required under section 30 [*Policies, procedures and designation*].

An appropriate response could include directing a subordinate to respond to the non-compliance.

A senior derivatives manager's responsibilities under this Division apply to the senior derivatives manager even in situations where that individual has delegated his or her responsibilities.

Subsection 31(3) – Senior derivatives manager's report to the board

Whether non-compliance with the Instrument or applicable securities legislation is "material" will depend on the specific circumstances. For example, material non-compliance with respect to a small, unsophisticated derivatives party may differ from the material non-compliance with respect to a large, more sophisticated derivatives party. Further, if the non-compliance is part of a continual pattern or practice of activities constituting non-compliance within the derivatives business unit or by an individual employee within the derivatives business unit, even if a single incident of non-compliance would not be material, the pattern of non-compliance itself may be "material". Any single incident of fraud, price fixing, manipulation of benchmark rates, or front-running of trades would be considered material.

[5] NTD. Deleted because this is already covered in s. 29 definitions (including it here was duplicative and the wording was a bit different). Also note it was raised that the expression "implementing operational risk" did not make sense. It's a good point. Surely, we don't intend for a senior manager to 'implement risk'! So the language was rephrased in the section below that deals with explaining who a 'senior manager is'.

We expect that in complying with the requirement to submit a report under paragraph 31(3)(b) to the board of directors, that reasonable care will be exercised in determining when and how often material non-compliance should be reported to the board. For example, in a case of serious misconduct, we expect the board to be made aware promptly of the misconduct. In the ordinary course, it may otherwise be appropriate to consolidate the senior derivatives manager's report into an annual report; however, the senior derivatives manager should be involved in preparing the report on behalf of the derivatives business unit, even in the circumstances where the senior derivatives manager's obligation to submit the report to the board of directors is being fulfilled by the derivatives dealer's chief compliance officer.

Section 31.1 - Exemptions from the designation and responsibilities of a senior derivatives manager

The exemptions from the designation and responsibilities of a senior derivatives manager in section 31 are available to a derivatives dealer that satisfies the requirements necessary to rely on either,

- the exemption in section 31.1(1) for derivatives dealers whose aggregate month-end gross notional amount of derivatives outstanding in any of the previous 24 months does not exceed $250 million, or
- the exemption in section 31.1.(2) for derivatives dealers that deal solely in commodity derivatives and whose aggregate month-end gross notional amount of commodity derivatives outstanding in any of the previous 24 months does not exceed $3 billion.

The term "notional amount" used in sections 31.1(1) and 31.1(2) should be calculated by determining the aggregate month-end gross notional amount under all outstanding derivatives below the threshold specified in each section.

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. We expect the method that derivatives dealers use for determining how the monetary notional amount should be calculated is taken from the Technical Guidance - *Harmonisation of critical OTC derivatives data elements (other than UTI and UPI)* published in April of 2018 by the Committee on Payments and Market Infrastructures and the Board of the International Organization of Securities Commissions. It is commonly referred to as the CDE methodology.

Section 32 – Responsibility of a derivatives dealer to report material non-compliance to the regulator or securities regulatory authority

The requirement on a derivatives dealer to make a report to the regulator under section 32 will depend on whether the particular non-compliance would reasonably be considered by the derivatives dealer to be non-compliance with the Instrument or applicable securities legislation and create a risk of material harm to a derivatives party or to capital markets, or otherwise reflect a significant pattern of non-compliance.

The derivatives dealer 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 the material harm to a large, more sophisticated derivatives party.

We expect that the report to the regulator could be provided by any one of the following individuals:

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

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

(c) if the derivatives dealer has other significant business activities, the officer in charge of the division of the derivatives firm that acts as a derivatives dealer; or

(d) the chief compliance officer of the derivatives dealer.

See Appendix A of this Policy for the suggested form that a derivatives dealer may use to report the type of non-compliance contemplated in section 32 to the regulator.

This section does not apply to derivatives advisers.

DIVISION 2 – RECORDKEEPING

Section 33 – Derivatives party agreement must establish all material terms

The Instrument does not prescribe a form of agreement. Appropriate subject matter for the derivatives party agreement typically includes terms addressing payment obligations, netting of payments, events of default or other termination events, calculation and

netting of obligations upon termination, transfer of rights and obligations, governing law, valuation, and dispute resolution. In determining whether the requirements of section 33 are met, we would generally take into consideration harmonized disclosure, reporting and other documentary practices that may be developed from time to time by global trade associations in standard form industry documentation based on requirements applicable in the major global markets.

The process of reaching an agreement with a new counterparty may involve setting out the essential terms before the transaction, followed by more general terms (such as events of default) in the trade confirmation, prior to executing a master agreement. We would accept in some circumstances that this process could satisfy the obligations in section 33. We expect that the agreement would also cover other areas as appropriate in the context of the transactions into which the parties will enter. For example, where transactions will be subject to margin, we expect the agreement to include terms that cover margin requirements, assets that are acceptable as collateral, collateral valuation methods, investment and rehypothecation of collateral, and custodial arrangements for initial margin, if applicable.

We understand that it is not market practice by Canadian market participants for certain types of foreign exchange transactions to be documented in standard form industry documentation. Rather, firms will typically rely on a trade confirmation (including a SWIFT confirmation) to evidence the agreement between the parties. In this circumstance, we would generally accept that the requirements in section 33 can also be satisfied through a trade confirmation (including a SWIFT confirmation) required to be delivered under subsection 27(1), which may not include all the terms that are otherwise typically included in standard form industry documentation.

Section 34 – Records

Section 34 imposes a general obligation on a derivatives firm to keep full and complete records relating to the derivatives firm's derivatives, transactions in derivatives, and all of its business activities relating to derivatives, trading in derivatives or advising in derivatives. These records must be kept in a form that is readily accessible and searchable. This list of records is not intended to be exhaustive but rather sets out the minimum records that must be kept. We expect a derivatives firm to consider the nature of its derivatives-related activity when determining the records that it must keep and the form of those records.

The principle underlying section 34 is that a derivatives firm should document, through its records,

- compliance with all applicable securities legislation (including the Instrument) for its derivatives-related activities,
- the details and evidence of each derivative which it has been a party or in respect of which it has been an agent,
- the circumstances surrounding the entry into and termination of those derivatives, and
- related post-transaction matters.

We expect, for example, a derivatives firm to be able to demonstrate, for each derivatives party, the details of compliance with the obligations in section 10 [*Know your derivatives party*] and, if applicable, the obligations in section 13 [*Derivatives-party-specific needs and objectives*] and section 14 [*Suitability*] (and if sections 13 and 14 are not applicable, the reason as to why they are not).

If a derivatives firm wishes to rely on any exemption or exclusion in the Instrument or other related securities laws, it should be able to demonstrate that the conditions of the exemption or exclusion are met.

With respect to records required under paragraph 34(b), demonstrating the existence and nature of the derivatives firm's derivatives, and records required under paragraph 34(c) documenting the transactions relating to the derivatives, we expect

- a derivatives firm to accurately and fully document every transaction it enters into, and
- to keep records to the extent that they demonstrate the existence and nature of the derivative (this includes documentation capable of being represented in computer code, if the records meet the requirements in the Instrument).

We also expect a derivatives firm to maintain notes of communications that could have an impact on a derivatives party's account or its relationship with the derivatives firm. These records of communications kept by a derivatives firm may include notes of oral and written communications, including all communications by e-mail, regular mail, fax, instant messaging, chat rooms, mobile device, or other digital or electronic media performed across a technology platform.

While a derivatives firm may not need to save every voicemail or e-mail, or record all telephone conversations with every derivatives party, we expect a derivatives firm to maintain reasonable records of all communications with a derivatives party relating to derivatives transacted with, for or on behalf of the derivatives party. What is "reasonable" for larger derivatives firm may be different from what is "reasonable" for a smaller derivatives firm.

Section 35 – Form, accessibility and retention of records

Paragraph 35(1)(a) requires derivatives firms to keep their records in a safe location. This includes ensuring that no one has unauthorized access to information, particularly confidential derivatives party and counterparty information. We expect a 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 expect the derivatives firm to have a confidentiality agreement with the third party.

PART 6
EXEMPTIONS

The Instrument provides several exemptions from the requirements in the Instrument. If a firm is exempt from a requirement in the Instrument, the individuals acting on its behalf are likewise exempt.

DIVISION 1 – EXEMPTION FROM THE INSTRUMENT

Section 36 – Exemption for foreign liquidity providers

General principle

This exemption allows foreign liquidity providers (i.e., foreign derivatives dealers) to transact with derivatives dealers that are located in Canada without being subject to the conduct requirements in the Instrument in order to facilitate access and liquidity in the inter-dealer market.

Availability of the exemption

There are no notice or filing requirements (or any additional conditions) imposed on foreign derivatives dealers relying on this exemption when they transact with local derivatives dealers. Foreign dealers that seek wider access to Canadian derivatives markets on an exempt basis would need to rely on the foreign derivatives dealer exemption in section 38 [*Exemption from this Instrument – foreign derivatives dealers*].

A derivatives dealer that is a Schedule I or Schedule II bank under the *Bank Act* (Canada) is not permitted to rely on this exemption; however, we intend for this exemption to be available to derivatives dealers that are Schedule III banks (foreign bank branches of foreign derivatives dealers authorized under the Bank Act to do business in Canada), since the exemption is intended to be available to a foreign bank (i.e., the foreign legal entity that is counterparty to a transaction with a local derivatives dealer).

For example, a derivatives dealer located in the U.S., regardless of whether it is a registered swaps dealer or otherwise operates under an exemption from having to be registered (because they fall below certain financial thresholds that would require them to register as a U.S. swaps dealer), is exempt from the conduct requirements in the Instrument when transacting with a Canadian financial institution that is a derivatives dealer. Similarly, the conduct requirements in the Instrument would not apply to a derivatives dealer solely in commodities that is located in the U.S., regardless of whether it is a registered swaps dealer or otherwise operates under an exemption from having to be registered (because they fall below certain financial thresholds that would require them to register as a U.S. swaps dealer), when they are transacting with a person or company referenced in paragraph 36(a).

For the purposes of this exemption, we consider “securities, commodity futures or derivatives legislation in a foreign jurisdiction” to include banking legislation of a foreign jurisdiction.

Section 37 – Exemption for certain derivatives end-users

Section 37 provides an exemption from the provisions of the Instrument for a person or company that does engage in the activities described in section 37 and not have the status described in section 36.

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 referred to in paragraphs 37(1)(a) to (e) 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.

Section 38 – Foreign derivatives dealers

General principle

Section 38 provides an exemption from the provisions of the Instrument for foreign derivatives dealers that are regulated under the laws of a foreign jurisdiction to conduct the activities it proposes to conduct with an eligible derivatives party in Canada that achieve comparable regulatory outcomes to the requirements in the Instrument.

Availability of the exemption

The exemption is available to foreign derivatives dealers whose head office or principal place of business is in a jurisdiction listed in Appendix A, if the transaction is with persons or companies that are eligible derivatives parties. The regulator may designate additional jurisdictions for the purposes of Appendix A. For other jurisdictions to be designated, either the foreign regulator, market participants or relevant industry associations would need to apply to the regulator for consideration.

With respect to foreign derivatives dealers that are foreign banks whose home jurisdiction is listed on Appendix A and that operate a foreign bank branch in Canada (i.e., a Schedule III bank under the *Bank Act* (Canada)), this exemption will extend to its Canadian branches.

This exemption is only available where a foreign derivatives dealer complies with the laws of the foreign jurisdiction specified in Appendix A that are applicable to the dealer with respect to its derivatives activities with a derivatives party located in Canada. If a foreign derivatives dealer is not subject to regulations in its 'home' jurisdiction with respect to its derivatives activities, including where it relies on an exclusion or an exemption (including discretionary relief) from those regulations in the foreign jurisdiction, the exemption in section 38 will not be available. If the foreign derivatives dealer relies on an exclusion or exemption in the foreign jurisdiction (or there is otherwise no regulatory regime that applies to its derivatives activities with a derivatives party), it would need to apply to the relevant securities regulatory authorities for consideration of similar exemptive or discretionary relief from the Instrument.

Report to regulator

The requirement to report to the regulator provided in paragraph 38(1)(d) will depend on whether the instance or instances of non-compliance would reasonably be considered by the derivatives dealer to be material non-compliance with the laws of the foreign jurisdiction relating to trading in derivatives and create a risk of material harm to a derivatives party or to capital markets, or otherwise reflect a significant pattern of non-compliance. Whether the harm is "material" will depend on the specific circumstances. What constitutes "material harm" to a small derivatives party that is a commercial hedger may differ from what constitutes "material harm" to a large, more sophisticated derivatives party.

If the report provided in paragraph 38(1)(d) first requires notification to the regulator in its home jurisdiction, we expect the report to be provided to the Canadian regulator within a reasonable period of time after the derivatives dealer has provided the notification. The report can be made to the regulator by a chief compliance officer, chief executive officer (or if the derivatives dealer does not have a chief executive officer, an individual acting in a capacity like that of a chief executive officer) or the officer in charge of the division of the derivatives firm that acts as a derivatives dealer.

See Appendix A of this Policy for a suggested form a derivatives dealer may use to report material non-compliance to the regulator in accordance with paragraph 38(1)(d). We recognize that depending on the facts and circumstances that it may be appropriate for a foreign derivatives dealer to provide a report to the Canadian regulator using the form of report that was filed by the foreign derivatives dealer in its home jurisdiction.

Additional conditions

This exemption in section 38 is available if the foreign derivative dealer is dealing only with persons or companies that are eligible derivatives parties. The foreign derivatives dealer must comply with the conditions set out in subsection 38(2).

Foreign derivatives dealers are only expected to file one submission to jurisdiction form to the regulator. In other words, if a foreign derivative dealer files a Form 93-101F1 *Submission to Jurisdiction and Appointment of Agent for Service* with the regulator, this satisfies the filling requirement.

DIVISION 2 – EXEMPTIONS FROM SPECIFIC PROVISIONS IN THE INSTRUMENT

Section 39 – Investment dealers

Section 39 of the Instrument includes an exemption from certain provisions in the Instrument that are listed in Appendix B for a derivatives dealer that is a dealer member of IIROC provided the derivatives dealer complies with the corresponding IIROC provisions relating to a transaction with a derivatives party. We regard compliance with applicable IIROC procedures, interpretations, notices, bulletins and practices as relevant to compliance with the applicable IIROC provisions.

A derivatives dealer cannot rely on this exemption unless (i) they are complying with the IIROC requirements that correspond to the provisions specified in Appendix B and (ii) notify the regulator of material non-compliance with the IIROC requirements that correspond to the provisions specified in Appendix B.

Section 40 – Canadian financial institutions

Section 40 of the Instrument includes an exemption from certain provisions in the Instrument that are listed in Appendix C for a derivatives dealer that is a Canadian financial institution that is prudentially regulated by the Office of the Superintendent of Financial Institutions (**OSFI**) provided the derivative dealer complies with the corresponding OSFI requirements or Bank Act provisions relating to a transaction with a derivatives party. We regard compliance with applicable OSFI guidelines, rules, regulations, interpretations, advisory and practices of OSFI as relevant to compliance with the applicable OSFI requirements.

A derivatives dealer cannot rely on this exemption unless (i) they are complying with the OSFI requirement or Bank Act requirements that correspond to the provisions specified in Appendix C and (ii) notify the regulator of material non-compliance with the OSFI requirements or Bank Act requirement that correspond to the provisions specified in Appendix C.

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

Where a derivatives dealer enters into a transaction with a derivatives party on an derivatives trading facility or an analogous platform or trading venue (e.g., a trading facility referred to as a swap execution facility under CFTC rules or a multilateral trading facility under E.U. rules), it may not be possible for the derivatives dealer to establish the identity of the derivatives party prior to entering into the transaction. We understand that a trading facility would perform know-your-derivatives party diligence prior to accepting a derivatives party for trading on the platform, as well as provide trade confirmation to each counterparty to a transaction; accordingly, this section of the Instrument includes an exemption for the derivatives dealer in these circumstances, as well as other pre-transaction level requirements that cannot be fulfilled due to the fact that the identity of the derivatives party is unknown at the time the transaction is executed.

We do not expect that derivatives trading facilities rules will permit non-eligible derivatives parties to transact on a derivatives trading facility.

DIVISION 3 – EXEMPTIONS FOR DERIVATIVES ADVISERS

Section 42 – Advising generally

Section 42 contains an exemption from the requirements applicable to a derivatives adviser if advice does not purport to be 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 42(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.

Section 43 – Foreign derivatives adviser

General principle

Section 43 provides, in respect of advice provided to a derivatives party, an exemption from the provisions in the Instrument for foreign derivatives advisers that are regulated under the laws of a foreign jurisdiction to conduct the activities it proposes to conduct with an eligible derivatives party in Canada that achieve comparable regulatory outcomes to the requirements in the Instrument.

There is a separate exemption in section 45 [*Exemption – registered advisers under securities or commodities futures legislation*] for derivatives advisers that are registered as an adviser under securities or commodity futures legislation.

Availability of the exemption

The exemption is available to foreign derivatives advisers whose head office or principal place of business is in a jurisdiction listed in Appendix D in respect of derivatives-related advice given to persons or companies that are eligible derivatives parties. The

regulator may designate additional jurisdictions for the purposes of Appendix D. For other jurisdictions to be designated, either the foreign regulator, market participants or relevant industry associations would need to apply to the regulator for consideration.

This exemption is only available where a foreign derivatives adviser complies the laws of the foreign jurisdiction specified in Appendix D that are applicable to the adviser with respect to its derivatives activities with a derivatives party located in Canada. If a foreign derivatives adviser is not subject to regulations in its 'home' jurisdiction with respect to its derivatives activities, including where it relies on an exclusion or an exemption (including discretionary relief) from those regulations in the foreign jurisdiction, the exemption in section 43 will not be available. If the foreign derivatives adviser relies on an exclusion or exemption in the foreign jurisdiction, it would need to apply to the relevant securities regulatory authorities for consideration of similar exemptive or discretionary relief from the Instrument.

Additional conditions

The foreign derivatives adviser must comply with each of the conditions set out in subsection 43(2). The disclosures provided in paragraph 43(2)(b) can be made by a derivatives adviser in account opening documentation.

Section 44 – Foreign derivatives sub-adviser

The exemption is available to foreign derivatives sub-advisers whose head office or principal place of business is in a jurisdiction listed in Appendix E.

This exemption permits a foreign derivatives sub-adviser to provide advice to certain derivatives advisers (and derivatives dealers), without having to register as an adviser in Canada. In these arrangements, the derivatives adviser or derivatives dealer is the foreign derivatives sub-adviser's client, and it receives the advice, either for its own benefit or for the benefit of its clients. One of the conditions of this exemption is that the derivatives adviser or derivatives dealer has entered into an agreement with its client that it is responsible for losses that arise out of certain failures by the sub-adviser. We expect that a derivatives firm taking on this liability will conduct appropriate initial and ongoing due diligence on the sub-adviser and ensure the investments are suitable for their client. We also expect that the derivatives firm will maintain records of the due diligence conducted.

Section 45 – Registered advisers under securities or commodity futures legislation

Registered advisers under securities or commodities futures legislation are exempt from the provisions listed in Appendix E. This exemption is available to registered advisers provided they comply with the corresponding requirements in NI 31-103 in respect of their derivatives activity.

This exemption is intended to allow registered advisers to extend their existing compliance systems to cover their derivatives activities with their clients for requirements related to for example, among other things, the suitability requirement and referral arrangements (section 14 – [*Suitability*] and section 15 – [*Permitted referral arrangements*] provided they comply with the corresponding provisions found in NI 31-103 with respect to their derivatives activities with a client. The remaining provisions that apply to registered advisers in respect of their derivatives activity are principles based and therefore, we similarly expect for their existing compliance systems to accommodate the application of the core principles such as the fair dealing obligations.

PART 8
TRANSITION AND EFFECTIVE DATE

Section 47 – Transition for existing non-individual derivatives parties

Under the Instrument, a derivatives firm may qualify for specific exemptions where each of its derivatives parties is an eligible derivatives party. The transition provision will allow the derivatives firm to rely on existing representations it has received that a derivatives party is a permitted client, accredited counterparty (in Québec), a qualified party (in a number of jurisdictions) or an eligible contract participant.

This transition provision is only available for use by a derivatives firm with respect to non-individual clients. It expires 5 years after the effective date of the Instrument.

A derivatives firm that has previously obtained a representation from a derivatives party as to its status as a permitted client**,** qualified party, accredited counterparty, or as an eligible contract participant in the context of similar rules in the United States, prior to the effective date of the Instrument – for example, in documentation such as an ISDA master agreement, account opening documentation or an investment management agreement – is able to treat the derivatives party as having represented to the derivatives firm that it qualifies as an "eligible derivatives party" for the purposes of the Instrument. As long the derivatives firm obtained the status representation and could rely on that representation before the Instrument came into force, then the derivatives firm may rely on that representation until the transition period expires.

Following the effective date of the Instrument, the expectation is that documentation, for example an ISDA master agreement, account opening documentation or an investment management agreement, used by a derivatives firm to confirm the derivatives

party's status under the Instrument, will refer exclusively to the definition and categories of eligible derivatives party. This expectation applies to any transaction entered into with a derivatives party where the derivatives firm has not confirmed a derivatives party's status or in circumstances where the derivatives firm establishes an entirely new relationship with a derivatives party.

If a sophisticated derivatives party (such as a pension fund) enters into a derivative transaction with a derivatives firm following the effective date of the Instrument and the derivatives firm has already confirmed the derivatives party's status as an existing sophisticated derivatives party in writing – for example, in documentation such as an ISDA master agreement, account opening documentation or an investment management agreement where a derivatives party has represented that it is a "permitted client" – the derivatives firm is able to treat the derivatives party as having represented to the derivatives firm that the derivatives party is an eligible derivatives party. If a derivatives firm enters into a derivatives transaction following the effective date of the Instrument with a sophisticated derivatives party and the derivatives firm has not previously obtained a "permitted client" representation from the derivatives party, the derivatives firm is required to confirm a derivatives party's status on the basis of the definition and the categories of eligible derivatives party in subsection 1(1) of the Instrument. We would generally expect that derivatives firms that are updating information relating to derivatives parties after the effective date of the Instrument and prior to the expiry of the transition period would begin to collect information about the status of the derivatives party as an eligible derivatives party.

The definition of "permitted client" does not include a "eligible commercial hedger". In any circumstance where a derivatives party is relying on the "eligible commercial hedger" category to qualify as an eligible derivatives party, the derivatives firm is required to confirm a derivatives party's status as an eligible derivatives party by using the definition and the categories of eligible derivatives party in subsection 1(1) of the Instrument.

Section 48 – Transition for existing transactions

For any transaction that a derivatives firm enters into with a derivatives party prior to the effective date of the Instrument, if the derivatives firm has already determined that the derivatives party qualifies as a permitted client, accredited counterparty, qualified party, or an eligible contract participant under applicable U.S. legislation., only the fair dealing obligation (section 8 [*Fair dealing*]) applies with respect to such transaction.

Section 49 – Effective Date

The Instrument comes into force on [●] (the **in-force date**). Any transaction entered into by a derivatives firm from this date forward is subject to the terms of the Instrument.

In Saskatchewan, if the Instrument is filed with the Registrar of Regulations after the in-force date, the Instrument comes into force on the day on which they are filed with the Registrar of Regulations.

With respect to transactions that pre-date the in-force date, only section 8 [*Fair dealing*] will apply if the following conditions are met:

- the transaction was entered into before the in-force date; and
- the derivatives firm has taken reasonable steps to determine that its derivatives party is either (i) a "permitted client" under NI 31-103, (ii) an "accredited counterparty" under the *Derivatives Act* (Quebec), (iii) a "qualified party" as that term is defined the relevant blanket orders in the provinces of Alberta, British Columbia, Manitoba, New Brunswick or Nova Scotia, or (iv) an "eligible contract participant" as that term is defined under Section 1(a)(18) of the United States Commodity Exchange Act.

In our view, taking "reasonable steps" would include having received a written representation, provided the derivatives firm has no information or reason to question the accuracy of that representation.

Appendix A

Suggested form of report for reportable material non-compliance under section (32) and subsection 38(1)

1. Identify any entities, business units, and/or individuals involved.

2. Provide details of the non-compliance, including its context (describe how and by whom the issue was identified (derivatives party complaints, internal testing or audit, other surveillance) setting out whether it relates to (a) a risk of material harm to a derivatives party, (b) a risk of material harm to capital markets, and/or (c) is part of a pattern of non-compliance.

3. Provide a timeline setting out when in relation to question 2 above, (i) the non-compliance occurred, (ii) the non-compliance was discovered, (iii) the non-compliance was remedied, and (iv) the non-compliance was reported.

4. What steps, if any, have been taken to address/remedy the non-compliance?

ANNEX E

LOCAL MATTERS

As set out in the main body of this Notice, the CSA are publishing the following for a third comment period:

- Proposed National Instrument 93-101 *Derivatives: Business Conduct*;
- Proposed Companion Policy 93-101 *Derivatives: Business Conduct*.

Please refer to the main body of this CSA Notice.

The Proposed Instrument includes revisions that address three of the burden reduction initiatives identified in the OSC Report entitled Reducing Regulatory Burden in Ontario's Capital Markets that was published on November 19, 2019 (the **OSC Burden Reduction Report**). Specifically, revisions relating to the following Decisions and Recommendations discussed in the OSC Burden Reduction Report have been included:

- **D-2** Leverage existing regulatory requirements to eliminate duplicative obligations for dealers and advisers that are already registered.
- **D-3** Ensure domestic and foreign dealers remain active in offering OTC derivatives products to institutions hedging commercial risks associated with their businesses.
- **D-4** Expand the availability and ease the use of exemptions for international dealers, and international advisers and sub-advisers.

Regulatory Impact Assessment

A. Overview

The Proposed Instrument is intended to create a uniform approach to derivatives markets conduct regulation in Canada and promote consistent protections for market participants regardless of the derivatives firm they deal with, while also ensuring that derivatives dealers and advisers operating in Canada are subject to consistent internationally harmonized regulation that does not result in any competitive disadvantage. The Proposed Instrument is introducing new requirements only where a derivatives firm is not subject to appropriate conduct oversight and codifying industry practices.

Recognizing that federally regulated financial institutions, IIROC dealer members, registered advisers, foreign derivatives dealers and foreign derivatives advisers may already be subject to comparable requirements to the provisions of the Instrument, exemptions provided in the Instrument allow such firms to leverage off existing frameworks as much as possible. We anticipate many firms already have systems in place to implement and monitor codes of conduct and that implementation and ongoing costs will be incremental to existing costs that derivatives dealers and derivatives advisers currently incur, will vary by firm, and will be influenced by the nature of the derivatives dealer's or derivatives adviser's derivatives party.

The Proposed Instrument, which was developed over the course of an extensive consultation process, aims to facilitate an effective operationalization of its requirements and to ensure that access to derivatives products will not be unduly limited for investors/customers in the Canadian OTC derivatives markets and that costs will remain competitive.

B. Rationale for intervention

The CSA have developed the Proposed Instrument to help protect market participants, reduce risk, improve transparency, increase accountability and promote responsible business conduct in the OTC derivatives markets.

As evident since the financial crisis of 2008, the inappropriate sale of financial investments can have a substantial impact on global financial markets and lead to major losses for retail and institutional investors. There have been numerous cases of serious market misconduct in the global and domestic derivatives markets, including in Ontario. This includes misconduct relating to the manipulation of benchmarks and front-running of customer orders, breaches of client confidentiality and failure to adequately manage conflicts of interest. The International Monetary Fund reported in 2019 that Canada's "[o]ngoing reforms in the areas of conduct of business of over-the-counter (OTC) derivatives and duties towards clients should be completed."[1]

The Proposed Instrument not only protects investors/customers, but also helps promote confidence in Ontario's capital markets and contributes to the stability of Ontario's financial system. The Proposed Instrument requires derivatives firms to transact with investors/customers in compliance with a set of standardized protections that allow investors/customers to make informed

[1] Financial System Stability Assessment of Canada, Country Report No. 19/177 (24 June 2019).

decisions and accurately assess risks, and benefits the public interest through reduced risk, increased transparency and greater market integrity.

The Proposed Instrument aims to prevent the types of losses experienced by a variety of participants in the derivatives market and potential negative consequences for all Ontarian taxpayers, as demonstrated by the global and local examples provided in section "E" below.

C. Proposed intervention

The Proposed Instrument applies to a person or company if it is a "derivatives adviser" or a "derivatives dealer", regardless of whether it is registered or exempted from the requirement to be registered; however, where appropriate, exemptions from specific requirements are provided. The requirements of the Proposed Instrument are tailored depending on the nature of the derivatives dealer's or derivatives adviser's derivatives party.

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

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

D. Stakeholders affected

The stakeholders who will be impacted by the Proposed Instrument are derivatives dealers, derivatives advisers, and investors/customers, as well as, society at large. OSC staff (**we**) have, where feasible, used available information[2] to quantify the number of stakeholders that we anticipate will be impacted.

1. Local derivatives dealers and advisers

We estimate that there are at least 105 local derivatives dealers, of which approximately 15 are federally regulated financial institutions and 20 are IIROC dealer members, and 210 local derivatives advisers that are registered as advisers under securities or commodity futures legislation that will be subject to the Proposed Instrument in Ontario.

2. Foreign derivatives dealers and advisers

We estimate that there are together at least 100 foreign derivatives dealers and advisers that will be subject to the Proposed Instrument in Ontario.

3. Investors/customers

Investors/customers will benefit from the protections of the Proposed Instrument, which will help protect participants in the OTC derivatives markets from unfair, improper or fraudulent practices and foster confidence in Canadian financial markets.[3]

E. Benefits of the Proposed Instrument

In this section, we present our qualitative assessment of the anticipated benefits of the Proposed Instrument on local derivatives dealers and advisers, foreign derivatives dealers and advisers, and investors/customers. Benefits like enhanced financial stability and reduced systemic risk can be difficult to quantify because their magnitude may be unknown or uncertain, or because they are difficult to monetize even if their impact is known.

The Proposed Instrument benefits the public interest. It contributes to the stability of Ontario's financial system through reduced risk and increased transparency, and promotes confidence in Ontario's capital markets through greater market integrity.

[2] Including, data reported to designated trade repositories pursuant to OSC Rule 91-507 *Trade Repositories and Derivatives Data Reporting*.

[3] We have identified 52,374 participants in Ontario's OTC derivatives market using trade repository data from a period between November 2019 to November 2020. This includes: 7,395 organizations located in Ontario; 4,972 organizations located in other parts of Canada; 13,703 foreign organizations; and 26,304 individuals.

Market misconduct can harm a variety of investors/customers, including small business owners, large corporations, pension funds and governments. In addition to investor losses, it can result in the use of capital by participants in derivatives markets to fund lawsuits, settlements, and bankruptcy repayments, whereas that capital could have been used to fund commercial operations and growth, public services and economic growth.

There have been several recent cases of misconduct by some of the largest participants in Ontario's derivatives market:

- In 2019, the Royal Bank of Canada and the Toronto-Dominion Bank paid more than CAD$24 million in settlement with the OSC for compliance failures in their foreign exchange trading businesses, which allowed traders to share confidential customer information in chatrooms with other traders at competitor firms from 2011-2013. In so doing, traders were free to engage in self-serving behaviour that put the banks' economic interests ahead of their customers, other market participants and the integrity of the capital markets.[4]

- In August 2020, the Bank of Nova Scotia settled two enforcement actions brought against the bank by the Commodity Futures Trading Commission (United States) for record-setting penalties totaling USD$127.4 million. The enforcement actions concerned spoofing and making false statements relating to gold and silver futures contracts between 2008-2016, as well as swap dealer compliance and supervision violations and additional false statements between 2012-2020. In a parallel action, the United States Department of Justice deferred criminal prosecution on charges of attempted price manipulation and wire fraud under an agreement that, among other things, involved US$60.4 million in criminal fines, criminal disgorgement, and victim compensation, in addition to requiring the Banks of Nova Scotia to retain an independent compliance monitor.[5]

In addition, consider the following examples of misconduct in the global derivatives markets:

- The municipality of Orange County, California declared bankruptcy in 1994 after experiencing losses of US$1.6 billion related to risky interest rate swaps sold by Merrill Lynch & Co. The result was a significant reduction of public services, including education and health, for residents. Merrill Lynch & Co settled allegations that it had inappropriately sold risky products and used false and misleading materials for US$400 million. Orange County began importing solid waste as part of its bankruptcy plan, using imported trash fees to pay off its debt. In 2017, Orange County fully repaid its bankruptcy debt, having spent roughly US$68 million a year for 22 years on interest and principal repayment.[6]

- Several corporates, including Proctor & Gamble and Gibson Greetings, brought claims against Bankers Trust New York Corporation for selling them risky derivatives products without appropriate disclosures on the risks involved. Bankers Trust New York Corporation ultimately charged off about US$300 million in relation to disputes with clients about its alleged misleading derivative sales.[7]

- As result of a review by the Financial Conduct Authority (United Kingdom) of sales of interest rate hedging products to small business clients, nine banks, including Bank of Ireland and Royal Bank of Scotland, HSBC, and Barclays, paid £2.2 billion in redress (including £500 million to cover consequential losses) to about 13,900 clients.[8]

- Several lenders, including Rabobank Groep, Deutsche Bank AG, and ING Groep NV, accepted reparations plans involving payment of over €1 billion in damages for selling almost 18,000 inappropriate interest rate swaps to small and mid-sized Dutch companies without making the companies aware of the risks involved.[9]

- The collapse of Iceland's banking system in October 2008 was precipitated by the activity of its three largest banks, Landsbanki Íslands hf, Glitnir Banki hf, and KaupÞing Banki hf. Bank bonds from these banks used as a way of increasing the credit rating of collateralized debt obligations (CDOs) with which they were bundled was one of several contributors (along with aggressive risk-seeking, insider lending, moral hazard, and limited bank supervision) that allowed the Icelandic banking system to grow to over 9 times GDP prior to the financial crisis

4 Ontario Securities Commission, "RBC and TD pay more than $24 million for foreign exchange compliance failings" (30 August 2019), online: <https://www.osc.gov.on.ca>.

5 Commodity Futures Trading Commission, "CFTC Orders The Bank of Nova Scotia to Pay $127.4 Million for Spoofing, False Statements, Compliance and Supervision Violations Record Civil Monetary Penalties Levied for Spoofing, False Statements, and Swap Dealer Compliance and Supervision Violations" (19 August 2020), online: <https://www.cftc.gov>. US Department of Justice, "The Bank of Nova Scotia Agrees To Pay $60.4 Million in Connection with Commodities Price Manipulation Scheme" (19 August 2020), online: <www.justice.gov>.

6 Andrew Pollack & Leslie Wayne, "Ending Suit, Merrill Lynch to Pay California County $400 Million", *The New York Times* (3 June 1998), online: <www.nytimes.com>; Teri Sforza, "We're out! Orange County pays final bankruptcy bill on July 1. The ride's been wild", *The Orange County Register* (30 June 2017), online: <www.ocregister.com>. Matt Morison, "O.C. may keep taking in neighbors' trash, and the millions in revenue it creates", *Los Angeles Times* (22 May 2015), online: <www.latimes.com>.

7 Saul Hansell, "Bankers Trust Settles Suit With P.& G." (10 May 1996), online: <www.nytimes.com> .

8 Financial Conduct Authority, "Interest rate hedging products (IRHP)" (Updated 14 May 2020), online: <www.fca.org.uk/consumers/interest-rate-hedging-products> .

9 David de Jong, "Rabobank Takes $555 Million Provision to Settle Dutch Swaps", *Bloomberg* (7 July 2016), online: <www.bloomberg.com>.

of 2008. People were put into debt and mortgage defaults, and their savings were wiped out, and losses spread to the US and EU when Iceland defaulted on its loans.[10]

While in these examples investors were able to reclaim some of their losses, smaller market participants, in particular, face challenges in recovering losses. By promoting responsible business conduct, the likelihood of investor harm should be reduced.

1. Local derivatives dealers and advisers

Currently, OTC derivatives are regulated differently across Canadian jurisdictions, and there is inconsistency in regulation of business conduct in OTC derivatives markets. The Proposed Instrument aims to level the playing field and 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.

In addition, the Proposed Instrument allows firms that are already registered and subject to a comprehensive registration and business conduct regime through NI 31-103 or are already subject to comparable requirements to the provisions of the Instrument to leverage off these existing frameworks as much as possible.

2. Foreign derivatives dealers and advisers

In addition to benefiting from a harmonized cross-Canada rule that is tailored for the derivatives market, foreign derivatives dealers and advisers will benefit from the foreign derivatives dealer and foreign derivatives adviser exemptions provided in the Instrument. These are complete exemptions from the Instrument that are provided to foreign dealers and advisers from foreign jurisdictions that on an outcomes-basis have comparable requirements to the Instrument.

Foreign derivatives dealers will also benefit from a foreign liquidity provider exemption for foreign derivatives dealers that trade with derivatives dealers in Canada. Unlike the general foreign derivatives dealer and foreign derivatives adviser exemptions, there are no notice, filing requirements, or other conditions to relying on the foreign liquidity provider exemption.

3. Investors/customers

The Proposed Instrument will help protect counterparties from unfair, improper or fraudulent practices, including by reducing the likelihood of suffering loss through inappropriate transactions, inappropriate sale of derivatives and other market misconduct. The elements of the Instrument that should lead to this outcome are:

- section 8 [*Fair dealing*];
- section 9 [*Conflicts of interest*];
- section 10 [*Know your derivatives party*];
- section 11 [*Handling complaints*];
- section 12 [*Tied selling*];
- section 13 [*Derivatives-party-specific needs and objectives*];
- section 14 [*Suitability*];
- section 15 [*Permitted referral arrangements*] and section 16 [*Verifying the qualifications of the person or company receiving the referral*].

In addition, the Proposed Instrument improves transparency through minimum information that counterparties that require greater protections can expect to receive. The following requirements of the Instrument increase transparency in this respect:

- section 17 [*Disclosing referral arrangements to a derivatives party*];
- section 18 [*Relationship disclosure information*];
- section 19 [*Pre-transaction disclosure*];
- section 20 [*Daily reporting*];

[10] Sigríður Benediktsdóttir, Gauti Bergþóruson Eggertsson & Eggert Þórarinsson, "The rise, the fall, and the resurrection of Iceland: A post mortem analysis of the 2008 financial crisis", *Brookings Papers on Economic Activity* (Fall 2017).

- section 21 [*Notice to derivatives parties by non-resident derivatives dealers*];
- section 27 [*Content and delivery of transaction information*];
- section 28 [*Derivatives party statements*];
- section 33 [*Derivatives party agreement*].

By filling a regulatory gap in the Canadian OTC derivatives markets for certain derivatives firms that are not subject to business conduct regulation and oversight, the Proposed Instrument would increase accountability and promote responsible business conduct. The Proposed Instrument would fill an existing gap in oversight of federally regulated financial institutions by a conduct regulator, further to the CSA's objective to ensure that all derivatives firms, regardless of their registration status, remain subject to certain minimum standards in relation to their business conduct towards their customers and counterparties.

The Proposed Instrument reduces risk as protections are not only offered to retail market participants, but also to large market participants whose derivatives losses could impact their business operations and potentially the Canadian economy more broadly. All derivatives market participants, regardless of their level of sophistication or financial resources (and thereby "eligible derivatives party" or "EDP" status), can expect to receive protections from the following:

- Division 1 [*General obligations towards all derivatives parties*] of Part 3 [*Dealing with or advising derivatives parties*]
- sections 23 [*Interaction with other Instruments*] and 24 [*Segregating derivatives party assets*]
- subsection 27(1) [*Content and delivery of transaction information*]
- Part 5 [*Compliance and recordkeeping*]

A regime that meets international standards and offers protections that are comparable to protections offered to participants in other major trading jurisdictions fosters confidence in the Canadian derivatives market.

F. Costs of the Proposed Instrument

In this section, we present our qualitative and quantitative assessment of the anticipated costs of complying with the Proposed Instrument for local derivatives dealers and advisers, foreign derivatives dealers and advisers, and investors/customers currently participating in Ontario's OTC derivatives market.

Generally, derivatives dealers and advisers will incur initial costs from analyzing the requirements of the Instrument, establishing or updating policies and procedures for compliance, and updating existing IT systems.[11] We anticipate that the ongoing costs of compliance will be higher than the initial costs of implementation, as ongoing costs will involve day-to-day operational activities by a variety of personnel[12], management, systems updates and maintenance, internal testing, and may involve compliance audits. Firms will also incur costs to provide training to their representatives with respect to the Instrument.[13]

Many of these firms have represented that they already have systems in place to implement and monitor codes of conduct. While we have attempted to estimate the potential costs associated with modifying existing IT systems, it is difficult to quantify these costs with meaningful precision due to limitations in information on the necessary updates to an individual firms' existing systems.

Firm may vary in how far developed and advanced their existing policies, procedures, and systems may be, and consequently their costs of compliance with the Proposed Instrument may vary. We present a conservative approximation of the anticipated costs of complying with the Proposed Instrument; however, firms that already have in place robust compliance programs with respect to their derivatives activities are expected to face lower implementation and ongoing costs.

Table 1: Summary of Total Costs (for 415 firms)

	Cost Lower Estimate	**Cost Higher Estimate**	**Hours Lower Estimate**	**Hours Higher Estimate**
Initial	$3,463,000	$4,335,000	63,690	79,360
Ongoing	$4,690,000	$5,870,000	94,900	119,700

[11] Estimated hourly rates are based on the Robert Half 2020 Salary Guide for Accounting and Finance Professionals, the Counsel Network's In-House Counsel Compensation & Career Survey Report 2019 and the Canadian Lawyer 2019 Legal Fees Survey.
[12] Functions of personnel involved include legal, accounting, compliance, business and data analysis, and IT.
[13] We have estimated the number of training hours on an initial and ongoing basis. We are not able to estimate the dollar costs of providing training due to limitations in information concerning each individual firm.

1. Local derivatives dealers and advisers

The Proposed Instrument is introducing new requirements only where a derivatives firm is not subject to appropriate conduct oversight and codifying industry practices. We anticipate that local derivatives dealers and advisers may incur limited costs to change their IT systems and related policies and procedures to comply with the requirements of the Proposed Instrument. Many of these firms have represented that they already have systems in place to implement and monitor codes of conduct. We are of the view that implementation costs will be incremental to existing costs that local derivatives dealers and advisers currently incur to conform with industry practices. Implementation costs will vary by firm and will be influenced by the nature of the derivatives dealer's or derivatives adviser's derivatives party.

We anticipate ongoing costs will also be incremental to existing operational costs that local derivatives dealers and advisers currently incur, will vary by firm, and will be influenced by the nature of the derivatives dealer's or derivatives adviser's derivatives party.

a. Local derivatives dealers

IIROC dealer members

Derivatives dealers that are IIROC dealer members/investment dealers are exempt from many provisions of the Instrument when they comply with IIROC requirements relating to a transaction with a derivatives party that correspond to certain provisions of the Proposed Instrument. We therefore anticipate that they will be able to leverage their existing business practices and IT systems to reflect the requirements of the Proposed Instrument.

We anticipate that as part of their initial cost of implementing the Proposed Instrument, approximately 20 IIROC dealer members will need to update their policies and procedures, in addition to their systems. The initial costs borne by IIROC dealer members will in large part be to ensure that existing business conduct standards are extended to their derivatives activities and that their representatives are trained to comply with such standards when dealing with derivatives parties.[14]

We also anticipate that areas of ongoing costs will be incremental to the costs that IIROC dealer members currently incur, because they are exempt from certain provisions of the Instrument when they comply with comparable IIROC requirements in connection with their derivatives activities (*e.g.*, provisions in respect of know your derivatives party and complaints handling) or are able to satisfy the principles-based provisions of the Instrument by satisfying corresponding obligations in NI 31-103 in connection with their derivatives activities (*e.g.*, provisions in respect of tied selling and referral arrangements). Ongoing costs are anticipated to include upkeep with regulatory developments, internal audits to ensure compliance with the Proposed Instrument and recordkeeping obligations.

A per firm and aggregate summary of the anticipated costs and hours required for the initial operationalization of the Proposed Instrument and ongoing cost of complying with it follow:

Table 2A: Policies & Procedures, Systems, Operations—IIROC Dealer Members

	Cost Lower Estimate	Cost Higher Estimate	Hours Lower Estimate	Hours Higher Estimate
All Firms: Initial	$86,000	$108,000	1,440	1,800
All Firms: Ongoing	$150,000	$190,000	2,700	3,400
Per Firm: Initial	$5,000	$6,000	90	110
Per Firm: Ongoing	$10,000	$13,000	170	210

Table 2B: Training Hours Per Firm—IIROC Dealer Members

	Lower Estimate	Higher Estimate
Initial	12	15
Ongoing	12	15

[14] It is assumed that firms may elect to provide on-going training as needed when there is a significant change in obligations and/or policies and procedures, and may otherwise elect to provide on-going training through targeted and condensed refreshers.

Federally regulated financial institutions

Federally regulated financial institutions are exempt from many provisions of the Instrument when they comply with *Bank Act* or OSFI requirements relating to a transaction with a derivatives party that correspond to certain provisions of the Proposed Instrument.

We consider that federally regulated financial institutions will limit their services to derivatives parties that are EDPs.[15] Accordingly, these firms will benefit from section 7 of the Instrument, which exempts derivatives firms from many of the provisions of the Instrument when transacting with an EDP. Where there is overlap between the remaining conduct obligations and prudential oversight, additional exemptions are provided in the Instrument (*i.e.,* know your derivatives party, tied selling, segregating derivatives party assets, holding initial margin, investment or use of initial margin, and derivatives party agreement).

We consider that since federally regulated financial institutions already have obtained the requisite representations from their clients and counterparties to benefit from the transition period provided in the Instrument, and as they refresh stale know your derivatives party information during the transition period, there will be no specific client outreach or duplicative re-papering exercise required to determine EDP status.

We anticipate that the initial cost of implementing the Proposed Instrument will require approximately 15 federally regulated financial institutions to build on their existing policies and procedures, in addition to modifying aspects of their systems to accommodate the obligations under the Proposed Instrument. We anticipate that as part the overall initial cost of implementation, approximately 25 hours per federally regulated financial institution will be dedicated to implementing the senior derivatives manager regime. In addition, federally regulated financial institutions will need to provide training to their representatives.[16]

Ongoing costs of compliance will include costs associated with obligations relating to fair dealing, conflicts of interest, handling complaints, content and delivery of transaction information, the senior derivatives manager regime, and record keeping. To account for the application of certain obligations (*i.e.*, fair dealing, conflicts of interest, complaints handling, and the senior derivatives manager regime) to the wholesale foreign exchange market activity of a limited class of federally regulated financial institutions that meet the conditions set out under section 3.1 of the Instrument, we take into consideration that this class of federally regulated financial institutions already voluntarily follow the FX Code of Conduct. In addition, we anticipate ongoing costs will include upkeep with regulatory developments, as well as internal audits to ensure compliance with the Proposed Instrument.

A per firm and aggregate summary of the anticipated costs and hours required for the initial operationalization of the Proposed Instrument and ongoing cost of compliance for federally regulated financial institutions follows:

Table 3A: Policies & Procedures, Systems, Operations—Federally Regulated Financial Institutions

	Cost Lower Estimate	**Cost Higher Estimate**	**Hours Lower Estimate**	**Hours Higher Estimate**
All Firms: Initial	$189,000	$236,000	2,850	3,560
All Firms: Ongoing	$530,000	$660,000	7,000	9,000
Per Firm: Initial	$13,000	$16,000	190	240
Per Firm: Ongoing	$35,000	$44,000	470	590

Table 3B: Training Hours Per Firm—Federally Regulated Financial Institutions

	Lower Estimate	**Higher Estimate**
Initial	90	113
Ongoing	15	19

Other derivatives dealers not otherwise registered under Canadian securities legislation

Other derivatives dealers that are not currently registered (or exempt from registration) under Canadian securities legislation and subject to business conduct regulation and oversight will incur costs to implement the Proposed Instrument. We anticipate these

[15] This assumption results from comments that we received on the second consultation concerning the Proposed Instrument. *See* the September 12, 2018 comment letter from the Canadian Market Infrastructure Committee.

[16] It is assumed that firms may elect to provide on-going training as needed when there is a significant change in obligations and/or policies and procedures, and may otherwise elect to provide on-going training through targeted and condensed refreshers.

firms may incur higher costs because they are not subject to existing requirements in the same way as, for example, IIROC dealer members and federally regulated financial institutions; however, we consider that these firms necessarily have some IT systems and policies and procedures already in place and will accordingly build on these existing infrastructures. The analysis of the costs that these firms may incur to comply with the Proposed Instrument is underpinned by the assumption that they have in place certain systems and processes in order to operate their business in a way that is consistent with current industry practices.

Subsets of such derivatives dealers include money services businesses and commodity dealers. Because the Proposed Instrument takes a two-tiered approach to investor/customer protections, compliance costs for these dealers will depend on the nature of the derivatives dealer's derivatives party.

These firms will incur initial and ongoing costs associated with certain core obligations (*i.e.,* fair dealing, conflict of interest, know your derivatives party, handling complaints, tied selling, compliance and recordkeeping) that apply in all cases regardless of the level of sophistication or financial resources of a derivatives party.

We anticipate over 70 derivatives dealers will need to reflect the core obligations of the Proposed Instrument in their policies and procedures, in addition to building on and tailoring their systems to accommodate these core obligations. In addition, representatives will need to be provided with training.[17]

Ongoing costs are anticipated to include upkeep with regulatory developments, internal audits to ensure compliance with the Proposed Instrument and recordkeeping obligations.

Of these 70 derivatives dealers, we approximate 30 may meet one of the conditions under section 31.1 of the Instrument in order to benefit from the exemption from obligations concerning designation and responsibilities of senior derivatives managers. We anticipate that approximately 25 hours per firm will be dedicated to implementing the senior derivatives manager regime.

A per firm and aggregate summary of the anticipated costs and hours required for the initial operationalization of core conduct obligations and ongoing cost of complying with these obligations follows:

Table 4A: Policies & Procedures, Systems, Operations—Core Conduct Obligations—Other Dealers

	Cost Lower Estimate	**Cost Higher Estimate**	**Hours Lower Estimate**	**Hours Higher Estimate**
All Firms: Initial	$1,390,000	$1,740,000	21,000	26,000
All Firms: Ongoing	$1,620,000	$2,030,000	30,000	38,000
Per Firm: Initial	$20,000	$25,000	300	380
Per Firm: Ongoing	$23,000	$29,000	420	530

As part of the initial costs of operationalizing the core conduct obligations of the Proposed Instrument, we allot on average 80 hours for a firm that has not previously identified its derivatives parties as any of permitted clients, accredited counterparties, qualified parties, or eligible contract participants under the Commodity Futures Trading Commission (United States) rules to determine which of its derivatives parties are EDPs or otherwise individual-EDPs or eligible commercial hedger-EDPs that do not require all of the protections provided in the Instrument. The number of hours required to make this determination will be higher for a firm that requires client outreach to complete its assessment or to obtain a written waiver from its derivatives parties that are either individual-EDPs or eligible commercial hedger-EDPs that they do not require all of the protections provided in the Instrument. Conversely, the hours required to make this determination will be lower for firms that have already identified which of their derivative parties are permitted clients, accredited counterparties, qualified parties, or eligible contract participants, as these firms will be able to leverage the know your derivatives party information that they already have to benefit from the transition period provided in the Instrument. Accordingly, we anticipate that as these firms refresh stale know your derivatives party information during the transition period, they will not need to perform specific client outreach or re-paper clients to determine whether they are EDPs.

We take as an assumption that approximately 30% of unregistered dealers will serve derivatives parties that do not otherwise qualify as EDPs or have not waived some of the protections of the Proposed Instrument. These firms will incur additional costs for obligations relating to investor protections that are tailored to derivatives parties that do not have the requisite level of sophistication or financial resources to qualify as EDPs, including derivatives-party-specific needs and objectives, suitability, and relationship, transaction and account disclosures, as well as upkeep with regulatory developments and internal audits to ensure compliance with the Proposed Instrument. A per firm and aggregate summary of the anticipated costs and hours required for the initial and

[17] It is assumed that firms may elect to provide on-going training as needed when there is a significant change in obligations and/or policies and procedures, and may otherwise elect to provide on-going training through targeted and condensed refreshers.

ongoing costs of complying with obligations that apply when dealing with non-EDPs or individual-EDPs or eligible commercial hedger-EDPs that have not waived some of the protections under the Proposed Instrument follows:

Table 4B: Policies & Procedures, Systems, Operations—Additional Obligations when Dealing with non-EDPs or individual/eligible commercial hedger EDPs that have not waived the additional protections—Other Dealers

	Cost Lower Estimate	Cost Higher Estimate	Hours Lower Estimate	Hours Higher Estimate
All Firms: Initial	$270,000	$340,000	15,000	19,000
All Firms: Ongoing	$310,000	$390,000	19,000	24,000
Per Firm: Initial	$14,000	$18,000	210	260
Per Firm: Ongoing	$16,000	$20,000	270	340

Table 4C: Training Hours Per Firm—Other Dealers

	Lower Estimate	Higher Estimate
Initial	50	63
Ongoing	5	6

b. Local derivatives advisers

We anticipate approximately 210 registered advisers will incur incremental costs to implement and comply with the Proposed Instrument. We note that to date we have not identified any advisers that advise solely in OTC derivatives that would not already be subject to registration as advisers under securities or commodity futures legislation.

There are limited costs for registered advisers to comply with the Instrument as they can leverage their existing compliance systems. Registered advisers are not subject to the senior derivatives manager provisions and are exempt from many provisions of the Instrument if they comply with corresponding requirements in NI 31-103 in respect of their derivatives activities.

While registered advisers are not exempt from certain core obligations of the Proposed Instrument under Division 1 [*General obligations towards all derivatives parties*] of Part 3 [*Dealing with or advising derivatives parties*], we anticipate that they will incur limited costs of compliance, as they can leverage their compliance with corresponding obligations under NI 31-103 in respect of their derivatives activities to satisfy these principles-based core obligations of the Proposed Instrument.

We anticipate registered advisers will incur initial costs to extend their existing policies and procedures to their derivatives activities and to train their representatives accordingly.[18] In addition, we anticipate ongoing costs will include upkeep with regulatory developments and internal audits to ensure compliance with the Proposed Instrument. To note, we consider that due to the transition period provided in the Instrument, as registered advisers refresh stale know your derivatives party information, there will be no duplicative re-papering exercise required to assess whether a client qualifies as an EDP.

A per firm and aggregate summary of the anticipated costs and hours required for the initial operationalization of the Proposed Instrument and ongoing cost of complying with it follow:

Table 5A: Policies & Procedures, Systems, Operations—Derivatives Advisers

	Cost Lower Estimate	Cost Higher Estimate	Hours Lower Estimate	Hours Higher Estimate
All Firms: Initial	$1,094,000	$1,368,000	17,000	21,000
All Firms: Ongoing	$1,810,000	$2,260,000	32,000	40,000
Per Firm: Initial	$5,200	$6,500	80	100
Per Firm: Ongoing	$8,600	$10,800	150	190

[18] It is assumed that firms may elect to provide on-going training as needed when there is a significant change in obligations and/or policies and procedures, and may otherwise elect to provide on-going training through targeted and condensed refreshers.

Table 5B: Training Hours Per Firms—Derivatives Advisers

	Lower Estimate	Higher Estimate
Initial	10	13
Ongoing	10	13

2. Foreign derivatives dealers and advisers

Foreign derivatives dealers, advisers, and sub-advisers from specified foreign jurisdictions that on an outcomes-basis have comparable requirements to the Instrument and that comply with the conditions of the foreign derivatives dealer exemption, the foreign derivatives adviser exemption, or the foreign derivatives sub-adviser exemption, as applicable, will receive a complete exemption from the Instrument when transacting with EDPs.

As at this time, we have identified 37 countries[19] that on an outcomes-basis have comparable requirements to the Instrument. We consider that that the over 100 foreign derivatives dealers, advisers, and sub-advisers from these specified foreign jurisdictions that are currently active in Ontario's derivatives market will provide services only to derivatives parties that are EDPs, noting that many dealers have represented that they will opt to only trade with EDPs.[20] Trade repository data also shows that currently foreign firms generally transact with counterparties that would qualify as EDPs. Accordingly, we anticipate that foreign derivatives dealers and foreign derivatives advisers will incur limited costs to familiarize themselves with the complete exemptions from the Instrument that are available to them and to ensure that they have in place processes that will allow them to comply with the conditions of these exemptions.

A per firm and aggregate summary of the anticipated costs and hours required for the initial operationalization of the Proposed Instrument and ongoing cost of compliance in respect of transactions by foreign derivatives dealers and foreign derivatives advisers with EDPs follows:

Table 6A: Policies & Procedures, Systems, Operations—Foreign Derivatives Dealers and Advisers

	Cost Lower Estimate	Cost Higher Estimate	Hours Lower Estimate	Hours Higher Estimate
All Firms: Initial	$434,000	$543,000	6,400	8,000
All Firms: Ongoing	$270,000	$340,000	4,200	5,300
Per Firm: Initial	$4,100	$5,100	60	80
Per Firm: Ongoing	$2,600	$3,300	40	50

Table 6B: Training Hours Per Firm—Foreign Derivatives Dealers and Advisers

	Lower Estimate	Higher Estimate
Initial	5	6
Ongoing	5	6

In addition, foreign derivatives dealers from any foreign jurisdiction are exempt from the Instrument without any notice, filing requirements, or other conditions with respect to their trades with derivatives dealers in Canada, and accordingly will not incur any costs as result of the Instrument.

3. Investors/customers

Some of the costs associated with complying with the Proposed Instrument that are borne by derivatives dealers and advisers may in certain circumstances be passed on to derivatives investors/customers. However, exemptions that are available to

[19] Australia, Brazil, Hong Kong, Japan, Korea, New Zealand, Singapore, Switzerland, United States of America, United Kingdom of Great Britain and Northern Ireland, any member country of the European Union (currently, 27 countries), and any other jurisdiction that is later recognized or designated.

[20] This assumption results from comments that we received on the second consultation concerning the Proposed Instrument. *See* the September 17, 2018 comment letter from the International Swaps and Derivatives Association, Inc.

derivatives dealer and advisers (*i.e.,* the exemptions for federally regulated financial institutions, foreign derivatives dealers and advisers, IIROC dealer members, and advisers registered under securities or commodity futures legislation) facilitate operationalization of the requirements of the Instrument and reduce compliance costs, particularly for firms that are able to leverage their existing infrastructures, systems, and policies and procedures. In addition, at this time, foreign derivatives dealers and advisers from 37 countries are able to rely on exemptions that reduce their costs for complying with the Proposed Instrument when transacting with EDPs. Furthermore, the foreign liquidity provider exemption ensures liquidity remains in Ontario's derivatives market without additional compliance costs by allowing foreign derivatives dealers from any jurisdiction to transact with derivatives dealers in Ontario without being subject to any notice, filing requirements, or other conditions.

Accordingly, it is not anticipated that the Proposed Instrument would result in any significant cost to investors/customers.

Considering that the Proposed Instrument is intended to address potentially hundreds of millions of dollars of financial loss and harm to capital markets, governments, businesses and investors, as discussed in greater detail above, we are of the view that the positive impact of the Proposed Instrument is more than proportionate to the anticipated compliance costs for derivatives firms.

G. Risks and uncertainties

Changing industry trends, market conditions, and the decisions of derivatives firms as to their target market and product offerings may affect their responses to the Proposed Instrument. The risks posed by such uncertainties is that our assessment of the impacts of the Proposed Instrument may not reflect all the key costs and benefits that could arise.[21]

This analysis considers stakeholder feedback and comments submitted over the course of an extensive consultation process to develop the Proposed Instrument and is underpinned by assumptions based on current industry trends.

Alternatives Considered

No alternatives to the Proposed Instrument were considered other than more burdensome versions of the Instrument that were considered and rejected.

Legislative Authority for Rule Making

The rule-making authority for the Proposed Instrument is in paragraphs 1, 1.1 to 1.6, 2, 3, 4, 5, 5.1, 7, 8, 8.1, 8.2, 10, 10.1, 11, 13, 18, 19.1 to 19.7, 25, 33, 35, 39, 39.1, 40, 41, 43, 45, 49 and 56 of subsection 143(1) of the *Securities Act* (Ontario).

[21] Note also that some derivatives firms have represented that they already afford their customers the protections required under the Proposed Instrument, and accordingly costs may be overestimated where no technological change or limited technical change is required to implement the Proposed Instrument.

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Chapter 7

Insider Reporting

This chapter is available in the print version of the OSC Bulletin, as well as in Thomson Reuters Canada's internet service SecuritiesSource (see www.westlawnextcanada.com).

This chapter contains a weekly summary of insider transactions of Ontario reporting issuers in the System for Electronic Disclosure by Insiders (SEDI). The weekly summary contains insider transactions reported during the seven days ending Sunday at 11:59 pm.

To obtain Insider Reporting information, please visit the SEDI website (www.sedi.ca).

Chapter 11

IPOs, New Issues and Secondary Financings

INVESTMENT FUNDS

Issuer Name:
Invesco 1-10 Year Laddered Investment Grade Corporate Bond Index ETF (formerly, PS 1-10 Yr Laddered Invmt Gr Corp Bond)
Invesco 1-3 Year Laddered Floating Rate Note Index ETF (formerly, PowerShares 1-3 Year Laddered Floating Rate Note Index
Invesco 1-5 Year Laddered All Government Bond Index ETF (formerly, PowerShares 1-5 Year Laddered All Government Bond Ind
Invesco 1-5 Year Laddered Investment Grade Corporate Bond Index ETF (formerly, PS 1-5 Yr Laddered Invmt Gr Corp Bond)
Invesco Canadian Dividend Index ETF (formerly, PowerShares Canadian Dividend Index ETF)
Invesco Canadian Preferred Share Index ETF (formerly, PowerShares Canadian Preferred Share Index ETF)
Invesco ESG Canadian Core Plus Bond ETF (formerly, Invesco Tactical Bond ETF)
Invesco ESG Global Bond ETF
Invesco ESG NASDAQ 100 Index ETF
Invesco ESG NASDAQ Next Gen 100 Index ETF
Invesco FTSE RAFI Canadian Index ETF (formerly, PowerShares FTSE RAFI Canadian Fundamental Index ETF)
Invesco FTSE RAFI Canadian Small-Mid Index ETF (formerly, PS FTSE RAFI Canadian Small-Mid Fundamental Index ETF)
Invesco FTSE RAFI Global Small-Mid ETF (formerly, PowerShares FTSE RAFI Global Small-Mid Fundamental ETF)
Invesco FTSE RAFI Global+ Index ETF (formerly, PowerShares FTSE RAFI Global+ Fundamental Index ETF)
Invesco FTSE RAFI U.S. Index ETF (formerly, PowerShares FTSE RAFI U.S. Fundamental Index ETF)
Invesco FTSE RAFI U.S. Index ETF II (Formerly, PowerShares FTSE RAFI U.S. Fundamental Index ETF II)
Invesco Fundamental High Yield Corporate Bond Index ETF (formerly, PowerShares Fundamental High Yield Corporate Bond Ind
Invesco Global Shareholder Yield ETF (formerly, PowerShares Global Shareholder Yield ETF)
Invesco LadderRite U.S. 0-5 Year Corporate Bond Index ETF (formerly, PowerShares LadderRite U.S. 0-5 Yr Corp Bond Index
Invesco Long Term Government Bond Index ETF (formerly, PowerShares Ultra Liquid Long Term Government Bond Index ETF)
Invesco Low Volatility Portfolio ETF (formerly, PowerShares Low Volatility Portfolio ETF)
Invesco NASDAQ 100 Equal Weight Index ETF
Invesco NASDAQ 100 Index ETF (formerly, Invesco QQQ Index ETF)
Invesco NASDAQ Next Gen 100 Index ETF
Invesco S&P 500 Equal Weight Index ETF
Invesco S&P 500 ESG Index ETF
Invesco S&P 500 ESG Tilt Index ETF
Invesco S&P 500 High Dividend Low Volatility Index ETF (formerly, PowerShares S&P 500 High Dividend Low Vol Index ETF)
Invesco S&P 500 Low Volatility Index ETF (formerly, PowerShares S&P 500 Low Volatility Index ETF)
Invesco S&P 500 Momentum Index ETF (formerly, Invesco DWA Global Momentum Index ETF)
Invesco S&P Emerging Markets Low Volatility Index ETF (formerly, PowerShares S&P Emerging Markets Low Vol Index ETF)
Invesco S&P Europe 350 Equal Weight Index ETF
Invesco S&P Global ex. Canada High Dividend Low Volatility Index ETF (formerly, PowerShares S&P Global ex. Can High Div
Invesco S&P International Developed ESG Index ETF
Invesco S&P International Developed ESG Tilt Index ETF
Invesco S&P International Developed Low Volatility Index ETF (formerly, PowerShares S&P International Dev Low Vol Index)
Invesco S&P US Total Market ESG Index ETF
Invesco S&P US Total Market ESG Tilt Index ETF
Invesco S&P/TSX 60 ESG Tilt Index ETF
Invesco S&P/TSX Composite ESG Index ETF
Invesco S&P/TSX Composite ESG Tilt Index ETF
Invesco S&P/TSX Composite Low Volatility Index ETF (formerly, PowerShares S&P/TSX Composite Low Volatility Index ETF)
Invesco S&P/TSX REIT Income Index ETF (formerly, PowerShares S&P/TSX REIT Income Index ETF)
Invesco Senior Loan Index ETF (formerly, PowerShares Senior Loan Index ETF)
Principal Regulator – Ontario
Type and Date:
Combined Preliminary and Pro Forma Long Form Prospectus dated Jan 11, 2022
NP 11-202 Final Receipt dated Jan 11, 2022
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
N/A
Promoter(s):
N/A
Project #3305170

Issuer Name:
Evermore Retirement ETF 2025
Evermore Retirement ETF 2030
Evermore Retirement ETF 2035
Evermore Retirement ETF 2040
Evermore Retirement ETF 2045
Evermore Retirement ETF 2050
Evermore Retirement ETF 2055
Evermore Retirement ETF 2060
Principal Regulator – Ontario
Type and Date:
Preliminary Long Form Prospectus dated Jan 11, 2022
NP 11-202 Preliminary Receipt dated Jan 11, 2022
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
N/A
Promoter(s):
N/A
Project #3325614

Issuer Name:
Fidelity All-in-One Conservative ETF Fund
Fidelity All-in-One Equity ETF Fund
Fidelity Global Developed Markets Sovereign Bond Index Hedged Multi-Asset Base Fund
Fidelity Global Inflation-Linked Bond Index Hedged Multi-Asset Base Fund
Fidelity Tactical Yield Fund
Principal Regulator – Ontario
Type and Date:
Preliminary Simplified Prospectus dated Jan 12, 2022
NP 11-202 Final Receipt dated Jan 14, 2022
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
N/A
Promoter(s):
N/A
Project #3313986

Issuer Name:
CIBC Active Investment Grade Corporate Bond ETF
CIBC Active Investment Grade Floating Rate Bond ETF
CIBC Canadian Bond Index ETF
CIBC Canadian Equity Index ETF
CIBC Clean Energy Index ETF
CIBC Emerging Markets Equity Index ETF
CIBC Flexible Yield ETF (CAD-Hedged)
CIBC Global Bond ex-Canada Index ETF (CAD-Hedged)
CIBC Global Growth ETF
CIBC International Equity ETF
CIBC International Equity Index ETF
CIBC Multifactor Canadian Equity ETF
CIBC Multifactor U.S. Equity ETF
CIBC Qx Canadian Low Volatility Dividend ETF
CIBC Qx International Low Volatility Dividend ETF
CIBC Qx U.S. Low Volatility Dividend ETF
CIBC U.S. Equity Index ETF
Principal Regulator – Ontario
Type and Date:
Final Long Form Prospectus dated Jan 13, 2022
NP 11-202 Final Receipt dated Jan 14, 2022
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
N/A
Promoter(s):
N/A
Project #3300963

Issuer Name:
Fidelity All-in-One Conservative ETF
Fidelity All-in-One Equity ETF
Principal Regulator – Ontario
Type and Date:
Preliminary Long Form Prospectus dated Jan 12, 2022
NP 11-202 Final Receipt dated Jan 14, 2022
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
N/A
Promoter(s):
N/A
Project #3313544

Issuer Name:
IA Clarington Global Risk-Managed Income Portfolio
IA Clarington Inhance Conservative SRI Portfolio
IA Clarington Inhance High Growth SRI Portfolio
Principal Regulator – Quebec
Type and Date:
Preliminary Simplified Prospectus dated Jan 12, 2022
NP 11-202 Final Receipt dated Jan 14, 2022
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
N/A
Promoter(s):
N/A
Project #3301951

Issuer Name:
Canada Life Emerging Markets Equity Fund
Canada Life European Equity Fund
Canada Life Global Growth Opportunities Fund
Canada Life Global Resources Fund
Canada Life Precious Metals Fund
Canada Life U.S. Small-Mid Cap Growth Fund
Principal Regulator – Ontario
Type and Date:
Preliminary Simplified Prospectus dated Jan 13, 2022
NP 11-202 Final Receipt dated Jan 14, 2022
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
N/A
Promoter(s):
N/A
Project #3232037

Issuer Name:
Arrow Global Opportunities Alternative Class
Principal Regulator – Ontario
Type and Date:
Preliminary Simplified Prospectus dated Jan 10, 2022
NP 11-202 Final Receipt dated Jan 11, 2022
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
N/A
Promoter(s):
N/A
Project #3315714

Issuer Name:
CI Bio-Revolution ETF
CI Digital Security ETF
Principal Regulator – Ontario
Type and Date:
Preliminary Long Form Prospectus dated Jan 14, 2022
NP 11-202 Preliminary Receipt dated Jan 17, 2022
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
N/A
Promoter(s):
N/A
Project #3326732

Issuer Name:
Horizons Carbon Credits ETF
Principal Regulator – Ontario
Type and Date:
Preliminary Long Form Prospectus dated Jan 13, 2022
NP 11-202 Preliminary Receipt dated Jan 13, 2022
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
N/A
Promoter(s):
N/A
Project #3326315

NON-INVESTMENT FUNDS

Issuer Name:
Aurum Lake Mining Corporation
Principal Regulator - Ontario
Type and Date:
Preliminary CPC Prospectus dated January 12, 2022
NP 11-202 Preliminary Receipt dated January 14, 2022
Offering Price and Description:
$350,000.00 - 3,500,000 Common Shares
Price: $0.10 per Common Share
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3326126

Issuer Name:
Bausch + Lomb Corporation
Principal Regulator - Ontario
Type and Date:
Preliminary Long Form Prospectus dated January 13, 2022
NP 11-202 Preliminary Receipt dated January 13, 2022
Offering Price and Description:
US$*
* Common Shares
Price: US$* per Common Share
Underwriter(s) or Distributor(s):
MORGAN STANLEY CANADA LIMITED
GOLDMAN SACHS CANADA INC.
CITIGROUP GLOBAL MARKETS CANADA INC.
J.P. MORGAN SECURITIES CANADA INC.
BARCLAYS CAPITAL CANADA INC.
MERRILL LYNCH CANADA INC.
JEFFERIES SECURITIES, INC.
WELLS FARGO SECURITIES CANADA, LTD.
HSBC SECURITIES (CANADA) INC.
Promoter(s):
BAUSCH HEALTH COMPANIES INC.
Project #3326303

Issuer Name:
Cosa Resources Corp.
Principal Regulator - British Columbia
Type and Date:
Preliminary Long Form Prospectus dated January 12, 2022
NP 11-202 Preliminary Receipt dated January 12, 2022
Offering Price and Description:
$585,000.00
3,900,000 Shares at a Price of $0.15 per Share
Underwriter(s) or Distributor(s):
HAYWOOD SECURITIES INC.
Promoter(s):
Keith Bodnarchuk
Wesley Short
Project #3325966

Issuer Name:
Digihost Technology Inc.
Principal Regulator - Ontario
Type and Date:
Preliminary Shelf Prospectus dated January 13, 2022
NP 11-202 Preliminary Receipt dated January 17, 2022
Offering Price and Description:
US$250,000,000.00
Subordinate Voting Shares
Warrants
Subscription Receipts
Units
Debt Securities
Share Purchase Contracts
Underwriter(s) or Distributor(s):
-
Promoter(s):
Michel Amar
Project #3326463

Issuer Name:
Emerge Commerce Ltd.
Principal Regulator - Ontario
Type and Date:
Preliminary Shelf Prospectus dated January 14, 2022
NP 11-202 Preliminary Receipt dated January 14, 2022
Offering Price and Description:
$100,000,000.00
Common Shares
Warrants
Debt Securities
Subscription Receipts
Units
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3326556

Issuer Name:
Fédération des caisses Desjardins du Québec
Principal Regulator - Quebec
Type and Date:
Preliminary Shelf Prospectus dated January 13, 2022
NP 11-202 Preliminary Receipt dated January 13, 2022
Offering Price and Description:
$3,000,000,000.00
Debt Securities (unsubordinated indebtedness)
Debt Securities (subordinated indebtedness)
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3326346

Issuer Name:
P2 Gold Inc.
Principal Regulator - British Columbia
Type and Date:
Amendment dated January 12, 2022 to Preliminary Shelf Prospectus dated October 15, 2021
NP 11-202 Preliminary Receipt dated January 12, 2022
Offering Price and Description:
$50,000,000.00
Common Shares
Debt Securities
Warrants
Subscription Receipts
Units
Share Purchase Contracts
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3288671

Issuer Name:
Source Rock Royalties Ltd.
Principal Regulator - Alberta
Type and Date:
Preliminary Long Form Prospectus dated January 10, 2022
NP 11-202 Preliminary Receipt dated January 11, 2022
Offering Price and Description:
$10,000,000.00 - * Units
Price: $* per Unit
Underwriter(s) or Distributor(s):
PI FINANCIAL CORP.
ACUMEN CAPITAL FINANCE PARTNERS LIMITED
HAYWOOD SECURITIES INC.
CANACCORD GENUITY CORP.
ATB CAPITAL MARKETS INC.
Promoter(s):
-
Project #3325328

Issuer Name:
Starlight Western Canada Multi-Family (No. 2) Fund
Principal Regulator - Ontario
Type and Date:
Amendment dated January 17, 2022 to Preliminary Long Form Prospectus dated November 30, 2021
NP 11-202 Preliminary Receipt dated January 17, 2022
Offering Price and Description:
Minimum: $42,000,000.00
Maximum: $130,000,000 of Class A Units and/or Class B Units and/or Class C Units
Price: $10.00 per Class A Unit
$10.00 per Class B Unit
$10.00 per Class C Unit
Underwriter(s) or Distributor(s):
CIBC WORLD MARKETS INC.
WELLINGTON-ALTUS PRIVATE WEALTH INC.
SCOTIA CAPITAL INC.
CANACCORD GENUITY CORP.
BMO NESBITT BURNS INC.
NATIONAL BANK FINANCIAL INC.
RICHARDSON WEALTH LIMITED
DESJARDINS SECURITIES INC.
ECHELON WEALTH PARTNERS INC.
IA PRIVATE WEALTH INC.
LAURENTIAN BANK SECURITIES INC.
RAYMOND JAMES LTD.
Promoter(s):
STARLIGHT GROUP PROPERTY HOLDINGS INC.
Project #3313390

Issuer Name:
Trisura Group Ltd.
Principal Regulator - Ontario
Type and Date:
Preliminary Shelf Prospectus dated January 11, 2022
NP 11-202 Preliminary Receipt dated January 11, 2022
Offering Price and Description:
$500,000,000.00
Common Shares
Preference Shares
Debt Securities
Subscription Receipts
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3325548

Issuer Name:
Atmofizer Technologies Inc. (formerly Consolidated HCI Holdings Corporation)
Principal Regulator - British Columbia
Type and Date:
Final Shelf Prospectus dated January 14, 2022
NP 11-202 Receipt dated January 14, 2022
Offering Price and Description:
$60,000,000.00
Common Shares
Warrants
Units
Debt Securities
Subscription Receipts
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3314710

Issuer Name:
dentalcorp Holdings Ltd.
Principal Regulator - Ontario
Type and Date:
Final Shelf Prospectus dated January 14, 2022
NP 11-202 Receipt dated January 14, 2022
Offering Price and Description:
$1,250,000,000.00
Subordinate Voting Shares
Preferred Shares
Debt Securities
Subscription Receipts
Warrants
Share Purchase Contracts
Units
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3324268

Issuer Name:
Firm Capital Property Trust
Principal Regulator - Ontario
Type and Date:
Final Shelf Prospectus dated January 10, 2022
NP 11-202 Receipt dated January 11, 2022
Offering Price and Description:
$250,000,000.00 - Trust Units Debt Securities Subscription Receipts Warrants Units
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3319908

Issuer Name:
Gemina Laboratories Ltd.
Principal Regulator - British Columbia
Type and Date:
Final Shelf Prospectus dated January 10, 2022
NP 11-202 Receipt dated January 13, 2022
Offering Price and Description:
$50,000,000.00
COMMON SHARES
WARRANTS
UNITS
SUBSCRIPTION RECEIPTS
DEBT SECURITIES
Underwriter(s) or Distributor(s):
-
Promoter(s):
ECOMINE TECHNOLOGIES CORPORATION
Project #3307941

Issuer Name:
Hi-View Resources Inc.
Principal Regulator - British Columbia
Type and Date:
Final Long Form Prospectus dated January 14, 2022
NP 11-202 Receipt dated January 14, 2022
Offering Price and Description:
$247,500.00 - 4,950,000 Units issuable upon deemed exercise of 4,950,000 outstanding Special Unit Warrants 3,443,000 Common Shares issuable upon deemed exercise of 3,443,000 outstanding Special Share Warrants
Underwriter(s) or Distributor(s):
-
Promoter(s):
Steve Mathiesen
Howard Milne
Project #3305630

Issuer Name:
Vecima Networks Inc.
Principal Regulator - British Columbia
Type and Date:
Final Shelf Prospectus dated January 11, 2022
NP 11-202 Receipt dated January 11, 2022
Offering Price and Description:
$150,000,000.00
Common Shares
Warrants
Subscription Receipts
Units
Debt Securities
Share Purchase Contracts
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3288157

Issuer Name:
VerticalScope Holdings Inc.
Principal Regulator - Ontario
Type and Date:
Final Shelf Prospectus dated January 14, 2022
NP 11-202 Receipt dated January 17, 2022
Offering Price and Description:
C$500,000,000.00
Subordinate Voting Shares
Preferred Shares
Debt Securities
Warrants
Subscription Receipts
Units
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3321420

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Chapter 12

Registrations

12.1.1 Registrants

Type	Company	Category of Registration	Effective Date
Change in Registration Category	BNY Mellon Asset Management Canada Ltd.	From: Commodity Trading Manager, Portfolio Manager, Exempt Market Dealer and Investment Fund Manager To: Commodity Trading Manager, Portfolio Manager and Exempt Market Dealer	January 11, 2022
New Registration	Forterra Investment Management Inc.	Portfolio Manager, Investment Fund Manager, Exempt Market Dealer	January 11, 2022
New Registration	Brant Street Capital Ltd.	Exempt Market Dealer	January 5, 2022
Change in Registration Category	Community Forward Fund Assistance Corp.	From: Investment Fund Manager, Restricted Portfolio Manager and Exempt Market Dealer To: Exempt Market Dealer	January 14, 2022
Change in Registration Category	Agora Dealer Services Corp.	From: Mutual Fund Dealer To: Mutual Fund Dealer and Exempt Market Dealer	January 17, 2022
New Registration	AGFWave Asset Management Inc.	Portfolio Manager	January 17, 2022

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Chapter 13

SROs, Marketplaces, Clearing Agencies and Trade Repositories

13.2 Marketplaces

13.2.1 Tradelogiq Markets Inc. – Omega ATS and Lynx ATS – Notice of Proposed Changes and Request for Comments

TRADELOGIQ MARKETS INC.

NOTICE OF PROPOSED CHANGES AND REQUEST FOR COMMENTS

OMEGA ATS AND LYNX ATS

Tradelogiq Markets Inc. is publishing this Notice of Proposed Changes and Request for Comments in accordance with the "Process for the Review and Approval of Rules and the Information Contained in Form 21-101F2 and the Exhibits Thereto".

Market Participants are invited to provide comments on the Proposed Changes. Comments should be in writing and delivered by February 21, 2022, to:

Paul Romain
Chief Compliance Officer, and
Head of Market Structure
Tradelogiq Markets Inc.
25 York Street, Suite 612
Toronto, Ontario M5J 2V5
Email: paul.romain@tradelogiq.com

A copy should also be provided to:

Market Regulation Branch
Ontario Securities Commission
20 Queen St. W.
Toronto, Ontario M5H 3S8
Email: marketregulation@osc.gov.on.ca

Comments will be made publicly available. Upon completion of the review by Staff at the Ontario Securities Commission (**OSC**), and in the absence of any regulatory concerns, a notice will be published to confirm approval by the OSC.

Tradelogiq Markets Inc. (**Tradelogiq**) is filing proposed significant changes to both Omega ATS (**Omega**) and Lynx ATS (**Lynx**) in accordance with the Process for the Review and Approval of the Information Contained in Form 21-101F2 (**F2**) and the Exhibits Thereto (**Protocol**). Tradelogiq is filing this change as a significant change subject to public comment as the proposed change is categorized within paragraph 6.1(4)(a) of National Instrument 21-101CP (**NI 21-101CP**). Collectively, Tradelogiq refers to the changes identified below as the proposed changes (**Proposed Changes**).

The Proposed Changes will be applied to both Omega ATS and Lynx ATS identically and simultaneously.

A. The proposed Fee Change or Significant Change:

1. Introduce hidden non-standard trading increment limit prices.

Tradelogiq is proposing to allow subscribers to enter a limit price on midpoint peg orders at half-tick increments. Current functionality allows subscribers to enter mid-point limit orders at full tick increments only. The execution price of a mid-point pegged order continues to be calculated by the marketplaces based on the mid-point of the Protected Best Bid/Offer (**PBBO)**.

As a result of this change, subscribers may assign upper or lower limits on their midpoint pegged orders with additional precision by expressing them with an extra decimal place. This is beneficial to subscribers as it will allow them to refine the limit price on their midpoint order to target a specific midpoint price, potentially avoiding executing trades at unintended prices in the case where there is a sudden change in the PBBO price.

Examples:

Example 1: BUY

1. *PBBO is 1.50 / 1.51*

2. *Participant would like to buy at the midpoint of 1.505 but would not want to participate at the midpoint should the protected offer suddenly widen to 1.50 / 1.52 and the midpoint were to change to 1.51.*

3. *Participant enters mid-point pegged limit order to buy with a price of 1.505.*

4. *While PBBO is 1.50 / 1.51 the participant will be eligible to trade at the midpoint, should the PBBO widen to 1.50 / 1.52 the participant will not be eligible to trade at the midpoint as the midpoint price has changed to 1.51 and has moved to outside of the participant's limit price of 1.505.*

Example 2: Sell

1. *PBBO is 0.255 / 0.300*

2. *Participant would like to sell at the midpoint of 0.2775 but would not want to participate at the midpoint if the bid were to suddenly widen to 0.250 / 0.300 and the midpoint were to change to 0.275.*

3. *Participant enters mid-point pegged limit order to sell with a price of 0.2775.*

4. *While PBBO is 0.255 / 0.300 the participant will be eligible to trade at the midpoint, should the PBBO widen to 0.250 / 0.300 the participant will not be eligible to trade at the midpoint.*

2. Amend Intentional Crossing Functionality

Tradelogiq is proposing to allow subscribers to enter intentional crosses with special term settlement options. These terms would include both cash settlement and delayed delivery transaction dates. At this time, only cross orders with regular settlement (T+2) are supported.

B. The expected date of implementation of the proposed Fee Change or Significant Change:

Tradelogiq is planning on launching the Proposed Changes in Q2, 2022 which is dependent on receiving all required regulatory approvals and meeting all internal scheduled timelines. Tradelogiq will advise subscribers of the approved changes and will meet the testing and technology timelines of section 12.3 of National Instrument 21-101 *Marketplace Operation* (**NI 21-101**).

C. The rationale for the proposal and any relevant supporting analysis:

1. Introduce hidden non-standard trading increment limit prices

Given that mid-point pegged orders can be executed at half tick increments, the proposed change affords subscribers the ability to send mid-point pegged orders with limit prices that can be expressed in half tick increments. This will allow subscribers to set limits prices with additional precision and remove the risk of executing orders above/below their intended limit midpoint price. This is a way for subscribers to better manage their execution risk.

2. Crossing Functionality

Omega and Lynx support the crossing of regular orders and bypass orders but do not currently afford our participants the capability to express special settlement terms on these crossing orders. The rationale for accepting special terms settlement options is to provide our subscribers with greater optionality in how they wish to cross and settle larger internal order flow. Often clients of our subscribers will require settlement dates that are not consistent with what is currently supported (T+2). We expect that this proposed functionality will give our subscribers more options as to where and how they want to execute this internal order flow. We also anticipate that this change will allow Tradelogiq to compete more equally with other marketplaces for internal order flow with special settlement terms.

D. The expected impact, including the quantitative impact, of the proposed Fee Change or Significant Change on the market structure, subscribers and, if applicable, on investors and the capital markets:

We believe that the Proposed Changes will not have a negative impact on market structure, members, investors, issuers, or capital markets. The Proposed Changes represent voluntary order type functionality and subscribers may choose to use them as part of their overall trading strategies.

We expect that the Proposed Changes will allow subscribers to access more liquidity, seek better executions, and reduce their trading costs. Overall, we believe that this will improve market structure in Canada and benefit investors without having any negative impacts on capital markets.

E. The expected impact of the Fee Change or Significant Change on the ATS's compliance with Ontario securities law requirements and in particular requirements for fair access and maintenance of fair and orderly markets:

The Proposed Changes comply with securities laws and meet the requirements for fair access and maintenance of fair and orderly markets. All the Proposed Changes are standard order type functionality that is available across most marketplaces in Canada and will be made available to all marketplace participants on an equal basis.

F. A summary of consultations, including consultations with external parties, undertaken in formulating the Fee Change or Significant Change, and the internal governance process followed to approve the Change:

Tradelogiq is in the process of improving our competitive structure and has discussed the Proposed Changes with select subscribers. Given that none of the Proposed Changes are novel or new to the Canadian market, the subscribers who we consulted were supportive of the Proposed Changes. This approach was discussed and approved by the senior executives of Tradelogiq prior to filing the Proposed Changes for regulatory approval.

G. For a proposed Fee Change:

1. The expected number of marketplace participants likely to be subject to the new fee, along with a description of the costs they will incur, and

N/A.

2. If the proposed Fee Change applies differently across types of marketplace participants, a description of this difference, how it impacts each class of affected marketplace participants, including, where applicable, numerical examples, and any justification for the difference in treatment.

N/A.

H. If the Significant Change will require subscribers or service vendors to modify their systems after implementation of the Change, the expected impact of the Change on the systems of subscribers and service vendors together with an estimate of the amount of time needed to perform the necessary work and how the estimated amount of time was deemed reasonable in light of the expected impact or the Significant Change on the ATS, its market structure, subscribers, investors or the Canadian capital markets;

Subscribers and vendors will have enough time to prepare for the implementation of the Proposed Changes as Tradelogiq plans on allowing at a minimum 90-days to implement. Given that the Proposed Changes are voluntary order type functionality, we believe that the minimum 90 days is reasonable. Furthermore, the Proposed Changes are voluntary and are not required to be adopted by service vendors by the implementation date.

I. Where the proposed Significant Change is not a Significant Change subject to Public Comment, the rationale for why the proposed Significant Change is not considered a Significant Change subject to Public Comment:

N/A.

J. A discussion of any alternatives considered; and

No other alternatives were considered as we are focusing on implementing features that are already in existence on competing marketplaces.

K. If applicable, whether proposed Fee Change or Significant Change would introduce a fee model or feature that currently exists in other markets or jurisdictions.

Yes. All the Proposed Changes are order type functionality that is currently being offered by most of the Canadian marketplaces. None of the Proposed Changes are based on new order functionality in Canada.

13.3 Clearing Agencies

13.3.1 CDS – Technical Amendments to CDS Procedures – New Equity Instrument Type – Notice of Effective Date

CDS

NOTICE OF EFFECTIVE DATE

TECHNICAL AMENDMENTS TO CDS PROCEDURES

NEW EQUITY INSTRUMENT TYPE

The Ontario Securities Commission is publishing *Notice – Technical Amendments to CDS Procedures – New Equity Instrument Type*. The CDS procedure amendments were reviewed and approved by CDS's Strategic Development Review Committee (SDRC) on October 28, 2021.

13.3.2 CDS – Technical Amendments to CDS Procedures – Wire Instructions – Notice of Effective Date

CDS

NOTICE OF EFFECTIVE DATE

TECHNICAL AMENDMENTS TO CDS PROCEDURES

WIRE INSTRUCTIONS

The Ontario Securities Commission is publishing *Notice – Technical Amendments to CDS Procedures – Wire Instructions.* The CDS procedure amendments were reviewed and approved by CDS's Strategic Development Review Committee (SDRC) on October 28, 2021.

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