

## Chapter 6

# Request for Comments

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### 6.1.1 Proposed NI 94-101 Mandatory Central Counterparty Clearing of Derivatives and Proposed Companion Policy 94-101CP Mandatory Central Counterparty Clearing of Derivatives



Canadian Securities  
Administrators

Autorités canadiennes  
en valeurs mobilières

#### CSA Notice and Request for Comment

Proposed National Instrument 94-101  
*Mandatory Central Counterparty Clearing Of Derivatives* (2<sup>nd</sup> Publication)

Proposed Companion Policy 94-101CP  
*Mandatory Central Counterparty Clearing Of Derivatives* (2<sup>nd</sup> Publication)

February 24, 2016

#### Introduction

We, the Canadian Securities Administrators (**CSA**), are republishing for a 90-day comment period expiring on May 24, 2016:

- Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (the **Clearing Rule**), and
- Proposed Companion Policy 94-101CP *Mandatory Central Counterparty Clearing of Derivatives* (the **Clearing CP**).

Collectively, the Clearing Rule and the Clearing CP will be referred to as the “Proposed National Instrument”.

We are issuing this notice to provide interim guidance and solicit comments on the Proposed National Instrument and the determination of classes of interest rate derivatives (**IRD**) denominated in certain currencies as mandatory clearable derivatives. This process is part of the ongoing implementation of Canada’s commitments in relation to global over-the-counter (**OTC**) derivatives markets reforms stemming from the G20 commitments.

The CSA Derivatives Committee (the **Committee**) has consulted and collaborated with the Bank of Canada, the Office of the Superintendent of Financial Institutions (Canada), the Department of Finance Canada, and market participants on the determination of certain classes of OTC derivatives as mandatory clearable derivatives. The Committee also continues to contribute to and follow international regulatory developments. In particular, members of the Committee work with international regulators and bodies such as the International Organization of Securities Commissions and the OTC Derivatives Regulators’ Group in the development of international standards and regulatory practices.

Although a significant market in Canada, the Canadian OTC derivatives market comprises a relatively small share of the global market, and a substantial portion of transactions entered into by Canadian market participants involve foreign counterparties. The Committee endeavours to develop rules for the Canadian market that are aligned with international practices to ensure that Canadian market participants have access to the international market and are regulated in accordance with international principles.

We would like to draw your attention to another publication, Proposed National Instrument 94-102 *Derivatives Customer Clearing and Protection of Customer Positions and Collateral*, and to the recent publication of National Instrument 24-102 *Clearing Agency Requirements*. These publications, and the Proposed National Instrument, each relate to central counterparty clearing and we therefore invite the public to consider these publications comprehensively.

We note that once the Proposed National Instrument is in force, the Committee intends that Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination*, Manitoba Securities Commission Rule 91-506 *Derivatives: Product Determination*, Québec Regulation 91-506 respecting Derivatives Determination and the Multilateral Instrument 91-101 *Derivatives: Product Determination* (collectively, the **Scope Rules**) will apply to the Proposed National Instrument. Accordingly, in Québec, Regulation to amend Regulation 91-506 respecting Derivative Determination is published for consultation concurrently with the Proposed National Instrument.

## **Background**

The members of the CSA published Draft National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* on February 12, 2015 (the **Draft National Instrument**), inviting public comment on all aspects of the Draft National Instrument. Twenty-five comment letters were received. A list of those who submitted comments as well as a chart summarizing the comments received and the Committee's responses are attached as Annex A to this Notice. Copies of the comment letters can be found on the websites of the Alberta Securities Commission, Ontario Securities Commission and Autorité des marchés financiers.

## **Summary of Changes to the Proposed National Instrument**

The Committee has reviewed the comments received and made changes to the Proposed National Instrument in response. In particular, the Clearing Rule now applies only to participants that subscribe to the services of a regulated clearing agency for a mandatory clearable derivative, and their affiliated entities, as well as to local counterparties with a month-end gross notional amount of outstanding OTC derivatives above \$500 000 000 000.

The revised scope of application addresses concerns of market participants regarding indirect clearing. The Committee intends to reassess this scope when more market participants reasonably have access to clearing services for OTC derivatives.

In addition, the non-application provision was broadened by adding the International Monetary Fund and by including entities that are guaranteed by one or more governments. Also, the interpretation of an affiliated entity was broadened by adding partnerships, and an exemption for multilateral portfolio compression exercise was added.

Finally, our intent to keep Form 94-101F1 confidential has been clarified in the Clearing CP.

## **Substance and Purpose of the Proposed National Instrument**

The purpose of the Clearing Rule is to propose mandatory central counterparty clearing of certain standardized OTC derivatives transactions in order to reduce systemic risk in the derivatives market and increase financial stability.

The Clearing Rule is divided into two areas: (i) mandatory central counterparty clearing for certain derivatives (including proposed exemptions), and (ii) the determination of derivatives subject to mandatory central counterparty clearing (each a mandatory clearable derivative).

## **Summary of the Clearing Rule**

### **a) *Mandatory central counterparty clearing and exemptions***

The Clearing Rule provides that a local counterparty to a transaction in a mandatory clearable derivative must submit that transaction for clearing to a regulated clearing agency when itself and the other counterparty are one or more of the following:

- (i) a participant subscribing to the services of a regulated clearing agency for a mandatory clearable derivative;
- (ii) an affiliated entity of a participant described in (i);
- (iii) a local counterparty that, together with its local affiliated entities, has an aggregate gross notional amount of more than \$500 000 000 000 in outstanding derivatives as specified under the Scope Rules, excluding intragroup transactions.

In addition to the non-application section, two exemptions are provided in the Clearing Rule. The proposed intragroup exemption applies, subject to conditions provided in the Clearing Rule, where affiliated entities or counterparties prudentially supervised on a consolidated basis enter into a transaction in a mandatory clearable derivative. A counterparty relying on the intragroup exemption must deliver Form 94-101F1 to the regulator identifying the other counterparty and the basis for relying on the exemption.

The proposed multilateral portfolio compression exercise exemption applies, subject to the conditions listed in the Clearing Rule, when several counterparties are changing, terminating and replacing prior uncleared transactions in derivatives that were not mandatory clearable derivatives at the time the prior transactions were entered into.

A counterparty relying on either exemption must document and maintain records to demonstrate its eligibility to rely on the exemption.

**b) Determination of mandatory clearable derivatives**

The Committee seeks comment on the determination as mandatory clearable derivatives of certain classes of IRD denominated in US dollars (**USD**), Euro (**EUR**), British pounds (**GBP**) and Canadian dollars (**CAD**) (collectively, the **Proposed Determination**). In making this Proposed Determination, the Committee has considered factors including

- information on OTC derivatives cleared by regulated clearing agencies,
- markets of importance to Canadian financial stability, and
- foreign central clearing mandates.

Regulated clearing agencies have notified the Committee of all the OTC derivatives or classes of OTC derivatives for which they provide clearing services. For each of these derivatives or classes of derivatives, the Committee has assessed whether it is suitable for mandatory central clearing by examining the following criteria set out in the Clearing CP:

- standardization of legal documentation and of the operational processes at the regulated clearing agency, as measured by the use of electronic affirmation and confirmation platforms and the use of industry standard documentation and definitions;
- sufficient transaction activity and participation to absorb the risk resulting from the default of two large participants of a regulated clearing agency, as measured by the number of participants subscribing to OTC derivative services at the regulated clearing agencies;
- fair, reliable and generally accepted pricing information made available in the relevant class of derivatives by market entities providing pre- and post- trade transparency;
- sufficient liquidity in the market to allow for close out or hedging of outstanding derivatives in a default scenario of at least two participants of a regulated clearing agency, as measured by the average number of transactions and average notional transactions size daily.

We have also considered publicly available data, derivatives transaction data reported pursuant to local derivatives data reporting rules<sup>1</sup> and foreign regulators' proposals, including their analysis of the standardization and risk profile of the proposed mandatory clearable derivatives as well as the liquidity and characteristics of their market.

International harmonization is also an important factor used by the Committee when making a determination on whether a type or class of derivative should be a mandatory clearable derivative. In the absence of broadly harmonized requirements, there may be potential for regulatory arbitrage or other distortions in market participants' choices as to where to conduct business or book trades.

The list of proposed mandatory clearable derivatives for all jurisdictions of Canada, other than Québec, is included in the Clearing Rule as Appendix A. In Québec, a list of mandatory clearable derivatives will be published in a decision from the Autorité des marchés financiers. Following the review of OTC derivatives against the criteria presented above, the Committee is proposing that the following classes of IRD be mandatory clearable derivatives:

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<sup>1</sup> Regulation 91-507 respecting Trade Repositories and Derivatives Data Reporting (Québec); Ontario Securities Commission Rule 91-507 *Trade Repositories and Derivatives Data Reporting*; Manitoba Securities Commission Rule 91-507 *Trade Repositories and Derivatives Data Reporting*; and, once implemented, Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting*.

## Interest Rate Swaps

Type	Floating index	Settlement currency	Maturity	Settlement Currency Type	Optionality	Notional type
Fixed-to-float	CDOR	CAD	28 days to 30 years	Single currency	No	Constant or variable
Fixed-to-float	LIBOR	USD	28 days to 50 years	Single currency	No	Constant or variable
Fixed-to-float	EURIBOR	EUR	28 days to 50 years	Single currency	No	Constant or variable
Fixed-to-float	LIBOR	GBP	28 days to 50 years	Single currency	No	Constant or variable
Basis	LIBOR	USD	28 days to 50 years	Single currency	No	Constant or variable
Basis	EURIBOR	EUR	28 days to 50 years	Single currency	No	Constant or variable
Basis	LIBOR	GBP	28 days to 50 years	Single currency	No	Constant or variable
Overnight index swap	CORRA	CAD	7 days to 2 years	Single currency	No	Constant or variable
Overnight index swap	FedFunds	USD	7 days to 30 years	Single currency	No	Constant or variable
Overnight index swap	EONIA	EUR	7 days to 30 years	Single currency	No	Constant or variable
Overnight index swap	SONIA	GBP	7 days to 30 years	Single currency	No	Constant or variable

## Forward Rate Agreements

Forward rate agreement	LIBOR	USD	3 days to 3 years	Single currency	No	Constant or variable
Forward rate agreement	EURIBOR	EUR	3 days to 3 years	Single currency	No	Constant or variable
Forward rate agreement	LIBOR	GBP	3 days to 3 years	Single currency	No	Constant or variable

In particular, IRD represent more than 80% of the gross notional amount of outstanding derivatives of local counterparties. Within IRD traded, single currency interest rate swaps (**IRS**) dominate. IRD are also highly standardised, thus posing minimal operational concerns for clearing unlike more complex and exotic products. There is also sufficient liquidity for clearing in IRD. IRD are not only traded by local participants, but also by local branches or affiliates of foreign participants. Furthermore, the majority of local counterparties that would be subject to the Proposed National Instrument have already begun clearing IRS on regulated clearing agencies.

Our goal is to harmonise, to the greatest extent possible, the Proposed Determination across Canada and with international practices. Certain classes of IRD denominated in USD, GBP and EUR are already mandated to be cleared in the United States, in Australia beginning in April 2016, and in Europe beginning in June 2016.

There is currently no central clearing mandate in any jurisdiction covering CAD IRS, although it is being assessed by some foreign jurisdictions. Considering that the market for CAD IRS involves foreign counterparties outside of our jurisdiction, the competitiveness of local counterparties subject to the Proposed National Instrument could be impacted negatively, in the absence of foreign regulators also mandating clearing of CAD IRS. The Committee is well aware of this potential impact and is seeking to harmonise implementation of the Proposed Determination with our international counterparts to minimise disadvantageous consequences. Where harmonisation is not possible, the Committee could consider delaying the determination of CAD IRS as mandatory clearable derivatives, or including a transition provision or phase-in to minimise negative consequences while potential foreign mandates are considered. For example, such a phase-in could provide that, for a certain

period of time, CAD IRS only be mandated to be cleared when entered into by two local counterparties in any jurisdiction of Canada. Transactions involving a foreign counterparty could then be part of a second phase triggered once a foreign mandate for CAD IRS is in place.

The Committee would appreciate your input on the following questions.

1. The scope of counterparties subject to the clearing requirement has been significantly scaled back since the publication of the Draft National Instrument. In your view, is the scope in the Proposed National Instrument appropriate considering the Proposed Determination?
2. Is the Proposed Determination appropriate for the Canadian market? Please provide specific concerns relating to any or all of the following:
  - (i) US IRD;
  - (ii) GBP IRD;
  - (iii) EUR IRD;
  - (iv) CAD IRS;
  - (v) any other derivatives.
3. What additional risks to the market or regulated clearing agencies would result from the Proposed Determination?
4. As currently contemplated, the Proposed National Instrument and the Proposed Determination would become effective simultaneously. Do you agree with this approach or should a transition period be provided after the Proposed National Instrument has come into force and before mandatory clearable derivatives must be cleared? Please identify significant consequences that could arise from the current approach and what length of time would be appropriate if you deem that a phase-in is necessary.
5. Please discuss any significant consequences that could arise from a determination of CAD IRS as a mandatory clearable derivative absent a corresponding CAD IRS mandate in one or more foreign jurisdictions.
6. Are the characteristics used in Appendix A and the table above to define mandatory clearable derivatives adequate? If not, what other variables should be considered?

### **Anticipated Costs and Benefits of the Proposed National Instrument**

We believe that the impact of the Proposed National Instrument, including anticipated compliance costs for market participants, is proportional to the benefits we seek to achieve. The G20 has agreed that requiring standardised and sufficiently liquid OTC derivatives transactions to be cleared through central counterparties will result in more effective management of counterparty credit risk through multilateral netting of transactions and mutualisation of losses through a default fund. As such, central counterparty clearing of derivatives included in the Proposed Determination contributes to greater stability of our financial markets and reduced systemic risk.

We recognise that counterparties will incur additional costs in order to comply with the Proposed National Instrument due to the increase in transactions that are centrally cleared. However, we note that the G20 has also committed to impose capital and collateral requirements on OTC derivative transactions that are not centrally cleared; the related costs may well exceed the costs associated with clearing OTC derivatives transactions. The intragroup and multilateral portfolio compression exemptions in the Clearing Rule will help mitigate the costs borne by counterparties as a result of the Clearing Rule.

Moreover, the narrow scope of application of the Clearing Rule will provide relief for certain categories of market participants. We note that the current approach of the Clearing Rule will provide the provincial regulators time to establish a derivatives registration regime under which a category would be contemplated for larger derivatives participants who could become subject to the Clearing Rule. We will continue to monitor trade repository data to assess the characteristics of the markets for derivatives mandated to be cleared to inform whether the \$500 000 000 000 threshold for an entity to be subject to mandatory clearing should be lowered and if so, what carve-outs might be appropriate for certain types of entities.

With respect to the Proposed Determination, while we acknowledge that CAD IRS are systemically important to the Canadian market, as noted above, there may be potential costs associated with requiring CAD IRS to be cleared without international harmonisation. In the absence of foreign regulators also mandating clearing of CAD IRS, local counterparties subject to the Proposed National Instrument could be impacted negatively if foreign counterparties withdraw from the market and reduced the

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ability of local counterparties to hedge their risks. This risk is particularly relevant to the cleared CAD IRS market where approximately half of all outstanding positions are cleared by foreign clearing members.

### Content of Annexes

The following annexes form part of this CSA Notice:

- Annex A – Summary of Comments and List of Commenters;
- Annex B – Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives*; and
- Annex C – Proposed Companion Policy 94-101CP *Mandatory Central Counterparty Clearing of Derivatives*.

### Request for Comments

Please provide your comments in writing by **May 24, 2016**.

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](http://www.albertasecurities.com), the Autorité des marchés financiers at [www.lautorite.qc.ca](http://www.lautorite.qc.ca) and the Ontario Securities Commission at [www.osc.gov.on.ca](http://www.osc.gov.on.ca). Therefore, you should not include personal information directly in comments to be published. It is important that you state on whose behalf you are making the submission.

Thank you in advance for your comments.

Please address your comments to each of the following:

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

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

Me Anne-Marie Beaudoin  
Corporate Secretary  
Autorité des marchés financiers  
800, square Victoria, 22e étage  
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### Questions

Please refer your questions to any of the following:

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## ANNEX A

## COMMENT SUMMARY AND CSA RESPONSES

Section Reference	Issue/Comment	Response
General Comment	A commenter suggested that the rule use a more principles-based approach.	No change. A clearing requirement is necessary to ensure the objective of enhancing central clearing is accomplished.
S. 1 – Definitions	A commenter requested that we define derivative to be harmonized with Proposed Multilateral Instrument 96-101 <i>Trade Repositories and Derivatives Data Reporting</i> .	Change made. An application section was added to explain that derivative has the same meaning as in securities legislation and the local Rule 91-506 <i>Derivatives: Product Determination</i> and Proposed Multilateral Instrument 91-101 <i>Derivatives: Product Determination</i> .
S. 1 – Definitions: Financial entity	Several commenters pointed out that, until there is a registration regime in place, it would be difficult for a participant to determine if it is a financial entity or not.	Change made. The definition of “financial entity” was removed since the distinction between a financial and non-financial entity was solely for the purpose of the end-user exemption which was deleted.
S.1 – Definitions: Local counterparty	A number of commenters requested additional guidance on concepts such as “head office”, “principal place of business” and “affiliate”.	Partial change. We note that the interpretation of “affiliated entity” was changed to harmonize with other Canadian derivatives rules. The other concepts are commonly used terms with judicially considered definitions.
	A few commenters asked what is meant by “responsible for the liabilities of that affiliated party”.	Change made. The Clearing Rule now specifies that the responsibility is for all or substantially all the liabilities of the affiliated entity.
S.1 – Definitions: Mandatory Clearable Derivatives	A commenter requested that the definition should be harmonized across Canada and internationally.	No change. Although the definition provides that mandatory clearable derivatives will be determined in a decision in Québec, while other jurisdictions of Canada will list them in Appendix A of the Clearing Rule, the intent of the Committee is to harmonize the determinations across Canada. When proposing mandatory clearable derivatives, the Committee intends to take into account whether the derivatives are mandated to be cleared in foreign jurisdictions.
S.1 – Definitions: Regulated clearing agency	A commenter suggested that the definition be restricted to a person or company that acts as a central counterparty.	The Clearing CP now explains that a regulated clearing agency acts as a central counterparty.
Former S.3 – Interpretation of the term affiliated entity	Two commenters opined that definitions should be the same across rules.  Another commenter requested that partnerships and unincorporated entities be included in the definition.	Change made. We included a broader definition of affiliated entity that includes partnerships and trusts for greater harmonization with other derivatives rules.
Former S. 4 – Interpretation of hedging	Many commenters expressed the need for clarification regarding the meaning of “speculating”, the “intent to reduce risk”, the “list of risks” and the “normal course of business”.	This section was deleted since non-financial entities are no longer required to clear their transactions unless they fall into the scope of revised subsection 3(1).
Former S. 5 – Duty to clear	A few commenters highlighted the difficulties relating to access to clearing for certain market participants. Many commenters requested an exemption or an exclusion from the scope of the duty to clear for smaller financial entities or non-systemic entities such as pension schemes.	Change made. See revised subsection 3(1) where the scope of the duty to clear was narrowed to capture only the largest entities, and those with direct access to a regulated clearing agency.
	A commenter expressed the concern that the Clearing Rule would not provide for situations where a local counterparty accesses a regulated clearing agency directly without being a clearing member.	Change made. The definition of “participant” referring to a person or company in a contractual relationship with a regulated clearing agency and bound by its rules has been added to the Clearing Rule.
	A commenter proposed to extend the clearing requirement to foreign entities whose transactions	No change. We note that, although the obligation to clear rests on local counterparties, a transaction with

	<p>have a direct, substantial and foreseeable effect in Canada or are aimed at evading the clearing requirement.</p>	<p>a foreign counterparty must be cleared if the foreign counterparty is also subject to subsection 3(1).</p>
	<p>Three commenters were concerned about the lack of substituted compliance within Canada and with foreign jurisdictions available for a counterparty subject to the duty to clear in more than one jurisdiction.</p>	<p>Partial change. Regarding substituted compliance within Canada, Alberta, New Brunswick and Nova Scotia were added to the list of jurisdictions which provide substituted compliance where a transaction is cleared at a clearing agency regulated in any jurisdiction of Canada. It is the Committee's view that an application for exemptive relief may be made in a local jurisdiction that do not provide substituted compliance.</p> <p>With regard to equivalence with foreign jurisdictions, we note that only local counterparties under paragraph (b) of that definition should benefit from substituted compliance, since the Clearing Rule would only apply when there is a local counterparty in scope involved in the transaction if the Clearing Rule is the stricter rule applicable to the transaction.</p>
	<p>A commenter submitted that the requirement to submit transactions for clearing before the end of the day of execution is too short since it does not allow the overnight file transfer and could impact liquidity.</p>	<p>No change. We note that this requirement is consistent with foreign regulation.</p>
Former S. 6 – Non-application	<p>Several commenters expressed their concern that this section confers an advantage to crown corporations over their competitors.</p> <p>Some commenters added that the non-application section should provide objective criteria.</p>	<p>No change. We note that the regulators retain the right to modify the applicability of all exemptions.</p>
	<p>Two commenters requested that the non-application section be available for entities wholly-owned by or acting as agent for the government and who do not benefit from a guarantee of its obligations by that government.</p>	<p>No change. The non-application section includes a crown corporation for which the government where the crown corporation was constituted is responsible for all or substantially all of the crown corporation's liabilities. We note that crown corporations are not required to clear their transactions unless they fall into the scope of revised subsection 3(1).</p>
	<p>A commenter suggested adding the International Monetary Fund to the list of entities.</p>	<p>Change made. The International Monetary Fund was added to the non-application section. We note that the non-application section has not been extended to recognize other supra-national agencies. The Committee anticipates exemption requests would be sent to regulators as required.</p>
	<p>A commenter suggested that former section 6 apply to a financial entity that is wholly owned by one or more government(s) as long as all or substantially all the liabilities of the entity are guaranteed by one or more of that or these government(s). It was also noted that a government of a foreign jurisdiction in former paragraph 6(a) should include both sovereign and subsovereign governments.</p>	<p>Change made. The language in the non-application section has been adapted to include entities wholly-owned by more than one government. The Clearing CP now includes guidance on the interpretation of a foreign government.</p>
Former Part 3 - Exemptions	<p>A commenter suggested that an exemption should be available for a transaction resulting from a multilateral portfolio compression exercise where the previous transactions were not cleared and were entered into prior to the effective date of the clearing requirement for the derivative.</p>	<p>Change made. An exemption was added in section 8 of the Clearing Rule for certain transactions resulting from a multilateral portfolio compression exercise.</p>
Former S. 9 – End-user exemption	<p>Many commenters requested that the exemption be broadened to be available for small financial entities, pension funds and property and casualty insurers. Three commenters believed this exemption should be available to a registrant hedging the risk of a non-financial affiliated entity.</p>	<p>This section was deleted in consideration of the new scope of application.</p>

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Former S. 10 – Intragroup exemption	Many commenters thought that the intragroup exemption should be available for entities that are not prudentially supervised on a consolidated basis or that do not have consolidated financial statements.	No change. The Committee notes that the approach used in the Clearing Rule is harmonized with exemptions found in foreign regulations.
	A commenter asked that financial statements using Canadian or U.S. GAAP or GAAP of the local jurisdiction be allowed.	No change. The Committee notes that Canadian and U.S. GAAP are included in National Instrument 52-107 <i>Acceptable Accounting Principles and Auditing Standards</i> .
	Two commenters expressed the need for clarification as to the agreement between the affiliated entities.	No change. The Committee notes that the requirement that the counterparties agree to rely on the exemption provides sufficient flexibility for them to choose in which form to express their intent to rely on the exemption.
	Four commenters asked for clarification on the level of detail of the written agreement required and whether written confirmations are required for each transaction.	No change. The Committee notes that the written agreement required provides flexibility.
	A commenter urged that former subsection 10(3) include “or cause to be submitted” to allow a counterparty that centralizes its compliance and reporting functions to another entity to submit the form through this entity.	Change made. See revised subsection 7(2) where “or cause to be delivered” was added.
	A commenter requested clarification regarding whether Form 94-101F1 should be submitted for every transaction between two affiliated entities.	Change made. See revised subsection 7(2). We are of the view that Form 94-101F1 must be delivered only once per pair of counterparties to be valid for all transactions between the pair.
	A commenter suggested the elimination of a form filing requirement.	No change. The Committee notes that regulators could review filed Forms 94-101F1 to determine whether the exemption was properly relied on.
	A commenter proposed that a corporate group be permitted to file only one Form 94-101F1.	No change. We note that the exemption is available on a bilateral basis and not on a group basis.
	Two commenters proposed that Form 94-101F1 be submitted to a trade repository. A commenter suggested that only one regulator should receive the form and share it with the other regulators.	No change. The regulators do not have arrangements in place with trade repositories regarding the Clearing Rule.  The Committee notes that there is no agreement in place between regulators for sharing the information received on Form 94-101F1. Furthermore, it is the Committee’s view that it would not be overly burdensome for market participants to send the same form to several regulators.
Former S. 11 – Recordkeeping	Some commenters sought clarification on the requirements for the end-user exemption regarding factual representations and documentation on a portfolio level.	The end-user exemption and related requirements were deleted.
Former S. 12 – Submission of information on clearing services for derivatives by a regulated clearing agency	Two commenters asked about the authority to make top-down determinations.	Change made. See revised sections 10 and 12 of the Clearing CP that discuss top-down determinations.
Former S. 13 – Other exemption	A commenter requested clarification on the impact of the clearing requirement on a market participant who submitted an application for an exemption.	No change. We believe that market participants will have sufficient time ahead of a determination to submit an application for a discretionary exemption. However, a transition period was added to section 3.
Former S. 14 – Transition – regulated clearing agency filing requirement	A commenter proposed that products already offered for clearing by a clearing agency be presumed eligible for clearing.	No change. It is the Committee’s view that the information required in Form 94-101F2 is an important element for regulators in making or proposing a determination as to which derivatives should be mandatory clearable derivatives.

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Form 94-101F1	A commenter requested that Form 94-101F1 be kept confidential	Change made. The Clearing CP includes a provision about the confidentiality of this form.
Form 94-101F2	A commenter requested that regulated clearing agencies provide specific information on the end-to-end testing conducted with its participants.	No change. We note that the information requested from regulated clearing agencies is only one part of the determination process which considers multiple factors as set out in the notice.
Appendix A – Mandatory clearable derivatives	<p><u>Determination</u></p> <p>Many commenters provided their insight on which types of derivatives should or should not be mandatory clearable derivatives.</p> <p>Several commenters suggested that the process for the determination of mandatory clearable derivatives should be harmonized with international standards and across all jurisdictions of Canada.</p> <p>Two commenters asked that the list of mandatory clearable derivatives be kept in one place. Some commenters also suggested that mandatory clearable derivatives and derivatives excluded from the scope should be harmonized with foreign jurisdictions.</p>	<p>No change. It is the Committee's intention that the mandatory clearable derivatives will not include derivatives that are outside the scope of the Scope Rule.</p> <p>Other than in Québec, all mandatory clearable derivatives will be listed in Appendix A to the Clearing Rule. In Québec, the same mandatory clearable derivatives would be determined in a decision by the Autorité des marchés financiers.</p> <p>The timing for implementation of each determination will be aligned across all jurisdictions of Canada. It is the Committee's view that foreign determinations of derivatives mandated to be cleared are important criteria when determining what derivatives should be a mandatory clearable derivative under the Clearing Rule.</p>
	<p><u>Consultation</u></p> <p>Many commenters requested that either the Clearing Rule or the Clearing CP contain a statement to insure that the regulators will seek public comment prior to determining a mandatory clearable derivative.</p> <p>A commenter suggested that the determinations follow a simplified approach that does not follow the full rulemaking process and that is harmonized in all jurisdictions of Canada.</p>	<p>No change. Any subsequent determinations of a mandatory clearable derivative will require that Appendix A of the Clearing Rule be amended to include the new derivative or class of derivatives. In some jurisdictions of Canada, such an amendment would be a material change requiring a public consultation. Since the Clearing Rule is a national instrument, every jurisdiction of Canada would align with the longest public consultation period. It is the Committee's view that the public consultation required to make an amendment will allow sufficient time for market participants to comment and prepare for the new clearing requirements.</p>
	<p><u>Timing</u></p> <p>A commenter was concerned that a derivative would be determined a mandatory clearable derivative before mutual recognition across Canada and substituted compliance are provided.</p> <p>Another commenter raised the concern that no timing is provided for when determinations are made which makes it difficult for market participants to predict when they can expect a determination to be published.</p> <p>Several commenters mentioned that the clearing requirement should not become effective until the registration regime for OTC derivatives is finalized.</p>	<p>No change. We note that the regulators intend to adopt a "stricter rule applies" principle in the case of cross-border discrepancies. As a result, when a foreign counterparty transacts with a local counterparty in a derivative that is subject to mandatory clearing under the Clearing Rule, the transaction must be cleared even if an exemption exists in the foreign counterparty's jurisdiction.</p> <p>We also note that the Committee continues to monitor the development of cross-border guidance with respect to substituted compliance on clearing requirements.</p> <p>Considering the changes to the Clearing Rule, qualification as a registrant is no longer a criteria.</p>
	<p><u>Phase-in</u></p> <p>A few commenters provided comments on the phase-in approach and which market participants should be caught and when.</p>	<p>The phase-in approach was deleted as client clearing services are not readily available yet. We intend to monitor the situation and reassess in the future whether the application of the Clearing Rule should be made broader.</p>

**List of Commenters**

1. ATCO Power Canada Ltd.
2. Canadian Advocacy Council
3. Capital Power Corporation
4. Canadian Commercial Energy Working Group
5. Canadian Market Infrastructure Committee
6. Canadian Life and Health Insurance Association Inc.
7. Canadian Pension Fund Managers
8. Central 1 Credit Union
9. CLS Bank International
10. Concentra Financial Services Association
11. Dentons Canada LLP
12. Enbridge, Inc.
13. Global Foreign Exchange Division, GFMA
14. Investment Industry Association of Canada
15. Insurance Bureau of Canada
16. International Energy Credit Association
17. International Swaps and Derivatives Association, Inc.
18. KFW Bankengruppe
19. LCH.Clearnet Group Limited
20. Pension Investment Association of Canada
21. SaskEnergy Incorporated
22. TMX Group Limited
23. TransCanada Corporation
24. TriOptima AB
25. Western Union Business Solutions

ANNEX B

PROPOSED NATIONAL INSTRUMENT 94-101  
MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES

PART 1  
DEFINITIONS AND INTERPRETATION

**Definitions and interpretation**

**1. (1)** In this Instrument

“local counterparty” means a counterparty to a transaction if, at the time of execution of the transaction, either of the following applies:

- (a) the counterparty is a person or company, other than an individual, to which one or more of the following apply:
  - (i) it is organized under the laws of the local jurisdiction;
  - (ii) its head office is in the local jurisdiction;
  - (iii) its principal place of business is in the local jurisdiction;
- (b) the counterparty is an affiliated entity of a person or company referred to in paragraph (a) and the person or company is responsible for all or substantially all the liabilities of the counterparty;

“mandatory clearable derivative” means a derivative or class of derivatives that is offered for clearing at a regulated clearing agency and is

- (a) except in Québec, listed in Appendix A, and
- (b) in Québec, determined by the Autorité des marchés financiers to be subject to mandatory central counterparty clearing;

“participant” means a person or company that has entered into an agreement with a regulated clearing agency to access the services of the regulated clearing agency and is bound by the regulated clearing agency’s rules and procedures;

“regulated clearing agency” means

- (a) in British Columbia, Manitoba, Ontario and Saskatchewan, a person or company recognized or exempted from recognition as a clearing agency in the local jurisdiction,
- (b) in Québec, a person recognized or exempted from recognition as a clearing house, and
- (c) in Alberta, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island and Yukon, a person or company recognized or exempted from recognition as a clearing agency or clearing house pursuant to the securities legislation of any jurisdiction of Canada;

“transaction” means any of the following:

- (a) entering into, making a material amendment to, assigning, selling or otherwise acquiring or disposing of a derivative;
  - (b) a novation of a derivative, other than a novation resulting from submitting the derivative to a regulated clearing agency.
- (2)** In this Instrument, a person or company is an affiliated entity of another person or company if one of them controls the other or each of them is controlled by the same person or company.
- (3)** In this instrument, a person or company (the first party) is considered to control another person or company (the second party) if any of the following apply:

- (a) the first party beneficially owns or directly or indirectly exercises control or direction over securities of the second party carrying votes which, if exercised, would entitle the first party to elect a majority of the directors of the second party unless the first party holds the voting securities only to secure an obligation;
- (b) the second party is a partnership, other than a limited partnership, and the first party holds more than 50% of the interests of the partnership;
- (c) the second party is a limited partnership and the general partner of the limited partnership is the first party.

**Application**

2. (1) This Instrument applies to:

- (a) in Manitoba, a derivative as prescribed in Manitoba Securities Commission Rule 91-506 *Derivatives: Product Determination*;
  - (b) in Ontario, a derivative as prescribed in Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination*;
  - (c) in Québec, a derivative specified in Regulation 91-506 respecting derivatives determination.
- (2) In Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan and Yukon, in this Instrument, each reference to a “derivative” is a reference to a specified derivative as defined in Multilateral Instrument 91-101 *Derivatives: Product Determination*.

**PART 2  
MANDATORY CENTRAL COUNTERPARTY CLEARING**

**Duty to submit for clearing**

3. (1) A local counterparty to a transaction in a mandatory clearable derivative must submit, or cause to be submitted, the transaction for clearing to a regulated clearing agency that provides clearing services in respect of the mandatory clearable derivative if one or more of the following applies to each counterparty to the transaction:
- (a) it is a participant of a regulated clearing agency that offers clearing services in respect of the mandatory clearable derivative and it subscribes for clearing services for the class of derivative to which the mandatory clearable derivative belongs;
  - (b) it is an affiliated entity of a participant referred to in paragraph (a);
  - (c) it is a local counterparty in any jurisdiction of Canada that has or has had a month-end gross notional amount under all outstanding derivatives, of the local counterparty and each affiliated entity that is a local counterparty in any jurisdiction of Canada, exceeding \$500 000 000 000 after excluding transactions to which section 7 applies.
- (2) Unless subsection (3) applies, a local counterparty must submit a transaction for clearing under subsection (1) no later than
- (a) if the transaction is executed during the business hours of the regulated clearing agency, the end of the day of execution, or
  - (b) if the transaction is executed after the business hours of the regulated clearing agency, the end of the next business day.
- (3) A local counterparty that exceeds the month-end outstanding gross notional amount specified in paragraph (1)(c) is not required to comply with subsection (1) until the 90th day after the end of the month in which the amount was first exceeded unless paragraphs (1)(a) or (b) apply.
- (4) A local counterparty required to submit a transaction for clearing under subsection (1) must submit the transaction in accordance with the rules of the regulated clearing agency, as amended from time to time.

- (5) A local counterparty that is a local counterparty solely pursuant to paragraph (b) of the definition of “local counterparty” satisfies subsection (1) if the transaction is submitted for clearing in accordance with the laws of a foreign jurisdiction that
- (a) except in Québec, is listed in Appendix B, and
  - (b) in Québec, appears on a list determined by the Autorité des marchés financiers.

**Notice of rejection**

4. If a regulated clearing agency rejects a transaction in a mandatory clearable derivative submitted to it for clearing, the regulated clearing agency must immediately notify each local counterparty to the transaction.

**Public disclosure of clearable and mandatory clearable derivatives**

5. A regulated clearing agency must maintain a website on which it discloses a list, which must be accessible to the public at no cost, of all derivatives or classes of derivatives for which it provides clearing services and, for each derivative or class of derivatives listed, identify whether it is a mandatory clearable derivative.

**PART 3  
EXEMPTIONS FROM MANDATORY CENTRAL COUNTERPARTY CLEARING**

**Non-application**

6. The following counterparties are excluded from the application of this Instrument:
- (a) the government of Canada, the government of a jurisdiction of Canada or the government of a foreign jurisdiction;
  - (b) a crown corporation for which the government of the jurisdiction where the crown corporation was constituted is responsible for all or substantially all the liabilities;
  - (c) an entity wholly owned by one or more governments, referred to in paragraph (a), that are responsible for all or substantially all the liabilities of the entity;
  - (d) the Bank of Canada or a central bank of a foreign jurisdiction;
  - (e) the Bank for International Settlements;
  - (f) the International Monetary Fund.

**Intragroup exemption**

7. (1) Despite any other section of this Instrument, a local counterparty is under no obligation to clear a transaction in a mandatory clearable derivative if all of the following apply:
- (a) the transaction is between either of the following:
    - (i) two counterparties that are prudentially supervised on a consolidated basis;
    - (ii) a counterparty and its affiliated entity if the financial statements for the counterparty and the affiliated entity are prepared on a consolidated basis in accordance with “accounting principles” as defined in the National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards*;
  - (b) both counterparties to the transaction agree to rely on this exemption;
  - (c) the transaction is subject to centralized risk evaluation, measurement and control procedures reasonably designed to identify and manage risks;
  - (d) there is a written agreement between the counterparties setting out the terms of the transaction between the counterparties.

- (2) No later than the 30th day after a local counterparty first relies on subsection (1) with each affiliated entity, the local counterparty must deliver or cause to be delivered to the regulator, in an electronic format, a completed Form 94-101F1 *Intragroup Exemption*.
- (3) No later than the 10th day after a local counterparty becomes aware that the information in a previously delivered Form 94-101F1 *Intragroup Exemption* is no longer accurate, the local counterparty must deliver to the regulator, in an electronic format, an amended Form 94-101F1 *Intragroup Exemption*.

**Multilateral portfolio compression exemption**

8. Despite any other section of this Instrument, a local counterparty to a mandatory clearable derivative resulting from a multilateral portfolio compression exercise is under no obligation to clear the resulting transaction if all of the following apply:
- (a) the resulting transaction is entered into as a result of more than two counterparties changing or terminating and replacing prior transactions;
  - (b) the prior transactions do not include a transaction entered into after the effective date on which the derivative or class of derivatives became a mandatory clearable derivative;
  - (c) the prior transactions were not cleared by a regulated clearing agency;
  - (d) the resulting transaction is entered into by the same counterparties as the prior transactions;
  - (e) the multilateral portfolio compression exercise is conducted by a third-party provider.

**Recordkeeping**

9. (1) A local counterparty to a transaction that relies on section 7 or section 8 must keep records demonstrating that the conditions referred to in those sections, as applicable, were satisfied.
- (2) The records required to be maintained under subsection (1) must be
- (a) kept in a safe location and in a durable form,
  - (b) provided to the regulator within a reasonable time following request,
  - (c) except in Manitoba, kept for a period of 7 years following the date on which the transaction expires or terminates, and
  - (d) in Manitoba, kept for a period of 8 years following the date on which the transaction expires or terminates.

**PART 4  
MANDATORY CLEARABLE DERIVATIVES**

**Submission of information on clearing services for derivatives by a regulated clearing agency**

10. No later than the 10th day after a regulated clearing agency first provides or offers clearing services for a derivative or class of derivatives, the regulated clearing agency must deliver to the regulator, in an electronic format, a completed Form 94-101F2 *Derivatives Clearing Services*, identifying the derivative or class of derivatives.

**PART 5  
EXEMPTION**

**Exemption**

11. (1) The regulator or the securities regulatory authority may grant an exemption to 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 an exemption.
- (3) Except in Alberta and Ontario, an exemption referred to in subsection (1) is granted under the statute referred to in Appendix B of National Instrument 14-101 *Definitions* opposite the name of the local jurisdiction.

**PART 6  
TRANSITION AND EFFECTIVE DATE**

**Transition – regulated clearing agency filing requirement**

12. No later than the 30th day after the coming into force of this Instrument, a regulated clearing agency must deliver to the regulator, in an electronic format, a completed Form 94-101F2 *Derivatives Clearing Services*, identifying all derivatives or classes of derivatives for which it provides clearing services as of the date of the coming into force of this Instrument.

**Effective date**

13. This Instrument comes into force on *[insert date]*.

## APPENDIX A

## MANDATORY CLEARABLE DERIVATIVES

## Interest Rate Swaps

Type	Floating index	Settlement currency	Maturity	Settlement Currency Type	Optionality	Notional type
Fixed-to-float	CDOR	CAD	28 days to 30 years	Single currency	No	Constant or variable
Fixed-to-float	LIBOR	USD	28 days to 50 years	Single currency	No	Constant or variable
Fixed-to-float	EURIBOR	EUR	28 days to 50 years	Single currency	No	Constant or variable
Fixed-to-float	LIBOR	GBP	28 days to 50 years	Single currency	No	Constant or variable
Basis	LIBOR	USD	28 days to 50 years	Single currency	No	Constant or variable
Basis	EURIBOR	EUR	28 days to 50 years	Single currency	No	Constant or variable
Basis	LIBOR	GBP	28 days to 50 years	Single currency	No	Constant or variable
Overnight index swap	CORRA	CAD	7 days to 2 years	Single currency	No	Constant or variable
Overnight index swap	FedFunds	USD	7 days to 30 years	Single currency	No	Constant or variable
Overnight index swap	EONIA	EUR	7 days to 30 years	Single currency	No	Constant or variable
Overnight index swap	SONIA	GBP	7 days to 30 years	Single currency	No	Constant or variable

## Forward Rate Agreements

Forward rate agreement	LIBOR	USD	3 days to 3 years	Single currency	No	Constant or variable
Forward rate agreement	EURIBOR	EUR	3 days to 3 years	Single currency	No	Constant or variable
Forward rate agreement	LIBOR	GBP	3 days to 3 years	Single currency	No	Constant or variable

APPENDIX B

EQUIVALENT CLEARING LAWS OF FOREIGN JURISDICTIONS PURSUANT TO PARAGRAPH 3(5)(a)

Jurisdiction	Law, Regulation and/or Instrument



**Section 3 – Certification**

I certify that I am authorised to deliver this Form on behalf of the counterparty delivering this Form and, where applicable, on behalf of the other counterparties listed above in Section 2 and that the information in this Form is true and correct.

DATED at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
(Print name of authorized person)

\_\_\_\_\_  
(Print title of authorized person)

\_\_\_\_\_  
(Signature of authorized person)

\_\_\_\_\_  
(Email)

\_\_\_\_\_  
(Phone number)

**Instructions: Deliver this form to the regulator in the local jurisdiction as follows:**

*[Insert names of each jurisdiction and email or other address by which submission is to be made.]*



**Request for Comments**

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\_\_\_\_\_  
(Print name of authorized person)

\_\_\_\_\_  
(Print title of authorized person)

\_\_\_\_\_  
(Signature of authorized person)

***Instructions: Deliver this form to the regulator in the local jurisdiction as follows:***

*[Insert names of each jurisdiction and email or other address by which submission is to be made.]*

## ANNEX C

### PROPOSED COMPANION POLICY 94-101CP MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES

#### GENERAL COMMENTS

##### Introduction

This Companion Policy sets out how the Canadian Securities Administrators (the “CSA” or “we”) interpret or apply the provisions of National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (“NI 94-101” or the “Instrument”) and related securities legislation.

The numbering of Parts and sections in this Companion Policy correspond to the numbering in NI 94-101. Any specific guidance on sections in NI 94-101 appears immediately after the section heading. If there is no guidance for a section, the numbering in this Companion Policy will skip to the next provision that does have guidance.

#### SPECIFIC COMMENTS

Unless defined in NI 94-101 or explained in this Companion Policy, terms used in NI 94-101 and in this Companion Policy have the meaning given to them in the securities legislation of each jurisdiction including National Instrument 14-101 *Definitions*.

In this Companion 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.

In this Companion Policy, “TR Instrument” means,

in Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan and Yukon, Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting*,

in Manitoba, Manitoba Securities Commission Rule 91-507 *Trade Repositories and Derivatives Data Reporting*,

in Ontario, Ontario Securities Commission Rule 91-507 *Trade Repositories and Derivatives Data Reporting*, and

in Québec, Regulation 91-507 respecting Trade Repositories and Derivatives Data Reporting.

#### PART 1 DEFINITIONS AND INTERPRETATION

##### Definitions and interpretation

1. (1) This Instrument defines “regulated clearing agency”. It is intended that only a regulated clearing agency that acts as a central counterparty for over-the-counter derivatives be subject to the Instrument. The purpose of paragraph (c) of this definition is to allow a transaction in a mandatory clearable derivative involving a local counterparty in one of the listed jurisdictions to be submitted to a clearing agency that is not yet recognized or exempted in the local jurisdiction. Paragraph (c) does not supersede any provisions of the securities legislation of the local jurisdiction with respect to any recognition requirements for a person or company that is carrying on the business of a clearing agency in the local jurisdiction.

The Instrument uses the term “transaction” rather than the term “trade” in part to reflect that “trade” is defined in the securities legislation of some jurisdictions as including the termination of a derivative. We do not think the termination of a derivative should trigger a requirement to submit the derivative for central clearing. Similarly, the definition of transaction in NI 94-101 excludes a novation resulting from the submission of a transaction to a regulated clearing agency as this is already a cleared

transaction. Finally, the definition of “transaction” is not the same as the definition found in the TR Instrument as the latter does not include a material amendment since the TR Instrument expressly provides that an amendment must be reported.

In the definition of “transaction”, the term “material amendment” should be considered in light of the fact that only new transactions will be subject to mandatory central counterparty clearing under NI 94-101. If a derivative that existed prior to the coming into force of NI 94-101 is materially amended after NI 94-101 is effective, that amendment will trigger the mandatory clearing requirement if applicable. A material amendment is one that changes information that would reasonably be expected to have a significant effect on the derivative’s attributes, including its value, the terms and conditions of the contract evidencing the derivative, the transaction methods or the risks related to its use, excluding information that is likely to have an effect on the market price or value of its underlying interest. We will consider several factors when determining whether a modification to an existing transaction is a material amendment. Examples of modifications to an existing transaction that would be a material amendment include any modification which would result in a significant change in the value of the transaction, differing cash flows or the creation of upfront payments.

(2) For the purpose of the interpretation of control, a person or company will always be considered to control a trust to which it is acting as trustee.

## **PART 2 MANDATORY CENTRAL COUNTERPARTY CLEARING**

### **Duty to submit for clearing**

3. (1) The duty to submit a transaction for clearing only applies at the time the transaction is executed. If a derivative or class of derivatives is determined to be a mandatory clearable derivative after the date of execution of a transaction in that derivative or class of derivatives, a local counterparty will not be required to submit the transaction for clearing. However, if after a derivative or class of derivatives is determined to be a mandatory clearable derivative, there is another transaction in that same derivative, including a material amendment to a previous transaction, (as discussed in subsection 1(1) above), that transaction in or material amendment to the derivative will be subject to the mandatory clearing requirement. Where a derivative is not subject to the mandatory clearing requirement, but the derivative is clearable through a regulated clearing agency, the counterparties have the option to submit the derivative for clearing at any time.

For a local counterparty that is not a participant of a regulated clearing agency, we have used the phrase “cause to be submitted” to refer to the local counterparty’s obligation. In order to comply with subsection (1), a local counterparty would need to have arrangements in place with a participant for clearing services in advance of entering into a transaction in a mandatory clearable derivative.

A transaction in a mandatory clearable derivative is required to be cleared when at least one of the counterparties is a local counterparty and one or more of paragraphs (a), (b) or (c) apply to both counterparties.

A local counterparty that has or has had a month-end gross notional amount of outstanding derivatives exceeding the threshold in paragraph (c), for any month following the entry into force of the Instrument, must clear all its subsequent transactions in a mandatory clearable derivative with another counterparty captured under one or more of paragraphs (a), (b), or (c). A local counterparty that is a participant at a regulated clearing agency who does not subscribe to clearing services for a mandatory clearable derivative would still have to clear such transactions if it is subject to paragraph (c).

A local counterparty determines whether it exceeds the threshold in paragraph (c) by calculating the notional amount of all outstanding derivatives which were entered into by itself and those of its affiliated entities that are also local counterparties. However, the calculation of the gross notional amount excludes derivatives entered into by entities that are prudentially supervised on a consolidated basis or whose financial statements are prepared on a consolidated basis, which are exempted in section 7.

(2) The Instrument requires that a transaction subject to mandatory central clearing be submitted to a regulated clearing agency as soon as practicable, but no later than the end of the day on which the transaction was executed or if the transaction occurs after business hours of the clearing agency, the next business day.

## **PART 3 EXEMPTIONS FROM MANDATORY CENTRAL COUNTERPARTY CLEARING**

### **Non-application**

6. A transaction involving a counterparty that is an entity listed in section 6 is not subject to the duty to submit for clearing under section 3 even if the other counterparty is otherwise subject to it.

The expression “government of a foreign jurisdiction” in paragraph (a) is interpreted as including sovereign and sub sovereign governments.

### **Intragroup exemption**

7. (1) The intragroup exemption is based on the premise that the risk created by these transactions is expected to be managed in a centralized manner to allow for the risk to be identified and managed appropriately.

This subsection sets out the conditions that must be met for the counterparties to rely on the intragroup exemption for a transaction in a mandatory clearable derivative. Subparagraph (a)(i) extends the availability of the intragroup exemption to transactions among certain entities that do not prepare consolidated financial statements. This may apply, e.g., to cooperatives or other entities that are prudentially supervised on a consolidated basis. Entities prudentially supervised on a consolidated basis are counterparties that are supervised on a consolidated basis either by the Office of the Superintendent of Financial Institutions (Canada), a government department or a regulatory authority of Canada or a jurisdiction of Canada responsible for regulating deposit-taking institutions.

Paragraph (c) refers to a system of risk management policies and procedures designed to monitor and manage the risks associated with a particular transaction. We are of the view that counterparties relying on this exemption may structure their centralized risk management according to their unique needs, provided that the program reasonably monitors and manages risks associated with non-centrally cleared derivatives.

(2) Within 30 days of the first transaction between two entities relying on the intragroup exemption, a completed Form 94-101F1 *Intragroup Exemption* (“Form 94-101F1”) must be delivered to the regulator to notify the regulator that the exemption is being relied upon. The information provided in the Form 94-101F1 will aid the regulators in better understanding the legal and operational structure allowing counterparties to benefit from the intragroup exemption. The obligation to deliver the completed Form 94-101F1 is imposed on one of the counterparties to a transaction relying on the exemption. For greater clarity, a completed Form 94-101F1 must be delivered for each pairing of counterparties that seek to rely upon the intragroup exemption. One completed Form 94-101F1 is valid for every transaction between the pair provided that the requirements set out in subsection (1) continue to apply.

(3) Examples of changes to the information provided that would require an amended Form 94-101F1 include: (i) a change in the control structure of one or more of the counterparties listed in Form 94-101F1, and (ii) any significant amendment to the risk evaluation, measurement and control procedures of a counterparty listed in Form 94-101F1.

### **Multilateral portfolio compression exemption**

8. A multilateral portfolio compression exercise is an exercise which involves more than two counterparties who wholly change or terminate the notional amount of some or all of the prior transactions submitted by the counterparties for inclusion in the exercise and, depending on the methodology employed, replace the terminated derivatives with other derivatives whose combined notional amount, or some other measure of risk, is less than the combined notional amount, or some other measure of risk, of the derivatives terminated in the exercise.

The purpose of a multilateral portfolio compression exercise is to reduce operational or counterparty credit risk by reducing the number or notional amounts of outstanding derivatives between counterparties and aggregate gross number or notional amounts of outstanding derivatives.

The expression “resulting transaction” refers to the transaction resulting from the multilateral portfolio compression exercise. The expression “prior transactions” refers to transactions that were entered into before the multilateral portfolio compression exercise. Those prior transactions were not required to be cleared under the Instrument, either because they did not include a mandatory clearable derivative or because they were entered into before the derivative or class of derivatives became a mandatory clearable derivative.

We would expect a local counterparty involved in a multilateral portfolio compression exercise to comply with its credit risk tolerance levels. To do so, we expect each participant to the compression exercise to set its own counterparty, market and cash payment risk tolerance levels so that the exercise does not alter the risk profiles of each participant beyond a level acceptable to the participant. Consequently, prior transactions that would be reasonably likely to significantly increase the risk exposure of the participant cannot be included in the portfolio compression exercise in order to benefit from this exemption.

We would generally expect that the resulting transaction would have the same material terms as the prior transactions with the exception of reducing the notional amount of outstanding derivatives.

## Recordkeeping

9. (1) We would generally expect that the reasonable supporting documentation to be kept in accordance with section 9 would include full and complete records of any analysis undertaken by the local counterparty to demonstrate it satisfies the conditions necessary to rely on the intragroup exemption under section 7 or the multilateral portfolio compression exemption under section 8.

The local counterparty subject to the mandatory central counterparty clearing requirement is responsible for determining whether, given the facts available, the exemption is available. Generally, we would expect a local counterparty relying on an exemption to retain all documents that show it properly relied on the exemption. It is not appropriate for a local counterparty to assume an exemption is available.

Counterparties using the intragroup exemption under section 7 should have appropriate legal documentation between them and detailed operational material outlining the risk management techniques used by the overall parent entity and its affiliated entities with respect to the transactions benefiting from the exemption.

### **PART 4 MANDATORY CLEARABLE DERIVATIVES**

and

### **PART 6 TRANSITION AND EFFECTIVE DATE**

10 & 12. A regulated clearing agency must deliver a Form 94-101F2 *Derivatives Clearing Services* ("Form 94-101F2") to identify all derivatives for which it provides clearing services within 30 days of the coming into force of the Instrument pursuant to section 12. A new derivative or class of derivatives added to the offer of clearing services after the Instrument is in force is declared through a Form 94-101F2 within 10 days of the launch of such service pursuant to section 10.

Each of the regulators has the power to determine by rule or otherwise which derivative or classes of derivatives will be subject to the mandatory central counterparty clearing requirement through a top-down approach. Furthermore, NI 94-101 includes a bottom-up approach for determining whether a derivative or class of derivatives will be subject to the mandatory clearing obligation. The information required by Form 94-101F2 will assist the CSA in carrying out this determination.

In the course of determining whether a derivative or class of derivatives will be subject to the clearing requirement, some of the factors we will consider include the following:

- the level of standardization of the derivative, such as the availability of electronic processing, the existence of master agreements, product definitions and short form confirmations;
- the effect of central clearing of the derivative on the mitigation of systemic risk, taking into account the size of the market for the derivative and the available resources of the regulated clearing agency to clear the derivative;
- whether mandating the derivative to be cleared would bring undue risk to regulated clearing agencies;
- the outstanding notional amount of counterparties transacting in the derivative or class of derivatives, the current liquidity in the market for the derivative or class of derivatives and the availability of reliable and timely pricing data;
- the existence of third-party vendors providing pricing services;
- with regards to a regulated clearing agency, the existence of an appropriate rule framework, and the existence of capacity, operational expertise and resources, and credit support infrastructure to clear the derivative on terms that are consistent with the material terms and trading conventions on which the derivative is traded;
- whether a regulated clearing agency would be able to manage the risk of the additional derivatives that might be submitted due to the clearing requirement determination;
- the effect on competition, taking into account appropriate fees and charges applied to clearing, and whether mandating clearing of the derivative could harm competition;
- alternative derivatives or clearing services co-existing in the same market;
- the public interest.

**FORM 94-101F1  
INTRAGROUP EXEMPTION**

**Submission of information on intragroup transactions by a local counterparty**

In item 3 of section 2, the phrase “in the manner required under the securities legislation” means in accordance with section 28 of the TR Instrument.

The forms delivered by or on behalf of a local counterparty under the Instrument will be kept confidential in accordance with the provisions of the applicable legislation. We are of the view that the forms generally contain proprietary information, and that the cost and potential risks of disclosure for the counterparties to an intragroup transaction outweigh the benefit of the principle requiring that forms be made available for public inspection.

While Form 94-101F1 and any amendments to it will be kept generally confidential, if the regulator considers that it is in the public interest to do so, it may require the public disclosure of a summary of the information contained in such form, or amendments to it.

**FORM 94-101F2  
DERIVATIVES CLEARING SERVICES**

**Submission of information on clearing services of derivatives by the regulated clearing agency**

Paragraphs (a), (b) and (c) of item 2 in section 2 address the potential for a derivative or class of derivatives to be a mandatory clearable derivative given its level of standardization in terms of market conventions, including legal documentation, processes and procedures, and whether pre- to post- transaction operations are carried out predominantly by electronic means. The standardization of the economic terms is a key input in the determination process as discussed in the following section.

In paragraph (a) of item 2 in section 2, life-cycle events has the same meaning as in section 1 of the TR Instrument.

Paragraphs (d) and (e) of item 2 in section 2 provide details to assist in assessing the market characteristics such as the activity (volume and notional amount) of a particular derivative or class of derivatives, the nature and landscape of the market for that derivative or class of derivatives and the potential impact its determination as a mandatory clearable derivative could have on market participants, including the regulated clearing agency. The determination process will involve different or additional considerations when assessing whether a derivative or class of derivatives should be a mandatory clearable derivative in terms of its liquidity and price availability, versus the considerations used by the regulator in permitting a regulated clearing agency to offer clearing services for a derivative or class of derivatives. Stability in the availability of pricing information will also be an important factor considered in the determination process. Metrics such as the total number of transactions and aggregate notional amounts, and outstanding positions can be used to justify the confidence and frequency with which the pricing of a derivative or class of derivatives is calculated. The data presented should also cover a reasonable period of time of no less than 6 months. Suggested information to be provided on the market includes

- statistics regarding the percentage of activity of participants on their own behalf and for customers,
- average net and gross positions including the direction of positions (long or short), by type of market participant submitting transactions directly or indirectly, and
- average trading activity and concentration of trading activity among participants by type of market participant submitting transactions directly or indirectly.