Chapter 5

Rules and Policies

5.1.1 National Instrument 94-102 Derivatives: Customer Clearing and Protection of Customer Collateral and Positions and Related Companion Policy

NATIONAL INSTRUMENT 94-102
DERIVATIVES: CUSTOMER CLEARING AND PROTECTION OF CUSTOMER COLLATERAL AND POSITIONS

PART 1
DEFINITIONS, INTERPRETATION AND APPLICATION

Definitions and interpretation

1. (1) In this Instrument

"Canadian financial institution" has the meaning ascribed to it in National Instrument 45-106 *Prospectus Exemptions*;

"cleared derivative" means a derivative that is, directly or indirectly, submitted to and cleared by a clearing agency;

"clearing intermediary" means a direct intermediary or an indirect intermediary;

"customer" means a counterparty to a cleared derivative other than a clearing intermediary or a regulated clearing agency;

"customer collateral" means all cash, securities and other property if any of the following apply:

(a) the cash, securities or other property is received or held by a clearing intermediary or regulated clearing agency from, for or on behalf of a customer, and is intended to or does margin, guarantee, secure, settle or adjust a cleared derivative of the customer;

(b) the cash, securities or other property is posted on behalf of a customer by a clearing intermediary to satisfy the margin requirements arising from the customer's cleared derivatives;

"direct intermediary" means a person or company that

(a) with respect to a cleared derivative, is a participant of the regulated clearing agency at which the cleared derivative is cleared,

(b) directly provides clearing services for a customer in respect of a cleared derivative entered into by, for or on behalf of the customer, and

(c) requires, receives or holds collateral from, for or on behalf of the customer in providing clearing services;

"excess margin" means customer collateral in respect of a customer's cleared derivatives that

(a) is delivered to a regulated clearing agency or clearing intermediary from, for or on behalf of the customer, and

(b) has a value in excess of the amount required by the regulated clearing agency to clear and settle the cleared derivatives of the customer;

"indirect intermediary" means a person or company that

(a) indirectly provides clearing services for a customer in respect of a cleared derivative entered into by, for or on behalf of the customer, and

(b) requires, receives or holds collateral from, for or on behalf of the customer in providing clearing services;

"initial margin" means, in relation to a regulated clearing agency's margin system that manages credit exposures to its participants, collateral that is required by the regulated clearing agency to cover potential changes in the value of a customer's cleared derivatives over an appropriate close-out period in the event of a default;

"local customer" means a customer that, in respect of a local jurisdiction, is any of the following:

(a) an individual who is resident in the local jurisdiction;

(b) a person or company, other than an individual, to which any of the following apply:

(i) the person or company is organized under the laws of the local jurisdiction;

(ii) the head office of the person or company is in the local jurisdiction;

(iii) the principal place of business of the person or company is in the local jurisdiction;

"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;

"permitted depository" means a person or company that is any of the following:

(a) a Canadian financial institution or Schedule III bank;

(b) a regulated clearing agency;

(c) the central bank of Canada or of a permitted jurisdiction;

(d) in Québec, a person recognized or exempt 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 the equivalent of $100 000 000;

(f) with respect to customer collateral that it receives from a customer or a clearing intermediary for which it provides clearing services, a registered investment dealer as defined in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*;

(g) with respect to customer collateral that it receives from a customer or a clearing intermediary for which it provides clearing services, a prudentially regulated entity

(i) whose head office or principal place of business is located outside of Canada, and

(ii) that is subject to and in compliance with the laws of a permitted jurisdiction relating to clearing services and the requiring, receiving and holding of customer collateral;

"permitted investment" means cash or a security or other financial instrument with minimal market and credit risk that is capable of being liquidated rapidly with minimal adverse price effect;

"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 customer has provided express written consent to the clearing intermediary or the regulated clearing agency clearing a cleared derivative in a foreign currency, the country of origin of the foreign currency used to

denominate the rights and obligations under the cleared derivative entered into by, for or on behalf of the customer, and a political subdivision of that country;

"position" means the economic interest of a counterparty in an outstanding cleared derivative at a point in time;

"prudentially regulated entity" means a person or company that is subject to and in compliance with the laws of a foreign jurisdiction that is a permitted jurisdiction under paragraph (a) of the definition of "permitted jurisdiction", relating to minimum capital requirements, financial soundness and risk management;

"qualifying central counterparty" means a person or company to which all of the following apply:

(a) it is recognized, exempt from recognition or otherwise registered or authorized to operate as a central counterparty in a jurisdiction of Canada or a foreign jurisdiction by a government or regulatory authority;

(b) it is subject to regulation that is consistent with the *Principles for market infrastructures* published by the Bank for International Settlements' Committee on Payments and Market Infrastructures and the International Organization of Securities Commissions in April 2012, as amended from time to time;

"regulated clearing agency" means

(a) in British Columbia, Manitoba and Ontario, a person or company recognized or exempt from recognition as a clearing agency in the local jurisdiction, and

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

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

"segregate" means to separately hold or separately account for a customer's positions or customer collateral.

(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;

(d) the second party is a trust and the trustee of the trust is the first party.

(4) 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*.

Application

2. (1) This Instrument does not apply to any of the following:

(a) a regulated clearing agency whose head office or principal place of business is in a foreign jurisdiction except with respect to a cleared derivative entered into by, for or on behalf of a local customer;

(b) a clearing intermediary that provides clearing services except with respect to a cleared derivative entered into by, for or on behalf of a local customer.

(2) This Instrument applies to

(a) in Manitoba,

(i) a derivative other than a contract or instrument that, for any purpose, is prescribed by any of sections 2, 4 and 5 of Manitoba Securities Commission Rule 91-506 *Derivatives: Product Determination* not to be a derivative, and

(ii) a derivative that is otherwise a security and that, for any purpose, is prescribed by section 3 of Manitoba Securities Commission Rule 91-506 *Derivatives: Product Determination* not to be a security,

(b) in Ontario,

(i) a derivative other than a contract or instrument that, for any purpose, is prescribed by any of sections 2, 4 and 5 of Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination* not to be a derivative, and

(ii) a derivative that is otherwise a security and that, for any purpose, is prescribed by section 3 of Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination* not to be a security, and

(c) in Québec, a derivative specified in section 1.2 of *Regulation 91-506 respecting derivatives determination*, other than a contract or instrument specified in section 2 of that regulation.

In each other local jurisdiction, this Instrument applies to a derivative as defined in subsection 1(4) of this Instrument. This text box does not form part of this Instrument and has no official status.

(3) Despite subsection (2), this Instrument does not apply to an option on a security.

(4) In British Columbia, Newfoundland and Labrador, the Northwest Territories, Nunavut, Prince Edward Island and Yukon, subsection (3) does not apply to a security that is a derivative as defined in subsection 1(4).

PART 2
TREATMENT OF CUSTOMER COLLATERAL BY A CLEARING INTERMEDIARY

Segregation of customer collateral – clearing intermediary

3. (1) A clearing intermediary must segregate a customer's positions and customer collateral from the positions and property of other persons or companies including the positions and property of the clearing intermediary.

(2) A clearing intermediary must segregate the positions and customer collateral of a customer of an indirect intermediary from the positions and property of the indirect intermediary.

Holding of customer collateral – clearing intermediary

4. A clearing intermediary must hold all customer collateral

(a) in one or more accounts at a permitted depository that are clearly identified as holding customer collateral, and

(b) in separate accounts from the property of all persons who are not customers.

Excess margin – clearing intermediary

5. A clearing intermediary must at least once each business day identify and record the value of excess margin it holds that is attributable to each customer for which the clearing intermediary provides clearing services.

Use of customer collateral – clearing intermediary

6. (1) A clearing intermediary must not use or permit the use of customer collateral except in accordance with this section and sections 7 and 8.

(2) A clearing intermediary must not use or permit the use of customer collateral of a customer except to do any of the following:

(a) margin, guarantee, secure, settle or adjust a cleared derivative of the customer;

(b) with respect to excess margin, guarantee, secure or extend the credit of the customer.

(3) Other than with respect to excess margin used in accordance with paragraph (2)(b), a clearing intermediary must not create or permit to exist any lien or other encumbrance on a cleared derivative of a customer or customer collateral in respect of the cleared derivative unless the lien or other encumbrance secures an obligation resulting from the cleared derivative in favour of any of the following:

(a) the customer;

(b) the regulated clearing agency or clearing intermediary responsible for clearing the cleared derivative.

Investment of customer collateral – clearing intermediary

7. (1) A clearing intermediary must not invest customer collateral or enter into an agreement for resale or repurchase of customer collateral except in accordance with subsections (2) and (3).

(2) A clearing intermediary may

(a) invest customer collateral in a permitted investment, and

(b) enter into an agreement for resale or repurchase of customer collateral if all of the following apply:

(i) the agreement is for the resale or repurchase of a permitted investment;

(ii) the agreement is in writing;

(iii) the term of the agreement is no more than one business day, or reversal of the transaction is possible on demand;

(iv) written confirmation specifying the terms of the agreement is delivered by the counterparty to the agreement to the clearing intermediary immediately on entering into the agreement;

(v) the agreement is not entered into with an affiliated entity of the clearing intermediary.

(3) A loss resulting from an investment or use of a customer's customer collateral in accordance with subsection (1) or subsection (2) by the clearing intermediary must be borne by the clearing intermediary making the investment and not by the customer.

Use of customer collateral – indirect intermediary default

8. (1) A clearing intermediary must not use customer collateral of a customer of an indirect intermediary for which the clearing intermediary provides clearing services to satisfy an obligation of the indirect intermediary.

(2) Despite subsection (1), a clearing intermediary may use the customer collateral of a customer to fully or partially satisfy an obligation of an indirect intermediary that arises or is accelerated as a consequence of the indirect intermediary's default only if the obligation is attributable to a cleared derivative of the customer.

Acting as a clearing intermediary

9. (1) A person or company must not act as a clearing intermediary for a customer unless the person or company is any of the following:

(a) a person or company that is subject to and is in compliance with the laws of a jurisdiction of Canada relating to minimum capital requirements, financial soundness and risk management;

(b) a person or company that is registered as a dealer under securities legislation in a local jurisdiction;

(c) a person or company that is

(i) a prudentially regulated entity, and

(ii) subject to and in compliance with the laws of a permitted jurisdiction relating to clearing services and the requiring, receiving and holding of customer collateral.

(2) A clearing intermediary must not provide clearing services for a customer unless the clearing services are provided in respect of derivatives that are cleared by a regulated clearing agency.

Risk management – clearing intermediary

10. A clearing intermediary that provides or proposes to provide clearing services for an indirect intermediary must adopt and implement rules, policies or procedures reasonably designed to

(a) identify, monitor and reasonably mitigate material risks arising from the provision of clearing services, and

(b) manage a default of the indirect intermediary.

Risk management – indirect intermediary

11. (1) An indirect intermediary must establish and implement rules, policies or procedures reasonably designed to identify, monitor and reasonably mitigate the material risks to the clearing intermediary or its customers arising from the provision of indirect clearing services for a customer.

(2) An indirect intermediary that receives clearing services from a clearing intermediary must provide the clearing intermediary with all information reasonably required to identify, monitor and reasonably mitigate any material risks arising from the provision of indirect clearing services for customers.

PART 3
RECORDKEEPING BY A CLEARING INTERMEDIARY

Retention of records – clearing intermediary

12. (1) A clearing intermediary must keep a record required under this Part and Part 4, and all supporting documentation,

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

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

(c) in any other case, for a period of 7 years following the date on which a customer's last cleared derivative that is cleared for or on behalf of the customer through the clearing intermediary expires or is terminated.

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

Daily records – clearing intermediary

13. (1) A clearing intermediary that receives customer collateral must calculate and record all of the following at least once each business day in its records:

(a) for each customer, the amount of customer collateral it requires from, for or on behalf of the customer;

(b) the total amount of customer collateral it requires from, for or on behalf of all customers.

(2) For each indirect intermediary that a clearing intermediary provides clearing services for, the clearing intermediary must calculate and record all of the following at least once each business day in its records:

(a) the amount of customer collateral it requires from, for or on behalf of each customer of each indirect intermediary;

(b) the total amount of customer collateral it requires from, for or on behalf of all customers of each indirect intermediary.

(3) For each customer, a clearing intermediary must record all of the following in its records:

(a) each permitted depository at which it holds customer collateral of the customer;

(b) calculated at least once each business day, the current value of any customer collateral received from, for or on behalf of the customer, including all of the following:

(i) any accruals on the customer collateral creditable to the customer;

(ii) any gains or losses in respect of the customer collateral;

(iii) any charges accruing to the customer;

(iv) any distributions or transfers of the customer collateral.

Daily records – direct intermediary

14. For each customer, a direct intermediary must record all of the following at least once each business day in its records:

(a) the total amount of customer collateral required for the cleared derivatives of the customer by each regulated clearing agency;

(b) the total amount of the customer's excess margin held by the direct intermediary.

Daily records – indirect intermediary

15. For each customer, an indirect intermediary must record all of the following at least once each business day in its records:

(a) the total amount of collateral required for the cleared derivatives of the customer by each clearing intermediary through which the indirect intermediary clears;

(b) the sum of the amounts for the customer referred to in paragraph (a);

(c) the total amount of the customer's excess margin held by the indirect intermediary.

Identifying records – direct intermediary

16. A direct intermediary must keep records that, at any time, enable it to identify all of the following in its own accounts and in the accounts held with each regulated clearing agency through which it provides clearing services:

(a) the positions and property of the direct intermediary;

(b) the positions and value of customer collateral held for or on behalf of each of the direct intermediary's customers.

Identifying records – indirect intermediary

17. An indirect intermediary must keep records that, at any time, enable it to identify all of the following in its own accounts and in the accounts held with each clearing intermediary through which it provides clearing services:

(a) the positions and property of the indirect intermediary;

(b) the positions and value of customer collateral held for or on behalf of each of the indirect intermediary's customers.

Identifying records – multiple clearing intermediaries

18. A clearing intermediary that provides clearing services in respect of a cleared derivative for an indirect intermediary must keep records that, at any time, enable it and each of its indirect intermediaries to identify all of the following in the accounts held with the clearing intermediary:

(a) the positions and property of the indirect intermediary;

(b) the positions and value of customer collateral held for or on behalf of the indirect intermediary's customers.

Records of investment of customer collateral – clearing intermediary

19. A clearing intermediary that invests customer collateral must keep records of all of the following with respect to each investment of customer collateral:

(a) the date of the investment;

(b) the name of each person or company through which the investment was made;

(c) a daily market valuation of the investment, including any unrealized gain or loss on the investment and related supporting documentation;

(d) a description of each asset or instrument in which the investment was made;

(e) the identity of each permitted depository where each asset or instrument in which the investment was made is deposited;

(f) the date on which the investment was liquidated or otherwise disposed of and the realized gain or loss;

(g) the name of each person or company liquidating or disposing of the investment.

Records of currency conversion – clearing intermediary

20. A clearing intermediary must keep a record of each conversion of customer collateral from one currency to another.

PART 4
REPORTING AND DISCLOSURE BY A CLEARING INTERMEDIARY

Clearing intermediary delivery of disclosure by regulated clearing agency

21. (1) Before receiving the first cleared derivative from, for or on behalf of a customer, a clearing intermediary must provide the customer, or an indirect intermediary for which it provides clearing services, with all of the following:

(a) the written disclosure provided under subsection 41(1) by each regulated clearing agency the direct intermediary uses to clear a cleared derivative for the customer or indirect intermediary;

(b) the investment guidelines and policy provided under subsection 45(1) by each regulated clearing agency that invests customer collateral attributable to the customer.

(2) After accepting the first cleared derivative from, for or on behalf of a customer, each time that the clearing intermediary receives written disclosure in accordance with subsection 41(2) or subsection 45(2) from a regulated clearing agency that invests customer collateral attributable to the customer, the clearing intermediary must provide the written disclosure to the customer, or indirect clearing intermediary for which it provides clearing services, within a reasonable period of time.

Disclosure to customer by clearing intermediary

22. (1) Before receiving the first cleared derivative from, for or on behalf of a customer, a clearing intermediary must provide written disclosure to the customer describing the treatment of customer collateral not held at a regulated clearing agency, including the impact of relevant bankruptcy and insolvency laws, in the event of a default by the clearing intermediary.

(2) After accepting the first cleared derivative from, for or on behalf of a customer of, each time there is a change to the written disclosure referred to in subsection (1), the clearing intermediary must provide written disclosure to the customer, within a reasonable period of time, describing the change.

Disclosure to customer by indirect intermediary

23. (1) Before receiving the first cleared derivative from, for or on behalf of a customer, an indirect intermediary must provide written disclosure to the customer including a description of all of the following:

(a) the material risks associated with receiving clearing services through an indirect intermediary;

(b) the rules, policies or procedures for transferring positions and customer collateral to another clearing intermediary or liquidating positions and customer collateral, in the event of the indirect intermediary's default.

(2) After accepting the first cleared derivative from, for or on behalf of a customer of, each time there is a change to the rules, policies or procedures referred to in paragraph (1)(b), the indirect intermediary must provide written disclosure to the customer, within a reasonable period of time, describing the change.

Customer information – clearing intermediary

24. (1) A direct intermediary must provide all of the following to a regulated clearing agency:

(a) before submitting to the regulated clearing agency the first cleared derivative for or on behalf of a customer of the direct intermediary, or of an indirect intermediary for which the direct intermediary provides clearing services, information sufficient to identify the customer and the customer's positions and customer collateral;

(b) at least once each business day after providing the information referred to in paragraph (a), information that identifies the customer's positions and the current value of the customer's customer collateral.

(2) An indirect intermediary must provide all of the following to a clearing intermediary through which it provides clearing services:

(a) before submitting to the clearing intermediary the first cleared derivative for or on behalf of a customer, information sufficient to identify the customer and the customer's positions and customer collateral;

(b) at least once each business day after providing the information referred to in paragraph (a), information that identifies the customer's positions and the current value of the customer's customer collateral.

Customer collateral report – regulatory

25. (1) A direct intermediary that receives customer collateral must electronically deliver to the regulator or securities regulatory authority, within 10 business days of the end of each calendar month, a completed Form 94-102F1 *Customer Collateral Report: Direct Intermediary*.

(2) An indirect intermediary that receives customer collateral must electronically deliver to the regulator or securities regulatory authority, within 10 business days of the end of each calendar month, a completed Form 94-102F2 *Customer Collateral Report: Indirect Intermediary*.

Customer collateral report – customer

26. (1) A clearing intermediary must make available to each customer from, for or on behalf of whom it receives customer collateral, a report, calculated and available on a daily basis, setting out all of the following:

(a) the current value of each position of the customer;

(b) the current value of customer collateral received from, for or on behalf of the customer that is held by the clearing intermediary or at a permitted depository;

(c) the current value of the customer collateral received from, for or on behalf of the customer that is posted with any of the following:

(i) a regulated clearing agency;

(ii) another clearing intermediary.

(2) A clearing intermediary must make available to each indirect intermediary from which it receives customer collateral a report, calculated and available on a daily basis, setting out all of the following:

(a) the current value of each position of each customer of the indirect intermediary;

(b) the current value of customer collateral received from the indirect intermediary for or on behalf of each customer of the indirect intermediary that is held by the clearing intermediary or at a permitted depository;

(c) the current value of the customer collateral received from the indirect intermediary for or on behalf of each customer of the indirect intermediary that is posted with any of the following:

(i) a regulated clearing agency;

(ii) another clearing intermediary.

Disclosure of investment of customer collateral

27. (1) Before receiving the first cleared derivative from, for or on behalf of a customer, a clearing intermediary that invests customer collateral must disclose in writing its investment guidelines and policy directly to the customer, or, if applicable, to the indirect intermediary that is providing clearing services to the customer.

(2) A clearing intermediary that invests customer collateral must within a reasonable period of time disclose in writing any change to the investment guidelines and policy referred to in subsection (1) directly to the customer or, if applicable, to the indirect intermediary that is providing clearing services to the customer.

PART 5
TREATMENT OF CUSTOMER COLLATERAL BY A REGULATED CLEARING AGENCY

Collection of initial margin

28. A regulated clearing agency must collect initial margin for each customer on a gross basis.

Segregation of customer collateral – regulated clearing agency

29. A regulated clearing agency must segregate a customer's positions and customer collateral from the positions and property of other persons or companies including the positions and property of the regulated clearing agency.

Holding of customer collateral – regulated clearing agency

30. A regulated clearing agency must hold all customer collateral

(a) in one or more accounts at a permitted depository that are clearly identified as holding customer collateral, and

(b) in separate accounts from all other property that is not customer collateral.

Excess margin – regulated clearing agency

31. A regulated clearing agency must at least once each business day identify and record the value of excess margin it holds for or on behalf of the customers of each clearing intermediary.

Use of customer collateral – regulated clearing agency

32. (1) A regulated clearing agency must not use or permit the use of customer collateral except in accordance with this section and sections 33 and 34.

(2) A regulated clearing agency must not use or permit the use of customer collateral of a customer except to do any of the following:

(a) margin, guarantee, secure, settle or adjust a cleared derivative of the customer;

(b) with respect to excess margin, guarantee, secure or extend the credit of the customer.

(3) Other than with respect to excess margin used in accordance with paragraph (2)(b), a regulated clearing agency must not create or permit to exist any lien or other encumbrance on a cleared derivative of a customer or customer collateral in respect of the cleared derivative unless the lien or other encumbrance secures an obligation resulting from the cleared derivative in favour of any of the following:

(a) the customer;

(b) the regulated clearing agency or a clearing intermediary responsible for clearing the cleared derivative.

Investment of customer collateral – regulated clearing agency

33. (1) A regulated clearing agency must not invest customer collateral or enter into an agreement for resale or repurchase of customer collateral except in accordance with subsections (2) and (3).

(2) A regulated clearing agency may

(a) invest customer collateral in a permitted investment, and

(b) enter into an agreement for resale or repurchase of customer collateral if all of the following apply:

(i) the agreement is for resale or repurchase of a permitted investment;

(ii) the agreement is in writing;

(iii) the term of the agreement is no more than one business day, or reversal of the transaction is possible on demand;

(iv) written confirmation specifying the terms of the agreement is delivered by the counterparty to the agreement to the regulated clearing agency immediately on entering into the agreement;

(v) the agreement is not entered into with an affiliated entity of the regulated clearing agency.

(3) A loss resulting from an investment or use of a customer's customer collateral in accordance with subsection (1) or subsection (2) by the regulated clearing agency must be borne by the regulated clearing agency making the investment or by a clearing intermediary that is a participant of the regulated clearing agency and not by any customer.

Use of customer collateral – clearing intermediary default

34. (1) A regulated clearing agency must not use customer collateral to satisfy an obligation of a clearing intermediary to which the regulated clearing agency provides clearing services.

(2) Despite subsection (1), a regulated clearing agency may use the customer collateral of a customer to fully or partially satisfy an obligation of a clearing intermediary that arises or is accelerated as a consequence of the clearing intermediary's default only if the obligation is attributable to a cleared derivative of the customer.

Risk management – NI 24-102 applies

35. Part 3 of National Instrument 24-102 *Clearing Agency Requirements* applies to a regulated clearing agency and, for that purpose, a reference in that instrument to a "recognized clearing agency" is to be read as a reference to a "regulated clearing agency".

PART 6
RECORDKEEPING BY A REGULATED CLEARING AGENCY

Retention of records – regulated clearing agency

36. A regulated clearing agency must keep a record required under this Part and Part 7, and all supporting documentation, in a readily accessible and safe location and in a durable form, until the date on which the cleared derivative that the record or supporting documentation relates to expires or is terminated.

Daily records – regulated clearing agency

37. (1) A regulated clearing agency that receives customer collateral must calculate and record all of the following at **least** once each business day in its records:

(a) for each customer, the amount of customer collateral it requires from, for or on behalf of the customer;

(b) the total amount of customer collateral it requires from, for or on behalf of all customers.

(2) A regulated clearing agency must record all of the following in its records:

(a) each permitted depository at which it holds customer collateral;

(b) calculated at least once each business day, the current value of the customer collateral received from, for or on behalf of the customers of each direct intermediary including all of the following:

(i) any accruals on the customer collateral creditable to the direct intermediary's customers;

(ii) any gains or losses in respect of the customer collateral;

(iii) any charges accruing to the direct intermediary's customers;

(iv) any distributions or transfers of the customer collateral.

Identifying records – regulated clearing agency

38. A regulated clearing agency must keep records that, at any time, enable it and each of its direct intermediaries to identify all of the following in the accounts held at the regulated clearing agency:

(a) the positions and property held for the direct intermediary;

(b) the positions and value of customer collateral held for or on behalf of the direct intermediary's customers;

(c) the positions and value of customer collateral held for or on behalf of customers of each indirect intermediary for which the direct intermediary provides clearing services.

Records of investment of customer collateral – regulated clearing agency

39. A regulated clearing agency that invests customer collateral must keep records of all of the following with respect to each investment of customer collateral:

(a) the date of the investment;

(b) the name of each person or company through which the investment was made;

(c) a daily market valuation of the investment, including any unrealized gain or loss on the investment and related supporting documentation;

(d) a description of each asset or instrument in which the investment was made;

(e) the identity of each permitted depository where each asset or instrument in which the investment is made is deposited;

(f) the date on which the investment was liquidated or otherwise disposed of and the realized gain or loss;

(g) the name of each person or company liquidating or disposing of the investment.

Records of currency conversion – regulated clearing agency

40. A regulated clearing agency must keep a record of each conversion of customer collateral from one currency to another.

PART 7
REPORTING AND DISCLOSURE BY A REGULATED CLEARING AGENCY

Disclosure to direct intermediaries by regulated clearing agency

41. (1) Before receiving the first cleared derivative from, for or on behalf of a customer, a regulated clearing agency must provide written disclosure to the direct intermediary through which the derivative is cleared including a description of all of the following:

(a) the rules, policies or procedures of the regulated clearing agency that govern the segregation and use of customer collateral and the transfer or liquidation of a cleared derivative of a customer in the event of a direct intermediary's default;

(b) the impact of laws, including bankruptcy and insolvency laws, on the customer, its positions and customer collateral in the event of a direct intermediary's default;

(c) the circumstances under which an interest or ownership rights in customer collateral may be enforced by the regulated clearing agency, the direct intermediary or the customer.

(2) After accepting the first cleared derivative from, for or on behalf of a customer, each time there is a change to the rules, policies or procedures referred to in paragraph (1)(a), the regulated clearing agency must provide written disclosure to the direct intermediary through which the derivative is cleared, within a reasonable period of time, describing the change.

Customer information – regulated clearing agency

42. A regulated clearing agency must have rules, policies or procedures reasonably designed to confirm that the information it receives from a direct intermediary in accordance with subsection 24(1) is complete and received in a timely manner.

Customer collateral report – regulatory

43. A regulated clearing agency that receives customer collateral must electronically deliver to the regulator or securities regulatory authority, within 10 business days of the end of each calendar month, a completed Form 94-102F3 *Customer Collateral Report: Regulated Clearing Agency*.

Customer collateral report – direct intermediary

44. A regulated clearing agency must make available to each direct intermediary from which it receives customer collateral a report, calculated and available on a daily basis, setting out all of the following:

(a) the current value of each position of each customer of the direct intermediary;

(b) the current value of customer collateral received from the direct intermediary for or on behalf of each customer of the direct intermediary that is held by the regulated clearing agency;

(c) the total current value of customer collateral received from the direct intermediary that is held at a permitted depository;

(d) the location of each permitted depository at which the customer collateral is held.

Disclosure of investment of customer collateral

45. (1) Before receiving the first cleared derivative from, for or on behalf of a customer, a regulated clearing agency that invests customer collateral must disclose in writing its investment guidelines and policy to the direct intermediary through which the derivative is cleared.

(2) A regulated clearing agency that invests customer collateral must within a reasonable period of time disclose in writing any change to the investment guidelines and policy referred to in subsection (1) to the direct intermediary through which the derivative is cleared.

PART 8
TRANSFER OF POSITIONS

Transfer of customer collateral and positions

46. (1) On default of a direct intermediary, a regulated clearing agency and the defaulting direct intermediary must do all of the following:

(a) facilitate a transfer of the defaulting direct intermediary's customers' positions and customer collateral, or their liquidation proceeds, from the defaulting direct intermediary to one or more non-defaulting direct intermediaries;

(b) make reasonable efforts to ensure the transfer is facilitated in accordance with the customer's instructions.

(2) At the request of a customer, a regulated clearing agency and a non-defaulting direct intermediary must facilitate a transfer of the customer's positions and customer collateral from the non-defaulting direct intermediary to one or more non-defaulting direct intermediaries if all of the following apply:

(a) the customer has consented to the transfer;

(b) the customer's account is not currently in default;

(c) the transferred positions will have appropriate margin at the receiving direct intermediary;

(d) any remaining positions will have appropriate margin at the transferring direct intermediary;

(e) the receiving direct intermediary has consented to the transfer.

Transfer from a clearing intermediary

47. A clearing intermediary that provides clearing services for an indirect intermediary must have rules, policies or procedures in respect of the portability and transfer of a customer's positions and customer collateral that include a reasonable mechanism for transferring the positions and customer collateral of the indirect intermediary's customers, in the event of a default by the indirect intermediary or at the request of the indirect intermediary's customer, to one or more non-defaulting clearing intermediaries.

PART 9
SUBSTITUTED COMPLIANCE

Substituted compliance

48. (1) A clearing intermediary whose head office or principal place of business is in a foreign jurisdiction is exempt from this Instrument in respect of a cleared derivative entered into by, for or on behalf of a local customer if all of the following apply:

(a) the cleared derivative is cleared for or on behalf of a local customer

(i) in a local jurisdiction other than British Columbia, Manitoba and Ontario by a qualifying central counterparty or a regulated clearing agency, and

(ii) in British Columbia, Manitoba and Ontario, by a regulated clearing agency;

(b) the clearing intermediary is all of the following:

(i) registered, licensed or otherwise authorized to perform the services of a clearing intermediary in a foreign jurisdiction listed in Appendix A;

(ii) in compliance with the laws of the foreign jurisdiction applicable to the clearing intermediary set out in Appendix A opposite the name of the foreign jurisdiction relating to clearing services and the requiring, receiving and holding of customer collateral.

(2) Despite subsection (1), a clearing intermediary relying on the exemption from the Instrument set out in subsection (1) that provides clearing services in respect of a cleared derivative entered into by, for or on behalf of a local customer

must comply with the provisions of this Instrument set out in Appendix A opposite the name of the foreign jurisdiction referred to in paragraph (1)(b).

(3) A regulated clearing agency whose head office or principal place of business is in a foreign jurisdiction is exempt from this Instrument in respect of a cleared derivative entered into by, for or on behalf of a local customer if the regulated clearing agency complies with all of the following:

(a) the terms and conditions of any recognition or exemption decision made by any securities regulatory authority in respect of the regulated clearing agency;

(b) the laws of a foreign jurisdiction applicable to the regulated clearing agency set out in Appendix A opposite the name of the foreign jurisdiction relating to clearing services and the requiring, receiving and holding of customer collateral.

(4) Despite subsection (3), a regulated clearing agency relying on the exemption from the Instrument set out in subsection (3) that provides clearing services in respect of a cleared derivative entered into by, for or on behalf of a local customer must comply with the provisions of this Instrument set out in Appendix A opposite the name of the foreign jurisdiction referred to in paragraph (3)(b).

PART 10
EXEMPTIONS

Exemption – general

49. (1) The regulator or the securities regulatory authority may grant an exemption from this Instrument, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.

(2) Despite subsection (1), in Ontario, only the regulator may grant 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 11
EFFECTIVE DATE

Effective date

50. This Instrument comes into force on July 3, 2017.

APPENDIX A
TO
NATIONAL INSTRUMENT 94-102 DERIVATIVES: CUSTOMER CLEARING AND PROTECTION OF CUSTOMER POSITIONS AND COLLATERAL

Substituted Compliance
(Section 48)

PART A
LAWS, REGULATIONS OR INSTRUMENTS OF FOREIGN JURISDICTIONS APPLICABLE TO CLEARING INTERMEDIARIES FOR SUBSTITUTED COMPLIANCE

Foreign Jurisdiction	**Laws, Regulations or Instruments**	**Provisions of this Instrument applicable to a clearing intermediary despite compliance with the foreign jurisdiction's laws, regulations or instruments**
European Union	Regulation (EU) 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, as amended by Regulation (EU) 600/2014 of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012. Commission Delegated Regulation (EU) 149/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP. Directive (EU) 39/2004 of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.	Subsection 6(2) Subsection 6(3) Section 12 Section 25 Section 26
United States of America	Commodity Futures Trading Commission, *General Regulations Under the Commodity Exchange Act*, 17 CFR pt 1. Commodity Futures Trading Commission, *Registration*, 17 CFR pt 3. Commodity Futures Trading Commission, *Cleared Swaps*, 17 CFR pt 22. Commodity Futures Trading Commission, *Bankruptcy Rules*, 17 CFR pt 190.	Section 12 Section 25 Section 26

PART B
LAWS, REGULATIONS OR INSTRUMENTS OF FOREIGN JURISDICTIONS
APPLICABLE TO REGULATED CLEARING AGENCIES FOR SUBSTITUTED COMPLIANCE

Foreign Jurisdiction	Laws, Regulations or Instruments	Provisions of this Instrument applicable to a regulated clearing agency despite compliance with the foreign jurisdiction's laws, regulations or instruments
European Union	Regulation (EU) 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, as amended by Regulation (EU) 600/2014 of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012. Commission Delegated Regulation (EU) 149/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP. Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on requirements for central counterparties, as amended by Commission Delegated Regulation (EU) 822/2016 of 21 April 2016 amending Delegated Regulation (EU) No 153/2013 as regards the time horizons for the liquidation period to be considered for the different classes of financial instruments. Directive (EU) 39/2004 of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.	Section 28 Subsection 32(2) Subsection 32(3) Section 36 Section 43 Section 44
United States of America	Commodity Futures Trading Commission, *General Regulations Under the Commodity Exchange Act*, 17 CFR pt 1. Commodity Futures Trading Commission, *Cleared Swaps*, 17 CFR pt 22. Commodity Futures Trading Commission, *Derivatives Clearing Organizations*, 17 CFR pt 39. Commodity Futures Trading Commission, *Provisions Common to Registered Entities*, 17 CFR pt 40. Commodity Futures Trading Commission, *Swap Data Recordkeeping and Reporting Requirements*, 17 CFR pt 45. Commodity Futures Trading Commission, *Bankruptcy Rules*, 17 CFR pt 190.	Section 36 Section 43 Section 44

FORM 94-102F1
CUSTOMER COLLATERAL REPORT: DIRECT INTERMEDIARY

This Form 94-102F1 is to be completed by each direct intermediary in order to comply with its reporting obligations to the local securities regulator under subsection 25(1) of National Instrument 94-102 *Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* (the "**Instrument**").

Type of Filing: ☐ INITIAL ☐ AMENDMENT[1]

Reporting Date[2]	DD/MM/YY
Reporting Period[3]	MM/YY

Reporting direct intermediary
[LEI][4]

Table A

Table A is to be completed by each direct intermediary that receives customer collateral from a customer in accordance with the Instrument. For calculations in Table A, include all customers that have posted customer collateral with the reporting direct intermediary.

A.	Total value of non-cash customer collateral posted with the direct intermediary as of the last business day of the Reporting Period	Total value of customer collateral posted with the direct intermediary as of the last business day of the Reporting Period	Number of customers represented by the reported total value of customer collateral posted with the direct intermediary[5]

Table B

Table B is to be completed by each direct intermediary that receives customer collateral from an indirect intermediary in accordance with the Instrument. Complete a separate line for each indirect intermediary that has posted customer collateral with the reporting direct intermediary. Where an LEI is not available, please provide the complete legal name of the indirect intermediary.

B.	Indirect intermediary	Customer collateral	
		Total value of non-cash customer collateral posted with the direct intermediary as of the last business day of the Reporting Period	Total value of customer collateral posted with the direct intermediary as of the last business day of the Reporting Period
1.	[LEI of any indirect intermediary that has posted customer collateral with the reporting direct intermediary]		

1 Please mark the form as "amendment" if the form is being resubmitted to correct or replace a form previously filed for a Reporting Period. Otherwise, please make the form as "initial".

2 The Reporting Date must be within 10 business days of the end of the Reporting Period.

3 The Reporting Period is the calendar month for which the form is submitted.

4 Where an LEI is not available, please provide the complete legal name of the reporting direct intermediary together with the complete address of its head office.

5 Please report the number of customers whose customer collateral was included in calculating the value reported in the second column of Table A.

Table C

Table C is to be completed by each direct intermediary that receives customer collateral from a customer or from an indirect intermediary in accordance with the Instrument. Complete a separate line for each location at which customer collateral is held by or for the reporting direct intermediary. Where an LEI is not available, please provide the complete legal and operating name(s) of the permitted depository.

C.	Permitted depository
1.	[LEI of reporting direct intermediary, if holding customer collateral itself]
2.	[LEI of any permitted depository holding customer collateral for the reporting direct intermediary]

Table D

Table D is to be completed by each direct intermediary that has posted customer collateral with a regulated clearing agency in accordance with the Instrument. Complete a separate line for each regulated clearing agency with which the reporting direct intermediary has posted customer collateral. Where an LEI is not available, please provide the complete legal and operating name(s) of the regulated clearing agency.

D.	Regulated clearing agency	Customer collateral	
		Total value of non-cash customer collateral posted with the regulated clearing agency as of the last business day of the Reporting Period	Total value of customer collateral posted with the regulated clearing agency as of the last business day of the Reporting Period
1.	[LEI of any regulated clearing agency with which the reporting direct intermediary has posted customer collateral]		

FORM 94-102F2
CUSTOMER COLLATERAL REPORT: INDIRECT INTERMEDIARY

This Form 94-102F2 is to be completed by each person or company that acts as an indirect intermediary in order to comply with its reporting obligations to the local securities regulator under subsection 25(2) of National Instrument 94-102 *Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* (the "**Instrument**").

Type of Filing: ☐ INITIAL ☐ AMENDMENT[1]

Reporting Date[2]	DD/MM/YY
Reporting Period[3]	MM/YY

Reporting indirect intermediary
[LEI][4]

Table A

Table A is to be completed by each indirect intermediary that receives customer collateral from a customer in accordance with the Instrument. For calculations in Table A include all customers that have posted customer collateral with the reporting indirect intermediary.

A.	Total value of non-cash customer collateral posted with the indirect intermediary as of the last business day of the Reporting Period	Total value of customer collateral posted with the indirect intermediary as of the last business day of the Reporting Period	Number of customers represented by the reported total value of customer collateral posted with the indirect intermediary[5]

Table B

Table B is to be completed by each indirect intermediary that receives customer collateral from a customer in accordance with the Instrument. Complete a separate line for each location at which customer collateral is held by or for the reporting indirect intermediary. Where an LEI is not available, please provide the complete legal and operating name(s) of the permitted depository.

B.	Permitted depository
1.	[Reporting indirect intermediary, if holding customer collateral itself]
2.	[Any permitted depository holding customer collateral for the reporting direct intermediary]

Table C

Table C is to be completed by each indirect intermediary that has posted customer collateral with a direct intermediary in accordance with the Instrument. Complete a separate line for each direct intermediary with which the reporting indirect intermediary has posted customer collateral. Where an LEI is not available, please provide the complete legal and operating name(s) of the direct intermediary.

1 Please mark the form as "amendment" if the form is being resubmitted to correct or replace a form previously filed for a Reporting Period. Otherwise, please make the form as "initial".

2 The Reporting Date must be within 10 business days of the end of the Reporting Period.

3 The Reporting Period is the calendar month for which the form is submitted. .

4 Where an LEI is not available, please provide the complete legal name of the reporting indirect intermediary together with the complete address of its head office.

5 Please report the number of customers whose customer collateral was included in calculating the value reported in the second column of Table A.

C.	Direct intermediary	Customer collateral	
		Total value of non-cash customer collateral posted with the direct intermediary as of the last business day of the Reporting Period	Total value of customer collateral posted with the direct intermediary as of the last business day of the Reporting Period
1.	[LEI of any direct intermediary with which the reporting indirect intermediary has posted customer collateral]		

FORM 94-102F3
CUSTOMER COLLATERAL REPORT: REGULATED CLEARING AGENCY

This Form 94-102F3 is to be completed by each regulated clearing agency in order to comply with its reporting obligations to the local securities regulator under section 43 of National Instrument 94-102 *Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* (the "**Instrument**").

Type of Filing: ☐ INITIAL ☐ AMENDMENT[1]

Reporting Date[2]	DD/MM/YY
Reporting Period[3]	MM/YY

Reporting regulated clearing agency
[LEI][4]

Table A

Table A is to be completed by each regulated clearing agency that receives customer collateral from a direct intermediary in accordance with the Instrument. Complete a separate line for each direct intermediary that has posted customer collateral with the reporting regulated clearing agency. Where an LEI is not available, please provide the complete legal name of the direct intermediary.

A.	Direct intermediary	Customer collateral	
		Total value of non-cash customer collateral posted with the regulated clearing agency as of the last business day of the Reporting Period	Total value of customer collateral posted with the regulated clearing agency as of the last business day of the Reporting Period
1.	[LEI of any direct intermediary that has posted customer collateral with the reporting regulated clearing agency]		

Table B

Table B is to be completed by each regulated clearing agency that holds customer collateral in accordance with the Instrument. Complete a separate line for each location at which customer collateral is held by or for the reporting regulated clearing agency. Where an LEI is not available, please provide the complete legal and operating name(s) of the permitted depository.

B.	Permitted depository
1.	[LEI of reporting regulated clearing agency, if holding customer collateral itself]
2.	[LEI of any permitted depository holding customer collateral for the reporting regulated clearing agency]

1 Please mark the form as "amendment" if the form is being resubmitted to correct or replace a form previously filed for a Reporting Period. Otherwise, please make the form as "initial".

2 The Reporting Date must be within 10 business days of the end of the Reporting Period.

3 The Reporting Period is the calendar month for which the form is submitted.

4 Where an LEI is not available, please provide the complete legal name of the reporting regulated clearing agency together with the complete address of its head office.

COMPANION POLICY 94-102
DERIVATIVES: CUSTOMER CLEARING AND PROTECTION OF CUSTOMER COLLATERAL AND POSITIONS

TABLE OF CONTENTS

PART 1
GENERAL COMMENTS

Introduction

This Companion Policy ("CP") sets out the views of the Canadian Securities Administrators (the "CSA" or "we") on various matters relating to National Instrument 94-102 *Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* (the "Instrument") and related securities legislation.

Other than this Part, the numbering of Parts, sections, subsections, paragraphs and subparagraphs in this CP generally corresponds to the numbering in the Instrument. Any general guidance for a Part appears immediately after the Part's name. Any specific guidance on a section, subsection, paragraph or subparagraph in the Instrument follows any general guidance. If there is no guidance for a Part, section, subsection paragraph or subparagraph, the numbering in this CP 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 CP is a reference to the corresponding Part, section, subsection, paragraph, subparagraph or definition in the Instrument.

Definitions and interpretation

Unless defined in the Instrument, terms used in the Instrument and in this CP have the meaning given to them in securities legislation. including National Instrument 14-101 Definitions.

Interpretation of terms used in the Instrument and in this CP

A number of key terms are used in the Instrument and this CP, including the terms that follow.

- "Clearing services" refers to acts in furtherance of the clearing of a customer's derivatives. This includes, among other things: submitting the customer's derivatives and associated collateral to a regulated clearing agency for clearing; monitoring and maintaining collateral requirements from the regulated clearing agency on behalf of a customer, including those for initial and variation margin; monitoring and maintaining excess collateral; recording and monitoring cleared positions, collateral received and valuations of both; and monitoring credit and liquidity limits.

- Clearing services also include services provided from one clearing intermediary to another in furtherance of clearing a customer's derivatives. For example, a direct intermediary would be providing clearing services to an indirect intermediary where it accepts a customer's derivatives that were originally submitted by a customer to the indirect intermediary and submits it to a regulated clearing agency.

- "Global Legal Entity Identifier System" means the system for unique identification of parties to financial transactions developed by the Legal Entity Identifier Regulatory Oversight Committee.

- "Legal Entity Identifier Regulatory Oversight Committee" means the international working group established by the finance ministers and the central bank governors of the Group of Twenty nations and the Financial Stability Board, under the Charter of the Regulatory Oversight Committee for the Global Legal Entity Identifier System dated November 5, 2012.

- The term "lien" refers to a creditor's claim against property to secure repayment of a debt.

- "PFMI Report" means 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.

Interpretation of terms defined in the Instrument

Section 1 – Definition of cleared derivative

A "cleared derivative" is submitted to and cleared by a clearing agency, either voluntarily or in accordance with the clearing requirement set out in National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives*. The terms "directly" and "indirectly" refer to the chain of clearing intermediaries involved in a clearing a derivative. Where a customer interacts directly with a direct intermediary, the derivative would be considered to be directly submitted to and cleared by a clearing agency. Where an indirect intermediary submits a derivative to a direct intermediary for clearing on behalf of a customer, the derivative is considered to be cleared through the direct intermediary and indirectly submitted to the clearing agency.

Section 1 – Definition of customer

A direct intermediary is not a customer where it transacts with a clearing agency of which it is a participant. However, a person or company that acts as a direct intermediary can be a customer when clearing its own proprietary financial instruments through another direct intermediary of a clearing agency (or in Québec, a clearing house) where it is not itself a participant. An indirect intermediary is considered a clearing intermediary rather than a customer for a transaction in a cleared derivative where it is providing clearing services to a customer. However, a person or company acting as an indirect intermediary can be a customer to the extent that it is clearing its own proprietary financial instruments through another clearing intermediary. For certainty, there is always one and only one customer per clearing chain. The customer is the person or company entering into the derivative on its own behalf and accessing clearing services through one or more clearing intermediaries.

In a clearing chain that involves an indirect intermediary providing clearing services to a person or company, that person or company would be considered a customer of each clearing intermediary in the chain as well as of the clearing agency. For example, where a customer submits a derivative to an indirect intermediary, it would be a customer of both the indirect intermediary and the direct intermediary that submits the derivative to the clearing agency, as well as of the clearing agency. If there were multiple indirect intermediaries involved in clearing a derivative, the person or company would be considered a customer of each of these clearing intermediaries.

Section 1 – Definition of clearing intermediary

We expect that, subject to any available exemption, a clearing intermediary offering clearing services to a customer must register as a derivatives dealer when such requirement is in place. CSA Consultation Paper 91-407 *Derivatives: Registration* ("Consultation Paper 91-407") outlines the recommended business trigger for determining whether a person is in the business of trading derivatives.[1] These factors include intermediating transactions in derivatives and providing clearing services to third-parties. Please refer to Consultation Paper 91-407 for further details.

A person or company providing services in respect of a cleared derivative would be considered a clearing intermediary for the purposes of the Instrument if it requires, receives or holds collateral from, for or on behalf of a customer. Accordingly, an intermediary that does not receive, hold or transfer collateral from, for on behalf of a customer would not be subject to the requirements under the Instrument even if it facilitates some limited aspects of the relationship between a clearing intermediary and a customer with respect to cleared derivatives (e.g., organizing orders for derivatives).

[1] See subsection 6.1(b) of Consultation Paper 91-407.

Section 1 – Definition of customer collateral

With respect to "customer collateral", we wish to point out that although a customer may deliver certain collateral to a clearing intermediary, this specific collateral may not be the collateral delivered to the regulated clearing agency to satisfy the customer's margin requirements at the regulated clearing agency. A clearing intermediary may "upgrade" or "transform" the collateral delivered by the customer pursuant to their agreement. For example, a customer may deliver cash as collateral and, pursuant to their agreement, the clearing intermediary may deliver securities of an equivalent value to the regulated clearing agency. Any collateral that is transformed, upgraded or otherwise and delivered to the regulated clearing agency on behalf of a customer would be considered customer collateral. Generally, the original collateral delivered by the customer is no longer considered customer collateral once it has been transformed or upgraded and therefore is no longer subject to the requirements of the Instrument. The transformed or upgraded collateral exchanged for the customer's original collateral becomes the customer collateral that is subject to the Instrument and must be treated as customer collateral regardless of the number or type of transformations or upgrades it undergoes.

Paragraph (b) of the definition of "customer collateral" refers to a situation where a clearing intermediary submits its own property to satisfy the obligations of one or more customers to the regulated clearing agency. An example of this would be a direct intermediary providing its own property to meet an intra-day margin call by the regulated clearing agency. Where a clearing intermediary submits its own property on behalf of a customer, this property must be treated as customer collateral.

Section 1 – Definition of direct intermediary

A "direct intermediary" is a participant of the regulated clearing agency where a customer's derivative is submitted for clearing. A direct intermediary is responsible for submitting a customer's derivative to the regulated clearing agency and has obligations to the regulated clearing agency with respect to the derivative.

Section 1 – Definition of indirect intermediary

An "indirect intermediary" is a person or company that facilitates clearing on behalf of a customer but is not a participant of the regulated clearing agency where a customer's derivative is submitted. In order to clear its customer's derivative, the indirect intermediary would enter into an agreement with a direct intermediary (or another indirect intermediary that would in turn submit the derivative to a direct intermediary) that would submit the derivative to the regulated clearing agency to be cleared. This clearing relationship is often referred to as "indirect customer clearing".

It is possible that a person or company that is a direct intermediary at one regulated clearing agency could also act as an indirect intermediary in order to access another regulated clearing agency, of which it is not a participant. The classification as a direct intermediary or indirect intermediary is not exclusive. A clearing intermediary can be a direct intermediary for some derivatives and an indirect intermediary for others.

Section 1 – Definition of initial margin

The term "initial margin" refers to collateral required by a regulated clearing agency to cover potential future losses resulting from expected changes in the value of a cleared derivative over a pre-determined close-out period with a certain level of confidence.

Section 1 – Definition of participant

The term "participant" refers to a clearing intermediary that is a member of a regulated clearing agency.

Section 1 – Definition of permitted depository

A "permitted depository" is a person or company acceptable for holding customer collateral posted with a clearing intermediary or regulated clearing agency. A clearing intermediary that itself meets the requirements of the definition may hold customer collateral directly and is not required to use a third-party permitted depository.

In recognition of the international nature of the derivatives market, paragraph (e) of the definition permits a foreign bank or trust company with a minimum amount of reported shareholders' equity to act as a permitted depository and hold customer collateral, 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. Paragraph (g) of the definition permits a prudentially regulated entity, other than a bank or trust company, whose head office or principal place of business is located outside of Canada, to act as a permitted depository for customer collateral it receives in connection with providing clearing services to a customer, provided that it is subject to and in compliance with the laws of a permitted jurisdiction relating to clearing services and customer collateral.

Section 1 – Definition of permitted investment

The term "permitted investment" sets out a principles-based approach to determining the types of instruments in which a clearing intermediary or regulated clearing agency may invest customer collateral, in accordance with the provisions of the Instrument. The term is intended to cover an investment in an instrument that is secured by, or is a claim on, high-quality obligors, and which allows for quick liquidation with little, if any, adverse price effect, for the purpose of mitigating market, credit and liquidity risk.

We expect that a clearing intermediary or regulated clearing agency that invests customer collateral in accordance with the Instrument would ensure such investment is:

- consistent with its overall risk-management strategy,
- fully disclosed to its customers,
- limited to instruments that are secured by, or are claims on, high-quality obligors, and
- able to be liquidated quickly with little, if any, adverse price effect.

We are also of the view that it would be inconsistent with the principles-based approach to permitted investments for a clearing intermediary or regulated clearing agency to invest customer collateral in its own securities or those of its affiliated entities.

Examples of instruments that would be considered permitted investments by the local securities regulatory authority include each of the following:

- debt securities issued by or guaranteed by the Government of Canada or the government of a province or territory of Canada;
- debt securities that are issued or guaranteed by a municipal corporation in Canada;
- certificates of deposit, that are not securities, issued by a bank listed in Schedule I, II or III to the *Bank Act* (Canada) ("Bank Act");[2]
- commercial paper fully guaranteed as to principal and interest by the Government of Canada;
- interests in money market mutual funds.

We are also of the view that foreign investments in high-quality obligors exhibiting the same conservative characteristics as the instruments listed above would be acceptable.

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.[3] The following countries and their political subdivisions are included: Belgium, France, Germany, Ireland, Japan, Netherlands, Singapore, Switzerland, United Kingdom (including Scotland) 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[4] and countries using the euro under a monetary agreement with the European Union.[5]

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2 *Bank Act* (SC 1991, c 46).

3 *Ibid.* at Part XII.1; 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).

4 European Union, Economic and Financial Affairs, *What is the euro area?*, May 18, 2015, online: European Union (http://ec.europa.eu/economy_finance/euro/adoption/euro_area/index_en.htm).

5 European Union, Economic and Financial Affairs, *The euro outside the euro area*, April 9, 2014, online: European Union (http://ec.europa.eu/economy_finance/euro/world/outside_euro_area/index_en.htm).

Section 1 – Definition of qualifying central counterparty

The definition of "qualifying central counterparty" is based on the qualifying central counterparty standard set out in the July 2012 final report entitled *Capital requirements for bank exposures to central counterparties*[6] published by the Basel Committee on Banking Supervision ("BCBS"). The BCBS has further stated[7] that if a regulator of a central counterparty has provided a public statement that the central counterparty has the status of a qualifying central counterparty, then the central counterparty may be considered to be a qualifying central counterparty. We are similarly of the view that a local counterparty may rely on a public statement made by a regulator of a central counterparty that the central counterparty is a qualifying central counterparty. The qualifying central counterparty standard is also discussed in CSA Multilateral Staff Notice 24-311 *Qualifying Central Counterparties*.

Section 1 – Definition of segregate

While the term "segregate" means to separately hold or separately account for customer collateral or positions, consistent with the PFMI Report, accounting segregation is acceptable.

Section 2 – Application

The Instrument applies to all regulated clearing agencies regardless of location; however, under subsection 2(1), a regulated clearing agency whose head office or principal place of business is in a foreign jurisdiction is only required to comply with the provisions of the Instrument with respect to the cleared derivatives of local customers. The Instrument has broader application with respect to a regulated clearing agency located in a local jurisdiction; such a regulated clearing agency is subject to the requirements of the Instrument in respect of the cleared derivatives of all of its customers (whether they are local customers or not).

The Instrument applies, regardless of location, to a clearing intermediary that provides clearing services to a local customer, but only in respect of a local customer's cleared derivatives. For example, a clearing intermediary providing clearing services to a local customer would be subject to the requirements of the Instrument only as they relate to the local customer and the cleared derivatives of the local customer. The Instrument is not applicable to the clearing intermediary when providing clearing services to foreign customers.

Under subsection 2(3), regulated clearing agencies and clearing intermediaries that provide clearing services for over-the-counter ("OTC") options on securities, are not required to comply with the Instrument in respect of such OTC options. Options on securities, including OTC options on securities, are subject to existing securities legislation. For example, OTC options on securities are regulated as securities under the *Securities Act* (Ontario) and as derivatives under the *Derivatives Act* (Québec).[8]

PART 2
TREATMENT OF CUSTOMER COLLATERAL BY A CLEARING INTERMEDIARY

Part 2 contains requirements for the treatment of customer collateral by a clearing intermediary.

Section 3 – Segregation of customer collateral – clearing intermediary

Recognizing that methods for segregating customer collateral at the clearing intermediary level may differ depending on collateral and entity type, we are of the view that parties should have the benefit of flexibility in their collateral arrangements. However, the principle remains that notwithstanding the legal arrangement under which customer collateral is posted with a clearing intermediary, the clearing intermediary must treat customer collateral posted with it as belonging to customers. For example, consider a title transfer collateral arrangement where the title to a customer's property is posted as collateral and legal title is transferred to a clearing intermediary collecting the collateral. Despite the transfer of legal title from the customer to the clearing intermediary, the clearing intermediary must treat the property as customer collateral transferred by or on behalf of the customer relating to the customer's cleared derivatives.

Subsection 3(1) requires a clearing intermediary to segregate customer collateral from its own property, including from collateral advanced for a proprietary position. For example, a direct intermediary's proprietary positions (i.e., a house account) would be required to be held or accounted for separately from customer positions. Similarly, an indirect intermediary would be required to establish a separate account for its customers with its direct intermediary, so that the indirect intermediary's proprietary positions

6 Basel Committee on Banking Supervision (BCBS), *Capital requirements for bank exposures to central counterparties*, July 2012, online: Bank for International Settlements (http://www.bis.org).

7 BCBS, Basel III counterparty credit risk and exposures to central counterparties – Frequently asked questions, updated December 2012, online: Bank for International Settlements (http://www.bis.org).

8 *Securities Act* (RSO 1990 c S.5) at s. 1(1), definition of "security"; *Derivatives Act* (RLRQ 2008 c I-14.01) at s. 3, definition of "derivative".

are held or accounted for separately from those of its customers. Records maintained by a clearing intermediary must make it clear that customer accounts are for the benefit of customers only.

Section 4 – Holding of customer collateral – clearing intermediary

Customer collateral posted by a clearing intermediary and held at a permitted depository may be commingled in an omnibus account (i.e., all of the clearing intermediary's customers' customer collateral is held in one omnibus account) if each customer's customer collateral is segregated on a recordkeeping basis. Additionally, the recordkeeping obligations in the Instrument require a clearing intermediary to identify the positions and the value of the collateral held for each customer within an omnibus customer account.

We expect that a clearing intermediary that holds customer collateral at a permitted depository in accordance with the Instrument would take reasonable efforts to confirm that the permitted depository:

- 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 customer collateral and minimize and manage the risks associated with the safekeeping and transfer of the collateral;
- maintains securities in an immobilised or dematerialised form for their transfer by book entry;
- protects customer collateral 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 participant's customers on the participant's books and facilitates the transfer of customer collateral;
- identifies, measures, monitors, and manages its risks from other activities that it may perform;
- facilitates prompt access to customer collateral, when required.

If a clearing intermediary is a permitted depository, as defined in the Instrument, it may hold customer collateral itself and is not required to hold customer collateral at a third party depository. For example, a Canadian financial institution that acts as a clearing intermediary would be permitted to hold customer collateral provided it did so in accordance with the requirements of the Instrument. Where a clearing intermediary deposits customer collateral with a permitted depository, the clearing intermediary is responsible for ensuring the permitted depository maintains appropriate books and records to ensure customer collateral can be attributed to each customer.

Section 5 – Excess margin – clearing intermediary

We would interpret the requirement that a clearing intermediary identify and record the value of excess margin as applying only to the excess margin that the clearing intermediary holds. For example, a direct intermediary would not be required to keep records of the excess margin required from a customer by an indirect intermediary to which it provides clearing services.

Section 6 – Use of customer collateral – clearing intermediary

Under subsection 6(2), the use of customer collateral attributable to one customer to satisfy the obligations of another customer is not permitted. Although customer collateral may be held in one omnibus account, such collateral is not available to satisfy customer obligations generally. Therefore, a clearing model that allows recourse to a non-defaulting customer's collateral, including any model that permits fellow customer risk, violates this provision and would not be permitted to be offered to customers. For certainty, fellow customer risk is found in a clearing model that allows the customer collateral of a non-defaulting customer to be used to settle the obligations of a defaulting customer. The pooling of customer collateral held by a clearing intermediary pursuant to applicable bankruptcy and insolvency laws would not be considered use of customer collateral by the clearing intermediary and is permitted where required by applicable laws.

Subsection 6(3) allows a clearing intermediary to place a lien on customer collateral where the lien arises in connection with a cleared derivative. This exception recognizes that certain clearing arrangements involve the granting of security interests in customer collateral. A clearing intermediary is prohibited from imposing or permitting a lien that is not expressly permitted by the instrument on customer collateral and should such an improper lien be placed on customer collateral, the clearing intermediary

must take all reasonable steps to promptly address the improper lien. However, a lien over excess collateral is not restricted where the lien is imposed to secure or extend credit to the customer.

Section 7 – Investment of customer collateral – clearing intermediary

Subsection 7(3) provides that any loss resulting from a permitted investment of customer collateral must not be borne by the customer. This requirement relates only to investments made by a clearing intermediary using customer collateral, not to collateral provided by a customer. For example, if a customer provided government bonds as collateral, and those bonds lost market value, the clearing intermediary would not be required to bear those losses. Similarly, where a customer provided collateral to a clearing intermediary and it was transformed into government bonds to be used as customer collateral posted to a regulated clearing agency, the clearing intermediary would not be required to bear any loss in market value of the transformed customer collateral.

Although losses in the value of invested customer collateral are not to be allocated to a customer, we are of the view that parties should be free to contract for the allocation of gains resulting from a clearing intermediary's investment activities in accordance with the Instrument.

Section 8 – Use of customer collateral – indirect intermediary default

An example of when a clearing intermediary may apply customer collateral to settle the obligations of a defaulting indirect intermediary is when a customer's default causes the default of the indirect intermediary. In such case, a direct intermediary could use the defaulting customer's collateral to satisfy the indirect intermediary's obligations attributable to the customer's default.

Section 9 – Acting as a clearing intermediary

Paragraph 9(1)(a) applies to a clearing intermediary that is prudentially regulated in a local jurisdiction. Prudential regulation by an authority in Canada should ensure that a clearing intermediary is adequately capitalized and has sufficient liquidity such that it is financially sound and does not present a significant solvency risk to customers. In Canada, prudential regulation of federally regulated financial institutions is undertaken by OSFI. Other regulators that perform prudential oversight include certain provincial prudential market regulators, such as the Autorité des marchés financiers in Québec, or other local securities regulatory authorities when the proposed registration regime for over-the-counter derivatives ("OTC derivatives") is implemented.

Paragraph 9(1)(c) applies to a clearing intermediary that is prudentially regulated and is subject to and in compliance with laws relating to clearing services and customer collateral in a permitted jurisdiction. This would include, for example, a futures commission merchant registered with the U.S. Commodity Futures Trading Commission ("CFTC") that is authorized by the CFTC to provide clearing services for OTC derivatives.

The CSA Derivatives Committee is developing a registration regime that will apply to clearing intermediaries. Once in force, subject to any available exemptions, we anticipate that registration will be required for clearing intermediaries to offer clearing services to local customers.

For greater certainty, pursuant to the application provision in paragraph 2(1)(b), the requirement under subsection 9(2) only applies to cleared derivatives involving local customers. Other than in British Columbia, Manitoba and Ontario, a foreign clearing intermediary may use a qualifying central counterparty instead of a regulated clearing agency if the foreign clearing intermediary qualifies for the exemption provided for in subsection 48(1) and otherwise complies with the requirements in subsection 48(2).

Section 10 – Risk management – clearing intermediary

We expect that rules, policies and procedures designed to identify, monitor and reasonably mitigate material risks arising from offering clearing services to an indirect intermediary and management of a default by an indirect intermediary would include all of the following:

- following industry standard best practices for understanding an indirect intermediary's: (i) identity and corporate structure, (ii) financial resources (e.g., by establishing credit and liquidity limits), (iii) product knowledge (e.g., by establishing a list of the indirect intermediary's products allowed to be cleared) and (iv) technical infrastructure (e.g., establishing adequate operational capacity and communication links between the indirect intermediary and the clearing intermediary);

- measuring and monitoring the positions of each indirect intermediary including (i) the daily valuation of the indirect intermediary's positions and cash flow obligations and (ii) market risk resulting from those positions;

- a default management plan which describes the steps followed in the event of an indirect intermediary's default.

Section 11 – Risk management – indirect intermediary

We expect that rules, policies and procedures designed to identify, monitor and reasonably mitigate material risks arising from offering indirect clearing services to customers would include all of the following:

- following industry standard best practices for understanding a customer's: (i) identity and corporate structure, (ii) financial resources (e.g., by establishing credit and liquidity limits), (iii) product knowledge (e.g., by establishing a list of the customer's products allowed to be cleared) and (iv) technical infrastructure (e.g., establishing adequate operational capacity and communication links between the customer and the indirect intermediary);

- measuring and monitoring the positions of each customer including (i) the daily valuation of the customer's positions and cash flow obligations and (ii) market risk resulting from those positions.

PART 3
RECORDKEEPING BY A CLEARING INTERMEDIARY

Part 3 outlines the minimum recordkeeping requirements that apply to clearing intermediaries. The effectiveness of the customer protections required under the Instrument is predicated on accurate and thorough recordkeeping by clearing intermediaries.

Section 12 – Retention of records – clearing intermediary

The records and supporting documentation related to a particular cleared derivative required to be prepared pursuant to this Part and Part 4 must be retained for at least 7 years from the date the cleared derivative expires or is terminated.

Any customer profiles, account agreements or other general information collected from a customer at any time the clearing intermediary provides clearing services for the customer, including prior to the date upon which the customer enters into a cleared derivative, must be kept for at least 7 years after the date upon which the customer's last derivative that is cleared by the clearing intermediary expires or is terminated.

All records and supporting documentation must be kept in accordance with industry best practices for record retention in Canada including safety and durability standards.

In Manitoba, the statutory minimum record retention period is 8 years.

Section 13 – Daily records – clearing intermediary

We are of the view that accurate recordkeeping requires, at minimum, daily valuations of customer collateral using industry standard best practice methodologies.

With respect to records required to be kept under paragraph 13(3)(b):

- subparagraph (i) refers to any revenue generated by the customer collateral, including, for example, dividend pay-outs relating to securities and coupon payments relating to debt instruments;

- subparagraph (ii) refers to any changes in the value of property forming part of the customer collateral, including, for example, an increase or decrease in the value of a security;

- subparagraph (iii) refers to charges that have accrued, or may accrue, that are payable by a customer and have been agreed to be paid by the customer in respect of the clearing services provided to the customer; such charges may include, for example, transaction or currency exchange charges or charges relating to the settlement or termination of a cleared derivative.

Section 18 – Identifying records – multiple clearing intermediaries

Where a clearing intermediary allows a person or company to act as an indirect intermediary, the clearing intermediary assumes recordkeeping obligations relating to the indirect intermediary and its customers. The effect of paragraphs 18(a) and (b) together is to enable the indirect intermediary to easily identify its own positions and property, and the positions and collateral held for, or on behalf, of each of its customers.

Section 19 – Records of investment of customer collateral – clearing intermediary

The date of the investment required to be recorded under paragraph 19(a) includes both the trade date and the settlement date. We are of the view that the requirement in paragraph 19(d) would be fulfilled by providing a unique identifier from an industry-accepted identifying standard, such as an ISIN or CUSIP number or, if an identifier is not available, a plain language description of each instrument or asset.

Pursuant to paragraph 7(2)(a) of the instrument, each investment of customer collateral must be in a permitted investment.

Section 20 – Records of currency conversion – clearing intermediary

We expect that currency conversion trade records would include, at minimum, all of the following:

- the legal entity identifier ("LEI") of the customer or, if the customer is ineligible to obtain an LEI as determined by the Global Legal Entity Identifier System, the name of the customer;
- the date of the currency exchange;
- the amount and original currency of the funds to be exchanged;
- the exchange rate at which the currency exchange is made;
- the amount and new currency resulting from the exchange;
- the name of the institution which made the exchange or provided the exchange rate.

PART 4
REPORTING AND DISCLOSURE BY A CLEARING INTERMEDIARY

Part 4 outlines disclosure and reporting to be made by a clearing intermediary to customers, regulated clearing agencies and the local regulator or securities regulatory authority. Disclosure required to be provided to customers under this Part is not required on a transaction-by-transaction basis.

The written disclosure required under sections 21, 22, 23 and 27 is necessary only once upon the opening of each customer account, not prior to each cleared derivative transaction. If there are changes to the information contained in the disclosure a customer received, the customer must be promptly informed in writing of such changes. Where there are multiple clearing intermediaries, direct intermediaries and indirect intermediaries may provide disclosure either to a clearing intermediary closer in the clearing chain to the customer or directly to the customer. Written disclosure and notice of changes to such disclosure can be provided in electronic form by delivering copies of required materials or by providing links to online information to the customer or clearing intermediary.

Where clearing intermediaries are already engaged in cleared derivative transactions with regulated clearing agencies, other clearing intermediaries or customers before the Instrument comes into force, new written disclosure is not required to be delivered to customers if the written disclosure delivered prior to the Instrument coming into force meets the requirements for written disclosure set out in this Part. We acknowledge the confidential nature of the information reported to the local regulator or securities regulatory authority, and each regulator or securities regulatory authority intends to treat it as such, subject to applicable provisions of the legislation adopted by the local jurisdiction, including any applicable freedom of information and protection of privacy legislation. However, information may be shared with self-regulatory organizations or other relevant regulatory authorities.

Section 21 – Clearing intermediary delivery of disclosure by regulated clearing agency

Section 21 requires a clearing intermediary to provide disclosure, including investment guidelines and policies for investing customer collateral, received from a regulated clearing agency pursuant to sections 41 and 45 to its customer. Where there is a chain of clearing intermediaries, the direct intermediary may provide this disclosure to the indirect intermediary, which is then required to provide this disclosure to the customer. Both subsections 41(2) and 45(2) require a regulated clearing agency to disclose any changes to the information previously disclosed. A clearing intermediary is required to promptly send to its customers all of the information related to changes in the disclosure provided by a regulated clearing agency under sections 41 and 45.

Section 22 – Disclosure to customer by clearing intermediary

Customer collateral held at the clearing intermediary level may receive different treatment from customer collateral held at the regulated clearing agency in the event of a clearing intermediary's bankruptcy or insolvency. We expect that the disclosure required by this provision would provide customers with clear information on the treatment of their collateral in a default situation. For example, there may be situations where customer collateral held in a customer account maintained by a clearing intermediary would, pursuant to applicable bankruptcy laws, be combined with the property of other customers.

We expect that the information given in the written disclosure would assist customers in evaluating: (i) the level of protection provided, (ii) the manner in which segregation and the transfer of assets is achieved, including the method for determining the value at which customer positions will be transferred, and (iii) any risks or uncertainties associated with such arrangements.

Disclosure helps customers assess the related risks and conduct due diligence when entering into derivatives that are cleared at a regulated clearing agency through one or more clearing intermediaries. Examples of the information that we expect the disclosure would provide include all of the following:

- information about the clearing intermediary including its name, address and principal place of business and contact information;
- the bankruptcy and insolvency laws which apply to the clearing intermediary;
- any material risks which may impact the clearing intermediary's ability to transfer customer collateral and enforce rights in relation to customer collateral during a default, including an explanation of how such risks are material to the customer;
- a basic overview of the clearing intermediary's fund segregation and collateral management practices and policies;
- the process for recovering or transferring customer collateral should the clearing intermediary default;
- information regarding the proactive steps that a customer must take to protect its collateral;
- an explanation of the interaction of domestic and foreign laws applicable to customer collateral held by the clearing intermediary.

Section 23 – Disclosure to customer by indirect intermediary

In addition to the disclosure required under section 22, an indirect intermediary is required to disclose to its customers any additional material risks to a customer's positions and customer collateral that arise as a result of the indirect clearing relationship and an explanation of how such risks are material to the customer.

Section 24 – Customer information – clearing intermediary

In order to facilitate a timely transfer of collateral and positions in a default scenario, a regulated clearing agency should have sufficient information to identify each customer of a clearing intermediary and each customer's positions and customer collateral. Additionally, the obligation on a clearing intermediary under this section to provide information on the current value of its customers' positions and customer collateral includes indicating to the direct intermediary or regulated clearing agency, as applicable, where a customer is in default of its obligations.

We expect that identifying information required under this section would include the LEI of the customer or, if the customer is ineligible to obtain an LEI as determined by the Global Legal Entity Identifier System, the name or other identifier of the customer.

Section 25 – Customer collateral report – regulatory

Regular reporting on customer collateral deposits and holdings assists securities regulatory authorities in monitoring customer collateral arrangements and in developing and implementing rules to protect customer assets that are responsive to market practices. To that end, subsections 25(1) and 25(2) set out reporting requirements for direct intermediaries and indirect intermediaries, respectively, regarding customer collateral. A completed Form 94-102F1 or Form 94-102F2, as applicable, will provide the local securities regulatory authority with a snapshot of the value of collateral held or posted by each reporting clearing intermediary. In Ontario, Form 94-102F1 and Form 94-102F2 are required to be filed electronically through the Ontario

Securities Commission's Electronic Filing Portal. Please see OSC Rule 11-501 *Electronic Delivery of Documents to the Ontario Securities Commission* for more information.[9]

Section 26 – Customer collateral report – customer

The customer collateral report required under this section could be made available to the customer or indirect intermediary through either direct electronic access available to the customer or indirect intermediary at any time or a daily report sent to the customer or indirect intermediary.

Section 27 – Disclosure of investment of customer collateral

We expect that the disclosure required under this section would include statements that customer collateral is permitted to be invested in accordance with section 7 of the Instrument and that any losses resulting from the clearing intermediary's investment of the customer collateral will not be borne or otherwise allocated to the customer.

We are of the view that the requirement to provide disclosure under subsection 27(1) and subsection 27(2) may be satisfied by directing a customer or, if applicable, the indirect intermediary to the disclosure on the clearing intermediary's website.

PART 5
TREATMENT OF COLLATERAL BY A REGULATED CLEARING AGENCY

Part 5 contains requirements for the treatment of customer collateral by regulated clearing agencies.

Section 28 – Collection of initial margin

The requirement that a regulated clearing agency collect initial margin on a gross basis for each customer means that a regulated clearing agency may not, and may not permit its direct intermediaries to, offset initial margin positions of different customers against one another. However, the initial margin collected from a customer may be determined by netting across the various cleared derivative positions of that customer. Further, a regulated clearing agency is not prohibited from collecting variation margin for cleared derivatives on a net basis from its direct intermediaries.

Margin requirements are determined by the regulated clearing agency in accordance with its rules, policies and procedures. For further discussion, please see National Instrument 24-102 *Clearing Agency Requirements* ("NI 24-102") for requirements applicable to clearing agency margin calculation.

Section 29 – Segregation of customer collateral – regulated clearing agency

Records maintained by the regulated clearing agency must make it clear that customer accounts are for the benefit of customers only.

We are of the view that parties should have the benefit of flexibility in their collateral arrangements. However, the principle remains that notwithstanding the legal arrangement under which customer collateral is posted with a regulated clearing agency, the regulated clearing agency must treat customer collateral posted with it as belonging to customers. For example, consider a title transfer collateral arrangement where the title to the customer's property is posted as collateral and legal title is transferred to a regulated clearing agency collecting the collateral. Despite the transfer of legal title from the customer (or clearing intermediary on behalf of the customer) to the regulated clearing agency, the regulated clearing agency must treat the property as customer collateral transferred by, for or on behalf of the customer relating to the customer's cleared derivatives.

Section 30 – Holding of customer collateral – regulated clearing agency

A regulated clearing agency is a permitted depository under the Instrument and may hold collateral itself if it offers depository services. Accordingly, a regulated clearing agency is not required to hold customer collateral at a third-party permitted depository.

The customer collateral of multiple customers may be commingled in an omnibus customer account if each customer's customer collateral is segregated on a recordkeeping basis. Additionally, the recordkeeping obligations in the Instrument require the regulated clearing agency to identify the positions and the value of the collateral held for each individual customer within an omnibus customer account.

[9] OSC Rule 11-501 *Electronic Delivery of Documents to the Ontario Securities Commission*, online: Ontario Securities Commission (http://www.osc.gov.on.ca/en/SecuritiesLaw_11-501.htm).

We expect that a regulated clearing agency that holds customer collateral at a third-party permitted depository in accordance with the Instrument would take reasonable efforts to confirm that the permitted depository:

- 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 customer collateral and minimize and manage the risks associated with the safekeeping and transfer of the collateral;
- maintains securities in an immobilised or dematerialised form for their transfer by book entry;
- protects customer collateral 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 participant's customers on the participant's books and facilitates the transfer of customer collateral;
- identifies, measures, monitors, and manages its risks from other activities that it may perform; and
- facilitates prompt access to customer collateral, when required.

Paragraph 30(b) requires a regulated clearing agency to hold customer collateral relating to cleared derivatives separately from any other type of property that is not customer collateral, including any other property posted by a customer as collateral relating to another investment or financial instrument that is not a cleared derivative. For example, the customer collateral of a customer may be commingled in an omnibus account with the customer collateral of another customer but may not be commingled with collateral belonging to the customer or any other customer relating to a futures contract.

Section 31 – Excess margin – regulated clearing agency

We would interpret the requirement that a regulated clearing agency identify and record the value of excess margin as applying only to the excess margin that the regulated clearing agency holds. For example, a regulated clearing agency would not be required to keep records relating to excess margin held by a clearing intermediary.

Section 32 – Use of customer collateral – regulated clearing agency

Under subsection 32(2), subject to an exception for excess collateral, regulated clearing agencies are only permitted to apply a customer's customer collateral to the cleared derivatives of that customer. Accordingly, the Instrument prohibits the cross-margining of a customer's cleared derivatives and futures positions. The reasoning for this is that the regulatory framework applicable to futures in certain jurisdictions, including Canada, may make customers more susceptible to shortfalls in the event of a clearing intermediary's insolvency and therefore cross-margining could undermine a customer's ability to port its cleared derivatives positions. However, in some jurisdictions, customer protection requirements applicable to futures are equivalent to those applicable to cleared derivatives. Under such regimes, cross-margining may not represent a material risk to porting a customer's positions in cleared derivatives. Therefore, when considering an application for discretionary relief from the prohibition on cross-margining or when making an equivalence determination of a foreign jurisdiction's regulatory requirements for the purpose of substituted compliance, the regulator or securities regulatory authority will take these factors into account.

Use of customer collateral attributable to one customer to satisfy the obligations of another customer is not permitted. Although customer collateral may be held in one omnibus account, such collateral is not available to satisfy customer obligations generally. Therefore, a clearing model that allows recourse to a non-defaulting customer's collateral, including any model that permits fellow customer risk, violates this provision and would not be permitted to be offered to customers. For certainty, fellow customer risk is found in a clearing model that allows the customer collateral of a non-defaulting customer to be used to settle the obligations of a defaulting customer. The pooling of customer collateral held by a regulated clearing agency pursuant to applicable bankruptcy and insolvency laws would not be considered use of customer collateral by the regulated clearing agency and is permitted where required by applicable laws.

Subsection 32(3) allows a regulated clearing agency to place a lien on customer collateral where the lien arises in connection with a cleared derivative. This exception recognizes that certain clearing arrangements involve the granting of security interests in customer collateral. A regulated clearing agency is prohibited from imposing or permitting a lien that is not expressly permitted by the Instrument on customer collateral and should such an improper lien be placed on customer collateral, the regulated

clearing agency must take all reasonable steps to promptly address the improper lien. However, a lien over excess collateral is not restricted where the lien is imposed to secure or extend credit to the customer.

Section 33 – Investment of customer collateral – regulated clearing agency

Subsection 33(3) provides that any loss resulting from a permitted investment of customer collateral must not be borne by the customer. This requirement relates only to investments made by a regulated clearing agency using customer collateral, not to collateral provided by a customer. For example, if a customer provided government bonds as collateral, and those bonds lost market value, the regulated clearing agency would not be required to bear those loses. Similarly, where a customer provided collateral to a regulated clearing agency and it was transformed into government bonds to be used as customer collateral, the regulated clearing agency would not be required to bear any loss in market value of the transformed customer collateral.

Although losses in the value of invested customer collateral are not to be allocated to a customer, we are of the view that parties should be free to contract for the allocation of gains resulting from a regulated clearing agency's investment activities in accordance with the Instrument. Where a regulated clearing agency's rules provide for investment loss mutualisation and allocation to clearing intermediaries, this would not violate the requirement.

Section 34 – Use of customer collateral – clearing intermediary default

An example of when a regulated clearing agency may apply customer collateral to settle the obligations of a defaulting clearing intermediary is when a customer's default causes the default of the clearing intermediary, whether directly or through the default of an indirect intermediary. In such case, a regulated clearing agency could use the defaulting customer's collateral, including its customer collateral under the Instrument, to satisfy the clearing intermediary's obligations attributable to the customer's default.

Section 35 – Risk management –NI 24-102 applies

NI 24-102 applies to all regulated clearing agencies providing clearing services to local customers, including to clearing agencies that are exempt from recognition if they clear derivatives for customers.

PART 6
RECORDKEEPING BY A REGULATED CLEARING AGENCY

Part 6 outlines the minimum recordkeeping requirements that apply to regulated clearing agencies. The effectiveness of the customer protections required under the Instrument is predicated on accurate and thorough recordkeeping by regulated clearing agencies.

Section 36 – Retention of records – regulated clearing agency

All records prepared pursuant to this Part and Part 7 must be kept in accordance with industry best practices for record retention in Canada including safety and durability standards.

Since clearing intermediaries are required to maintain records and supporting documentation related to cleared derivatives of their customers for at least 7 years pursuant to section 12, it is not necessary for a regulated clearing agency to retain records after the related cleared derivatives expire or are terminated. It would be redundant for both clearing intermediaries and regulated clearing agencies to keep records for an extended period after expiry or termination of a cleared derivative or after the clearing relationship with a customer ends.

Section 37 – Daily records – regulated clearing agency

We are of the view that accurate recordkeeping requires, at minimum, daily valuations of customer collateral using industry standard best practice methodologies.

With respect to records required to be kept under paragraph 37(2)(b):

- subparagraph (i) refers to any revenue generated by the customer collateral, including, for example, dividend pay-outs relating to securities and coupon payments relating to debt instruments;
- subparagraph (ii) refers to any changes in the value of property forming part of the customer collateral, including, for example, an increase or decrease in the value of a security; and
- subparagraph (iii) refers to charges that have accrued, or may accrue, that are payable by a customer of a direct intermediary and have been agreed to be paid by the customer in respect of the clearing services provided to the customer; such charges may include, for example, transaction or currency exchange charges or charges relating to the settlement or termination of a cleared derivative.

Section 38 – Identifying records – regulated clearing agency

A regulated clearing agency has recordkeeping obligations relating to all customers for which it clears cleared derivatives. The recordkeeping requirement under section 38 extends to any customer collateral held in an account of the regulated clearing agency at a third-party permitted depository.

Paragraph (c) ensures that direct and indirect customers receive equal treatment. Direct intermediaries are required under section 18 to make this information available to indirect intermediaries to which they provide clearing services.

Section 39 – Records of investment of customer collateral – regulated clearing agency

The date of the investment required to be recorded under paragraph 39(a) includes both the trade date and the settlement date. We are of the view that the requirement in paragraph 39(d) would be fulfilled by providing a unique identifier from an industry-accepted identifying standard, such as an ISIN or CUSIP number or, if an identifier is not available, a plain language description of each instrument or asset.

Pursuant to paragraph 33(2)(a) of the instrument, each investment of customer collateral must be in a permitted investment.

Section 40 – Records of currency conversion – regulated clearing agency

We expect that currency conversion trade records would include, at minimum, all of the following:

- LEI of the customer or, if the customer is ineligible to obtain an LEI as determined by the Global Legal Entity Identifier System, the name of the customer;
- the date of the currency exchange;
- the amount and original currency of the funds to be exchanged;
- the exchange rate at which the currency exchange is made;
- the amount and new currency resulting from the exchange;
- the name of the institution which made the exchange or provided the exchange rate.

PART 7
REPORTING AND DISCLOSURE BY A REGULATED CLEARING AGENCY

Part 7 outlines certain disclosure and reporting to be made by a regulated clearing agency to customers, clearing intermediaries and the local regulator or securities regulatory authority. Disclosure required to be provided to customers under this Part is not required on a transaction-by-transaction basis.

The written disclosure required under sections 41 and 45 is necessary only once upon the opening of each customer account, not prior to each cleared derivative transaction. If there are changes to the information contained in the disclosure a customer received, the customer must be promptly informed in writing of such changes. Where there are multiple clearing intermediaries, a direct intermediary may provide disclosure either to a clearing intermediary closer in the clearing chain to the customer or directly to the customer. Written disclosure and notice of changes to such disclosure can be provided in electronic form by delivering copies of required materials or by providing links to online information to the customer or direct intermediary.

Where a regulated clearing agency is already providing clearing services before the Instrument comes into force, new written disclosure is not required to be delivered to customers if the written disclosure delivered prior to the Instrument coming into force meets the requirements for written disclosure set out in this Part.

We acknowledge the confidential nature of the information reported to the local regulator or securities regulatory authority, and each regulator or securities regulatory authority intends to treat it as such, subject to applicable provisions of the legislation adopted by the local jurisdiction, including any applicable freedom of information and protection of privacy legislation. However, information may be shared with self-regulatory organizations or other relevant regulatory authorities.

Section 41 – Disclosure to direct intermediaries by regulated clearing agency

We expect that the information given in the written disclosure would assist customers in evaluating: (i) the level of protection provided, (ii) the manner in which segregation and the transfer of assets is achieved, including the method for determining the value at which customer positions will be transferred, and (iii) any risks or uncertainties associated with such arrangements.

Disclosure helps customers assess the related risks and conduct due diligence when entering into derivatives that are cleared through a direct intermediary of the regulated clearing agency. Examples of the information that we expect the disclosure would provide include all of the following:

- information about the regulated clearing agency including its name, address and principal place of business and contact information;
- a basic overview of the regulated clearing agency's rules, policies and procedures concerning segregation and portability of customers' positions and customer collateral including an explanation of any legal or operational constraints that may impair the ability of the regulated clearing agency to segregate or transfer the positions and related customer collateral of a customer;
- which bankruptcy and insolvency laws apply to the regulated clearing agency and an analysis of applicable laws governing the regulated clearing agency's clearing services including whether the regulated clearing agency is described or named under the *Payment and Clearing Settlement Act* (Canada);[10]
- the regulated clearing agency's rule book;
- information on the regulated clearing agency's rules and procedures for defaults including the process for recovering or transferring customer collateral should a clearing intermediary default and the size and composition of the financial resource package available in the event of a clearing intermediary's default; and
- the interaction of domestic and foreign laws applicable to customer collateral held by the regulated clearing agency and any other information relevant to using the regulated clearing agency's clearing services.

The written disclosure required under subsection 41(1), is necessary only upon the opening of each customer account, or upon any change to the rules, policies or procedures of the regulated clearing agency, rather than prior to each cleared derivative transaction.

Section 42 – Customer information – regulated clearing agency

In order to facilitate a timely transfer of collateral and positions in a default scenario, we expect that a regulated clearing agency would receive complete and timely information from a direct intermediary under subsection 24(1) to identify each customer of a clearing intermediary, and the customer's positions and customer collateral.

Section 43 – Customer collateral report – regulatory

Regular reporting on customer collateral deposits and holdings assists securities regulatory authorities in monitoring customer collateral arrangements and in developing and implementing rules to protect customer assets that are responsive to market practices. To that end, section 43 sets out reporting requirements for regulated clearing agencies regarding customer collateral. A completed Form 94-102F3 will provide the local securities regulatory authority with a snapshot of the value of collateral held or posted by the regulated clearing agency. In Ontario, Form 94-102F3 is required to be filed electronically through the Ontario Securities Commission's Electronic Filing Portal. Please see OSC Rule 11-501 *Electronic Delivery of Documents to the Ontario Securities Commission for more information*.[11]

Section 44 – Customer collateral report – direct intermediary

The customer collateral report required under this section could be made available to a direct intermediary through either direct electronic access available to the direct intermediary at any time or a daily report sent to the direct intermediary.

[10] *Payment and Clearing Settlement Act* (SC 1996 c 6 sch).

[11] *Supra* note 9.

Section 45 – Disclosure of investment of customer collateral

We expect that the disclosure required under this section would include statements that customer collateral is permitted to be invested in accordance with section 33 of the Instrument and that any losses resulting from the regulated clearing agency's investment of the customer collateral will not be borne or otherwise allocated to the customer. We are of the view that the requirements to provide disclosure under subsection 45(1) and subsection 45(2) may be satisfied by directing a customer to the disclosure on the regulated clearing agency's website.

PART 8
TRANSFER OF POSITIONS

Part 8 provides for the transfer of customer collateral and positions from one clearing intermediary to another, either in a default scenario or upon request of the customer.

The efficient and complete transfer of customer collateral and related positions is important in both pre-default and post-default scenarios but is particularly critical during a clearing intermediary's default or when it is undergoing insolvency proceedings.

Section 46 – Transfer of customer collateral and positions

It is our expectation that customer collateral and positions be transferred as seamlessly as possible from the perspective of the customer. This means that we expect that a customer's positions would be maintained on identical economic terms as governed the positions immediately before the transfer. In effecting such a transfer, a regulated clearing agency is permitted to operationally close-out and re-book the positions, provided that the ultimate result is that the customer's positions are maintained on identical economic terms as governed immediately before the transfer.

The regulated clearing agency's ability to transfer customer collateral and related positions in a timely manner may depend on such factors as market conditions, sufficiency of information on the individual constituents, and the complexity or size of the customer's portfolio. We would therefore expect the regulated clearing agency to structure its arrangements for the transfer of customer collateral and positions in a way that makes it highly likely that they will be effectively transferred to one or more other direct intermediaries, taking into account all relevant circumstances. In order to achieve a high likelihood of transferability, the regulated clearing agency would need to have the ability to (i) identify the positions belonging to each customer, (ii) identify and assert the regulated clearing agency's rights to related customer collateral held by or through the regulated clearing agency, (iii) transfer positions and related customer collateral to one or more other direct intermediaries, (iv) identify potential direct intermediaries to accept the positions, (v) disclose relevant information to such direct intermediaries so that they can evaluate the counterparty credit and market risk associated with the customers and positions, respectively and (vi) carry out its default management procedures in an orderly manner. We expect that regulated clearing agency's policies and procedures would provide for the proper handling of customer collateral and related positions of customers of a defaulting direct intermediary.

We expect that operations, policies and procedure of clearing intermediaries and regulated clearing agencies be structured to ensure, to the greatest extent possible, that a default by a clearing intermediary does not affect the positions and collateral of the defaulting clearing intermediary's customers. Generally, default by a direct intermediary would occur when it does not, or is unable to, meet its obligations at a regulated clearing agency.

To ensure that a customer's positions and customer collateral are insulated from a direct intermediary's default, including any winding-up or restructuring proceeding of the defaulting direct intermediary, we expect that a regulated clearing agency would be structured, including by having the necessary rules and procedures in place, to effectively and promptly facilitate the transfer of customer collateral and positions to a direct intermediary that (i) is not in default, as that term is defined in the rules and procedures of the relevant regulated clearing agency and (ii) is not reasonably expected to default on its obligations at a regulated clearing agency as they come due.

Although we stress the importance of the transfer of a customer's positions and customer collateral in a default scenario, we acknowledge that there may be circumstances where the portability of all or a portion of a customer's positions is not possible. Where a regulated clearing agency is not able to transfer positions within a pre-defined transfer period specified in its operating rules, it may take all steps permitted by its rules to actively manage its risks in relation to those positions, including liquidating the customer collateral and positions of the defaulting direct intermediary's customers.

We expect that a direct intermediary would also have policies and procedures in place to facilitate the prompt transfer of customer collateral that it holds to one or more direct intermediaries in the event of its own default.

Where a transfer of customer collateral and positions is facilitated under subsection 46(1), the Instrument requires that reasonable efforts are made to ensure that the customer's instructions are followed with respect to the transfer of the customer's positions and customer collateral to a particular transferee direct intermediary. We are of the view that these instructions may be best obtained at the outset of a clearing relationship, and by allowing a customer to identify direct intermediaries to which it

consents *a priori* to such a transfer. If there are circumstances where such instructions would not be obtained, or where a customer's prior instructions would not be followed, we expect those circumstances would be set out in the rules, policies or procedures of the regulated clearing agency. In a default scenario, where a customer has not provided instructions or the transfer of a customer's collateral and positions in accordance with its instructions is not possible, a regulated clearing agency or a direct intermediary may rely on the customer's negative consent (i.e., the customer's silence) in effecting a transfer.

Additionally, a regulated clearing agency or defaulting direct intermediary may promptly transfer the customer's positions and related customer collateral, as a single portfolio or in portions to one or more direct intermediaries.

A regulated clearing agency must have the necessary policies and procedures in place, to facilitate the transfer of the customer collateral and positions of a customer from one direct intermediary to another at the request of the customer. This is also known as a "business-as-usual transfer".

We expect that a customer be able to transfer its customer collateral and positions to another direct intermediary in the normal course of business. Subsection 46(2) requires that a regulated clearing agency be structured, including by having the necessary rules and procedures in place, to facilitate the transfer of customer collateral and related positions upon the customer's request to any one or more non-defaulting direct intermediaries, subject to any notice or other contractual requirements.

Where a business-as-usual transfer of a customer's positions and customer collateral is facilitated under subsection 46(2), we would expect that a regulated clearing agency would promptly transfer the customer's positions and related customer collateral as a single portfolio or in portions to one or more direct intermediaries, as requested by the customer.

A request from a customer to facilitate a business-as-usual transfer of the customer's positions and customer collateral to a particular transferee direct intermediary may also take the form of a consent to transfer obtained by the regulated clearing agency from the customer. When obtaining the consent of the receiving direct intermediary, we would expect the consent to contain information as to which positions and customer collateral are to be transferred.

Section 47 – Transfer from a clearing intermediary

We are of the view that customers of a clearing intermediary should benefit from protections and rights under the Instrument with respect to the transfer of their positions and customer collateral. To that end, in the event of the clearing intermediary's default, the clearing intermediary must be structured to promptly facilitate such a transfer, as a single portfolio or in portions as requested by the customer, to one or more non-defaulting clearing intermediaries.

PART 9
SUBSTITUTED COMPLIANCE

Section 48 – Substituted Compliance

Subsection 48(1) contemplates an exemption from the Instrument in the form of substituted compliance for foreign clearing intermediaries that are regulated under the laws of a foreign jurisdiction that achieve substantially the same objectives, on an outcomes basis, as the Instrument. Substituted compliance applies to the provisions of the Instrument where the clearing intermediary is in compliance with the laws of a foreign jurisdiction set out in Appendix A opposite the name of the foreign jurisdiction. The foreign jurisdictions specified for substituted compliance are determined on a jurisdiction by jurisdiction basis, and depend on a review of the laws and regulatory framework of the jurisdiction.

The exemption only applies where a clearing intermediary is in compliance with the requirements of the laws of the applicable foreign jurisdiction specified in Appendix A and does not incorporate any exemption or discretionary relief granted to a clearing intermediary in connection with the laws of the foreign jurisdiction. Where a clearing intermediary relies on an exemption or discretionary relief from the laws of a foreign jurisdiction set out in Appendix A, it will need to apply to the relevant securities regulatory authorities for similar exemptive or discretionary relief from the Instrument.

In respect of a local customer in a local jurisdiction other than British Columbia, Manitoba and Ontario, a clearing intermediary registered, licensed or otherwise permitted to act as a clearing intermediary in a jurisdiction set out in Appendix A may benefit from substituted compliance under subsection 48(1), if the clearing intermediary offers clearing services to local customers through either a clearing agency that is a qualifying central counterparty or a regulated clearing agency.

Subsection 48(3) contemplates an exemption from the Instrument in the form of substituted compliance for foreign regulated clearing agencies that are recognized or exempt from recognition by a Canadian securities regulatory authority and are in compliance with the laws of a foreign jurisdiction that achieve substantially the same objectives, on an outcomes basis, as the Instrument. Substituted compliance applies to the provisions of the Instrument where the regulated clearing agency is in compliance with the laws of a foreign jurisdiction set out in Appendix A opposite the name of the foreign jurisdiction.

The exemption only applies where a regulated clearing agency is in compliance with the requirements of the laws of the applicable foreign jurisdiction specified in Appendix A and does not incorporate any exemption or discretionary relief granted to a regulated clearing agency in connection with the laws of the foreign jurisdiction. Where a regulated clearing agency relies on an exemption or discretionary relief from the laws of a foreign jurisdiction set out in Appendix A, it will need to apply to the relevant securities regulatory authorities for similar exemptive or discretionary relief from the Instrument.

In accordance with subsections 48(2) and 48(4), the “residual” provisions listed in Appendix A must be complied with when providing clearing services for a local customer, even if a foreign clearing intermediary or foreign regulated clearing agency is in compliance with the laws of a foreign jurisdiction set out in Appendix A.