



REQUEST FOR COMMENTS

Notice and Request for Comment

Publication of the proposal to repeal existing Local Rule 91-501 *Derivatives* and replace with new proposed Local Rule 91-501 *Over-the-Counter Trades in Derivatives* (the “**Proposed Rule**”) as set out in Appendix “A”.

Substance and Purpose

The purpose of the Proposed Rule is to provide for exemptions from the dealer registration requirement for parties trading over-the-counter (“**OTC**”) derivatives with qualified counterparties, or when trading solely in physical commodity derivatives when the underlying commodity is physically delivered to the counterparty. The Proposed Rule updates the definitions of “qualified party” and “physical commodity contract” to harmonize the Proposed Rule with similar blanket orders and/or local rules regarding OTC derivatives in other provinces. The Proposed Rule also removes certain provisions that are unnecessary in light of overlapping provisions in the *Securities Act (New Brunswick)*, SNB 2004, c. S-5.5 (the “**Act**”), and in other instruments.

Summary of Changes:

- Revisions to “Qualified Party” definition: The Proposed Rule modernizes the definition of Qualified Party to be more consistent in language and substance with similar definitions in the blanket orders and/or local rules respecting OTC derivatives in other Canadian jurisdictions.
- Added exemption for parties trading in “Physical Commodity Contracts”: The Proposed Rule extends the exemption from the dealer registration rule for parties who trade solely in physical commodity derivatives where delivery is made in physical form to counterparties. This harmonizes the Proposed Rule with the blanket orders and/or local rules respecting OTC derivatives in other Canadian jurisdictions.
- Limiting application to OTC trades in derivatives: The Proposed Rule specifies that its application is limited to OTC trades in derivatives.
- Removing list of classes of investments as non-derivatives: Section 2(3) of the current Local Rule 91-501 *Derivatives* sets out a list of investment vehicles which are deemed not to be derivatives. This is not necessary in the Proposed Rule since “derivative” is a defined term in the *Act*.
- Removing registration requirement provisions: The current Local Rule 91-501 *Derivatives* requires dealers to register in certain categories in order to trade in derivatives. Registration for trading in derivatives is required under section 45 of the *Act* and specific registration requirements are contained in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*. Accordingly, the registration provisions are not needed in the Proposed Rule.



- Removing risk information document: The Proposed Rule removes the provision requiring dealers to provide clients with a risk information document. This risk information document is not necessary for parties that benefit from the exemptions in the Proposed Rule.
- Executive Director's discretionary powers: The Proposed Rule expands the powers available to the Executive Director to order certain actions or limit the applicability of the Proposed Rule to a trade or party, or class of trades or parties. This discretion is intended to protect the public interest in appropriate circumstances.

How to Provide your Comments

Comments are to be provided, in writing, by no later than 5 April 2021 to:

Secretary
Financial and Consumer Services Commission
85 Charlotte Street, Suite 300
Saint John, N.B. E2L 2J2

Telephone: 506-658-3060
Toll Free: 866-933-2222 (within NB only)
Fax: 506-658-3059
E-mail: secretary@fcnb.ca

We cannot keep submissions confidential. A summary of the written comments received during the comment period may be published.

Questions

If you have any questions, please refer them to:

To-Linh Huynh
Executive Director of Securities
Financial and Consumer Services Commission (NB)
Tel: (506) 643-7856
Email: to-linh.huynh@fcnb.ca

Appendices

Appendix A – Proposed Local Rule 91-501 *Over-the-Counter Trades in Derivatives*



ANNEXE A

FINANCIAL AND CONSUMER SERVICES COMMISSION LOCAL RULE 91-501 *OVER-THE-COUNTER TRADES IN DERIVATIVES*

PART 1 DEFINITIONS AND INTERPRETATION

Definitions

1. In this Instrument

“physical commodity contract” means a derivative to which all of the following apply:

- (a) it is not an exchange contract;
- (b) it contains an obligation to make or take future delivery of a commodity, other than cash or a currency;
- (c) at the time it is traded, it is intended by the counterparties to be settled by physical delivery of the commodity or by delivery of evidence of a legal title to the commodity;

“over-the-counter trade” means a trade in a derivative, other than a trade in an exchange contract;

“qualified party” means

- (a) the Government of Canada or a jurisdiction of Canada, or any crown corporation, agency or wholly-owned entity of the Government of Canada or a jurisdiction of Canada,
- (b) a municipality, municipal corporation, public board or commission in Canada or other similar municipal administration, metropolitan community or school board in Canada.
- (c) a national, federal, state, provincial, territorial or municipal government of or in a foreign jurisdiction, or an agency of that government,
- (d) a bank, loan corporation, trust company, trust corporation, insurance company, treasury branch, credit union, caisse populaire, financial services cooperative, or league that, in each case, is authorized by an enactment of Canada or a jurisdiction of Canada to carry on business in Canada or a jurisdiction of Canada;



- (e) an authorized foreign bank in Schedule III of the *Bank Act* (Canada);
- (f) an association governed by the *Cooperative Credit Associations Act* (Canada),
- (g) the Business Development Bank of Canada, established under the *Business Development Bank of Canada Act* (Canada),
- (h) a pension fund regulated by the Office of the Superintendent of Financial Institutions (Canada), or by a pension commission or similar regulatory authority of a jurisdiction of Canada, or a wholly-owned subsidiary of the pension fund.
- (i) a person organized in another jurisdiction of Canada or a foreign jurisdiction that is analogous to any of the persons referred to in paragraphs (d) to (h),
- (j) a person registered under the securities legislation of a jurisdiction of Canada as an adviser or investment dealer,
- (k) an investment fund if one or more of the following apply:
 - (i) each investor in the fund is a qualified person;
 - (ii) The fund is managed by a person registered as an investment fund manager under the securities legislation of a jurisdiction of Canada;
 - (iii) The fund is advised by a person authorized to act as an adviser under the securities legislation of a jurisdiction of Canada,
- (l) a person to which, with its affiliates, either of the following applies:
 - (i) the person has executed one or more over-the-counter trades in derivatives with counterparties that are not its affiliates, provided that each of the following applies:
 - (A) the trades had a total gross value of at least \$1 billion in notional principal amount;
 - (B) any of the derivatives relating to one of these trades was outstanding on any day within the 15 months prior to the trade;
 - (ii) the person had on any day since the date that is 15 months prior to the trade total gross marked-to-market positions of at least \$100 million



aggregated across counterparties, in one or more over-the-counter trades in derivatives,

- (m) an individual who, either alone or with their spouse, has net assets of at least \$5 million,
- (n) a person, unincorporated association, organization or trust, other than an individual or an investment fund, that has total assets of at least \$25 million as shown on their most recent prepared annual financial statements or interim report,
- (o) a person that buys, sells, trades, produces, markets, brokers or otherwise uses a commodity in its business and that executes an over-the-counter trade in a derivative provided that a material component of the underlying interest of the derivative is any of the following:
 - (i) a commodity that the person buys, sells, trades, produces, markets, brokers or otherwise uses in its ordinary course of business;
 - (ii) a commodity, security or variable that directly or indirectly affects the commodity that the person buys, sells, trades, produces, markets, brokers or otherwise uses in the ordinary course of its business;
 - (iii) a commodity, security or variable for which there is a high degree of correlation between the movement in its value and the movement in the value of the commodity that the person buys, sells, trades, produces, markets, brokers or otherwise uses in its ordinary course of its business;
 - (iv) another derivative which is not listed for trading on an exchange, where a material component of the underlying interest of that other derivative is a commodity, security or variable referred to in any of subparagraphs (i) to (iii),
- (p) a person that is directly or indirectly wholly owned (not taking into account securities required by law to be held by directors) by one or more qualified parties,
- (q) a person that directly or indirectly wholly owns (not taking into account securities required by law to be held by directors) a qualified party,
- (r) a person that is directly or indirectly wholly owned (not taking into account securities required by law to be held by directors) by a person referred to in paragraph (q),



- (s) a person whose obligations under the derivative that is being traded are fully guaranteed by one or more qualified parties.

Interpretation

- 2. (1) Unless otherwise defined, terms used in this Instrument that are defined in the *Securities Act (Act)* or in National Instrument 14-101 *Definitions* have the same respective meaning ascribed to those terms in the *Act* and that Instrument.
- (2) For the purposes of this Instrument:
 - (a) a party is a qualified party if that party is a qualified party at the time the party enters into the over-the-counter trade;
 - (b) a party entering into an over-the-counter trade with a party who claims to be a qualified party is entitled to rely on a representation by that party that the party is a qualified party, unless the first party has reasonable grounds to believe that the representation is false;
 - (c) a party referred to in clauses (d) or (j) of the definition of qualified party is deemed to be acting as a principal when it acts as an agent or trustee for accounts that it fully manages.

PART 2 EXEMPTION TO DEALER REGISTRATION REQUIREMENT

- 3. (1) The dealer registration requirement does not apply to an over-the-counter trade in a derivative if either of the following applies:
 - (a) each counterparty to the trade is a qualified party acting as principal;
 - (b) the trade is in a physical commodity contract.
- (2) A person relying on subsection (1) must comply with the requirements that the Executive Director may impose on such person in respect of a trade or class of trades, including one or more of the following:
 - (a) that the trade or class of trades be reported to a trade repository recognized or exempted from recognition by the Commission;
 - (b) that the trade or class of trades be made on an exchange recognized or exempted from recognition by the Commission;



- (c) that the trade or class of trades be cleared, or cleared and settled, through a clearing agency that is recognized or exempted from recognition by the Commission;
 - (d) that in respect of a trade or class of trades not cleared, or cleared and settled, through a clearing agency, the person have at least a prescribed minimum excess working capital.
- (3)** The Executive Director may at any time revoke the exemption set out in subsection (1) or impose any terms and conditions that the Executive Director considers appropriate.

PART 3 EFFECTIVE DATE

Effective date

- 4.** This rule comes into force on ●.