CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

CSA Notice of Publication

Multilateral Instrument 93-101
Derivatives: Business Conduct

Companion Policy 93-101CP
Derivatives: Business Conduct

September 28, 2023

Introduction

The securities regulatory authorities (collectively, the **Authorities** or **we**) of the Canadian Securities Administrators (the **CSA**) in Alberta, Saskatchewan, Manitoba, Ontario, Québec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon, Nunavut and Northwest Territories (the **Participating Jurisdictions**) are publishing in final form the following materials:

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

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

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

Substance and Purpose

Background

Derivatives play a critical role in Canadian financial markets and are now mainstream financial products that are used by a diverse group of market participants, including financial intermediaries, individuals, commercial end-users and commodities firms. However, Canada has remained the only G20 country that has not yet implemented business conduct standards for OTC derivatives markets. Accordingly, we developed the Instrument to address this significant regulatory gap in order to help protect market

participants, reduce risks, including potential systemic risk, as well as improve transparency, increase accountability, and promote responsible business conduct in OTC derivatives markets.[1]

During the financial crisis of 2008, the inappropriate sale of financial instruments had a substantial impact on global financial markets and led to major losses for retail and institutional participants. The International Organization of Securities Commissions (**IOSCO**) noted in 2012 that "*until recently, OTC derivatives markets have not been subject to the same level of regulation as securities markets. Insufficient regulation allowed certain participants to operate in a manner that created risks to the global economy that manifested during the financial crisis of 2008*."[2] Moreover, since the financial crisis, there have been numerous cases of serious market misconduct in the global derivatives market and short-term FX market, including misconduct relating to the manipulation of benchmarks and front-running of customer orders, breaches of client confidentiality and failure to adequately manage conflicts of interest. The International Monetary Fund also reported in 2019 that Canada's "*[o]ngoing reforms in the areas of conduct of business of over-the-counter (**OTC**) derivatives and duties towards clients should be completed*."[3]

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

Structure of the Instrument

The Instrument is intended to provide valuable protections for OTC derivatives market participants regardless of the type of derivatives firm they deal with, balanced with efficient regulation of derivatives dealers and advisers that are operating in Canada.

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

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

The Authorities' principles-based approach to regulating the conduct of derivatives firms, includes requirements relating to the following:

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

[2] https://www.iosco.org/library/pubdocs/pdf/IOSCOPD381.pdf (DMI Report) at p 1.

[3] Financial System Stability Assessment of Canada, published on June 24, 2019 (Country Report No.19/177).

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

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

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

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

- certain obligations apply in all cases when a derivatives firm is dealing with or advising a derivatives party, regardless of the level of sophistication or financial resources of the derivatives party; and

- certain additional obligations:

    - apply if the derivatives firm is dealing with or advising a derivatives party that is not an eligible derivatives party (i.e., a "non-eligible derivatives party"); and

    - apply but may be waived if the derivatives firm is dealing with or advising a derivatives party who is an eligible derivatives party that is an individual or a specified commercial hedger.

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

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

Timeline

The Instrument was developed over the course of an extensive consultation process, including the most recent consultation on January 20, 2022 (the **third consultation**). The comment period for the third

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

consultation closed on March 21, 2022.[6] In addition, we held a public roundtable on September 28, 2022, where we explored a number of regulatory, implementation and compliance matters associated with the Instrument.

We have made revisions in response to the comments we received during the third consultation and are publishing the Instrument in final form.

Multilateral Instrument

The British Columbia Securities Commission (**BCSC**) intends to adopt substantially similar rules at a later date, at which time CSA staff intends for Multilateral Instrument 93-101 to be converted to a National Instrument.

Summary of Written Comments Received by the CSA

During the comment period for the third consultation, we received submissions from 10 commenters. We thank all commenters for their input. The names of the commenters and a summary of their comments, together with our responses, are contained in Annex A – *List of Commenters* and Annex B – *Summary of Comments and Responses* of this Notice.

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

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

Summary of Changes to the Instrument

In finalizing the Instrument, we carefully reviewed the comments that we received during the third consultation. Public comments make a valuable contribution to the rule-making process. This includes finding the right balance between achieving regulatory goals and minimizing the associated regulatory burdens. Commenters expressed overall support for the policy and recommended changes to certain parts of the Instrument prior to its finalization. We found many of the recommended changes to be persuasive and revised the Instrument accordingly.

[6] On April 18, 2013, CSA Consultation Paper 91-407 *Derivatives: Registration,* which outlined a proposed registration and business conduct regime for participants in the OTC derivatives markets was published for comment;

On April 4, 2017, Proposed National Instrument 93-101 *Derivatives: Business Conduct* and Proposed Companion Policy 93-101 *Derivatives: Business Conduct* was published for a first comment period;

On June 14, 2018, Proposed National Instrument 93-101 *Derivatives: Business Conduct* and Proposed Companion Policy 93-101 *Derivatives: Business Conduct* was published for a second comment period; and

On January 20, 2022, Proposed National Instrument 93-101 *Derivatives: Business Conduct* and Proposed Companion Policy 93-101 *Derivatives: Business Conduct* was published for a third comment period.

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

The more notable changes to the Instrument, which are summarized in more detail below, include:

- adopting a bright-line test for qualifying clients as EDPs by removing the additional knowledge and experience representation in the EDP definition, which will harmonize the approach to obtaining status representations with the approach taken in NI 31-103, as well as the approach taken by foreign regulators;

- expanding the "commercial hedger" concept under the EDP definition to clarify that it is available for use by certain sole proprietorships;

- applying a more limited subset of provisions to derivatives dealers relying on the notional amount exemptions and increasing the financial threshold for commodity derivatives dealers relying on the notional amount exemption from CAD$3 billion to CAD$10 billion;

- expanding the list of status representations that derivatives firms can rely on for the purposes of the transition representations;

- clarifying that the inclusion of short-term FX contracts in the institutional FX market for the purposes of a limited sub-set of provisions does not require any of the Canadian financial institutions that are subject to this provision to obtain additional certifications or status representations from their clients;

- removing the requirement for foreign derivatives dealers to provide additional reports to Canadian regulators that were over and above what is required under NI 31-103 for foreign dealers that are relying on a similar type of exemption;

- including detailed guidance for registered advisers relying on the exemption in the Instrument available to registered advisers about the interaction of the exemption with the requirements that will apply to a registered adviser's derivatives activity under NI 31-103; and

- closely aligning the record retention requirements in the Instrument to the timeframe provided for in NI 31-103.

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

Definition of Canadian financial institution

- We note that on September 13, 2023, amendments to National Instrument 14-101 *Definitions and Consequential Amendments* took effect, which would align the definition of Canadian

financial institution in NI 14-101 to the definition found in the Instrument. The Instrument has been updated to cross-reference the definition in NI 14-101 to reflect the uniform definition of Canadian financial institution that will apply to all national and multilateral instruments.

Definition of CIRO

- As of January 1, 2023, the Investment Industry Regulatory Organization of Canada (**IIROC**) and the Mutual Fund Dealers Association of Canada amalgamated to become the Canadian Investment Regulatory Organization (**CIRO**). The Instrument has been updated to change the reference from IIROC to CIRO. This change has also been reflected in the exemption in the Instrument that is available to derivatives dealers that are also dealer members of CIRO.

EDP definition – certain sole proprietors hedging commercial risk can qualify as EDPs

- We understand that there are specific scenarios where sole proprietorships, which are legally treated as individuals, also use derivatives to hedge risks associated with their commercial activities. Accordingly, the "commercial hedger" concept under the EDP definition has been expanded to clarify that certain derivatives parties that are individuals operating as sole proprietorships may qualify as EDPs if they satisfy the conditions for qualifying as a commercial hedger and are entering into a transaction solely for the purposes of managing risks inherent to their commercial business.

- To ensure this prong of the EDP definition is used for its intended purpose, we intend to carefully monitor and review the use of this prong of the EDP definition and a derivatives firm's compliance with relevant requirements.

EDP definition – bright-line status test

- The status test for determining if a derivatives party qualifies as an EDP has been changed to align with the existing 'bright-line' approach to status representations under securities legislation pertaining to securities and exchange-traded derivatives products. Accordingly, we have removed the additional knowledge and experience representation that had to be given by certain persons or companies.

- This change aligns more closely with bright-line tests used by foreign regulators to establish the status of a client or counterparty in OTC derivatives markets, which is important due to the global nature of these markets.

- Additionally, taking this approach is expected to significantly ease the re-papering burden on derivatives firms without reducing the protections afforded to qualifying individuals and commercial hedgers, since all of the obligations in the Instrument presumptively apply to the activity of a derivatives firm transacting with an EDP that is either an individual or an eligible commercial hedger, unless that derivative party has provided written notice waiving all (or some of) the additional protections in the Instrument.

Exemption from certain requirements for certain notional amounts of derivatives activity

- The overall scope of the Instrument is that it applies regardless of whether a derivatives firm is registered or not, subject to any available exemption.

- Recognizing that not all foreign derivatives dealers are regulated in their home jurisdiction and that the Instrument applies to derivatives firms (foreign and local) operating under other derivatives regulatory frameworks (including in the U.S. and the E.U.), the exemptions in section 44 [*Exemptions from certain requirements in this Instrument for certain notional amounts of certain commodity derivatives and other derivatives activity*] (the **notional amount exemptions**) have been broadened and further tailored in the following two ways to align them more closely with the exemptions contemplated in the U.S. and the E.U. regulatory frameworks:

    - first, we recognize that there are certain commodity derivatives dealers whose primary business purpose is to operate a physical commodities business (involving delivery of commodities, such as energy, agricultural goods, or other raw materials, to industrial, commercial and residential consumers) and that the U.S. and E.U. regulatory frameworks largely exempts such commodity derivatives dealers. Therefore, the derivatives activity threshold that is used to determine whether a commodity derivatives dealer may rely on the notional amount exemption that is available to commodity derivatives dealers (the **commodity derivatives dealer notional amount exemption**) has been increased from CAD $3 billion to $10 billion; and

    - second, we reduced the scope of the provisions that will apply to a derivatives dealer relying on one of the two available notional amount exemptions, so that only the provisions relating to fair dealing, conflicts of interest, and the requirement to deliver a trade confirmation will continue to apply to a derivatives dealer relying on a notional amount exemption.

- We will continue to monitor developments in derivatives markets that may affect the appropriateness of the threshold notional derivatives activity amounts that are used to calibrate the application of the Instrument (particularly, in relation to the commodity derivatives dealer notional amount exemption).

Short-term FX

- We have made changes to the MI and the CP to clarify that the inclusion of short-term FX contracts in the wholesale FX market for the purposes of a limited sub-set of provisions does not require a Canadian financial institution that is subject to this provision to obtain any status certifications or representations from its counterparties.

- The limited sub-set of provisions in the MI[7] that apply to short-term FX contracts in the wholesale FX market is intended to overlay, on a principles basis, the existing policies and procedures that have already been adopted by the Canadian financial institutions that are subject to these provisions and have already been incorporated into their internal compliance regimes through

[7] Section 9 [*Fair dealing*]; section 10 [*Conflicts of interest*]; section 12 [*Handling complaints*]; Division 1 [*Compliance*] of Part 5 [*Compliance and recordkeeping*].

their adherence to the FX Global Code of Conduct[8] with the population of their counterparties that are covered by the FX Global Code of Conduct.

Registered advisers

- We have included additional guidance in the Companion Policy for registered advisers relying on the section 48 exemption [*Registered advisers under securities or commodity futures legislation*] about how the exemption interacts with the requirements applicable to a registered adviser's derivatives activity under NI 31-103, including providing an overview of the provisions in the Instrument that still apply to registered advisers relying on the section 48 exemption, as well as a summary of the provisions in the Instrument that do not apply to registered advisers that comply with the corresponding requirements in NI 31-103 in respect of their derivatives activity.

Specified foreign jurisdictions for substituted compliance

- Two additional countries (Norway and Iceland) where MiFID II[9] and MiFIR[10] are applicable have been included in Appendix A, Appendix D and Appendix E of the Instrument since they have comparable derivatives regulation on an outcomes basis to the requirements found in the Instrument. This means that foreign derivatives dealers, advisers and sub-advisers located in these two additional countries can utilize the exemptions in the Instrument that are available to a foreign dealer, foreign adviser or a foreign sub-adviser that complies with the conditions of the applicable exemption.

- The fact that a foreign jurisdiction is not included in the appendices is not intended to necessarily suggest any policy concern with the regulatory regime of that foreign jurisdiction. Rather, this decision reflects that staff in Participating Jurisdictions have not had an opportunity (or received fulsome submissions from industry associations or market participants) to consider if that foreign jurisdiction has in place, on an outcomes-basis, a comparable derivatives regulatory framework. We anticipate that these appendices may be amended from time to time to include additional foreign jurisdictions once we have had a chance to consider the regulatory regimes in other foreign jurisdictions.

Record retention requirements

- We have aligned the approach taken in the Instrument with respect to records retention with the approach to records retention under securities legislation (namely, in NI 31-103) and significantly reduced the timeframe for retaining applicable records. Applicable records are now required to be retained for 7 years (or 8 years in Manitoba) from the record creation date.

Transition provisions and effective date

- The effective date of the Instrument is September 28, 2024.[11]

[8] FX Global Code: https://www.globalfxc.org/docs/fx_global.pdf
[9] Markets in Financial Instruments Directive (MiFID) II: https://www.efta.int/eea-lex/32014L0065
[10] Markets in Financial Instruments Regulation (MiFIR): https://www.efta.int/eea-lex/32014R0600
[11] In some Participating Jurisdictions, ministerial approval is required for the implementation of the Instrument. Provided ministerial approvals are obtained, the Instrument will come into force on September 28, 2024 in such Participating Jurisdictions.

- Additional changes have been made to Part 8 [*Transition and Effective Date*] of the Instrument to further assist derivatives firms with transitioning to the new regulatory framework, including the following:

    - the transition representations that derivatives firms can rely on under section 50 [*Transition for existing derivatives parties*] during the transition period have been further expanded to account for certain additional types of sophisticated parties that can qualify as EDPs;

    - in addition to the delayed effective date of one year from the date of the final publication, in circumstances where the derivatives firm is required to obtain a waiver from a client or counterparty under section 8(2)(a)(iii) in order for that derivatives party to qualify as an EDP, derivatives firms will have an additional one-year period following the effective date of the Instrument to obtain the required waiver; and

    - BCSC staff anticipates that MI 93-101 will take effect in British Columbia on September 28, 2024, together with the Participating Jurisdictions – BCSC staff will provide more specific information when BCSC publishes the final version of the Instrument in its jurisdiction.

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

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

List of Annexes

This notice contains the following annexes:

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

Questions

Please refer your questions to any of:

Kevin Fine
Co-Chair, CSA Derivatives Committee
Director, Derivatives Branch
Ontario Securities Commission
416-593-8109
kfine@osc.gov.on.ca

Dominique Martin
Co-Chair, CSA Derivatives Committee
Senior Director, Market Activities and Derivatives
Autorité des marchés financiers
514-395-0337, ext. 4351
dominique.martin@lautorite.qc.ca

Janice Cherniak
Senior Legal Counsel, Market Regulation
Alberta Securities Commission
403-355-4864
Janice.Cherniak@asc.ca

Amélie McDonald
Legal Counsel - Securities
Financial and Consumer Services Commission, New Brunswick
506-635-2938
amelie.mcdonald@fcnb.ca

Graham Purse
Legal Counsel
Securities Division
Financial and Consumer Affairs Authority of Saskatchewan
306-787-5867
graham.purse2@gov.sk.ca

Paula White
Deputy Director, Compliance and Oversight
Manitoba Securities Commission
204-945-5195
paula.white@gov.mb.ca

Doug Harris
General Counsel, Director of Market Regulation
Nova Scotia Securities Commission
Doug.Harris@novascotia.ca

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

Annex A
List of Commenters

Commenter
Alternative Investment Management Association
Bloomberg Tradebook Canada Company
The Canadian Advocacy Council of CFA Societies Canada
The Canadian Commercial Energy Working Group
Canadian Bankers Association
Canadian Market Infrastructure Committee
Convera Canada ULC
International Swaps and Derivatives Association, Inc.
Pension Investment Association of Canada
Portfolio Management Association of Canada

Annex B
Summary of Comments and Responses

This summarizes the written public comments we received on the January 20, 2022 publication for comment of National Instrument 93-101 *Derivatives: Business Conduct*, now Multilateral Instrument 93-101 *Derivatives: Business Conduct* (the **Business Conduct Rule** or **MI 93-101**) and Companion Policy 93-101CP *Derivatives: Business Conduct* (the **CP**), and our responses to those comments.

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

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

"CIRO" means the Canadian Investment Regulatory Organization;

"CSA" means the Canadian Securities Administrators;

"EDP" means "eligible derivatives party" as defined in MI 93-101;

"IOSCO" means the International Organization of Securities Commissions;

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

"NI 93-102" or the "Proposed Registration Rule" means National Instrument 93-102 *Derivatives: Registration*;

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

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

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

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

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

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

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

Other capitalized terms not otherwise defined in this Summary of Comments have the meanings set out to them in the Business Conduct Rule.

A. Overview of Comments

1. Overview of support for the initiative

Summary of General Support

Overall, commenters were very supportive of the changes reflected in the January 2022 publication of the Business Conduct Rule and indicated that the significant changes to the Business Conduct Rule following the last publication are both improvements over the prior proposals and responsive to comments and concerns raised by market participants**.**

Commenters were supportive of the CSA's efforts to introduce business conduct regulations on derivatives dealers and advisers. As well, commenters were supportive of the principles behind the business conduct proposals and efforts to protect market participants, including reducing systemic risk and meeting IOSCO's statement of related principles and objectives. One commenter indicated that the January 2022 publication has struck the appropriate balance between putting in place a robust investor protection framework and responding to the overall comments of stakeholders impacted by the Business Conduct Rule. Commenters also indicated the importance of harmonizing rules across Canada, as well as harmonization with regimes outside of Canada.

One commenter specifically highlighted their belief that it is important the final Business Conduct Rule is implemented and operationalized as soon as possible, even without the inclusion some of some of the concepts from the Client Focused Reforms[1] at this time.

i) Support for the inclusion of short-term FX in the institutional FX market

Several commenters were very supportive of applying a subset of provisions in the Business Conduct Rule

[1] See recent amendments to NI 31-103 and its Companion Policy (the **Client Focused Reforms**) in 2019

to cover short-term FX in the institutional FX market and expressed the view that applicable dealers should be required to abide by these provisions, such as fair dealing and conflicts of interest when transacting with a derivatives party.

One commenter indicated that they believe there is value to provide Canadian regulators with the necessary tools in the event that there is a misconduct issue involving short-term FX. The commenter also emphasized that the FX Global Code of Conduct is very clear that it does not impose legal or regulatory obligations on market participants and therefore, integrating code of conduct into regulations is helpful. Similarly, another commenter commented that such inclusion is unlikely to cause a significant burden, but instead will enhance the integrity of the short-term FX market in Canada.

ii) Support for the liquidity provider exemption

Several commenters were supportive of including the liquidity provider exemption.

One commenter supported the new exemption and indicated that without such an exemption, liquidity in the Canadian OTC derivatives market would be materially impaired. The commenter believes adding regulatory burden would dissuade foreign banks from maintaining existing Canadian operations or existing Canadian coverage and that foreign liquidity is essential for Canadian businesses to be able to hedge the risks associated with their operations. Accordingly, this exemption is appropriate and necessary to maintain a robust Canadian OTC derivatives market.

iii) Support for including de minimis exemptions in the senior manager's requirements

Several commenters indicated their support for including de minimis exemptions (these exemptions are now referred to in the CP as "**notional amount exemptions**") in senior derivatives manager requirements.

iv) Support for eliminating the financial threshold to qualify as a commercial hedger

Several commenters were supportive of eliminating the $10 million financial threshold to qualify as a commercial hedger.

In many commenters' views, the removal of the threshold will have a positive effect on the ability of clients to access liquidity from dealers and on a dealer's willingness to trade with a broader range of clients. In particular, this change will ensure that mid-market entities are not excluded from access to OTC derivatives transactions and are therefore able to access important hedging products and continue to result in healthy competition.

One commenter who indicated strong support for eliminating the threshold stated that this decision is also consistent with the long-standing treatment of commercial hedgers of all sizes in other Canadian jurisdictions.

v) Support for streamlining the requirements that apply to registered derivatives advisers under NI 31-103

Many comments were supportive of the ability of registered advisers to leverage their existing compliance infrastructure by complying with corresponding requirements in NI 31-103 with respect to their derivatives activity for many of the conduct provisions set out in the Business Conduct Rule. One commenter indicated that this helps in reducing regulatory burden, while maintaining investor protection and lauded the approach.

vi) Support for a flexible 5-year timeframe for re-papering the status of existing clients that had previously provided status representations

Several comments indicated support for the extended time that will allow derivatives firms for a period of 5 years to treat existing status representations (e.g., permitted clients, qualified parties, accredited counterparties and eligible contract participants) as EDPs.

CSA Response

We thank the commenters for their comments supporting the changes reflected in the January 2022 publication of the Business Conduct Rule. Specifically, we thank the commenters for their comments supporting:

- the inclusion of the short-term FX in the Business Conduct Rule;
- the inclusion of the liquidity provider exemption in the Business Conduct Rule;
- the inclusion of the exemption from senior derivatives manager requirements in the Business Conduct Rule;
- the elimination of the $10 million financial threshold to qualify as a commercial hedger in the Business Conduct Rule;
- the CSA's efforts to streamline the requirements in the Business Conduct Rule that apply to registered derivatives advisers under NI 31-103; and
- the 5-year period to re-paper the status of representations given by certain clients.

2. Overview of Comments and Concerns with the Initiative

Although the majority of commenters were very supportive of the Business Conduct Rule, a few commenters raised additional comments regarding the impact of the Business Conduct Rule in the January 2022 publication. The principal concerns we received on the Business Conduct Rule were as follows:

- there are still elements of the EDP definition that pose challenges to firms transitioning to the use of the new definition, given that the proposed structure of the EDP definition retained the knowledge and experience requirement does not use a bright-line test, and therefore, is not harmonized with the approach taken under the framework for regulating securities market participants or comparable foreign regulators. The CSA should reconsider the impact on liquidity and allow more flexibility;

- the transition representations derivatives firms can rely on during the transition period should be further expanded to account for certain additional types of sophisticated parties;

- to promote continued liquidity in the Canadian market, it is important to harmonize Canadian OTC derivatives rules with the derivatives rules in larger markets outside Canada to the greatest extent possible, as well as align certain elements to the existing securities regime in Canada, where appropriate. Any onerous or bespoke reporting requirements imposed on foreign market participants will impact liquidity and dissuade foreign dealers from operating in the Canadian market; and

- although registered advisers are appreciative of the changes made to include an exemption in the Business Conduct Rule for registered advisers complying with the requirements under NI 31-103

in respect of their derivatives activity, additional guidance would be helpful to assist firms with implementing the new regime.

CSA Response

We thank the commenters for their comments on the Business Conduct Rule. In response to the comments we received, changes we have made to the Business Conduct Rule include:

- removing the knowledge and experience requirement in the EDP definition, which will significantly ease the re-papering burden and align with the approach taken to obtaining status representatives more generally under securities legislation for securities and exchange-traded derivatives products, as well as align with foreign regulators, which rely on bright-line tests;

- expanding the "commercial hedger" concept under the EDP definition such that it is available for use by individuals operating sole proprietorships;

- expanding the status representations that derivatives firms can rely on for the purposes of the transition representations;

- clarifying that the inclusion of short-term FX contracts in the institutional FX market for the purposes of a limited sub-set of provisions does not require any of the Canadian financial institutions that are subject to this provision to obtain any additional certifications or status representations from clients; rather the provision will simply overlay, on a principles basis, the existing policies and procedures that have already been adopted by these derivatives firms through their adherence to the FX Global Code of Conduct;

- harmonizing the foreign dealer exemption to align with the approach taken in the international dealer exemption under NI 31-103, as well as the approach taken in the foreign advisers and foreign liquidity providers exemption and removing the requirement to provide additional regulatory reports;

- including detailed guidance for registered advisers relying on the section 48 [*Registered advisers under securities or commodity futures legislation*] exemption on the interaction of the exemption with the comparable requirements applicable to a registered adviser's derivatives activity under NI 31-103;

- expanding the list of specified jurisdictions found in Appendix A, Appendix D and Appendix E of the Business Conduct Rule, which are identified to have comparable derivatives regulation on an outcomes-basis;

- aligning the recordkeeping requirements with the approach to conduct regulation under securities legislation, which significantly reduces the timeframe for retaining applicable records (from 7 years after the expiration of the transaction, to 7 years from the record creation date); and

- increasing the financial threshold from $3 billion to $10 billion under the notional amount exemption available to commodity derivatives dealers whose derivatives activity with eligible

derivatives parties falls below the stipulated financial threshold, to align the approach more closely with the exemptions contemplated in the U.S. and E.U. regulatory framework.

B. Summary of Specific Comments

1. Overview of comments on the exemptions impacting foreign dealers, foreign advisers and foreign sub-advisers

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

Accordingly, several commenters supported the significant changes proposed in the third publication of the Business Conduct Rule to minimize the potential impact of the Business Conduct Rule on foreign derivatives dealers and advisers in order to protect market liquidity by:

- introducing a new foreign liquidity provider exemption for foreign dealers that trade with derivatives dealers in Canada;
- streamlining the foreign dealer and foreign adviser exemptions so that they more closely conform to the international dealer and international adviser exemptions in NI 31-103;
- adding a new exemption for foreign sub-advisers similar to the international sub-adviser exemption in NI 31-103; and
- including additional guidance on the application of the business trigger test as it relates to dealers that conduct activities in Canada and in foreign jurisdictions, as well as on the availability of exemptions from business conduct requirements.

Several commenters noted that ensuring that Canadian regulation of the OTC derivatives market does not significantly reduce liquidity is critical to the functioning of the market. They noted that regulation that imposes unique requirements will deter market makers from continuing to participate in the Canadian OTC derivatives market. Accordingly, commenters expressed that these changes to the Business Conduct Rule would help to ensure that liquidity is maintained in the Canadian market.

a) New foreign liquidity provider exemption (section 37)

Several commenters expressed their strong support for the changes made by the CSA to preserve liquidity in the inter-dealer market by introducing a new foreign liquidity provider exemption for foreign dealers that trade with derivatives dealers in Canada. These commenters reiterated that Canadian based derivatives dealers do not desire or need the protection set out in the Business Conduct Rule when facing a foreign liquidity provider. And further, they indicated that this new exemption appropriately addressed their comments on previous publications of the Business Conduct Rule where they stressed that Canadian participants form only a very small part of the global derivatives market and that maintaining liquidity in the Canadian market and ongoing and uninterrupted access to foreign dealers (namely, foreign banks) is critical to the operation of Canadian financial markets.

Additionally, commenters noted that if or when the CSA proposed the next iteration of a derivatives registration rule, that this foreign liquidity provider exemption should also be incorporated into that rule as well.

CSA Response

Thank you from providing your comments in support of the new foreign liquidity provider exemption.

b) Foreign derivatives dealer exemption (section 39)

Several commenters were very supportive of the changes the CSA made to the foreign derivatives dealer exemption to streamline the requirements and provide limits on the reporting obligations imposed on foreign dealers, such as limiting the reporting to activities that involve parties located in Canada and introducing a materiality threshold to the conditions under which a foreign dealer relying on this exemption would be required to report non-compliance to the regulator.

Several commenters noted that the changes made were necessary to maintain liquid Canadian OTC derivatives markets and supported the changes that clarify that reports of material non-compliance extend only to the foreign dealers interaction with Canadian counterparties and the Canadian market; however, they noted that given the multiple global rules multinational dealers are subject to, that the timing for fulfilling such reporting obligation under the CSAs rules should not precede any report to the foreign dealers regulator in its home jurisdiction.

One commenter, however, noted that the approach taken in the Business Conduct Rule exceeds all current reporting requirements for registered and exempt securities firms in Canada and expressed concerns with taking a different approach as it relates to OTC derivatives, including that departing from existing standards on the securities side means that certain foreign dealers may simply exit the Canadian market entirely.

CSA Response

Thank you for providing support and recommendations on the foreign derivatives dealer exemption in the Business Conduct Rule. We have removed the requirement for foreign derivatives dealers to provide reports to Canadian regulators under this exemption. The rationale is to align the approach taken in the Business Conduct Rule with the foreign liquidity provider exemption and the foreign adviser exemption, which do not have requirements to provide this type of reporting, as well as aligning with the overall approach taken for all regulated product lines (i.e., securities and futures). Removing this reporting requirement from the Business Conduct Rule entirely for foreign dealers relying on this exemption ensures there is a common approach across product lines, as well as within the Business Conduct Rule itself. CSA Staff remain of the view that even with this change, the main benefits of modernizing the foreign dealer exemption remain intact since the availability of this exemption is limited to jurisdictions that CSA Staff has determined has comparable derivatives regulation.

c) Foreign derivatives adviser exemption (section 46) and sub-adviser exemption (section 47)

Several commenters expressed their overall support for streamlining the foreign adviser and sub-adviser exemptions so that they more closely conform to the international adviser exemptions in NI 31-103.

Two commenters expressed that they were in favour of these exemptions as contemplated, so long as there is a level playing field. Specifically, one commenter noted that to the extent foreign advisers are not

subject to any requirements to follow derivatives business conduct rules with respect to FX forwards in their home jurisdiction, that Canadian advisers should similarly not be required to follow such rules.

CSA Response

Thank you for providing support and recommendations on the foreign derivatives adviser and sub-adviser exemptions. The exemption model for foreign dealers and foreign advisers from the requirements in the Business Conduct Rule are intended to preserve market access and maintain general liquidity. Regulators both domestically and globally have observed market abuse as it relates to FX derivatives and do not support a change to the rule that minimizes the obligations of derivatives firms for conducting themselves responsibly and owing basic business conduct obligations to a derivatives party.

2. Comments on the definition of "eligible derivatives party"

A few commenters made recommendations on the definition of EDP in the Business Conduct Rule. One commenter recommended that the definition of EDP under paragraphs (m), (n), (o) and (p) of the Business Conduct Rule be revised to allow a derivatives firm flexibility in determining whether a derivatives party has the requisite knowledge and experience, instead of being required to only rely on written representations. The commenter noted that in their experience, written representations are not always provided by clients in all cases despite multiple follow-up requests. Another commenter specifically stated that the requirement is unnecessary. The commenter believes that financial thresholds are appropriate and sufficient to identify derivatives parties who are not in need of extra protections. The commenter believes that the definition as drafted will be a burden on derivatives firms without any meaningful benefit.

The commenter also expressed concerns that the definition of EDP is cumbersome and mostly duplicates other established Canadian client definitions. The commenter believes that the definition of EDP should include all the persons that qualify as "permitted clients" under NI 31-103. The commenter also strongly encouraged the CSA to consider that there is a need to align the EDP definition with the "eligible contract participant" definition under the U.S. *Commodity Exchange Act*.

CSA Response

We thank the commenters for their comments on the definition of EDP. In response to commenters, we have removed the requirement to provide a knowledge and experience self-certification from each relevant prong of the EDP definition. After careful consideration, the CSA has removed this requirement to more clearly harmonize the approach with the approach taken in the existing securities and commodities futures regulatory framework, which use bright-line tests to ascertain the status of a client. Furthermore, this generally aligns the CSA's approach with foreign approaches taken to client classification as well, which we recognize is important given the cross-border nature of derivatives markets and overlapping regulatory regimes.

We have also more closely aligned with the concept of "eligible contract participant" under the U.S. *Commodity Exchange Act*, which includes the concept of sole proprietorships, by expanding the "commercial hedger" concept under the EDP definition such that it is available for use by individuals operating sole proprietorships. We understand that there are specific scenarios where sole proprietorships (which are legally treated as individuals) also enter into derivatives to hedge risks associated with their commercial activities. As such, individual sole proprietors operating a commercial business are able to qualify as commercial hedgers if they satisfy the conditions for qualifying as a

commercial hedger and are entering into a transaction solely for the purposes of managing risks inherent to the commercial enterprise. To ensure this prong of the EDP definition is used for its intended purpose, CSA Staff intend to carefully monitor and review the use of this prong of the definition by clients of derivatives firms to qualify as an EDP. We will also continue to monitor the impact of differences between the Business Conduct Rule and foreign approaches to derivatives regulation.

We have not revised the EDP definition to include the concept of "permitted client" under NI 31-103. As there are differences between securities and derivatives markets, the Business Conduct Rule is intended to be a tailored regime for derivatives.

3. Comments on the potential impact of the Business Conduct Rule on registered advisers

We received a comment stating that the CSA should set out a clear roadmap at the start of MI 93-101 illustrating its application to advisers regulated by NI 31-103. The commenter believes that there can be increased clarity regarding the application of the Business Conduct Rule to advisers by setting out the parts of the Business Conduct Rule that advisers already complying with NI 31-103 are subject to.

Additional comments of the potential impact of the Business Conduct Rule on registered advisers are summarized in #7 of the Summary of Responses to Specific Request for Comments below.

CSA Response

We thank the commenter for their comments on the impact of the Business Conduct Rule on registered advisers and accordingly, have:

- explained through CP guidance how compliance with certain requirements of NI 31-103 could reasonably be viewed as also satisfying similar requirements for derivatives in the Business Conduct Rule; and

- included a chart in Appendix B of the CP to assist registered advisers with understanding their obligations. Appendix B of the CP sets out an overview of the parts, divisions and sections in MI 93-101 that still apply to registered advisers relying on the section 48 exemption in the Business Conduct Rule, as well as a summary of the parts, divisions and sections in the Business Conduct Rule that do not apply to registered advisers that comply with the corresponding requirements in NI 31-103 in respect of their derivatives activity. Appendix B of the CP also lists the provisions under NI 31-103 that are generally applicable in respect of a registered adviser's derivatives activity if such registered adviser is relying on the section 48 exemption in the Business Conduct Rule.

So long as the registered adviser complies with the relevant principles under NI 31-103 and MI 93-101 in connection with their activities in relation to derivatives, then the intention is for these firms to leverage off of these existing regimes when ensuring that market conduct principles extend to their derivatives activity with their clients.

4. Comments on Proposed Registration Requirements for Derivatives Market Participants

We received a few comments relating to proposed registration requirements for derivatives market participants and the interaction of such requirements with the Business Conduct Rule.

In relation to the Proposed Registration Rule, we received the following comments:

- Two commenters urged the CSA to implement the Business Conduct Rule and the Proposed Registration Rule at the same time.

- One commenter recommended that the exemptions provided in the Business Conduct Rule be harmonized with the Proposed Registration Rule. For example, the commenter noted that unlike the Proposed Registration Rule, there is no notional amount exemption from the derivatives dealer business conduct requirements other than with respect to the senior manager derivatives regime, nor is there an exemption for crown corporations.

- One commenter also noted that it is difficult to provide fulsome comments on the Business Conduct Rule without understanding the status of the Proposed Registration Rule regarding when a firm is required to be a derivatives adviser.

CSA Response

We thank the commenters for their comments on the proposed registration requirements for derivatives market participants and the interaction of such requirements with the Business Conduct Rule. The Business Conduct Rule is intended to create a uniform approach to derivatives markets conduct regulation in Canada and promote consistent protections for market participants, regardless of the derivatives firm they deal with, and accordingly is the next step towards creating a uniform approach to derivatives markets conduct regulation in Canada.

While the CSA did not publish the next iteration of the Proposed Registration Rule, and the Business Conduct Rule will be implemented in advance of the Proposed Registration Rule, we will consider comments received in relation to the Proposed Registration Rule and Companion Policy for any future publications, including in relation to the notional amount thresholds and related tests to determine such thresholds, since we intend these thresholds to be harmonized between these two rules.

Regarding the comment about how to determine when a firm will be considered to be a derivatives adviser, please note that the CP to the Business Conduct Rule provides guidance on the factors used to determine when a person or company is engaged in the business of advising with respect to derivatives. Specifically, refer to [*Factors in determining a business purpose – derivatives adviser*] in the CP to the Business Conduct Rule, which sets out the factors in determining a "business purpose" for derivatives advisers.

5. Comments on the timing of implementation and transition representations

We received a number of comments relating to the timing of implementation of the Business Conduct Rule and the representations set out under section 50 to facilitate the transition to the Business Conduct Rule (the **Transition Representations**). Commenters provided the following recommendations:

- Several commenters noted their appreciation for the proposed transition period of 5 years. However, one commenter recommended that the CSA provide at a two-year implementation period while another commenter recommended at least a three-year implementation period.

- Two commenters asked for additional clarity confirming that the transition period effectively ends in 6 years and asked that the CP be amended to expressly provide guidance on this point.

- Another commenter, while generally supportive, noted two concerns with respect to the transition provisions of the Business Conduct Rule that the commenter views significantly reduce the effectiveness of those provisions:

    - Firstly, the commenter is concerned that there are certain derivatives parties that would otherwise qualify as EDPs, where a derivatives firm would not have obtained any of the Transition Representations. Therefore, the commenter recommends the inclusion of the "accredited investor" representation in Ontario as well as the EMIR "financial counterparty" and "NFC+" representations as Transition Representations since parties that provide these representations are considered to be sophisticated counterparties.

    - Secondly, the commenter noted that if the derivatives party is an eligible commercial hedger, in order to meet its obligations under section 8(2) of the Business Conduct Rule, the commenter believes that derivatives firms will need to conduct an outreach in order to obtain the waiver required under that section. In the commenter's experience, this group has the lowest rate of response to information requests. As a result, this would place a significant burden on Canadian banks and increase the risk of market disruption. The commenter recommends that as long as one of the Transition Representations has been made prior to the effective date, eligible commercial hedgers would be deemed to have given the waiver.

- The commenter also recommends the following amendments to the transition provisions:

    - Provide that even where special purpose vehicles have not made one of the Transition Representations prior to the effective date, derivatives firms facing such special purpose vehicles would not need to conduct a special outreach to those parties and would not require a waiver from those parties to treat them as EDPs during the transition period; and

    - To reduce the significant burden placed on Canadian financial institutions trading short-term FX transactions, the Business Conduct Rule should expressly provide that such counterparties will be deemed to be EDPs during the transition period.

- Application to pre-existing transactions - lastly, the commenter noted that it is unclear to what extent the Business Conduct Rule would apply to transactions that were entered into before the effective date. Since there are certain derivatives parties from whom a derivatives firm would not have received any such representations but would otherwise be EDPs, this implies all obligations under the Business Conduct Rule would apply to all legacy transactions of such derivatives parties. The commenter noted that this is confusing as there are certain obligations under the Business Conduct Rule that apply only prior to trading, and this is also contrary to legislative conventions to have legislation apply retroactively.

CSA Response

We thank the commenters for their comments on the timing of implementation and Transition Representations. In response to the comments received, we have made the following changes to the Business Conduct Rule:

- We have added clarification language in the CP that the transition period to re-paper clients under the EDP definition ends 5 years following the date the Business Conduct Rule takes effect. Therefore, firms that have already papered clients under existing status representations effectively have 6 years to obtain new representations from their existing clients, since there is a delayed effective date of one year from the date of the final publication until the Business Conduct Rule takes effect.

- We have included a "non-individual accredited investor" representation in Ontario. We have included this "non-individual accredited investor" representation because we understand that banks relying on the registration exemption in section 35 of the *Securities Act* (Ontario) had obtained accredited investor representations from their Ontario clients in respect of certain OTC derivatives contracts. This accommodation is only intended to be available for use in the transition period to facilitate transition for banks that had obtained the accredited investor representation for their OTC contracts.

- We have included the EMIR "financial counterparty" and "NFC+" representations as Transition Representations.

- With respect to the comment about retroactively applying the rule, please note that the Business Conduct Rule applies only once the Business Conduct Rule takes effect.

    - Accordingly, when the Business Conduct Rule takes effect, to the extent there is a pre-existing transaction and the transaction (as well as the account and relationship between the parties) continues, provided the derivatives firm has obtained an applicable Transition Representation, only the fair dealing obligation will apply.

    - Derivatives are not point-in-time specific transactions. There are ongoing relationships and obligations between the parties in respect of a transaction once the Business Conduct Rule takes effect. Therefore, in CSA Staff's view, it would not be an appropriate outcome (especially given the length of certain OTC derivatives transactions) to remove the application of even the basic fair dealing obligation to such transactions going forward. Furthermore, stakeholders have expressed concerns to CSA Staff in the past with respect to the broad public interest powers in the provinces respective securities legislation and how that applies to their derivatives activity – in CSA Staff's view, firms will benefit from the additional certainty of knowing that a specific obligation applies.

    - With respect to transactions with non-eligible derivatives parties (i.e., retail clients), following the effective date, all applicable provisions in the Business Conduct Rule apply to the extent practicable. We note that for the population of firms that are members of CIRO and are offering over-the-counter derivatives to retail customers, that they are already subject to business conduct obligations. The Business Conduct Rule will now overlay those obligations and we expect those firms will be relying on the exemption

available to firms who are members of CIRO for complying with the relevant CIRO provisions. We also note that in previous comments letters received as part of consultations on the Business Conduct Rule, both the foreign banks and local Canadian banks have re-iterated that they do not intend to offer the products subject to this rule to clients that do not otherwise qualify as eligible derivatives parties. For the population of firms that are otherwise impacted and have any questions, we encourage them to contact their local securities regulator for any additional guidance they may need.

- With respect to the comment that was raised about having to re-paper all clients transacting in short-term FX in the wholesale FX market as eligible derivatives parties:

    - The inclusion of short-term FX contracts in the institutional FX market for the purposes of a limited sub-set of provisions **does not** require any of the Canadian financial institutions that are subject to this provision to obtain any additional certifications or status representations from clients; rather the provision will simply overlay, on a principles basis, the existing policies and procedures that have already been adopted by these derivatives firms through their adherence to the FX Global Code of Conduct when they transact with a client in a short-term FX contract in the "institutional foreign exchange market", which is a defined term in the Business Conduct Rule (and referred to in the FX Global Code of Conduct as the "wholesale foreign exchange market"). The CP reiterates that this excludes retail clients and is intended to only cover transactions with the types of counterparties covered in the FX Global Code of Conduct.

    - We have made changes to the Business Conduct Rule to further clarify that it was not the CSA's policy intention or expectation that firms would need to obtain status representations from any of their clients they transact with in the wholesale FX market by removing the reference to paragraphs of clients covered by the eligible derivatives party definition; the CSA's intention is to overlay a small sub-set of conduct provisions over certain Canadian financial institutions' existing policies and procedures that already incorporate the same principles (e.g., fair dealing, conflicts of interest, complaints handling) into their internal compliance regimes as a result of adhering to the FX Global Code of Conduct. The CP already explains that we would expect that it would cover the types of institutional FX counterparties referenced in certain paragraphs of the eligible derivatives party definition, which aligns with the types of counterparties that are considered to be wholesale FX clients that transact in the institutional foreign exchange market under the FX Global Code of Conduct. We refer you to the relevant section of the CP for additional explanation.

- The waiver required under section 8(2)(a)(iii) of MI 93-101 means that the additional protections in MI 93-101 are presumed to apply to eligible derivatives parties that are individuals or eligible commercial hedgers, unless they waive some or all of the additional protections in MI 93-101. For the purposes of transitioning to the new regulatory framework, CSA Staff expect that it may take some time for a derivatives firm to obtain the necessary waivers from the population of clients that this provision may otherwise apply to. Accordingly, we have included an additional one-year period following the effective date of MI 93-101 for derivatives firms to obtain the waiver. During this period, the core obligations in the Business Conduct Rule still apply. This specific grace period is to assist derivatives firms in circumstances where their client is an eligible derivatives party and is an individual (and the waiver is still required to be obtained by virtue of the application of

section 8(2)(a)(iii)), or in circumstances where a client can only qualify as an eligible derivatives party on the basis of the new eligible commercial hedger prong of the eligible derivatives party definition.

6. Comments on the end-user exemption

We have received a few comments with recommendations relating to the end-user exemption:

- One commenter noted that while the end-user exemption is helpful, the commenter recommends the CP be amended to add an additional example where a person or company may qualify for this exemption even if it is not entering into derivatives trades for hedging purposes but solely for purposes of gaining market returns, provided such person or company trades with a derivatives dealer.

- Another commenter recommended that paragraphs (d) and (e) of subsection 38(1) be removed or at least modified to exclude transactions arranged by a person for its affiliates. The commenter is concerned that phrases such as "facilitate" and "or otherwise intermediate" are broad and could inadvertently subject end users to the rule.

CSA Response

Thank you for comments on the end-user exemption. The CSA is aware that derivatives are not exclusively used for hedging purposes and in response to the comment received asking that we include an additional example in the CP, we have amended the CP to add an example of where a person or company may qualify for the end-user exemption for speculative purposes such as for the purpose of gaining market returns. We note that a similar exemption is not available for securities participants and this exemption was tailored for derivatives markets to provide some additional measures of certainty in circumstances for end users transacting with derivatives firms about their regulatory status in relation to their derivatives activity.

However, in response to the recommendation that paragraphs (d) and (e) of subsection 38(1) be removed or modified to exclude transactions arranged by a person for its affiliates, the CSA does not support this removal or modification. The CSA refers the commenter to section 5 of the Business Conduct Rule [*Non-application – affiliated entities*]. The Business Conduct Rule does not apply to a person or company in respect of dealing with or advising an affiliated entity of the person or company, unless the affiliated entity is an investment fund.

7. Miscellaneous other comments (by Part and Section)

Factors in determining a Business Purpose for a Derivatives Dealer and a Derivatives Adviser in the CP

One commenter expressed concern with the inclusion within the CP of "Directly or indirectly carrying on the activity with repetition, regularity or continuity" and "Transacting with the intention of being compensated" as factors to be considered in determining whether a person or company meets the definition of "derivatives dealer" or "derivatives adviser."

The commenter noted that these two factors are overly broad and may inadvertently capture pension plans or their sponsors. The commenter stated that due to their size and mandate, they might engage in various types of OTC derivatives transactions with repetition, regularity or continuity, however, such plans

and their sponsors do not act as a dealer or adviser in any traditional sense. Additionally, the commenter noted that pension plans, due to their size and mandate, might engage in various types of OTC derivatives transactions resulting in their earning various forms of compensation such as receiving premium payments.

The commenter proposes that the CP include additional clarification such that:

- certain pension plan investment trading activities with repetition on their own will not be considered to be in the business of trading derivatives if the only applicable factor is that they are carrying out the derivatives trading activity with repetition, regularity or continuity and where they are facing a dealer in those trades; and

- receiving option or derivative premiums will not be viewed as "transacting with the intention of being compensated."

Separately, another commenter commented on a deleted sentence in the CP under the "Facilitating or intermediating transactions" factor in determining a derivatives dealer. The deleted sentence is "This typically takes the form of the business commonly referred to as a broker." The commenter is concerned that with the deletion, the guidance for derivatives dealer registration can be interpreted broadly enough to capture electronic communication tools that allow third-party counterparties to communicate with their customers. The commenter is concerned that the broader language signals a potential expansion of the CSA's jurisdiction over software service providers that facilitate communications between derivatives counterparties.

CSA Response

In Canada, the registration requirement for securities and derivatives market participants is set out in Canadian securities legislation. Under this legislation, unless an exemption from registration is available, a person or company is generally required to register in one or more categories of registration if they are, *inter alia*,

- in the business[2] of trading securities or derivatives,

- in the business of advising others in relation to securities or derivatives, or

- hold themselves out as being in the business of trading or advising others in relation to securities or derivatives.

The test for determining whether a person or company is considered "in the business" of trading or advising others in relation to securities or derivatives is commonly referred to as the "business trigger".

The CSA have provided guidance on the interpretation of the business trigger as it relates to securities market participants in Section 1.3 [*Fundamental concepts*] of the companion policy to NI 31-103. This guidance reflects prior case law and regulatory decisions that have interpreted the business trigger test for securities matters.

[2] In British Columbia, Manitoba and New Brunswick, the statutory trigger for registration is based on a trade trigger, but NI 31-103 provides an exemption for entities not in the business of trading securities.

The criteria set out in the CP are based on the similar criteria set out in the companion policy to NI 31-103 but have been modified to reflect the different nature of derivatives markets and derivatives market participants. In particular, the criteria have been modified to place greater emphasis on the factor of "acting as a market maker" while retaining the flexibility to consider the other criteria as appropriate.

As explained in the CP, in determining whether a person or company should be considered in the business of trading derivatives, the person or company should consider its activities holistically. We do not consider that all of the factors discussed above necessarily carry the same weight or that any one factor will be determinative.

In determining whether a person or company is subject to business conduct requirements under the Business Conduct Rule, a person should also consider the availability of exemptions in the Business Conduct Rule, such as the end-user exemption in section 38 of the Business Conduct Rule, for entities that may transact in derivatives with regularity but that do not otherwise engage in specified "dealer-like" activities. The CSA have included this exemption to provide market participants with regulatory certainty as to whether the requirements of the rules apply to their activities. The CSA recognize that many businesses may transact in derivatives as part of their regular business and may not deal with non-EDPs or otherwise engage in specified "dealer-like" activities. It is not necessary for end-users that satisfy the criteria described in the end-user exemption to comply with the requirements of the Business Conduct Rule because they may not be considered "in the business of trading" or because they can rely on the exemption for end-users that do not engage in specified dealer activities.

Comparison with swap-dealer criteria in the U.S.

We also note that the criteria for determining whether a person or company is a derivatives dealer are generally similar to the criteria used by the U.S. CFTC and SEC in determining whether a person or company is a "swap dealer" or a "security-based swap dealer". The CFTC and SEC have issued the following guidance in determining whether an entity is a swap dealer or security-based swap dealer:[3]

> The Dodd-Frank Act definitions of the terms "swap dealer" and "security-based swap dealer" focus on whether a person engages in particular types of activities involving swaps or security-based swaps. Persons that meet either of those definitions are subject to statutory requirements related to, among other things, registration, margin, capital and business conduct.
>
> The CEA and Exchange Act definitions in general encompass persons that engage in any of the following types of activity:
>
> (i) Holding oneself out as a dealer in swaps or security-based swaps,
> (ii) making a market in swaps or security-based swaps,
> (iii) regularly entering into swaps or security-based swaps with counterparties as an ordinary course of business for one's own account, or
> (iv) engaging in any activity causing oneself to be commonly known in the trade as a dealer or market maker in swaps or security-based swaps.

[3] See Commodity Futures Trading Commission and Securities and Exchange Commission Joint Final Rule, Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant", available at http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2012-10562a.pdf

> These dealer activities are enumerated in the CEA and Exchange Act in the disjunctive, in that a person that engages in any one of these activities is a swap dealer under the CEA or security-based swap dealer under the Exchange Act, even if such person does not engage in one or more of the other identified activities. … [Footnotes omitted]

In the case of derivatives market participants that engage in derivatives activities in both Canada and the U.S., the CSA will consider the regulatory status of the participant in the U.S. in determining whether the participant should be subject to business conduct and registration obligations under the Business Conduct Rules.

Regarding the comment asking for clarification that a party that provides electronic communication tools that allow third-party counterparties to communicate with their customers to conduct derivatives transactions not be considered to be in the business of trading in derivatives, depending on the facts, to the extent that a market participant is recognized or exempt from recognition as an exchange (including swap execution facilities, multilateral trading facilities and similar trading facilities) by the CSA, and is the type of exchange that does not enter into derivatives transactions as a counterparty for its own account (including as riskless-principal), then we would not typically view this type of exchange as a derivatives dealer or derivatives adviser. We note that the Business Conduct Rule is principles-based and is intended to be flexible enough to accommodate its application, where appropriate, to business models or activities to address evolving market practices and technological developments.

Definition of "Derivatives Party Assets" in the Business Conduct Rule

One commenter reiterated their comments made on the second draft of the Business Conduct Rule that the definition of "Derivatives Party Assets" should be more precisely defined. The commenter noted that a broad definition increases the possibility of confusion and the potential for conflict with the proposed safeguarding requirements under the federal *Retail Payment Activities Act* to be administered by the Bank of Canada.

The commenter suggested that the definition be revised to reflect only client assets held by a derivatives firm as collateral in respect of derivatives transactions or, if applicable, held by a derivatives firm for investment purposes on the part of the derivatives party. At the very least, the commenter noted that the definition should be explicitly limited to assets which are held or received by a derivatives firm in relation to derivatives transactions such that it is clear that funds held or received for unrelated purposes are not in scope.

CSA Response

We thank the commenter for their comment. The Business Conduct Rule applies to a derivatives firm's conduct with respect to its derivatives activity with a derivatives party, including assets held or received by a derivatives firm in connection with this activity. As we described in the previous summary of comments, clarification was provided in the third publication of the CP to MI 93-101 that the CSA's expectations with respect to derivatives party assets is that a dealer is at minimum expected to maintain records that allow the positions and the value of collateral delivered by each customer in connection with a derivatives transaction to be identified in the books and records of the derivatives firm.

Definition of "Affiliated Entity" in the Business Conduct Rule

One commenter noted that until such time that the CSA addresses the definition of "affiliate" more broadly, the commenter believes it is important that the Business Conduct Rule not create additional

uncertainty as to how the term affiliate is to be applied. The commenter expressed that it would be problematic if a different definition of affiliate were applied in different derivatives rules, such as registration, trade reporting or mandatory clearing rules, and similar securities rules without a comprehensive consultation. Therefore, the commenter expressed that the CSA should avoid a material change to the definition of "affiliate" specifically for the Business Conduct Rule.

CSA Response

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

Section 9 – Fair Dealing

One commenter expressed explicit support for the fair dealing requirements under section 9.

Another commenter asked that the CSA provide greater clarity around what constitutes "unreasonable pressure" in the context of a breach of section 9, and in particular, to confirm that derivatives firms have the right to refuse to provide services to derivatives parties that are eligible commercial hedgers and that are unwilling to provide waivers required by the derivatives firm's operating model. The commenter believes that a requirement that asking clients to sign waivers as a condition of doing business not be considered "unreasonable pressure" placed on a derivatives party so long as the relevant waivers are presented at the time that the account is opened or before a derivatives transaction is booked.

Another commenter noted that the reference to "counterparty risk" in the CP commentary on fair dealing could be interpreted as meaning only credit risk and not capital risk. The commenter recommends that the wording of the relevant sentence in the CP be clarified to add "capital risk" after the words "level of counterparty risk."

CSA Response

We thank the commenters for their comments. What constitutes unreasonable pressure will be case-by-case and fact dependent. Derivatives firms will conduct their businesses in accordance with their own business objectives. In circumstances where a derivatives firm decides to only conduct its business with eligible derivatives parties, as part of potential future review of its practices by the CSA, they can expect that CSA Staff will review a firm's process for obtaining Eligible Derivatives Party representations, as well as its process for obtaining waivers.

We expect that derivatives firms clearly disclose their business practices, including that in providing a waiver, clients waive the additional protections in the Business Conduct Rule and that if the protections are something they are seeking, that they could seek to transact with another derivatives firm. If the derivatives firm is selling another product or service to a customer, we remind the derivatives firm of their obligations under section 13 [*Tied selling*].

Regarding the comment recommending that the reference to "counterparty risk" in the CP be clarified to add "capital" risk, we have made this clarification in the CP.

CP Commentary on Section 16 – Permitted Referral Arrangements

One commenter expressed that the approach noted in the CP on section 16 is too broad. The CP sets out that the definition of "Referral Arrangements" is not limited to referrals for providing derivatives, financial services or services requiring registration. It also includes receiving a referral fee for providing a derivatives party's name and contact information to an individual or a firm. As well, the CP noted that "Referral Fee" is broadly defined to include any benefits received from referring a derivatives party, including sharing or splitting any commission resulting from a transaction. The commenter noted that referrals which are specifically related to business lines which are not subject to the Business Conduct Rule should not be captured. The commenter also noted that the broad language appears to be inconsistent with later commentary in the CP which suggests that obligations should only apply to derivatives-related activities, which the commenter expressed is a more reasonable interpretation of the scope of a derivative firm's obligation.

CSA Response

We thank the commenter for their comments on permitted referral arrangements under the Business Conduct Rule. This provision only applies to derivatives firms in their activities with non-eligible derivatives parties. As such, it is our view that the scope of the permitted referral arrangements provision is appropriate given that it provides important protections to retail clients and is generally commensurate with the equivalent provision that applies to retail investors under NI 31-103.

CP Commentary on Section 19 – Relationship Disclosure Information

One commenter noted that the CP commentary on section 19 seems to expand the obligations set out in section 19(1) of the Business Conduct Rule. The CP sets out that to satisfy obligations under subsection 19(1), an individual acting on behalf of a derivatives firm must spend sufficient time with a derivatives party in a manner consistent with their operations to adequately explain the relationship disclosure information that is delivered to the derivatives party. The commenter noted that the requirement to walk each client through the relationship disclosure information is potentially burdensome and will create delays in the onboarding process, and that detailed walk throughs should not be required provided that individuals acting on behalf of the derivatives firm are available to answer questions.

CSA Response

The relationship disclosure obligations in section 19 of the Business Conduct Rule are generally similar to the corresponding relationship disclosure obligations in section 14.2 of NI 31-103 and as such should be familiar to firms that are registrants.

In the case of firms that are not registrants, this may represent a new obligation for these firms. However, as previously noted, we have made a number of significant changes to the EDP definition including eliminating the $10 million financial threshold in the commercial hedger category (from $10 million to $0), which means that the population of clients that this additional obligation applies to has been reduced.

To the extent a derivatives firm is dealing with a derivatives party that is not an EDP or is an individual EDP or a commercial hedger EDP that has not waived the right to receive this disclosure, we believe this is important disclosure for clients and should be retained.

Section 33 – Self Reporting

One commenter noted that it is not clear whether a new self-reporting requirement layer is necessary given that Canadian banks already have significant self-reporting requirements. The commenter asked that the CSA re-consider the self-reporting requirement given that section 32(3) of the Business Conduct Rule imposes a reporting requirement on the senior derivatives manager of a derivatives dealer that is substantially equivalent to paragraphs 5.2(c) and (d) of NI 31-103.

CSA Response

We remain of the view that it is necessary and appropriate to require timely disclosure of non-compliance to the regulator or securities regulatory authority in the circumstances where there is a risk of material harm to a derivatives party or to the capital markets generally, or the non-compliance represents a pattern of material non-compliance.

Section 36 – Form, accessibility and retention of records

One commenter recommended that the recordkeeping requirements be amended to be similar to NI 31-103 section 11.5(1) [*General Requirements for Records*], which the commenter noted would be consistent with the approach of keeping consistent with NI 31-103 as much as possible for consistency of regulatory regimes.

CSA Response

We thank the commenter for their comment on the recordkeeping requirements. We have amended the record retention period under the Business Conduct Rule to increase harmonization and reduce burden on market participants.

The record retention requirement under the Business Conduct Rule has been amended such that the retention period is linked to the record creation date as opposed to linked to the expiry of the transaction. Accordingly, derivatives firms are required to keep relevant records for 7 years (or 8 years in Manitoba) from the date such record is created. Linking the retention period to the record creation date harmonizes with the approach taken under NI 31-103 and also creates harmonization for investment dealers that offer OTC derivatives under the CIRO regime. In comparison to the record retention requirements in the third publication of the Business Conduct Rule, this approach significantly reduces burden on market participants, for example, in the case of a long-dated derivative, relevant communication records are no longer required to be kept for the duration of the long-dated derivative plus an additional number of years (which could have been up to 42 years). However, please note that this amended standard represents only a minimum requirement; firms can keep records for a longer period if they so choose. In addition, please note that the record retention requirements under the Business Conduct Rule are in addition to the record retention requirements found in other derivatives rules that applicable firms are subject to and are not meant to override any obligations of derivatives firms under those rules.

Extraterritoriality of the Rules

One commenter noted that there is an extraterritorial impact under the Business Conduct Rule. The commenter noted that this impact places Canadian derivatives dealers trading from foreign branches at a significant disadvantage as foreign end-users will not want to be forced to complete yet another representation letter in order to continue trading with Canadian derivatives dealers, and instead would choose to trade with non-Canadian dealers. Therefore, the commenter recommends that an exemption

from the Business Conduct Rule should be available if a Canadian dealer faces a derivatives party solely from its foreign office/branch. In the alternative, the commenter recommended that paragraph (m) of the EDP definition be amended to remove the "requisite knowledge and experience" requirement when a Canadian dealer faces a foreign derivatives party. The commenter believes that the net asset financial threshold test of $25 million is a sufficient proxy for determining a derivatives party's sophistication.

CSA Response

We thank the commenter for their comment. As noted earlier in this Summary of Comments, we have removed the requirement to provide a knowledge and experience self-certification from each relevant prong of the EDP definition to more clearly harmonize the approach with the approach taken in the existing securities and commodities futures regulatory framework, which use bright-line tests to ascertain the status of a client. Furthermore, this generally aligns the CSA's approach with foreign approaches taken to client classification as well, which we recognize is important given the cross-border nature of derivatives markets and overlapping regulatory regimes.

Miscellaneous Drafting Comments

A number of commenters provided drafting comments to the Business Conduct Rule and CP. Thank you to the commenters that provided drafting comments, we will amend the Business Conduct Rule and CP where necessary.

C. Summary of Responses to Specific Request for Comments

In the Notice and Request for Comments, we asked the following questions:

1. *We have introduced a new foreign liquidity provider exemption in section 37 of the Instrument for foreign dealers that transact with derivatives dealers located in Canada. This is an outright exemption from the requirements in the Proposed Instrument intended to preserve market access and maintain general liquidity in the inter-dealer market. As a result, a Canadian derivatives dealer, regardless of its size, will benefit from this provision. This also means that the core provisions in the Instrument will not apply when a local derivatives dealer is transacting with a foreign derivatives dealer.*

   Do you support including this additional exemption in section 37 of the Proposed Instrument?

Comments on the new foreign liquidity provider exemption are summarized in "B – Summary of Specific Comments" above.

CSA Response

We thank commenters for their support of the foreign liquidity provider exemption in the Business Conduct Rule.

2. *A foreign dealer or adviser from a foreign jurisdiction that, on an outcomes-basis, has comparable requirements to those in the Instrument will receive a complete exemption from the Instrument where that foreign dealer or adviser complies with the conditions of the exemption in section 39 or the exemption in section 46. Outcomes-based assessments have been conducted for the jurisdictions listed in Appendices A and D. Please provide any comments you may have on the inclusion of any of the foreign jurisdictions listed in these Appendices.*

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

A number of commenters generally agreed with the list set out in the Appendices, with certain recommended amendments. One commenter noted that both MiFID II and MiFIR are applicable in three additional European Free Trade Countries (Iceland, Liechtenstein and Norway) and accordingly should be included in the Appendices. Another commenter noted that Israel should also be added to the Appendices while a third commenter noted that the Appendices do not include all IOSCO jurisdictions and believes that there is no justification to limiting these lists to countries that are located in only certain IOSCO jurisdictions.

CSA Response

We thank commenters for their support and comments on Appendices A and D of the Business Conduct Rule which identifies foreign jurisdictions with comparable derivatives regulation on an outcomes-basis.

We have included Norway and Iceland, where both MiFID II and MiFIR are applicable, in Appendices A and D as well as Appendix E.

The fact that a foreign jurisdiction is not included in Appendices A, D or E is not necessarily intended to suggest any policy concern with the regulatory regime of that foreign jurisdiction. It simply means CSA Staff have not had an opportunity to consider whether that foreign jurisdiction has comparable requirements in place on an outcomes-basis. We anticipate that Appendices A, D and E may be updated from time to time to include additional foreign jurisdictions once CSA Staff have had a chance to consider the regulatory regimes in these additional foreign jurisdictions.

Please note that industry associations or market participants with interest in a particular jurisdiction that is not listed may make applications for exemptive relief and make submissions to CSA Staff in support of comparability assessments for jurisdictions that are not found in Appendices A, D and E.

3. *We have clarified that if the person or company that is a derivatives dealer is not located in the local jurisdiction (i.e., a foreign derivatives dealer), the obligations in the Instrument apply only to its dealing activities with a derivatives party that is located in the local jurisdiction. We have further clarified that any reports made by a foreign derivatives dealer to the regulator or securities regulatory authority under section 39(1)(d) are limited exclusively to the derivatives activity being conducted with a derivatives party located in Canada.*

   Do you support limiting the reports to the regulator contemplated by section 39(1)(d) to only cover a foreign derivatives dealer's activities with a derivatives party that is located in Canada?

All commenters that responded to this question indicated strong support for limiting the reports to only cover foreign derivatives dealers' activities with a derivatives party that is located in Canada.

One commenter indicated that it appears to be a reasonable limit, however, noted that some consideration of whether the transaction is with a foreign subsidiary of a domestic party that has not otherwise triggered an equivalent reporting obligation under the foreign subsidiary's applicable

regulatory regime could be considered to ensure the uniform reporting of transaction activity relating to ultimate domestic derivatives exposure.

Another commenter also indicated support and expressed that this change to limit the reports to the regulator is a change that is necessary to maintain liquid Canadian OTC derivatives markets. However, the commenter expressed that the timing of such reporting should be consistent with a foreign derivatives dealer's reporting obligations to its home jurisdiction regulator. And another commenter further took the view that the reports should be limited to providing notices of regulatory action, which would be consistent with the approach taken under NI 31-103.

CSA Response

Thank you to commenters for providing support and recommendations, as noted earlier in this Summary of Comments, we have removed the requirement for foreign derivatives dealers to provide reports to Canadian regulators under the foreign derivatives dealer exemption. Removing this reporting requirement from the Business Conduct Rule entirely for foreign dealers relying on this exemption ensures there is a common approach across product lines, as well as within the Business Conduct Rule itself. However, CSA Staff remains of the view that this approach should be limited to jurisdictions that CSA Staff has determined has comparable derivatives regulation.

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

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

A number of commenters provided responses to this question, all of which were in favour of eliminating the $10 million financial threshold for qualifying as a commercial hedger. Comments of support are summarized in (iv) of the Summary of General Support found in the beginning of this Summary of Comments.

CSA Response

We thank commenters for their support for eliminating the $10 million financial threshold for qualifying as a commercial hedger.

5. *We have added exemptions in section 31.1 of the [third publication of the] Instrument from the senior derivatives manager requirements for persons and companies to rely on (i) a general notional activity exemption available to all derivatives dealers whose aggregate gross notional*

amount of outstanding derivatives does not exceed $250 million or (ii) a notional activity exemption available to derivatives dealers that exclusively deal in commodities derivatives and whose aggregate gross notional amount of outstanding commodity derivatives does not exceed $3 billion.

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

The majority of commenters that commented on this question indicated support, however, certain commenters raised concerns with the additional exemptions in section 31.1 of the third publication of the Business Conduct Rule.

Of the commenters that support the additional exemptions, one commenter noted that derivatives dealers that can rely on the notional amount exemption should not bear the burden of implementing the senior derivatives manager regime under the Business Conduct Rules as the costs of complying with those obligations would far outweigh the benefits to market participants.

Another commenter that supported the additional exemptions suggested its expansion to cover all obligations with respect to transactions with EDPs. However, they also suggested that the notional amount exemption be amended in two ways. Firstly, the commenter stated that the exemption is over-inclusive, and the total amount of derivatives activity, including hedging, an entity engages in, should not be used as a metric to determine whether an entity receives dealer-related relief. Instead, Canada should follow the approach taken by the U.S. and EU and base the exemption on the entity's level of dealing activity. Secondly, the commenter stated that the exemption applies disproportionately to Canadian entities when compared to non-Canadian entities. Instead, the commenter believes that the exemption should be amended to require the inclusion of all relevant derivatives entered into by corporate Canadian entities and corporate non-Canadian entities with Canadian counterparts.

One commenter indicated that they do not support the additional exemptions in section 31.1. The commenter believes that the presentation of additional information on the reason for this change and related research is required to confirm whether the proposed notional amount exemptions are appropriate. The commenter is concerned that removing the requirement could have attendant gatekeeper risks and attract further risk of oversight failures and/or misconduct particular to this smaller dealer segment. The commenter noted that broad exemption provides an opportunity for significant counterparty damage, particularly for lesser sophisticated parties that transact without close supervision from experienced personnel.

One commenter provided concerns on the proposed senior manager regime overall. The commenter noted that if the CSA is unwilling to remove the proposed senior manager regime, the commenter recommends that the limits on the proposed notional amount for the exemption be removed.

CSA Response

CSA Staff are aware that there are different approaches taken to derivatives regulation in the European Union and the United States, and that our regime is structured somewhat differently in its application and scope. However, given the cross-border nature of OTC derivatives markets, and the interconnectedness between regulation as it applies to various market participants on a cross-border basis, we do accept that in the commodities derivatives market, there is derivatives activity that is closely linked to a physical commodities business and accordingly, the policy basis for regulating that activity warrants somewhat different considerations because the derivatives activity (including derivatives activity that takes place

within the corporate group and certain levels of trading activity in relation to the business) functions primarily in support of, and otherwise ancillary to, a firm's main business. Accordingly, as a matter of principle, certain commodity derivatives dealers, despite their derivatives activity, are not directly akin to the traditional purely financial derivatives dealers that operate in derivatives markets.

CSA Staff have carefully considered the operation of the exemptions that are available to commodities firms in the U.S. and in the E.U., considered the market participants that operate under such exemptions, and have raised the notional amount threshold from $3 Billion to $10 billion (the **Commodity Derivatives Dealer Notional Amount Exemption**) in a new section 44 [*Exemptions from certain requirements in this Instrument for certain notional amounts of certain commodity derivatives and other derivatives activity*] to align it more closely with the exemptions contemplated in the U.S. and E.U. regulatory framework. The Commodity Derivatives Dealer Notional Amount Exemption is only available when a derivatives dealer is trading with an eligible derivatives party and is only available if the conditions for relying on the exemption are fully satisfied. This change will significantly and meaningfully reduce the burden on commodities derivatives dealers. However, given the different structure of the Canadian business conduct rule when compared to the regime contemplated in the U.S. and E.U. (it applies regardless of whether a derivatives firm is registered or not), even if firms intend to rely on the notional amount exemption, the basic fair dealing and conflicts of interest principles will continue to apply to their derivatives activity, as well as the requirement to deliver a trade confirmation. We expect that firms can readily comply with these basic principles given their own internal best practices, corporate governance standards and market convention. We will continue to monitor derivatives data reports, as well as developments in commodity derivatives markets that may affect the appropriateness of the dollar value of the notional amount exemption threshold.

6. *Short-Term FX Contracts in the Institutional FX Market*

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

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

A number of commenters supported the inclusion of short-term FX, as outlined in the [*Support for the inclusion of short-term FX in the institutional FX market*] section of this Summary of Comments above. One of the commenters that supported the inclusion did provide certain recommendations with respect to providing flexibility as firms transition to this new regime by not requiring representations with respect to a party's EDP status and deeming a counterparty to a short-term FX transaction an EDP, unless a derivatives firm has or is aware of information that would make it unreasonable to deem that counterparty an EDP.

CSA Response

We thank the commenters for their comments supporting the inclusion of the short-term FX in the Business Conduct Rule. Please note the following:

- The inclusion of short-term FX contracts in the institutional FX market for the purposes of a limited sub-set of provisions **does not** require any of the Canadian financial institutions that are subject to this provision to obtain any additional certifications or status representations from clients; rather the provision will simply overlay, on a principles basis, the existing policies and procedures that have already been adopted by these derivatives firms through their adherence to the FX Global Code of Conduct when they transact with transacting with a client in a short-term FX contract only in the "institutional foreign exchange market", which is a defined term in the Business Conduct Rule. The CP reiterates that this excludes retail clients.

- We have made changes to the Business Conduct Rule to further clarify that it was not the CSA's policy intention or expectation that firms would need to obtain status representations from any of their clients they transact with in the wholesale FX market by removing the reference to paragraphs of clients covered by the eligible derivatives party definition. Again, the CSA's intention is to overlay a small sub-set of conduct provisions over certain Canadian financial institutions existing policies and procedures that already incorporate the same principles (e.g., fair dealing, conflicts of interest, complaints handling) into their internal compliance regimes as a result of adhering to the FX Global Code of Conduct. The CP already explains that we would expect that it would cover the types of institutional FX counterparties referenced in certain paragraphs of the eligible derivatives party definition, which aligns with the types of counterparties that are considered to be wholesale FX clients that transact in the institutional foreign exchange market under the FX Global Code of Conduct. We refer you to the relevant section of the CP for additional explanation.

7. *We have added an exemption in section 48 for registered advisers under securities or commodity futures legislation from certain requirements of the Proposed Instrument listed in Appendix E if the registered adviser complies with corresponding requirements in NI 31-103 relating to a transaction with a derivatives party. In such cases, we anticipate that the existing compliance systems of the registered adviser can easily be extended to address any of the residual obligations of the Instrument, which residual obligations ensure that NI 31-103 requirements are extended to the registered adviser's derivatives activities.*

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

   We understand that some derivatives parties rely on the expertise of a derivatives adviser to develop or implement derivatives trading strategies to help them achieve their organizational objectives. Section 8 of the Instrument exempts derivatives advisers from many of the requirements of the Instrument when they are advising an EDP.

   Are there any scenarios where derivatives advisers that are advising EDPs should be required to comply with any of the requirements that section 8 provides an exemption from?

A number of commenters provided strong support for this approach. One commenter indicates that they believe this approach strikes the correct balance of market and investor protection and imposition of regulatory burden.

One commenter noted that new requirements should only be imposed on registered advisers where a significant regulatory gap has been identified that is specific to derivatives, new conduct considerations, or new types of clients or counterparties. The commenter indicated that registrant outreach and guidance in staff notices to help meet these obligations are important so that registrants can develop the necessary remedial compliance policies and systems proactively as necessary, rather than in response to findings of a costly compliance review and remediation process.

One commenter provided overwhelming support for this approach, but also expressed certain preferences. The commenter set out the following recommendations and questions:

- To improve clarity, provide a statement setting out a list of the divisions and sections of MI 93-101 that do apply to registered portfolio managers, instead of listing only the exemptions for registered advisers under section 48 of Appendix F.

- Provide additional clarity on the timeline for obtaining an EDP representation from a derivatives party that is a permitted client, as currently, this transition period set out in the Business Conduct Rule and as discussed in the CP is confusing.

- Whether section 5 [*Non-application – affiliated entities*] could be interpreted as being available to a foreign derivatives sub-adviser, foreign derivatives sub-sub-adviser or foreign derivatives dealer that is affiliated with a derivatives adviser. The commenter asks that the CSA provide clarification in the CP, using examples.

Another commenter provided support while also recommending that the CSA add an exemption from Division 1 of Part 3 to section 48 because there are clear analogues under NI 31-103 that already apply to registered advisers, including the following core conduct obligations: fair dealing, conflicts of interest and know-your client provisions.

Commenters were either silent on scenarios where derivatives advisers that are advising EDPs should be required to comply with any of the requirements that section 8 provides an exemption from or indicated that there were not any scenarios they can think of.

CSA Response

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

- create regulatory gaps and uncertainty (e.g., the fair dealing obligation for registered advisers is not found in NI 31-103),[4]

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

- result in inconsistent treatment between different categories of registered firms (such as derivatives dealers and portfolio managers) that perform similar activities,[5] and

- result in an increased regulatory burden for registered advisers.[6]

However, we agree with the principle that registered advisers are already subject to a comprehensive registration and business conduct regime through NI 31-103, and the derivatives rules should, as much as possible, allow these firms to leverage off these existing regimes. We acknowledge that certain core conduct obligations are principles-based and as such we expect that registered advisers will leverage their existing compliance frameworks to ensure they are meeting these corresponding principles-based obligations under MI 93-101.

With respect to the drafting comments,

- we have made changes to the Business Conduct Rule and CP to improve clarity, by listing the divisions and sections of MI 93-101 that do apply to registered portfolio managers in a new Appendix B to the CP, in addition to listing the exemptions for registered advisers under section 48 of Appendix F;

- we have provided additional clarification in the CP on the availability and use of the transition period for a derivatives firm that has previously confirmed a derivatives party's status as a permitted client or eligible contract participant prior to the effective date of MI 93-101 (for example, in documentation such as an ISDA master agreement, account opening documentation or an investment management agreement), such that the derivatives firm is able to treat that representation as if the derivatives party had represented to the derivatives firm that it qualifies as an "eligible derivatives party" for the purposes of MI 93-101;

- regarding the availability of the affiliated entity exemption section 5 [*Non-application – affiliated entities*], the affiliated entity exemption is intended to generally be available to the extent the derivatives firm meets the affiliated entity definition set out in subsection 1(4). The exemption is not intended for use as a safe-harbour to avoid basic business conduct obligations from being imposed on that relationship either between a derivatives dealer and an affiliated derivatives adviser to the extent the derivatives adviser is advising a derivatives party that is unrelated to the adviser or the dealer, or if the dealer is counterparty to a trade with a derivative party that the adviser is not related to but is providing advice in respect of.

8. *Section 10 of the Instrument was developed with the intention that it would be generally consistent with the conflicts of interest provisions of NI 31-103. The Client Focused Reforms amended the conflicts of interest provisions of NI 31-103 (through amendments to section 13.4 and the addition of section 13.4.1) and adopted related companion policy changes. We are considering further*

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

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

changes to conform the conflicts of interest requirements so that they are consistent with those in NI 31-103, along with other changes to conform the requirements to be consistent with the requirements found in Client Focused Reforms.

Please provide any comments relating to the inclusion of such corresponding changes to the Proposed Instrument.

The commenters were very supportive of the changes to MI 93-101 to be generally consistent with conflicts of interest provisions in NI 31-103.

One commenter indicated that while they agree with the changes made, the top priority is that the Business Conduct Rule is first implemented expeditiously. The commenter believes that it is important that these Client Focused Reform initiatives be considered in the future but that the implementation of MI 93-101 not be held up as a result.

Another supportive commenter stated that any changes made to the Business Conduct Rule and CP recognize that there are differences between the derivatives and securities markets and that market participants should be given an opportunity to comment on these proposed changes if they are materially different from what is currently provided. The commenter also noted their belief that the conflicts of interest section should be interpreted flexibly and be sensitive to the context and to derivatives market participants' reasonable expectations. In particular, given the differences between the derivatives and securities markets, the commenter believes that it may not be necessarily appropriate to apply the conflicts of interest provisions to OTC derivatives market participants in the same manner as the relevant provisions would apply to securities market participants.

Two commenters believe that the Business Conduct Rule should be amended prior to implementation to conform with the conflicts of interest requirements in NI 31-103.

Conversely, one commenter indicated their view that changes to conform the conflicts of interest requirements so that they are consistent with those in NI 31-103 and with the Client Focused Reforms are not necessary or appropriate at this time, as such changes will increase compliance costs for derivatives dealers and advisers and there are differences between the nature of derivatives markets and securities markets that need to be carefully considered by the CSA when contemplating making any similar changes. Instead, the commenter recommends that the CSA consider any such conforming changes at a later date after derivatives firms have had sufficient time to implement changes necessitated by the Business Conduct Rule.

CSA Response

We thank the commenters for their comments. The CSA continues to monitor the implementation of Client Focused Reforms for securities market participants. We will consider whether comparable provisions are appropriate for the OTC derivatives market in the future.

ANNEX C

MULTILATERAL INSTRUMENT 93-101
DERIVATIVES: BUSINESS CONDUCT

PART 1
DEFINITIONS AND INTERPRETATION

Definitions and interpretation

1. (1) In this Instrument

"CIRO" means the Canadian Investment Regulatory Organization;

"collateral" means cash, securities or other property that is

(a) received or held by a derivatives firm from, for or on behalf of a derivatives party, and

(b) intended to or does margin, guarantee, secure, settle or adjust one or more derivatives between the derivatives firm and the derivatives party;

"commercial hedger" means a person or company that carries on a business and that transacts a derivative to hedge a risk in respect of the business, related to any of the following:

(a) an asset that the person or company owns, produces, manufactures, processes, or merchandises or, at the time of the execution of the transaction, reasonably anticipates owning, producing, manufacturing, processing, or merchandising;

(b) a liability that the person or company incurs or, at the time the transaction occurs, reasonably anticipates incurring;

(c) a service that the person or company provides, purchases, or, at the time the transaction occurs, reasonably anticipates providing or purchasing;

"commodity derivative" means a derivative for which the only underlying interest is a commodity other than a currency;

"derivatives adviser" means any of the following:

(a) except in Québec, a person or company engaging in or holding themself out as engaging in the business of advising others in respect of derivatives;

(b) in Québec, an adviser as that term is defined in the *Derivatives Act* (Québec);

(c) any other person or company required to be registered as a derivatives adviser under securities legislation;

"derivatives dealer" means any of the following:

(a) except in Québec, a person or company engaging in or holding themself out as engaging in the business of trading in derivatives as principal or agent;

(b) in Québec, a dealer as that term is defined in the *Derivatives Act* (Québec);

(c) any other person or company required to be registered as a derivatives dealer under securities legislation;

"derivatives firm" means a derivatives dealer or a derivatives adviser, as applicable;

"derivatives party" means,

(a) in relation to a derivatives dealer, any of the following:

(i) a person or company for which the derivatives dealer acts or proposes to act as an agent in relation to a transaction;

(ii) a person or company that is, or is proposed to be, a party to a derivative for which the derivatives dealer is the counterparty, and

(b) in relation to a derivatives adviser, a person or company to which the adviser provides or proposes to provide advice in relation to a derivative;

"derivatives party assets" means any asset, including, for greater certainty, collateral, received or held by a derivatives firm from, for or on behalf of a derivatives party;

"derivatives position" means the economic interest of a counterparty in an outstanding derivative;

"derivatives sub-adviser" means an adviser to any of the following:

(a) a derivatives adviser;

(b) a person or company that is registered as an adviser under securities legislation of a jurisdiction of Canada, or a person or company registered under commodity futures legislation in Manitoba or Ontario;

(c) a registered dealer member or a derivatives dealer that is, in each case, a dealer member of CIRO acting as an adviser in accordance with the applicable rules of CIRO;

"eligible commercial hedger" means a person or company that,

(a) is described in paragraph (n) of the definition of "eligible derivatives party", and

(b) is not described in any other paragraph of that definition;

"eligible derivatives party" means, for a derivatives party of a derivatives firm, any of the following:

(a) a Canadian financial institution;

(b) the Business Development Bank of Canada continued under the *Business Development Bank of Canada Act* (Canada);

(c) a subsidiary of a person or company referred to in paragraph (a) or (b), if the person or company owns all of the voting securities of the subsidiary, except the voting securities required by law to be owned by directors of the subsidiary;

(d) a person or company registered under the securities legislation of a jurisdiction of Canada as any of the following:

(i) a derivatives dealer;

(ii) a derivatives adviser;

(iii) an adviser;

(iv) an investment dealer;

(e) a pension fund that is regulated by the federal Office of the Superintendent of Financial Institutions or a pension commission or similar regulatory authority of a jurisdiction of Canada or a wholly-owned subsidiary of the pension fund;

(f) an entity organized under the laws of a foreign jurisdiction that is analogous to any of the entities referred to in paragraphs (a) to (e);

(g) the Government of Canada or the government of a jurisdiction of Canada, or any crown corporation, agency or wholly-owned entity of the Government of Canada or the government of a jurisdiction of Canada;

(h) a government of a foreign jurisdiction or any agency of that government;

(i) a municipality, public board or commission in Canada and a metropolitan community, school board, the Comité de gestion de la taxe scolaire de l'île de Montréal or an intermunicipal management board in Québec;

(j) a trust company or trust corporation registered or authorized to carry on business under the *Trust and Loan Companies Act* (Canada) or under comparable legislation in a jurisdiction of Canada or a foreign jurisdiction, acting on behalf of a managed account managed by the trust company or trust corporation, as the case may be;

(k) a person or company that is acting on behalf of a managed account if the person or company is registered or authorized to carry on business as either of the following:

(i) an adviser or a derivatives adviser in a jurisdiction of Canada;

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

(l) an investment fund if either of the following apply:

(i) the investment fund is managed by a person or company registered as an investment fund manager under the securities legislation of a jurisdiction of Canada;

(ii) the investment fund is advised by an adviser registered or exempted from registration under securities legislation or under commodity futures legislation of a jurisdiction of Canada;

(m) a person or company, other than an individual, that has net assets of at least $25 000 000 as shown on its most recently prepared financial statements;

(n) a person or company that has represented to the derivatives firm, in writing, that it is a commercial hedger in relation to the derivatives that it transacts with the derivatives firm;

(o) an individual that beneficially owns financial assets, as defined in section 1.1 of National Instrument 45-106 *Prospectus Exemptions*, that have an aggregate realizable value before tax but net of any related liabilities of at least $5 000 000;

(p) a person or company, other than an individual, that has represented to the derivatives firm, in writing, that its obligations under derivatives that it transacts with the derivatives firm are fully guaranteed or otherwise fully supported, under a written agreement, by one or more derivatives parties referred to in this definition, other than a derivatives party referred to in paragraph (n) or (o);

(q) a qualifying clearing agency;

"institutional foreign exchange market" means the global foreign exchange market comprised of persons or companies that are active in foreign exchange markets as part of their business and transact in foreign exchange contracts or instruments, including, for greater certainty, short-term foreign exchange contracts or instruments;

"investment dealer" means a person or company registered as an investment dealer under the securities legislation of a jurisdiction of Canada;

"managed account" means an account of a derivatives party for which another person or company makes the trading decisions if the other person or company has discretion to transact derivatives for the account without requiring the derivatives party's express consent to the transaction;

"non-eligible derivatives party" means a derivatives party that is not an eligible derivatives party;

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

(a) a Canadian financial institution;

(b) a qualifying clearing agency;

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

(d) a person recognized or exempted from recognition as a central securities depository under the *Securities Act* (Québec);

(e) a person or company

(i) whose head office or principal place of business is in a permitted jurisdiction,

(ii) that is a banking institution or trust company of a permitted jurisdiction, and

(iii) that has shareholders' equity, as reported in its most recent audited financial statements, of not less than $100 000 000;

(f) with respect to derivatives party assets that it receives from a derivatives party, a derivatives dealer;

"permitted jurisdiction" means a foreign jurisdiction that is any of the following:

(a) a country where the head office or principal place of business of an authorized foreign bank named in Schedule III of the *Bank Act* (Canada) is located, and a political subdivision of that country;

(b) if a derivatives party has provided express written consent to the derivatives dealer entering into a derivative in a foreign currency, the country of origin of the foreign currency used to denominate the rights and obligations under the derivative entered into by, for or on behalf of the derivatives party, and a political subdivision of that country;

"qualifying clearing agency" means a person or company if any of the following apply:

(a) it is recognized or exempted from recognition as a clearing agency or a clearing house, as applicable, in a jurisdiction of Canada;

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

"referral arrangement" means any arrangement in which a derivatives firm agrees to pay or receive a referral fee;

"referral fee" means any compensation, whether made directly or indirectly, provided for the referral of a derivatives party to or from a derivatives firm;

"registered derivatives firm" means a derivatives dealer or a derivatives adviser that is registered under the securities legislation of a jurisdiction of Canada as a derivatives dealer or a derivatives adviser;

"registered firm" means a registered derivatives firm or a registered securities firm;

"registered securities firm" means a person or company that is registered as a dealer, an adviser or an investment fund manager in a category of registration specified in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*;

"segregate" means to separately hold or separately account for a derivatives party's positions related to derivatives or derivatives party assets;

"short-term foreign exchange contract or instrument" means a contract or instrument referred to in the following:

(a) in Manitoba, paragraph 2(1)(c) of Manitoba Securities Commission Rule 91-506 *Derivatives: Product Determination;*

(b) in Ontario, paragraph 2(1)(c) of Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination*;

(c) in Québec, paragraph 2(c) of *Regulation 91-506 respecting Derivatives Determination*;

(d) in all other jurisdictions of Canada, paragraph 2(1)(c) of Multilateral Instrument 91-101 *Derivatives: Product Determination*;

"transaction" means either of the following:

(a) entering into a derivative or making a material amendment to, terminating, assigning, selling, or otherwise acquiring or disposing of, a derivative;

(b) the novation of a derivative, other than a novation with a qualifying clearing agency;

"valuation" means the value of a derivative as at a certain date determined in accordance with applicable accounting standards for fair value measurement using a methodology that is consistent with derivatives industry standards;

(2) In this Instrument, "adviser" includes

(a) in Manitoba, an "adviser" as defined in *The Commodity Futures Act* (Manitoba),

(b) in Ontario, an "adviser" as defined in the *Commodity Futures Act* (Ontario), and

(c) in Québec, an "adviser" as defined in the *Securities Act* (Québec).

(3) In this Instrument, a person or company is an affiliated entity of another person or company if one of them controls the other or each of them is controlled by the same person or company.

(4) In this Instrument, a person or company (the first party) is considered to control another person or company (the second party) if any of the following apply:

(a) the first party beneficially owns or directly or indirectly exercises control or direction over securities of the second party carrying votes which, if exercised, would entitle the first party to elect a majority of the directors of the second party unless the first party holds the voting securities only to secure an obligation;

(b) the second party is a partnership, other than a limited partnership, and the first party holds more than 50% of the interests of the partnership;

(c) all of the following apply:

(i) the second party is a limited partnership;

(ii) the first party is a general partner of the limited partnership referred to in subparagraph (i);

(iii) the first party has the power to direct the management and policies of the second party by virtue of being a general partner of the second party;

(d) all of the following apply:

(i) the second party is a trust;

(ii) the first party is a trustee of the trust referred to in subparagraph (i);

(iii) the first party has the power to direct the management and policies of the second party by virtue of being a trustee of the second party.

(5) In this Instrument, a person or company is a subsidiary of another person or company if at least one of the following applies:

(a) the person or company is controlled by

(i) the other person or company,

(ii) the other person or company and one or more persons or companies each of which is controlled by that person or company, or

(iii) 2 or more persons or companies each of which is controlled by the other person or company;

(b) the person or company is a subsidiary of a person or company that is that other person or company's subsidiary.

(6) For the purpose of this Instrument, a person or company referred to in paragraph (k) of the definition of "eligible derivatives party" is deemed to be transacting as principal when it is acting as an agent or trustee for a managed account.

(7) In this Instrument, in Alberta, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan and Yukon, "derivative" means a "specified derivative" as defined in Multilateral Instrument 91-101 *Derivatives: Product Determination*.

PART 2
APPLICATION AND EXEMPTION

Application to derivatives firms and individuals acting on their behalf

2. For greater certainty, this Instrument applies to a derivatives firm and an individual acting on behalf of the derivatives firm whether or not they are registered.

Application to certain derivatives

3. This Instrument applies to,

(a) in Manitoba,

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

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

(b) in Ontario,

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

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

(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, and

(d) in Alberta, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan and Yukon, a "specified derivative" as defined in Multilateral Instrument 91-101 *Derivatives: Product Determination*.

Application – short-term foreign exchange contract or instrument

4. (1) Despite section 3, this Instrument applies to a derivative that is a short-term foreign exchange contract or instrument in the institutional foreign exchange market transacted by a derivatives dealer with a derivatives party if all of the following apply:

(a) the derivatives dealer is a Canadian financial institution;

(b) the derivatives dealer has had, at any time after the date on which this Instrument comes into force, a month-end gross notional amount under all outstanding derivatives that exceed $500 000 000 000.

(2) In respect of a short-term foreign exchange contract or instrument to which subsection (1) applies, this Instrument does not apply other than the following provisions:

(a) section 9 [*Fair dealing*];

(b) section 10 [*Conflicts of interest*];

(c) section 12 [*Handling complaints*];

(d) Division 1 [*Compliance*] of Part 5 [*Compliance and recordkeeping*].

Non-application – affiliated entities

5. This Instrument does not apply to a person or company in respect of dealing with or advising an affiliated entity of the person or company unless the affiliated entity is an investment fund.

Non-application – qualifying clearing agencies

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

Non-application – governments, central banks and international organizations

7. This Instrument does not apply to any of the following:

(a) the Government of Canada, the government of a jurisdiction of Canada or the government of a foreign jurisdiction;

(b) the Bank of Canada or a central bank of a foreign jurisdiction;

(c) the Bank for International Settlements;

(d) the International Monetary Fund.

Exemptions from certain requirements in this Instrument when dealing with or advising an eligible derivatives party

8. (1) Subject to subsection (3), a derivatives firm is exempt from this Instrument, in relation to a transaction with a derivatives party if the derivatives party

(a) is an eligible derivatives party, and

(b) is not an individual or an eligible commercial hedger.

(2) Subject to subsection (3), a derivatives firm is exempt from this Instrument, in relation to a transaction with a derivatives party,

(a) if the derivatives party,

(i) is an eligible derivatives party,

(ii) is an individual or an eligible commercial hedger, and

(iii) has provided the derivatives firm with a written statement that it "waives protections provided in Multilateral Instrument 93-101" and specifies which protections that statement applies to, and

(b) if, in the case of a derivatives party that is an individual and is an eligible commercial hedger, the derivatives firm has identified and documented the nature of the derivatives party's business and the related commercial risks that the derivatives party is hedging.

(3) The exemptions in subsections (1) and (2) do not apply in respect of the following:

(a) Division 1 [*General obligations towards all derivatives parties*] of Part 3 [*Dealing with or advising derivatives parties*];

(b) sections 24 [*Interaction with other Instruments*] and 25 [*Segregating derivatives party assets*];

(c) subsection 28(1) [*Content and delivery of transaction information*];

(d) Part 5 [*Compliance and recordkeeping*].

Part 6 [Exemptions] of this Instrument provides exemptions from the requirements of this Instrument to persons or companies, subject to certain terms and conditions:

- *Foreign liquidity providers – transactions with derivatives dealers (s. 37)*
- *Certain derivatives end-users (s. 38)*
- *Foreign derivatives dealers (s. 39)*
- *Investment dealers (s. 41)*
- *Canadian financial institutions (s. 42)*
- *Derivatives transacted on a derivatives trading facility where the identity of the derivatives party is unknown (s. 43)*
- *Certain notional amounts of certain commodity derivatives and other derivatives activity (s.44)*
- *Advising generally (s. 45)*
- *Foreign derivatives advisers (s. 46)*
- *Foreign derivatives sub-advisers (s. 47)*
- *Registered advisers under securities or commodity futures legislation (s. 48)*

The text boxes in this Instrument do not form part of this Instrument and have no official status.

PART 3
DEALING WITH OR ADVISING DERIVATIVES PARTIES

DIVISION 1 – GENERAL OBLIGATIONS TOWARDS ALL DERIVATIVES PARTIES

Fair dealing

9. (1) A derivatives firm must act fairly, honestly and in good faith with a derivatives party.

(2) An individual acting on behalf of a derivatives firm must act fairly, honestly and in good faith with a derivatives party.

Conflicts of interest

10. (1) A derivatives firm must establish, maintain and apply reasonable policies and procedures to identify all material conflicts of interest, and material conflicts of interest that the derivatives firm in its reasonable opinion would expect to arise, between the derivatives firm, including each individual acting on behalf of the derivatives firm, and a derivatives party.

(2) A derivatives firm must respond to a conflict of interest identified under subsection (1).

(3) If a reasonable derivatives party would expect to be informed of a conflict of interest identified under subsection (1), the derivatives firm must disclose, in a timely manner, the nature and extent of the conflict of interest to the derivatives party whose interest conflicts with the interest identified.

Know your derivatives party

11.(1) For the purpose of paragraph (2)(c) in Ontario, "insider" has the same meaning as in the *Securities Act* except that "reporting issuer", as it appears in the definition of "insider", is to be read as "reporting issuer or any other issuer whose securities are publicly traded".

(2) A derivatives firm must establish, maintain and apply reasonable policies and procedures to ensure that the derivatives firm

(a) obtains the facts necessary to comply with applicable legislation relating to the verification of a derivatives party's identity,

(b) establishes the identity of a derivatives party and, if the derivatives firm has cause for concern, makes reasonable inquiries as to the reputation of the derivatives party,

(c) if transacting with, for or on behalf of, or advising a derivatives party in respect of a derivative that has one or more securities as an underlying interest, establishes whether either of the following applies:

(i) the derivatives party is an insider of a reporting issuer or any other issuer whose securities are publicly traded;

(ii) the derivatives party would reasonably be expected to have access to material non-public information relating to any interest underlying the derivative;

(d) establishes the creditworthiness of a derivatives party if the derivatives firm, as a result of its relationship with the derivatives party, will have any credit risk in relation to that derivatives party.

(3) For the purpose of establishing the identity of a derivatives party that is a corporation, partnership or trust, a derivatives firm must establish the following:

(a) the nature of the derivatives party's business;

(b) the identity of any individual if either of the following applies:

(i) in the case of a corporation, is a beneficial owner of, or exercises direct or indirect control or direction over, more than 25% of the voting rights attached to the outstanding voting securities of the corporation;

(ii) in the case of a partnership or trust, exercises control over the affairs of the partnership or trust.

(4) A derivatives firm must take reasonable steps to keep current the information required under this section.

(5) This section does not apply if the derivatives party is a registered firm or a Canadian financial institution.

Handling complaints

12. (1) In Québec, a derivatives firm is deemed to comply with this section if it complies with section 74 to 76 of the *Derivatives Act* (Québec).

(2) A derivatives firm must document and, in a manner that a reasonable person would consider fair and effective, promptly respond to each complaint made to the derivatives firm about any product or service offered by the derivatives firm or an individual acting on behalf of the derivatives firm.

Tied selling

13. A derivatives firm, or an individual acting on behalf of the derivatives firm, must not impose undue pressure on or coerce a person or company to obtain a derivatives-related product or service from a particular person or company, including, for greater certainty, the derivatives firm and any of its affiliated entities, as a condition of obtaining another product or service from the derivatives firm.

DIVISION 2 – ADDITIONAL OBLIGATIONS WHEN DEALING WITH OR ADVISING CERTAIN DERIVATIVES PARTIES

The obligations in this Division 2 apply if a derivatives firm is dealing with (i) a non-eligible derivatives party or (ii) an eligible derivatives party who is either an individual or eligible commercial hedger that has not waived these protections – see section 8.

Derivatives-party-specific needs and objectives

14.(1) A derivatives firm must take reasonable steps to ensure that, before it makes a recommendation to or accepts an instruction from a derivatives party to transact in a derivative, or transacts in a derivative for a derivatives party's managed account, it has sufficient information regarding all of the following to enable it to comply with section 15 [*Suitability*]:

(a) the derivatives party's needs and objectives with respect to its transacting in derivatives;

(b) the derivatives party's financial circumstances;

(c) the derivatives party's risk tolerance;

(d) if applicable, the nature of the derivatives party's business and the operational risks it wants to manage.

(2) A derivatives firm must take reasonable steps to keep current the information required under this section.

Suitability

15.(1) A derivatives firm, or an individual acting on behalf of a derivatives firm, must take reasonable steps to ensure, before it makes a recommendation to or accepts an instruction from a derivatives party to transact in a derivative, or transacts in a derivative for a derivatives party's managed account, that the derivative and the transaction are suitable for the derivatives party.

(2) If a derivatives party instructs a derivatives firm, or an individual acting on behalf of a derivatives firm, to transact in a derivative and, in the derivatives firm's reasonable opinion, following the instruction would result in a transaction or derivative that is not suitable for the derivatives party, the derivatives firm must inform the derivatives party in writing of the derivatives firm's opinion and must not transact in the derivative unless the derivatives party, after being informed, instructs the derivatives firm to proceed with the transaction.

Permitted referral arrangements

16. A derivatives firm, or an individual acting on behalf of a derivatives firm, must not participate in a referral arrangement in respect of a derivative with another person or company unless all of the following apply:

(a) before a derivatives party is referred by or to the derivatives firm, the terms of the referral arrangement are set out in a written agreement between the derivatives firm and the person or company;

(b) the derivatives firm records all referral fees;

(c) the derivatives firm, or the individual acting on behalf of the derivatives firm, ensures that the information prescribed by subsection 18(1) [*Disclosing referral arrangements to a derivatives party*] is provided to the derivatives party in writing before the derivatives firm or the individual receiving the referral either opens an account for the derivatives party or provides services to the derivatives party.

Verifying the qualifications of the person or company receiving the referral

17. A derivatives firm, or an individual acting on behalf of a derivatives firm, must not refer a derivatives party to another person or company unless the derivatives firm first takes reasonable steps to verify and conclude that the person or company has the appropriate qualifications to provide the services, and, if applicable, is registered to provide those services.

Disclosing referral arrangements to a derivatives party

18.(1) The written disclosure of the referral arrangement required by paragraph 16(c) [*Permitted referral arrangements*] must include all of the following:

(a) the name of each party to the referral arrangement referred to in paragraph 16(a) [*Permitted referral arrangements*];

(b) the purpose and material terms of the referral arrangement, including the nature of the services to be provided by each party;

(c) any conflicts of interest resulting from the relationship between the parties to the referral arrangement and from any other element of the referral arrangement;

(d) the method of calculating the referral fee and, to the extent possible, the amount of the fee;

(e) the category of registration of, or exemption from registration relied upon by, each derivatives firm and individual acting on behalf of the derivatives firm that is a party to the referral arrangement with a description of the activities that the derivatives firm and individual is authorized to engage in under that category or exemption and, giving consideration to the nature of the referral, the activities that the derivatives firm or individual is not permitted to engage in;

(f) any other information that a reasonable derivatives party would consider important in evaluating the referral arrangement.

(2) If there is a change to the information set out in subsection (1), the derivatives firm must ensure that written disclosure of that change is provided to each derivatives party affected by the change as soon as possible

and no later than the 30th day before the date on which a referral fee is next paid or received.

PART 4
DERIVATIVES PARTY ACCOUNTS

DIVISION 1 – DISCLOSURE TO DERIVATIVES PARTIES

The obligations in this Division 1 of Part 4 apply if a derivatives firm is dealing with (i) a non-eligible derivatives party or (ii) an eligible derivatives party who is either an individual or eligible commercial hedger that has not waived these protections – see section 8.

Relationship disclosure information

19.(1) Before transacting with, for or on behalf of, or advising, a derivatives party for the first time, a derivatives firm must deliver to the derivatives party all information that a reasonable person would consider important about the derivatives party's relationship with the derivatives firm, and each individual acting on behalf of the derivatives firm, that is providing derivatives-related services to the derivatives party.

(2) Without limiting subsection (1), the information delivered to a derivatives party under that subsection must include all of the following:

(a) a description of the nature or type of the derivatives party's account;

(b) a description of the conflicts of interest that the derivatives firm is required to disclose to a derivatives party under securities legislation;

(c) disclosure of the fees or other charges the derivatives party might be required to pay related to the derivatives party's account;

(d) a general description of the types of transaction fees or other charges the derivatives party might be required to pay in relation to derivatives;

(e) a general description of any compensation paid to the derivatives firm by any other party in relation to the different types of derivatives that a derivatives party may transact in through the derivatives firm;

(f) a description of the content and frequency of reporting for each account or portfolio of a derivatives party;

(g) disclosure of the derivatives firm's obligations if a derivatives party has a complaint contemplated under section 12 [*Handling complaints*];

(h) a statement that the derivatives firm has an obligation to assess whether a derivative is suitable for a derivatives party prior to executing a transaction or at any other time or a statement identifying the exemption the derivatives firm is relying on in respect of this obligation;

(i) the information a derivatives firm must collect about the derivatives party under sections 11 [*Know your derivatives party*] and 14 [*Derivatives-party-specific needs and objectives*];

(j) a general explanation of how performance benchmarks might be used to assess the performance of a derivatives party's derivatives and any options for benchmark information that might be available to the derivatives party from the derivatives firm;

(k) in the case of a derivatives firm that holds or has access to derivatives party assets, a general description of the manner in which the assets are held, used or are invested by the derivatives firm and a description of the risks and benefits to the counterparty arising from the derivatives firm holding or having access to use or invest the derivatives party assets in that manner.

(3) A derivatives firm must deliver the information required under subsection (1) to the derivatives party in writing before the derivatives firm does either of the following:

(a) first transacts in a derivative with, for or on behalf of the derivatives party;

(b) first advises the derivatives party in respect of a derivative.

(4) If there is a significant change in respect of the information delivered to a derivatives party under subsection (1) or (2), the derivatives firm must take reasonable steps to notify the derivatives party of the change in a timely manner and, if possible, before the derivatives firm next does either of the following:

(a) transacts in a derivative with, for or on behalf of the derivatives party;

(b) advises the derivatives party in respect of a derivative.

(5) A derivatives firm must not impose any new fee or other charge in respect of an account of a derivatives party, or increase the amount of any fee or other charge in respect of an account of a derivatives party, unless written notice of the new or increased fee or charge is provided to the derivatives party at least 60 days before the date on which the imposition or increase becomes effective.

(6) Subsections (1) to (4) do not apply to a derivatives dealer in respect of a derivatives party for whom the derivatives dealer transacts in a derivative only as directed by a derivatives adviser acting for the derivatives party.

(7) A derivatives dealer referred to in subsection (6) must deliver the information referred to in paragraphs (2)(a) to (g) to the derivatives party in writing before the derivatives dealer first transacts in a derivative for the derivatives party.

Pre-transaction disclosure

20. (1) Before transacting in a type of derivative with, for or on behalf of a derivatives party for the first time, a derivatives dealer must deliver each of the following to the derivatives party:

(a) a general description of the type of derivatives and services related to derivatives that the derivatives firm offers;

(b) a document designed to reasonably enable the derivatives party to assess each of the following:

(i) the types of risks that a derivatives party should consider when making a decision relating to types of derivatives that the derivatives dealer offers, including, for greater certainty, the material risks relating to the type of derivatives transacted and the derivatives party's potential exposure under the type of derivatives;

(ii) the material characteristics of the type of derivative, including, for greater certainty, the material economic terms and the rights and obligations of the counterparties to the type of derivative;

(c) the following statement, or a statement in writing that is substantially similar:

"A characteristic of many derivatives is that you are only required to deposit funds that correspond to a portion of your total potential obligations when entering into the derivative. However, your profits or losses from the derivative are based on changes in the total value of the derivative. This means the leverage characteristic magnifies the profit or loss under a derivative, and losses can greatly exceed the amount of funds deposited. We may require you to deposit additional funds to cover your obligations under a derivative as the value of the derivative changes. If you fail to deposit these funds, we may close out your position without warning. You should understand all of your obligations under a derivative, including your obligations if the value of the derivative declines.

Using borrowed money to finance a derivatives transaction involves greater risk than using cash resources only. If you borrow money, your responsibility to repay the loan and pay interest as required by its terms remains the same even if the value of the derivative declines."

(2) Before transacting in a derivative with, for or on behalf of a derivatives party, a derivatives dealer must advise the derivatives party of all of the following:

(a) any material risks or material characteristics that are materially different from the risks or characteristics described in the disclosure required under subsection (1);

(b) if applicable, the price of the derivative to be transacted and the most recent valuation;

(c) any compensation or other incentive payable by the derivatives party relating to the derivative or the transaction.

Valuation reporting

21.(1) On each business day, a derivatives dealer must make available to a derivatives party a valuation for each derivative that it has transacted with, for or on behalf of the derivatives party and with respect to which obligations remain outstanding on that day.

(2) At least once every 3 months, a derivatives adviser must make available to a derivatives party a valuation statement for each derivative that it has transacted for or on behalf of the derivatives party, unless the derivatives party requests the valuation statement be made available monthly, in which case the adviser must make available a statement to the derivatives party for each one-month period.

Notice to derivatives parties by non-resident derivatives dealers

22. A derivatives dealer whose head office or principal place of business is not in Canada must not transact in a derivative with a derivatives party in the local jurisdiction unless it has delivered to the derivatives party a statement in writing disclosing all of the following:

(a) the foreign jurisdiction in which the head office or the principal place of business of the derivatives dealer is located;

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

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

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

DIVISION 2 – DERIVATIVES PARTY ASSETS

Sections 24 and 25 apply when a derivatives firm is dealing with any derivatives party; the remaining sections in this Division only apply if a derivatives firm is dealing with (i) a non-eligible derivatives party or (ii) an eligible derivatives party who is either an individual or eligible commercial hedger that has not waived these protections – see section 8.

Definition – initial margin

23. In this Division, "initial margin" means any derivatives party assets delivered by a derivatives party to a derivatives firm as collateral to cover potential changes in the value of a derivative over an appropriate close-out period in the event of a default.

Application and interaction with other instruments

24. A derivatives firm is exempt from the provisions in this Division if any of the following apply:

(a) the derivatives firm is subject to and complies with or is exempt from sections 3 to 8 of National Instrument 94-102 *Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* in respect of derivatives party assets;

(b) the derivatives firm is subject to and complies with Guideline E-22 *Margin Requirements for Non-Centrally Cleared Derivatives* issued by the federal Office of the Superintendent of Financial Institutions;

(c) the derivatives firm is subject to and complies with the *Guideline on margins for over-the-counter derivatives not cleared by a central counterparty* issued by the Autorité des marchés financiers in respect of derivatives party assets;

(d) the derivatives firm is subject to and complies with National Instrument 81-102 *Investment Funds* in respect of derivatives party assets.

Segregating derivatives party assets

25. A derivatives firm must segregate derivatives party assets and derivatives positions from the property and derivatives positions of the derivatives firm and other persons or companies.

Holding initial margin

26. A derivatives firm must hold initial margin in an account at a permitted depository.

Investment or use of initial margin

27.(1) A derivatives firm must not use or invest initial margin without receiving written consent from the derivatives party.

(2) A derivatives firm must not use or invest the initial margin of a derivatives party unless the derivatives firm has entered into a written agreement with the derivatives party under which the derivatives firm assumes all losses resulting from the investment or use of initial margin by the derivatives firm.

DIVISION 3 – REPORTING TO DERIVATIVES PARTIES

This Division, other than subsection 28(1), applies if a derivatives firm is dealing with (i) a non-eligible derivatives party or (ii) an eligible derivatives party who is either an individual or eligible commercial hedger that has not waived these protections – see section 8.

Content and delivery of transaction information

28.(1) A derivatives dealer that transacts with, for or on behalf of a derivatives party must promptly deliver a written confirmation of the transaction to the following, as applicable:

(a) the derivatives party;

(b) if the derivatives party has consented in writing, a derivatives adviser acting for the derivatives party.

(2) If a derivatives dealer has transacted with, for or on behalf of a non-eligible derivatives party, the written confirmation required under subsection (1) must include all of the following, as applicable:

(a) a description of the derivative;

(b) a description of the agreement that governs the transaction;

(c) the notional amount, quantity or volume of the underlying asset of the derivative;

(d) the number of units of the derivative;

(e) the total price paid for the derivative and the per unit price of the derivative;

(f) the commission, sales charge, service charge and any other amount charged in respect of the transaction;

(g) whether the derivatives dealer acted as principal or agent in relation to the derivative;

(h) the date and the name of the trading facility on which the transaction took place;

(i) the name of each individual acting on behalf of the derivatives firm that provided advice relating to the derivative or the transaction;

(j) the date of the transaction;

(k) the name of the qualifying clearing agency where the derivative was cleared.

Derivatives party statements

29.(1) A derivatives firm must deliver a statement referred to in subsection (2) to a derivatives party, at the end of each quarterly period, if either of the following applies:

(a) within the quarterly period the derivatives firm transacted a derivative with, for or on behalf of the derivatives party;

(b) the derivatives party has an outstanding derivatives position resulting from a transaction where the derivatives firm acted as a derivatives dealer.

(2) A derivatives firm that delivers a statement referred to in subsection (1) must include in the statement all of the following information for each transaction made with, for or on behalf of the derivatives party by the derivatives firm during the period covered by the statement, if applicable:

(a) the date of the transaction;

(b) a description of the transaction, including, for greater certainty, the notional amount, the number of units, the price per unit and the total price of the derivative transacted;

(c) information sufficient to identify the agreement that governs the transaction.

(3) A derivatives firm that delivers a statement referred to in subsection (1) must include in the statement all of the following information, as applicable, as at the date of the statement:

(a) a description of each outstanding derivative to which the derivatives party is a party;

(b) the valuation, as at the statement date, of each outstanding derivative referred to in paragraph (a);

(c) the final valuation, as at the expiry or termination date, of each derivative that expired or terminated during the period covered by the statement;

(d) a description of all derivatives party assets held or received by the derivatives firm as collateral;

(e) the amount of any cash balance in the derivatives party's account;

(f) a description of assets of a derivatives party, other than assets referred to in paragraph (d), held or received by the derivatives firm;

(g) the total market value of any outstanding derivatives and derivatives party assets referred to in paragraph (f) in the derivatives party's account.

PART 5
COMPLIANCE AND RECORDKEEPING

DIVISION 1 – COMPLIANCE

Definitions

30. In this Division,

"chief compliance officer" means the officer or partner of a derivatives firm who is responsible for establishing, maintaining and applying written policies and procedures to monitor and assess compliance, of the derivatives firm and individuals acting on its behalf, with securities legislation relating to derivatives;

"derivatives business unit" means, in respect of a derivatives firm, a division or other organizational unit the employees of which transact in, or provide advice in relation to, a type of derivative, or a class of derivatives, on behalf of the derivatives firm;

"senior derivatives manager" means an individual designated by the derivatives dealer under subsection 32(1).

Policies and procedures

31. A derivatives firm must establish, maintain and apply policies and procedures that establish a system of controls and supervision sufficient to provide reasonable assurance that all of the following are satisfied:

(a) the derivatives firm and each individual acting on its behalf in relation to transacting in, or providing advice in relation to, a derivative, comply with securities legislation relating to trading and advising in derivatives;

(b) the risks relating to its derivatives activities within the derivatives business unit are managed in accordance with the derivatives firm's risk management policies and procedures;

(c) each individual who performs an activity on behalf of the derivatives firm relating to transacting in, or providing advice in relation to, a derivative, before commencing the activity and on an ongoing basis,

(i) has the experience, education and training that a reasonable person would consider necessary to perform the activity competently,

(ii) without limiting subparagraph (i), understands the structure, features and risks of each derivative that the individual transacts in or advises in relation to, and

(iii) acts with integrity.

Designation and responsibilities of a senior derivatives manager

32.(1) A derivatives dealer must do the following:

(a) designate an individual as a senior derivatives manager for each derivatives business unit;

(b) identify to the regulator or, in Québec, the securities regulatory authority, upon request, each individual designated as the senior derivatives manager in respect of each derivatives business unit.

(2) A senior derivatives manager must do the following:

(a) supervise the derivatives-related activities conducted in the derivatives business unit directed towards ensuring compliance by the derivatives business unit, and each individual employed in the derivatives business unit, with this Instrument, applicable securities legislation, including for greater certainty, ensuring the policies and procedures required under section 31[*Policies and procedures*] are applied;

(b) respond by addressing, in a timely manner, any material non-compliance by an individual employed in the derivatives business unit with this Instrument, applicable securities legislation, or the policies and procedures required under section 31 [*Policies and procedures*], including reporting to the chief compliance officer.

(3) At least once every calendar year, the senior derivatives manager in respect of each derivatives business unit must,

(a) prepare a report containing the following, as applicable:

(i) a description of

(A) each incident of material non-compliance with this Instrument, securities legislation relating to trading in derivatives or the policies and procedures required under section 31 [*Policies and procedures*] by the derivatives business unit or an individual in the derivatives business unit, and

(B) the steps taken to respond to each incidence of material non-compliance;

(ii) a statement to the effect that the derivatives business unit is in material compliance with this Instrument, securities legislation relating to trading and advising in derivatives and the policies and procedures required under section 31 [*Policies and procedures*]; and

(b) submit the report referred to in paragraph (a) to the board of directors of the derivatives firm.

(4) The obligation of the senior derivatives manager under paragraph (3)(b) may be fulfilled by the derivatives firm's chief compliance officer.

Responsibility of a derivatives dealer to report to the regulator or the securities regulatory authority

33. A derivatives dealer must report to the regulator or, in Québec, the securities regulatory authority, in a timely manner any circumstance in which a derivatives dealer is not or was not in compliance with the requirements of this Instrument or other securities legislation relating to trading in derivatives if any of the following applies:

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

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

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

DIVISION 2 – RECORDKEEPING

Derivatives party agreement

34.(1) A derivatives firm must, before transacting in a derivative with, for or on behalf of a derivatives party, enter into an agreement referred to in subsection (2) with the derivatives party.

(2) For the purposes of (1), the agreement must establish all of the material terms governing the relationship between the derivatives firm and the derivatives party including the rights and obligations of the derivatives firm and the derivatives party.

Records

35. A derivatives firm must keep records of its derivatives transactions and advising activities, including all of the following, as applicable:

(a) records containing a general description of its derivatives business and activities conducted with, for or on behalf of, derivatives parties, and compliance with applicable provisions of securities legislation, including,

(i) records of derivatives party assets, and

(ii) records documenting the derivatives firm's compliance with internal policies and procedures;

(b) for each derivative, records demonstrating the existence and nature of the derivative, including,

(i) records of communications with the derivatives party relating to transacting in the derivative,

(ii) documents provided to the derivatives party to confirm the derivative, the terms of the derivative and each transaction relating to the derivative,

(iii) correspondence relating to the derivative and each transaction relating to the derivative,

(iv) records made by staff relating to the derivative and each transaction relating to the derivative, including notes, memos and journals,

(v) records relating to pre-execution activity for each transaction including all communications relating to quotes, solicitations, instructions, transactions and prices, however they may be communicated,

(vi) reliable timing data for the execution of each transaction relating to the derivative,

(vii) records relating to the execution of the transaction, including

(A) information obtained to determine whether the counterparty qualifies as an eligible derivatives party,

(B) fees or commissions charged,

(C) information used in calculating the derivative's valuation; and

(D) any other information relevant to the transaction;

(viii) an itemized record of post-transaction processing and events, including a record in relation to the calculation of margin and exchange of collateral; and

(ix) the price and valuation of the derivative.

Form, accessibility and retention of records

36. (1) The records required to be maintained in this Instrument must be kept in a safe location, readily accessible and in a durable form for a period of,

(a) except in Manitoba, 7 years from the date the record is created, and

(b) in Manitoba, 8 years from the date the record is created.

(2) A record required to be provided to the regulator or, in Québec, the securities regulatory authority, must be provided in a format that is capable of being read by the regulator or, in Québec, the securities regulatory authority.

PART 6
EXEMPTIONS

DIVISION 1 – EXEMPTION FROM THIS INSTRUMENT

Exemption for foreign liquidity providers – transactions with derivatives dealers

37. A person or company is exempt from the provisions of this Instrument in respect of a transaction if all of the following apply:

(a) the transaction is made with either an investment dealer registered in accordance with National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* or a derivatives dealer, that, in each case, is transacting as principal for its own account;

(b) the person or company is registered, licensed or authorized, or otherwise operates under an exemption or exclusion from a requirement to be registered, licensed or authorized under the securities, commodity futures or derivatives legislation of a foreign jurisdiction in which its head office or principal place of business is located to carry on the activities in that jurisdiction that registration as a derivatives dealer would permit it to carry on in the local jurisdiction;

(c) the person or company is not any of the following:

(i) a derivatives dealer whose head office or principal place of business is in Canada**;**

(ii) a derivatives dealer that is a Canadian financial institution.

Exemption for certain derivatives end-users

38.(1) A person or company is exempt from this Instrument if all of the following apply:

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

(b) the person or company does not, in respect of any derivative or transaction, advise a non-eligible derivatives party, other than general advice that is provided in accordance with the conditions of section 45 [*Advising generally*];

(c) the person or company does not regularly make or offer to make a market in a derivative with a derivatives party;

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

(e) the person or company does not facilitate the clearing of a derivative through the facilities of a qualifying clearing agency for another person or company.

(2) The exemption in subsection (1) is not available to a person or company if either of the following applies:

(a) the person or company is a registered derivatives firm or a registered securities firm in any jurisdiction of Canada or is registered under the commodity futures legislation of Manitoba or Ontario;

(b) the person or company is registered under the securities, commodity futures or derivatives legislation of a foreign jurisdiction in which its head office or principal place of business is located in a category of registration to carry on the activities in that jurisdiction that registration as a derivatives dealer or derivatives adviser would permit it to carry on in the local jurisdiction.

Exemption for foreign derivatives dealers

39.(1) A derivatives dealer whose head office or principal place of business is in a foreign jurisdiction specified in Appendix A is exempt from the provisions in this Instrument if all of the following apply:

(a) the derivatives dealer transacts only with, for or on behalf of, a person or company in the local jurisdiction that is an eligible derivatives party;

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

(c) the derivatives dealer is subject to and complies with the securities, commodity futures or derivatives legislation of the foreign jurisdictions specified in Appendix A relating to the activities being conducted by the derivatives dealer with a derivatives party whose head office or principal place of business is in Canada;

(d) the derivatives dealer provides the regulator or, in Québec, the securities regulatory authority, with prompt access to its books and records upon request with respect to any matter relating to the

activities being conducted with a derivatives party whose head office or principal place of business is located in Canada.

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

(a) the derivatives dealer engages in the business of a derivatives dealer in the foreign jurisdiction in which its head office or principal place of business is located;

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

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

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

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

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

(c) the derivatives dealer has submitted to the regulator or, in Québec, the securities regulatory authority, a completed Form 93-101F1 *Submission to Jurisdiction and Appointment of Agent for Service of Process.*

(3) Paragraphs (1) (a) to (d) do not apply if the derivatives party is an affiliated entity of the derivatives dealer unless the affiliated entity is an investment fund.

(4) Paragraph (2)(b) does not apply if the derivatives party is an affiliated entity of the derivatives dealer unless the affiliated entity is an investment fund.

DIVISION 2 – EXEMPTIONS FROM SPECIFIC PROVISIONS IN THIS INSTRUMENT

Definition – local counterparty

40. In this Division, "local counterparty" means a counterparty to a derivative in any jurisdiction of Canada if either of the following applies:

(a) the counterparty is a person or company, other than an individual, to which one or more of the following apply:

(i) 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;

(b) the counterparty is an affiliated entity of a person or company referred to in paragraph (a) and the person or company is liable for all or substantially all of the liabilities of the counterparty.

Investment dealers

41. A derivatives dealer that is an investment dealer member of CIRO is exempt from the provisions of this Instrument set out in Appendix B if both of the following apply:

(a) the derivatives dealer is subject to and complies with the corresponding conduct and other applicable rules of CIRO in connection with a transaction or other related activity;

(b) the derivatives dealer promptly notifies the regulator or, in Québec, the securities regulatory authority, of each instance of material non-compliance with a provision of this Instrument that is set out in Appendix B.

Canadian financial institutions

42. A derivatives dealer that is a Canadian financial institution is exempt from the provisions of this Instrument set out in Appendix C if both of the following apply:

(a) the derivatives dealer is subject to and complies with the corresponding conduct and other regulatory provisions of its prudential regulator in connection with a transaction or other related activity;

(b) the derivatives dealer promptly notifies the regulator or, in Québec, the securities regulatory authority, of each instance of material non-compliance with a provision of this Instrument that is set out in Appendix C.

Derivatives transacted on a derivatives trading facility where the identity of the derivatives party is unknown

43. A derivatives dealer is exempt from the provisions in this Instrument, except for section 9 [*Fair dealing*], section 12 [*Handling complaints*], and Part 5 [*Compliance and recordkeeping*], in respect of a transaction to which both of the following apply:

(a) the execution of the transaction is on and subject to the rules of a derivatives trading facility;

(b) the derivatives dealer does not know the identity of the derivatives party prior to and at the time of execution of the transaction.

Exemptions from certain requirements in this Instrument for certain notional amounts of certain commodity derivatives and other derivatives activity

44. (1) A derivatives dealer is exempt from this Instrument, other than section 9 [*Fair dealing*], section 10 [*Conflicts of Interest*] and section 28 [*Content and delivery of transaction information*], if all of the following apply:

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

(b) the derivatives dealer does not, in respect of derivatives or transactions, advise a non-eligible derivatives party, other than in accordance with section 45 [*Advising generally*];

(c) either of the following applies:

(i) the derivatives dealer has its head office or principal place of business in a jurisdiction of

Canada and the derivatives dealer, together with each affiliated entity of the derivatives dealer that is a local counterparty, excluding investment funds, and excluding derivatives between all affiliated entities, has not had, in any of the previous 24 calendar months, an aggregate month-end gross notional amount under outstanding derivatives, exceeding $250 000 000;

(ii) the derivatives dealer has its head office and principal place of business in a foreign jurisdiction and the derivatives dealer, together with each affiliated entity of the derivatives dealer that is a local counterparty, excluding investment funds, and excluding derivatives between all affiliated entities, has not had, in any of the previous 24 calendar months, an aggregate month-end gross notional amount under outstanding derivatives with one or more counterparties that have a head office or principal place of business in Canada, exceeding $250 000 000.

(2) Subject to subsection (3), a derivatives dealer is exempt from the provisions of this Instrument, other than section 9 [*Fair dealing*], section 10 [*Conflicts of Interest*] and section 28 [*Content and delivery of transaction information*], if all of the following apply:

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

(b) the derivatives dealer does not, in respect of derivatives or transactions, advise a non-eligible derivatives party, other than in accordance with section 45 [*Advising generally*];

(c) the derivatives dealer, and each affiliated entity of the derivatives dealer that is also a derivatives dealer, is a derivative dealer solely as a result of transactions in respect of commodity derivatives;

(d) either of the following applies:

(i) the derivatives dealer has its head office or principal place of business in a jurisdiction of Canada and the derivatives dealer, together with each affiliated entity of the derivatives dealer that is a local counterparty, excluding investment funds, and excluding derivatives between all affiliated entities, has not had, in any of the previous 24 calendar months, an aggregate month-end gross notional amount under outstanding commodity derivatives, exceeding $10 000 000 000;

(ii) the derivatives dealer has its head office and principal place of business in a foreign jurisdiction and the derivatives dealer, together with each affiliated entity of the derivatives dealer that is a local counterparty, excluding investment funds, and excluding derivatives between all affiliated entities, has not had, in any of the previous 24 calendar months, an aggregate month-end gross notional amount under outstanding commodity derivatives with one or more counterparties that have a head office or principal place of business in Canada, exceeding $10 000 000 000.

(3) Subsection (2) does not apply in respect of a commodity derivative for which the underlying interest is a cryptoasset.

DIVISION 3 – EXEMPTIONS FOR DERIVATIVES ADVISERS

Advising generally

45.(1) For the purpose of subsection (3), "financial or other interest" in relation to a derivative or a transaction includes the following:

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

(b) ownership of, beneficial or otherwise, or another interest in, a derivative that has the same underlying interest as the derivative;

(c) a commission or other compensation received or expected to be received from any person or company in relation to a transaction, an underlying interest in the derivative or a derivative that has the same underlying interest as the derivative;

(d) a financial arrangement in relation to the derivative, an underlying interest in the derivative or a derivative that has the same underlying interest as the derivative;

(e) any other interest that relates to the transaction.

(2) A person or company that acts as a derivatives adviser is exempt from the provisions of this Instrument applicable to a derivatives adviser if the advice that the person or company provides does not purport to be tailored to the needs of the person or company receiving the advice.

(3) If the person or company referred to in subsection (2) recommends a transaction involving a derivative, a class of derivatives or the underlying interest of a derivative or class of derivatives in which any of the following has a financial or other interest, the person or company must disclose the interest, including a description of the nature of the interest, concurrently with providing the advice:

(a) the person or company;

(b) any partner, director or officer of the person or company;

(c) if the person is an individual, the spouse or child of the individual;

(d) any other person or company that would be an insider of the first mentioned person or company if the first mentioned person or company were a reporting issuer.

Foreign derivatives advisers

46.(1) A derivatives adviser whose head office or principal place of business is in a foreign jurisdiction specified in Appendix D is exempt from the provisions of this Instrument in respect of advice provided to a derivatives party if all of the following apply:

(a) the derivatives party to whom the advice is being provided is an eligible derivatives party;

(b) the derivatives adviser is registered, licensed or authorized, or otherwise operates under an exemption from registration, under the securities, commodity futures or derivatives legislation of a foreign jurisdiction specified in Appendix D to conduct the derivatives activities in the foreign

jurisdiction that it proposes to conduct with the derivatives party;

(c) the derivatives adviser is subject to and complies with the securities, commodity futures or derivatives legislation of the foreign jurisdictions specified in Appendix D relating to the activities being conducted by the derivatives adviser with a derivatives party whose head office or principal place of business is in Canada;

(d) the derivatives adviser provides the regulator or, in Québec, the securities regulatory authority, with prompt access to its books and records upon request with respect to any matter relating to the activities being conducted with a derivatives party whose head office or principal place of business is in Canada.

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

(a) the derivatives adviser engages in the business of a derivatives adviser in the foreign jurisdiction in which its head office or principal place of business is located;

(b) the derivatives adviser has delivered to the derivatives party a statement in writing disclosing the following:

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

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

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

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

(c) the derivatives adviser has submitted to the regulator or, in Québec, the securities regulatory authority, a completed Form 93-101F1 *Submission to Jurisdiction and Appointment of Agent for Service of Process*;

(3) A derivatives adviser that relied on the exemption under subsection (1) during the 12-month period preceding December 1 of a year must notify the regulator or, in Québec, the securities regulatory authority, of that fact by December 1 of that year.

(4) In Ontario, subsection (3) does not apply to a derivatives adviser that complies with the filing and fee payment provisions applicable to an unregistered exempt international firm under Ontario Securities Commission Rule 13-502 *Fees*.

(5) A person or company is exempt from subsections (2) and (3) if the person or company is registered as a derivatives adviser in the local jurisdiction.

(6) Paragraphs (1) (a) to (d) do not apply if the derivatives party is an affiliated entity of the derivatives adviser unless the affiliated entity is an investment fund.

(7) Paragraph (2)(b) does not apply if the derivatives party is an affiliated entity of the derivatives adviser unless the affiliated entity is an investment fund.

Foreign derivatives sub-advisers

47.(1) A derivatives sub-adviser whose head office or principal place of business is in a foreign jurisdiction specified in Appendix E is exempt from the provisions of this Instrument if all of the following apply:

(a) the obligations and duties of the sub-adviser are set out in a written agreement with the derivatives adviser or derivatives dealer;

(b) the derivatives adviser or derivatives dealer has entered into a written agreement with its derivatives parties on whose behalf derivatives advice is or portfolio management services are to be provided, agreeing to be responsible for any loss that arises out of the failure of the derivatives sub-adviser to do any of the following:

(i) exercise the powers and discharge the duties of its office honestly, in good faith and in the best interests of the derivatives firm and each derivatives party of the derivatives firm for whose benefit the derivatives advice is, or portfolio management services are, to be provided;

(ii) exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.

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

(a) the derivatives sub-adviser's head office or principal place of business is in a foreign jurisdiction;

(b) the derivatives sub-adviser is registered, licensed or authorized in a category of registration, or operates under an exemption from registration, under the securities, commodity futures or derivatives legislation of the foreign jurisdiction in which its head office or principal place of business is located;

(c) the legislation of the foreign jurisdiction referred to in paragraph (b) permits the derivatives sub-adviser to carry on the activities in that jurisdiction that registration as a derivatives adviser would permit it to carry on in the local jurisdiction;

(d) the derivatives sub-adviser engages in the business of a derivatives adviser in the foreign jurisdiction in which its head office or principal place of business is located.

Registered advisers under securities or commodity futures legislation

48. A derivatives adviser that is registered as an adviser under securities legislation or, in Ontario and Manitoba, commodity futures legislation, is exempt from the provisions set out in Appendix F if the derivatives adviser complies with the corresponding business conduct provisions of securities or commodity futures legislation in connection with a transaction or other related derivatives activity with a derivatives party.

PART 7
GRANTING AN EXEMPTION

Granting an exemption

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

(2) Despite subsection (1), in Ontario, only the regulator may grant such an exemption.

(3) Except in Alberta and Ontario, an exemption referred to in subsection (1) is granted under the statute referred to in Appendix B of National Instrument 14-101 *Definitions* opposite the name of the local jurisdiction.

PART 8
TRANSITION AND EFFECTIVE DATE

Transition representations for existing derivatives parties

50.(1) In this section "transition period" means the period commencing on September 28, 2024 and expiring on September 28, 2029.

(2) During the transition period, for the purposes of this Instrument, an "eligible derivatives party", as defined in section 1(1) [*Definitions and interpretation*], includes a person or company, that is any of the following:

(a) a permitted client, as that term is defined in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*;

(b) in Ontario, an accredited investor, other than an individual, as that term is defined in National Instrument 45-106 *Prospectus Exemptions*;

(c) an accredited counterparty, as that term is defined in the *Derivatives Act* (Québec);

(d) a qualified party, as that term is defined in any of the following:

(i) in Alberta, Blanket Order 91-507 *Over-the-Counter Trades in Derivatives*;

(ii) in British Columbia, Blanket Order 91-501 *Over-the-Counter Derivatives*;

(iii) in Manitoba, Blanket Order 91-501 *Over-the-Counter Trades in Derivatives*;

(iv) in New Brunswick, Local Rule 91-501 *Over-the-Counter Trades in Derivatives*;

(v) in Nova Scotia, Blanket Order 91-501 *Over-the-Counter Trades in Derivatives*;

(vi) in Saskatchewan, General Order 91-908 *Over-the-Counter Derivatives*;

(e) an eligible contract participant as that term is defined under Section 1(a)(18) of the United States *Commodity Exchange Act*;

(f) a financial counterparty as that term is defined under Article 2(8) of the *European Market Infrastructure Regulation*;

(g) a non-financial counterparty as that term is defined under Article 2(9) of, and which exceeds clearing thresholds pursuant to Article 10(4)(b) of, the *European Market Infrastructure Regulation*.

(3) Despite subsection (2), if either of the following circumstances apply, the definition of "eligible derivatives party", as set out in subsection 1(1), applies to that circumstance:

(a) the derivatives firm has obtained a representation from the derivatives party in writing, that the derivatives party is considered to be an eligible derivatives party on the basis of any of paragraphs (2)(a) to (g);

(b) the representation referred to in paragraph (a) was made prior to the effective date of this Instrument.

Transition for existing transactions that remain in place in accordance with their original terms

51. Other than section 9 [*Fair dealing*], the provisions of this Instrument do not apply in respect of the transaction if both of the following apply:

(a) the transaction was entered into before the effective date of this Instrument;

(b) the derivatives firm has taken reasonable steps to determine that the derivatives party is one or more of the following, as applicable:

(i) a permitted client, as that term is defined in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*;

(ii) in Ontario, an accredited investor, other than an individual, as that term is defined in National Instrument 45-106 *Prospectus and Registration Exemptions*;

(iii) an accredited counterparty, as that term is defined in the *Derivatives Act* (Québec);

(iv) a qualified party, as that term is defined in any of the following:

(A) in Alberta Blanket Order 91-507 *Over-the-Counter Trades in Derivatives*;

(B) in British Columbia Blanket Order 91-501 *Over-the-Counter Derivatives*;

(C) in Manitoba Blanket Order 91-501 *Over-the-Counter Trades in Derivatives*;

(D) in New Brunswick Local Rule 91-501 *Over-the-Counter Trades in Derivatives*;

(E) in Nova Scotia Blanket Order 91-501 *Over-the-Counter Trades in Derivatives*;

(F) in Saskatchewan General Order 91-908 *Over-the-Counter Derivatives*;

(v) an eligible contract participant as that term is defined in Section 1(a)(18) of the United States *Commodity Exchange Act*;

(vi) a financial counterparty as that term is defined under Article 2(8) of the *European Market Infrastructure Regulation*;

(vii) a non-financial counterparty as that term is defined under Article 2(9) of, and which exceeds clearing thresholds pursuant to Article 10(4)(b) of, the *European Market Infrastructure Regulation*.

Transition for obtaining waivers for certain individuals and eligible commercial hedgers

52. Despite paragraph 8(2)(a)(iii), a derivatives firm has a period of one year following the effective date of this Instrument to obtain the waiver referred to in paragraph 8(2)(a)(iii) of this Instrument.

Effective date

53.(1) This Instrument comes into force on September 28, 2024.

(2) In Saskatchewan, despite subsection (1), if this Instrument is filed with the Registrar of Regulations after September 28, 2024, this Instrument comes into force on the day on which it is filed with the Registrar of Regulations.

APPENDIX A
TO MULTILATERAL INSTRUMENT 93-101 *DERIVATIVES: BUSINESS CONDUCT*

FOREIGN DERIVATIVES DEALERS
(Section 39)

LIST OF SPECIFIED FOREIGN JURISDICTIONS

Australia

Brazil

Hong Kong

Iceland

Japan

Republic of Korea

New Zealand

Norway

Singapore

Switzerland

United States of America

United Kingdom of Great Britain and Northern Ireland

Any member country of the European Union

APPENDIX B
TO MULTILATERAL INSTRUMENT 93-101 *DERIVATIVES: BUSINESS CONDUCT*

INVESTMENT DEALERS
(Section 41)

Section 11, Know your derivatives party

Section 12, Handling complaints

Section 14, Derivatives-party-specific needs and objectives

Section 15, Suitability

Section 19(2)(a)-(k) to (4), Relationship disclosure information

Section 20, Pre-transaction disclosure

Section 21, Valuation reporting

Section 25, Segregating derivatives party assets

Section 26, Holding initial margin

Section 27, Investment or use of initial margin

Section 28, Content and delivery of transaction information

Section 29, Derivatives party statements

Section 32, Designation and responsibilities of senior derivatives managers

Section 33, Responsibility of derivatives dealer to report to the regulator or the securities regulatory authority

APPENDIX C
TO MULTILATERAL INSTRUMENT 93-101 *DERIVATIVES: BUSINESS CONDUCT*

CANADIAN FINANCIAL INSTITUTIONS
(Section 42)

Section 11, Know your derivatives party

Section 13, Tied selling

Section 25, Segregating derivatives party assets

Section 26, Holding initial margin

Section 27, Investment or use of initial margin

Section 34, Derivatives party agreement

APPENDIX D
TO MULTILATERAL INSTRUMENT 93-101 *DERIVATIVES: BUSINESS CONDUCT*

FOREIGN DERIVATIVES ADVISERS
(Section 46)

LIST OF SPECIFIED FOREIGN JURISDICTIONS

Australia

Brazil

Hong Kong

Iceland

Japan

Republic of Korea

New Zealand

Norway

Singapore

Switzerland

United States of America

United Kingdom of Great Britain and Northern Ireland

Any member country of the European Union

APPENDIX E
TO MULTILATERAL INSTRUMENT 93-101 *DERIVATIVES: BUSINESS CONDUCT*

FOREIGN DERIVATIVES SUB-ADVISERS
(Section 47)

LIST OF SPECIFIED FOREIGN JURISDICTIONS

Australia

Brazil

Hong Kong

Iceland

Japan

Republic of Korea

New Zealand

Norway

Singapore

Switzerland

United States of America

United Kingdom of Great Britain and Northern Ireland

Any member country of the European Union

APPENDIX F
TO MULTILATERAL INSTRUMENT 93-101 *DERIVATIVES: BUSINESS CONDUCT*

REGISTERED ADVISERS UNDER SECURITIES AND COMMODITY FUTURES LEGISLATION
(Section 48)

Section 12, Handling complaints

Section 13, Tied-selling

Division 2, Additional obligations when dealing with or advising certain derivatives parties of Part 3, Dealing with or advising derivatives parties

Part 4, Derivatives party accounts

Part 5, Compliance and recordkeeping, except section 31, Policies and Procedures

FORM 93-101F1
SUBMISSION TO JURISDICTION AND APPOINTMENT OF AGENT FOR SERVICE OF PROCESS

(Sections 39 [*foreign derivatives dealer*] and 46 [*foreign derivatives adviser*])

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

2. If the Foreign Firm was previously assigned an NRD number as a registered firm or an unregistered exempt international firm, provide the NRD number of the firm.

3. Jurisdiction of incorporation of the Foreign Firm:

4. Head office address of the Foreign Firm:

5. The name, email address, phone number and fax number of the Foreign Firm's chief compliance officer, or equivalent.

   Name:

   Email address:

   Phone:

   Fax:

6. Section of Multilateral Instrument 93-101 *Derivatives: Business Conduct* the Foreign Firm is relying on:

   ☐ Section 39 [*foreign derivatives dealer*]

   ☐ Section 46 [*foreign derivatives adviser*]

   ☐ Other [specify] [e.g *exemptive relief decision – please explain]*

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

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

9. The Foreign Firm designates and appoints the Agent for Service at the address stated above as its agent upon whom may be served a notice, pleading, subpoena, summons or other process in any action, investigation or administrative, criminal, quasi-criminal or other proceeding (a "**Proceeding**") arising out of or relating to or concerning the Foreign Firm's activities in the local jurisdiction and irrevocably waives any right to raise as a defence in any such Proceeding any alleged lack of jurisdiction to bring such Proceeding.

10. The Foreign Firm irrevocably and unconditionally submits to the non-exclusive jurisdiction of the judicial, quasi-judicial and administrative tribunals of the local jurisdiction in any Proceeding arising out of or related to or concerning the Foreign Firm's activities in the local jurisdiction.

11. Until 7 years after the Foreign Firm ceases to rely on section 39 [*foreign derivatives dealer*] or section 46 [*foreign derivatives adviser*], the Foreign Firm must submit to the securities regulatory authority

a. a new Submission to Jurisdiction and Appointment of Agent for Service in this form no later than the 30th day before the date this Submission to Jurisdiction and Appointment of Agent for Service is terminated;

b. an amended Submission to Jurisdiction and Appointment of Agent for Service no later than the 30th day before any change in the name or above address of the Agent for Service; and

c. a notice detailing a change to any information submitted in this form, other than the name or above address of the Agent for Service, no later than the 20th day after the change.

12. This Submission to Jurisdiction and Appointment of Agent for Service is governed by and construed in accordance with the laws of the local jurisdiction.

Dated:

_____

(Signature of the Foreign Firm or authorized signatory)

_____

(Name of signatory)

_____

(Title of signatory)

Acceptance

The undersigned accepts the appointment as Agent for Service of _____ [*Insert name of Foreign Firm*] under the terms and conditions of the foregoing Submission to Jurisdiction and Appointment of Agent for Service.

Dated:

_____

(Signature of the Agent for Service or authorized signatory)

_____

(Name of signatory)

_____

(Title of signatory)

ANNEX D
COMPANION POLICY 93-101
Derivatives: Business Conduct

PART 1
GENERAL COMMENTS

Introduction

This companion policy (the **Policy**) sets out the views of the Canadian Securities Administrators (the **CSA** or **we**) on various matters relating to Multilateral Instrument 93-101 *Derivatives: Business Conduct* (the **Instrument** or **MI 93-101**) and related securities legislation.

Numbering system

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

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

Definitions and interpretation

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

In this Policy,

"Product Determination Rule" means,

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

"regulator" means the regulator or securities regulatory authority in a jurisdiction as defined in NI 14-101.

Interpretation of terms defined in the Instrument

Section 1 – Definition of Canadian financial institution

The term "Canadian financial institution" is defined in NI 14-101. With respect to the Canadian financial institutions that are Schedule I or Schedule II banks, the definition of "Canadian financial institution" encompasses both domestic and foreign branches (if the bank in fact operates a foreign branch) – a branch does not have a legal identity apart from its principal entity. However, the definition of "Canadian financial institution" does not include an affiliate of a bank that is established, incorporated or organized as a separate legal entity in a foreign jurisdiction.

The definition of "Canadian financial institution" does not include a Schedule III bank. Schedule III banks are distinct legal entities that are organized in foreign jurisdictions and maintain a branch in Canada. To the extent a Schedule III bank enters into a derivatives transaction with a derivatives party in the local jurisdiction, we would consider that entity to be a foreign derivatives dealer for the purposes of the Instrument.

Section 1 – Definition of derivatives adviser and derivatives dealer

A person or company that meets the definition of "derivatives adviser" or "derivatives dealer" in a local jurisdiction is subject to the Instrument in that jurisdiction, whether or not it is registered or exempted from the requirement to be registered in that jurisdiction.

A person or company will be subject to the requirements of the Instrument if it is either of the following:

- in the business of trading derivatives or in the business of advising others in respect of derivatives;
- otherwise required to register as a derivatives dealer or a derivatives adviser under securities legislation.

Factors in determining a business purpose – derivatives dealer

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

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

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

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

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

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

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

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

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

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

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

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

In determining whether or not it is, for the purposes of the Instrument, a derivatives dealer, a person or company should consider its activities holistically. Assessment of the factors discussed above may depend on a person or company's particular facts and circumstances. We do not consider that all of the factors discussed above necessarily carry the same weight or that any one factor will be determinative.

Factors in determining a business purpose – derivatives adviser

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

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

As with derivatives dealers, a person or company that is determining whether or not it is a derivatives adviser should consider its activities holistically. We do not consider that all of the factors discussed above necessarily carry the same weight or that any one factor will be determinative.

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

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

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

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

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

A person or company that discusses the merits of a particular derivative or derivatives trading strategy in a newsletter or on a website may be considered to be advising others in relation to derivatives but would be exempt if it meets the conditions in section 45 [*Advising generally*].

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

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

Factors in determining a business purpose – general

Generally, we would consider a person or company that engages in the activities discussed above in an organized and repetitive manner to be a derivatives dealer or, depending on the context, a derivatives adviser. Ad hoc or isolated instances of the activities discussed above may not necessarily result in a person or company being a

derivatives dealer or, depending on the context, a derivatives adviser. Similarly, organized and repetitive proprietary trading, in and of itself, absent other factors described above, may not result in a person or company being considered to be a derivatives dealer for the purposes of the Instrument.

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

Where dealing or advising activities are provided to derivatives parties in a local jurisdiction or where dealing or advising activities are otherwise conducted within a local jurisdiction, regardless of the location of the derivatives party, we would generally consider a person or company to be a derivatives dealer or derivatives adviser (unless an exemption is otherwise available). However, where the person or company that is a derivatives dealer or adviser is not located in the local jurisdiction (e.g., is a foreign derivatives dealer or a foreign derivatives adviser), the obligations in the Instrument only apply to its dealing or advising activities with a derivatives party that is located in the local jurisdiction.

Note that a person or company that may be in the business of transacting derivatives may nevertheless be exempt from requirements of the Instrument; see the following Part 6 [*Exemptions*]:

- *Foreign liquidity providers – transactions with derivatives dealers (s. 37)*
- *Certain derivatives end-users (s. 38)*
- *Foreign derivatives dealers (s. 39)*
- *Investment dealers (s. 41)*
- *Canadian financial institutions (s. 42)*
- *Derivatives transacted on a derivatives trading facility where the identity of the derivatives party is unknown (s. 43)*
- *Certain notional amounts of certain commodity derivatives and other derivatives activity (s. 44)*
- *Advising generally (s. 45)*
- *Foreign derivatives advisers (s. 46)*
- *Foreign derivatives sub-advisers (s. 47)*
- *Registered advisers under securities or commodity futures legislation (s. 48)*

Section 1 – Definition of derivatives party assets

"Derivatives party assets" includes all assets of a derivatives party that are received or held by a derivatives firm for or on behalf of the derivatives party for any purpose relating to derivatives transactions.

Section 1 – Definition of derivatives party

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

Section 1 – Definition of commercial hedger

The definition of "commercial hedger" is used in paragraph (n) of the definition of "eligible derivatives party".

The concept of "commercial hedger" is meant to apply to a business entering into a transaction for the purpose of managing risks inherent in its business. For example, this could include a commodity producer managing risks associated with fluctuations in the price of the commodity it produces or a company entering into an interest rate swap to hedge its interest rate risks associated with a loan obligation. It could also include derivatives that are intended to eliminate or reduce currency risk associated with international commercial transactions (for example, when a company's functional currency or currency of index prices referenced in its transactions and the currency of settlement are not the same currency). It is not, however, intended to include a circumstance where the commercial enterprise enters into a transaction for speculative purposes; there has to be a significant link between the transaction and the business risks that are being hedged.

Section 1 – Definition of eligible derivatives party

The term "eligible derivatives party" is intended to refer to those derivatives parties that have the requisite knowledge and experience to evaluate the information about derivatives that has been provided to the derivatives party by the derivatives firm. These persons or companies generally may not require the full set of protections that are provided to other derivatives parties that are not eligible derivatives parties. As a result, only the following provisions in the Instrument apply to transactions with an eligible derivatives party (subject to the limitation discussed below for transactions with an eligible derivatives party that is an individual or eligible commercial hedger):

- Division 1 of Part 3 (fair dealing, conflicts of interest, know your derivatives party, handling complaints, tied selling);
- Sections 24 and 25 relating to derivatives party assets;
- Subsection 28(1) requirement to deliver a transaction confirmation; and
- Part 5 relating to compliance and recordkeeping requirements.

When a derivatives firm is dealing with or advising a derivatives party that is either an individual or a commercial hedger, all applicable additional protections in the Instrument are presumed to apply unless that derivatives party has provided the derivatives firm with the necessary representations and waived, in writing, some or all of the additional protections in the Instrument. Section 8 of this Policy provides additional guidance relating to this waiver and the conditions that must be fulfilled by the derivatives firm in order for the derivatives firm to rely on the exemption set out in section 8 of the Instrument.

A derivatives firm should take reasonable steps to determine if a derivatives party is an eligible derivatives party. In determining whether the person or company that it transacts with, solicits or advises is an eligible derivatives party, the derivatives firm may rely on factual representations made in writing by the derivatives party, unless a reasonable person would have grounds to believe that such statements are false, or it is otherwise unreasonable to rely on the representations. Examples of such grounds may include the following:

- a situation where a derivatives dealer has information in its possession (e.g. financial statements) that raise material questions with respect to a derivatives party's status as an eligible derivatives party; or

- a situation where a company represents that it is an eligible derivatives party on the basis of the commercial hedger category, however, the derivatives dealer is aware that the derivative in question is not being used to hedge risks of that company or is aware that the derivative is not linked to the business of the company.

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

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

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

We expect that a derivatives firm would maintain a copy of each derivatives party's written representations that are relevant to its status as an eligible derivatives party and would have policies and procedures reasonably designed to ensure that the information relating to each derivatives party is up to date.

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

Commercial hedgers in paragraph (n)

A person or company is an eligible derivative party under paragraph (n) only if the person or company has, at the time the transaction occurs, represented that it is a commercial hedger. The derivatives firm may rely on a written representation from the derivatives party that it is a commercial hedger for the derivatives it transacts with the derivatives firm unless a reasonable person would have grounds to believe that the statement is false, or it is otherwise unreasonable to believe that the representation is accurate. A derivatives firm may not rely on a representation if a reasonable person would have grounds to believe there may not be a reasonable link between the commercial risks the derivatives party is hedging and the transaction entered into. This representation may be tailored by the eligible derivatives party and the derivatives firm to provide that the derivatives party is only treated as an eligible derivatives party for specific derivatives or types of derivatives.

The concept of "commercial hedger" under paragraph (n) is meant to apply to a business (including a sole proprietorship) entering into a transaction for the purpose of managing risks inherent in its business. For example, this could include, a commodity producer managing risks associated with fluctuations in the price of the commodity it produces, or a company entering into an interest rate swap to hedge its interest rate risks associated with a loan obligation. It could also include derivatives that are intended to eliminate or reduce currency risk associated with international commercial transactions (for example, in circumstances where a company's functional currency or currency of index prices referenced in its transactions and the currency of settlement, are not the same currency). It could also include an agribusiness (e.g., farmer, grain operator) that operates as a sole proprietorship hedging risks associated with the production and operation of their commercial business. It is not, however, intended to include a circumstance where the commercial enterprise enters into a transaction for speculative purposes; there has to be a reasonable link between the transaction and the business risks that are being hedged.

For greater certainty, the "commercial hedger" concept under paragraph (n) is available for use by individuals operating sole proprietorships. We understand that there are specific scenarios where sole proprietorships (which are legally treated as individuals) also enter into derivatives to hedge risks associated with their commercial activities. A "sole proprietorship" is an unincorporated business that is owned by one individual. The owner of a sole proprietorship has sole responsibility for making decisions, receives all the profits, claims all the losses, and does not have a separate legal status from the business. Accordingly, individual sole proprietors operating a commercial business are able to qualify as commercial hedgers if they satisfy the conditions for qualifying as a commercial hedger and are entering into a transaction solely for the purposes of managing risks inherent to the commercial enterprise. For greater certainty, the "commercial hedger" concept is not intended to include a circumstance where an individual is entering into over-the-counter derivatives to hedge risks associated with their personal investment activities. To ensure this prong of the eligible derivatives party definition is used for its intended purpose, CSA Staff intend to carefully monitor and review the use of this prong of the definition by clients of derivatives firms to qualify as an eligible derivatives party.

The Instrument does not provide a definition of hedge. While, generally, we would expect that the hedge relating to a derivative would qualify for hedge accounting under applicable accounting standards, we understand that certain persons or companies may choose to account for the fair value of the contract in their financial statements. The key is that the hedging transaction be objectively connected to, and measurably reduce, a risk related to the commercial activity carried on by the person or company.

The additional obligations in the Instrument presumptively apply to transactions with a derivatives party that is an eligible commercial hedger; however, pursuant to subsection 8(2) of MI 93-101, an eligible commercial hedger may "waive" the application of the additional protections under MI 93-101.

In addition, as an eligible derivatives party, the eligible commercial hedger comes within the class of derivatives parties that a foreign derivatives dealer or adviser may deal with under an available exemption.

Obligations guaranteed by another eligible derivatives party under paragraph (p)

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

Determining assets – paragraphs (m) and (o)

For the purposes of paragraph (m), net assets must have an aggregate realizable value, before taxes, but after deduction of the corresponding liabilities, that are more than $25 000 000 in Canadian dollars or an equivalent amount in another currency as shown on its last financial statements. "Net assets" under this paragraph is calculated as total assets minus total liabilities. Unlike in paragraph (o), assets considered for the purposes of paragraphs (m) are not limited to "financial assets".

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

In general, determining whether financial assets are beneficially owned by an individual should be straightforward. However, this determination may be more difficult if financial assets are held in a trust or in other types of investment vehicles for the benefit of an individual.

Factors indicating beneficial ownership of financial assets include:

- possession of evidence of ownership of the financial asset;
- entitlement to receive any income generated by the financial asset;
- risk of loss of the value of the financial asset;
- the ability to dispose of the financial asset or otherwise deal with it as the individual sees fit.

Section 1 – Definition of permitted depository

In recognition of the international nature of the derivatives market, paragraph (e) of the definition of "permitted depository" permits a foreign bank or trust company with a minimum amount of reported shareholders' equity to act as a permitted depository and hold derivatives party assets, provided its head office or principal place of business is located in a permitted jurisdiction and it is regulated as a bank or trust company in the permitted jurisdiction.

Section 1 – Definition of permitted jurisdiction

Paragraph (a) of the definition of "permitted jurisdiction" captures jurisdictions where foreign banks authorized under the *Bank Act* to carry on business in Canada, subject to supervision by the Office of the Superintendent of

Financial Institutions (**OSFI**), are located.[1] As of the time of the publication of the Instrument, the following countries and their political subdivisions are permitted jurisdictions: Belgium, France, Germany, Ireland, Japan, Netherlands, Singapore, Switzerland, United Kingdom, and the United States of America.

For paragraph (b) of the definition of "permitted jurisdiction," in the case of the euro, where the currency does not have a single "country of origin", the provision will be read to include all countries in the euro area and countries using the euro under a monetary agreement with the European Union.[2]

Section 1 – Definition of segregate

While the term "segregate" means to separately hold or separately account for derivatives party assets or positions, consistent with the PFMI Report and National Instrument 94-102 *Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* (**NI 94-102**), accounting segregation is acceptable (i.e., customer collateral is segregated by maintaining records that allow the positions and the value of collateral delivered by each customer to be identified).

The PFMI Report is the April 2012 final report entitled *Principles for financial market infrastructures* published by the Bank for International Settlements' Committee on Payments and Market Infrastructure (formerly the Committee on Payment and Settlement Systems) and the Technical Committee of the International Organization of Securities Commissions, as amended from time to time.

Section 1 – Definition of valuation

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

PART 2
APPLICATION AND EXEMPTION

Section 2 – Application to derivatives firms and individuals acting on their behalf

The Instrument applies to "derivatives advisers" and "derivatives dealers" as defined in subsection 1(1) of the Instrument. These definitions include a person or company that, under securities legislation is

- registered as a "derivatives dealer" or "derivatives adviser",
- exempt from the requirement to register as a "derivatives dealer" or "derivatives adviser", and
- excluded from registration as a "derivatives dealer" or "derivatives adviser".

Accordingly, derivatives firms that may be exempt from the requirement to register in a jurisdiction, such as Canadian financial institutions and individuals acting on their behalf in relation to transacting in, or providing advice

[1] For a list of authorized foreign banks regulated under the *Bank Act* and subject to OSFI supervision, see: Office of the Superintendent 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).

[2] European Union, Economic and Financial Affairs, *What is the euro area?*, February 12, 2020, online: European Union (http://ec.europa.eu/economy_finance/euro/adoption/euro_area/index_en.htm).

in relation to, a derivative, will nevertheless be subject to the same standard of conduct towards their derivatives parties that apply to registered derivatives firms and their registered representatives.

Section 3 – Application to certain derivatives

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

Section 4 – Application – short-term foreign exchange contract or instrument

General principle

Subsection 4(1) provides that the Instrument applies to short-term foreign exchange contracts or instruments in the wholesale foreign exchange market, which are typically settled within two business days or less (**short-term FX**) and, which include, for greater certainty, transactions in this market that are commonly referred to as spot FX.

Inclusion of certain short-term FX transactions in the institutional foreign exchange market

The wholesale foreign exchange market is a global over-the-counter market made up of a broad subset of market participants, including, the types of derivatives parties referred to in paragraphs (a) to (m) and (q) of the definition of eligible derivatives party. Specifically, this includes banks, central banks, supranational and quasi-government organizations, investment funds, pension funds, insurance companies, investment dealers, payment remittance and money services businesses, proprietary trading firms, benchmark and trading execution providers, as well as large multinational corporates with global treasury operations (**wholesale FX market participants**). These wholesale FX market participants transact short-term FX with other wholesale FX market participants. As wholesale FX market participants, Canadian financial institutions typically transact short-term FX as market maker, as well as for hedging, speculation and operational purposes.

The obligations in the Instrument relating to fair dealing, conflicts of interest, complaints handling, as well as compliance and recordkeeping obligations (including the obligations related to senior managers) will apply to a derivatives dealer that is also a Canadian financial institution with respect to short-term FX transactions it enters into with its counterparties that are also wholesale FX market participants. These obligations, however, will only apply to a derivatives dealer that is a Canadian financial institution if its notional exposure under all outstanding derivatives – calculated on the basis of outstanding derivatives that are reportable derivatives under the trade reporting rules[3] – exceeds $500 billion (i.e., short-term FX transactions are excluded from this calculation).

Applying these obligations to cover the short-term FX transactions of this population of derivatives dealers in the wholesale foreign exchange market is generally consistent with expectations already laid out in a voluntary code of conduct that certain wholesale FX market participants, including derivatives dealers that are Canadian financial institutions, already adhere to. In addition to currency-linked derivatives that are covered by the Instrument, our intention is that this provision covers the same short-term FX activity that is covered by these voluntary codes of conduct. Therefore, we expect these derivatives dealers will already have in place an existing compliance framework (i.e., policies, procedures, and controls) to address this activity and would generally expect that existing framework will meet section 31 compliance obligations and the other limited subset of obligations of the Instrument that apply to short-term FX transactions.

[3] In the Instrument reference to "**trade reporting rules**" refers to the following instruments, as applicable: Ontario Securities Commission Rule 91-507 *Trade Repositories and Derivatives Data Reporting;* Manitoba Securities Commission Rule 91-507 *Trade Repositories and Derivatives Data Reporting*; Regulation 91-507 respecting Trade Repositories and Derivatives Data Reporting in Québec ; and, Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* in Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan, and Yukon

For greater certainty, a Canadian financial institution that is subject to this provision is not required or expected to obtain any status certifications or representations from its counterparties. The limited subset of three provisions in the Instrument (fair dealing, conflicts of interest, complaints handling) that apply to short-term FX contracts in the wholesale FX market is intended to overlay the existing policies and procedures that have already been adopted by the population of derivatives dealers subject to these provisions, including the existing policies and procedures that have been incorporated into their internal compliance frameworks through their adherence to a voluntary code of conduct that covers short-term FX activity and other FX derivatives (e.g., the FX Global Code, as it is amended and restated from time to time). [4]

If a derivatives party would not be considered a wholesale FX market participant that transacts in the wholesale FX market with a Canadian financial institution under the FX Global Code, we would not interpret any FX transaction by such derivatives party as a short-term FX transaction that needs to be included for the purposes of section 4.

The wholesale foreign exchange market does not include retail foreign currency exchange transactions, including retail foreign currency exchange transactions conducted at the branch level.

Section 7 – Non-application – governments, central banks and international organizations

Section 7 provides that the Instrument does not apply to certain governments, central banks and international organizations specified in the section. Section 7 does not, however, exclude derivatives firms that deal with or advise these entities from the application of the Instrument.

Section 8 – Exemptions from certain requirements in this Instrument when dealing with or advising an eligible derivatives party

We are of the view that, because of their nature, regulatory oversight, financial resources or experience, eligible derivatives parties do not require the full set of protections afforded to other derivatives parties. Other derivatives parties are referred to in this Policy as **non-eligible derivatives parties**.

The obligations of a derivatives firm and the individuals acting on its behalf towards a derivatives party differ depending on whether the derivatives party is an eligible derivatives party and on the nature of the eligible derivatives party.

Dealing with or advising a derivatives party that is a non-eligible derivatives party

If a derivatives firm is dealing with or advising a non-eligible derivatives party, no exemption is available from the requirements in Parts 3, 4 and 5.

Dealing with or advising an eligible derivatives party that is not an individual or an eligible commercial hedger

A derivatives firm is exempt from the requirements of the Instrument if it is dealing with or advising a derivatives party that is an eligible derivatives party that is not an individual or an eligible commercial hedger, other than the following requirements (the **core requirements**):

- in Part 3 [*Dealing with or advising derivatives parties*], all of the requirements in Division 1 [*General obligations towards all derivatives parties*]:
    - section 9 [*Fair dealing*];
    - section 10 [*Conflicts of interest*];
    - section 11 [*Know your derivatives party*];
    - section 12 [*Handling complaints*]; and

[4] See https://www.globalfxc.org/fx_global_code.htm, which was facilitated by the Foreign Exchange Working Group operating under the auspices of the Bank of International Settlements Markets Committee.

- section 13 [*Tied selling*];

- in Part 4, Division 2 [*Derivatives party assets*]:
  - section 24 [*Interaction with other instruments*]; and
  - section 25 [*Segregating derivatives party assets*];

- in Part 4, Division 3 [*Reporting to derivatives parties*]:
  - subsection 28(1) [Content and delivery of transaction information];

- in Part 5 [*Compliance and recordkeeping*]:
  - all of Division 1 [*Compliance*]; and
  - all of Division 2 [*Recordkeeping*].

Dealing with or advising an eligible derivatives party that is an individual or an eligible commercial hedger

Under subsection 8(2), when a derivatives firm is dealing with or advising a derivative party that is an individual or eligible commercial hedger, all applicable additional protections in the Instrument are presumed to apply unless that derivatives party has provided the derivatives firm with the requisite representations indicating that they qualify as an eligible derivatives party and the eligible derivatives party waives, in writing, some or all of the additional protections in Instrument. As specified in subsection 8(3), the core requirements cannot be waived by the eligible derivatives party.

An eligible derivatives party that is an individual or eligible commercial hedger can waive specific requirements for a specific derivative, a class of derivatives, or for all derivatives. For example, a producer of a certain commodity may choose to waive certain requirements in relation to derivatives where the underlying asset is a commodity that they produce but may not want to waive protections in relation to other types of derivatives.

We do not consider there to be an obligation under the Instrument to update the waiver after it is made. However, it is always open to an eligible derivatives party that is an individual or an eligible commercial hedger to withdraw, in whole or in part, any waiver it has made to a derivatives firm.

There is no prescribed form for the waiver provided by subparagraph 8(2)(a)(iii). For example, it may be appropriate for the waiver to be given by an eligible derivatives party that is an individual or an eligible commercial hedger as part of account-opening documentation, in master trading agreements or in protocols amending master trading agreements. A derivatives firm may also wish to use a form of waiver that is similar to the typical forms of waivers used by securities market participants when certain permitted clients provide a waiver from certain suitability/disclosure obligations under NI 31-103.

However, consistent with the derivatives firm's obligation to deal fairly, honestly and in good faith with derivatives parties, we expect the waiver to be presented to the derivatives party in a clear and meaningful manner in order to ensure the derivatives party understands the information presented and the significance of the protections being waived. We would consider it to be a breach of section 9 [*Fair dealing*] to put unreasonable pressure on a derivatives party to waive any requirements. We also expect the derivatives firm to remind the derivatives party that it has the option to obtain independent advice before signing the waiver.

In the limited circumstances where a sole proprietorship (which is legally treated as an individual) uses derivatives to hedge against commercial risk and thus qualify as an eligible derivatives party, the derivatives firm transacting with such party must identify and document the nature of the sole proprietorship's business and the commercial risks it needs to manage for purposes of the transaction (paragraph 8(2)(b)). This is in addition to the expectation that a derivatives firm will take reasonable steps to determine if a derivatives party is an eligible derivatives party (described more fully in Section 1 of this Policy).

PART 3
DEALING WITH OR ADVISING DERIVATIVES PARTIES

DIVISION 1 – GENERAL OBLIGATIONS TOWARDS ALL DERIVATIVES PARTIES

Section 9 – Fair dealing

General Principle

The obligation in section 9 (the **fair dealing obligation**) is a principles-based obligation and is intended to be similar to the duty to act fairly, honestly and in good faith applicable to registered firms and registered individuals under securities legislation (the **registrant fair dealing obligation**).[5]

The fair dealing obligation should be interpreted flexibly and in a manner sensitive to context

We recognize that there are important differences between derivatives markets and securities markets. The fair dealing obligation under the Instrument may not always apply to derivatives market participants in the same manner as the registrant fair dealing obligation would apply to securities market participants. Accordingly, we believe that the fair dealing obligation in section 9, as a principles-based obligation, should be interpreted flexibly and in a manner that is sensitive to context and to derivatives market participants' reasonable expectations. For this reason, prior CSA guidance and case law on the registrant fair dealing obligation may not necessarily be relevant in interpreting the fair dealing obligation under the Instrument. Similarly, the guidance in this Policy is not necessarily applicable to registrants in their conduct with securities market participants.

We take the view that the concept of fairness when applied to derivatives market participants is context-specific. Conduct that may be considered unfair when dealing with a derivatives party that is not an eligible derivatives party may be considered fair and part of ordinary commercial practice when dealing with an eligible derivatives party. For example, the fair dealing obligation may be interpreted differently if the derivatives party is an individual or small business than from how it would be interpreted if the derivatives party is a sophisticated market participant, such as a global financial institution. Similarly, conduct that may be considered to be unfair when acting as an agent to facilitate a derivatives transaction with a third-party may be considered fair when entering into a derivative as principal, where it would be expected that each party negotiating the derivative is seeking to ensure favourable financial terms.

When a derivatives firm is dealing with or advising an eligible derivatives party, we generally interpret the fair dealing obligation in section 9 in a similar manner to the "fair and balanced communications" obligation as it is conceived in the context of similar rules in the United States.

Abusive practices, including fraud, price fixing, spoofing and layering, manipulation of benchmark rates, and front-running of trades would be considered a severe breach of the fair dealing obligation.

Derivatives firms have an obligation to transact with a derivatives party under terms that are fair. What constitutes "fair" will vary depending on the particular circumstances. Misrepresenting the nature of the product and related

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[5] See section 14 of the Securities Rules, B.C. Reg. 194/97 **[B.C. Regulations]** under the *Securities Act* (British Columbia), R.S.B.C. 1996, c. 418 **[B.C. Act]**; section 75.2 of the *Securities Act* (Alberta) R.S.A. 2000, c.S-4 **[Alberta Act]**; section 33.1 of *The Securities Act, 1988* (Saskatchewan), S.S. 1988-89, c. S-42.2 **[Saskatchewan Act]**; subsection 154.2(3) of *The Securities Act* (Manitoba) C.C.S.M. c. S50 **[Manitoba Act]**; section 2.1 of OSC Rule 31-505 *Conditions of Registration* ; section 65 of the *Derivatives Act* (Québec), R.S.Q., c. 14.01 **[Québec Act]**; section 39A of the *Securities Act* (Nova Scotia), R.S.N.S. 1989, c. 418 **[N.S. Act]**; subsection 54(1) of the *Securities Act* (New Brunswick) S.N.B. 2004, c. S-5.5 **[N.B. Act]**; section 90 of the *Securities Act* (Prince Edward Island), R.S.P.E.I. 1988, c. S-3.1 **[P.E.I. Act]**; subsection 26.2(1) of the *Securities Act* (Newfoundland and Labrador), R.S.N.L.1990, c. S-13 **[Newfoundland Act]**; section 90 of the *Securities Act* (Nunavut), S.Nu. 2008, c. 12 **[Nunavut Act]**; section 90 of the *Securities Act* (Northwest Territories), S.N.W.T. 2008, c. 10 **[N.W.T. Act]**; and section 90 of the *Securities Act* (Yukon), S.Y. 2007, c. 16 **[Yukon Act]**.

risks, or deliberately selling a derivative that is not appropriate for a derivatives party, would not be considered to be “fair” and, in our view, would be a breach of the fair dealing obligation.

We expect a derivatives firm to ensure a derivatives party is reasonably made aware of the implications of terminating a transaction prior to maturity, including potential exit costs. However, depending on the level of sophistication of the derivatives party, as well as the nature of the derivatives party, we recognize that this may not be necessary and therefore, the obligation to be “fair” in this context is minimal. For example, it would be appropriate for this information to be provided to an eligible commercial hedger; whereas, we would generally not expect this information to be disclosed between two banks. We recognize that implications of termination, including costs, are wholly dependent on market conditions at the time of termination and therefore, the more specific details relating to such costs would only be disclosed when actual termination of the transaction is being discussed or negotiated.

As part of the policies and procedures required under section 31, a derivatives firm is expected to be able to demonstrate that it has established and follows policies and procedures that are reasonably designed to achieve fair terms, in the context, for the derivatives firm’s derivatives parties and that these policies and procedures are reviewed regularly and amended as required.

We interpret the fair dealing obligation to include determining prices for derivatives transacted with derivatives parties in a fair and equitable manner. We expect there to be a rational basis for a discrepancy in price where essentially the same derivative is transacted with different derivatives parties. Factors that indicate a rational basis could include the level of counterparty risk and capital risk of a particular derivatives party, the derivatives party’s trading activity, or relationship pricing. Lack of sophistication, knowledge or understanding of a derivatives product should never be a factor in providing less advantageous pricing. Both the compensation component and the market value or price component of the derivative are relevant in determining whether the price for a derivatives party is fair. A derivatives firm’s policies and procedures under section 31 must address pricing practices, as well as how the reasonableness of compensation is determined. A derivatives party should be given an opportunity, at their option, to obtain independent advice before transacting in a derivative.

Derivatives firms are expected to obtain information from each derivatives party to allow them to meet their fair dealing obligation.

Section 10 – Conflicts of interest

We consider a conflict of interest to be any circumstance where the interests of a derivatives party and those of a derivatives firm or its representatives are inconsistent or divergent.

The conflict of interest provisions in section 10 should be interpreted flexibly and in a manner that is sensitive to context and to derivatives market participants’ reasonable expectations. For example, a derivatives firm and the derivatives party with which it transacts bilaterally hold opposing positions under the same derivative and this may represent an inherent conflict of interest in the narrow context of that specific derivative. We further recognize that transacting in certain commodity derivatives markets, such as energy derivatives markets, may also necessarily involve counterparties that have competing interests. We recognize, therefore, that it may not necessarily be appropriate to apply the conflict of interest provisions under the Instrument to derivatives market participants in the same manner as the relevant conflict of interest provisions would apply to securities market participants.

We take the view that a conflict of interest, when applied to derivatives market participants, is context-specific. Circumstances that may be considered to give rise to a conflict of interest when dealing with a derivatives party that is not an eligible derivatives party may be considered fair and part of ordinary commercial practice when dealing with an eligible derivatives party. For example, conflicts of interests may be viewed differently when dealing with a non-eligible derivative party that is an individual or a small business than they would be viewed if the derivatives party were an eligible derivatives party, which may be different again from how conflicts of interest

would be viewed if the derivatives party were a sophisticated market participant such as a global financial institution.

In addition, the circumstances that may give rise to a conflict of interest when acting as an intermediary on behalf of an eligible derivatives party, may not represent a conflict of interest when entering into a derivative as principal, provided the eligible derivatives party is reasonably aware that the derivatives firm is seeking terms favourable to its own interests. One way to generally address this conflict would be to provide a representation to that effect in a master trading agreement; however, such standard representation may not necessarily address all of the circumstances that would give rise to a conflict of interest that ought to be disclosed to a derivatives party.

Subsection 10(2) – Responding to conflicts of interest

We expect that a derivatives firm's policies and procedures for managing conflicts should allow the firm and its staff to

- identify conflicts of interest,
- determine the level of risk, to both the derivatives firm and a derivatives party, that a conflict of interest raises, and
- respond appropriately to conflicts of interest.

When responding to any conflict of interest, we expect the derivatives firm to consider the fair dealing obligation in section 9 as well as any other standard of care that may apply when dealing with or advising a derivatives party.

There are three methods that are generally reasonable to respond to a conflict of interest, depending on the circumstances: avoidance, control and disclosure.

We expect that if there is a risk of material harm to a derivatives party or the integrity of the markets, the derivatives firm will take all reasonable steps to avoid the conflict of interest. If there is not a risk of material harm and the derivatives firm does not avoid the conflict of interest, we expect that it will take steps to either control or disclose the conflict, or both. We also expect the derivatives firm to consider what internal structures or policies and procedures it should implement to reasonably respond to such a conflict of interest.

Avoiding conflicts of interest

A derivatives firm must avoid all conflicts of interest that are prohibited by law. If a conflict of interest is not prohibited by law, we expect the derivatives firm to avoid the conflict if it is sufficiently contrary to the interests of a derivatives party that there can be no other reasonable response. We are generally of the view that conflicts that have a lesser impact on the interests of a derivatives party can be managed through controls or disclosure.

Where conflicts of interest between a derivatives party and a derivatives firm cannot be managed using controls or disclosure, we expect the derivatives firm to avoid the conflict. This may require the derivatives firm to stop providing the service or stop transacting derivatives with, or providing advice in relation to derivatives to, the derivatives party.

Controlling conflicts of interest

We expect that a derivatives firm would design its organizational structures, lines of reporting and physical locations to, where appropriate, control conflicts of interest effectively. For example, the following situations would likely raise a potential conflict of interest that could be controlled in this manner:

- advisory staff reporting to marketing staff,
- compliance or internal audit staff reporting to a business unit, and
- individuals acting on behalf of a derivatives firm and investment banking staff in the same physical location.

Depending on the conflict of interest, a derivatives firm may be able to reasonably respond to the conflict of interest by controlling the conflict in an appropriate way. This may include

- assigning a different individual to provide a service to the derivatives party,
- creating a group or committee to review, develop or approve responses to a type of conflict of interest,
- monitoring trading activity, or
- using information barriers for certain internal communication.

Where a conflict of interest is such that no control is effective, we expect the conflict to be avoided or disclosed.

Subsection 10(3) – Disclosing conflicts of interest

When disclosure is appropriate

We expect a derivatives firm to inform each derivatives party it transacts derivatives with, or provides advice in relation to derivatives to, about any conflicts of interest that could affect the services the firm provides to the derivatives party.

Timing of disclosure

Under subsection 10(3), a derivatives firm and individuals acting on its behalf must disclose a conflict of interest in a timely manner. We expect a derivatives firm and its representatives to disclose the conflict to a derivatives party before or at the time they recommend the transaction or provide the service that gives rise to the conflict to enable the derivatives party to decide beforehand whether or not they wish to proceed with the transaction or service.

Where this disclosure is provided to a derivatives party before the transaction takes place, we expect the disclosure to be provided shortly before the transaction takes place. For example, if it was initially provided with the derivatives party's account-opening documentation months or years previously, we expect that an individual acting on behalf of a derivatives firm to also disclose this conflict to the derivatives party shortly before the transaction or at the time the transaction is recommended.

When disclosure is not appropriate

Disclosure may not be appropriate if a conflict of interest involves confidential or commercially-sensitive information, or the information amounts to "inside information" under insider trading provisions in securities legislation. In these situations, a derivatives firm will need to assess whether there are other methods to adequately respond to the conflict of interest. If not, the firm may have to decline to provide the service to avoid the conflict of interest. We also expect a derivatives firm to have specific procedures for responding to conflicts of interest that involve inside information and for complying with insider trading provisions.

How to disclose a conflict of interest

Subsection 10(3) provides that a derivatives firm must provide disclosure about a material conflict of interest to a derivatives party. When a derivatives firm provides this disclosure, we expect that the disclosure would

- be prominent, specific, clear and meaningful to the derivatives party, and
- explain the conflict of interest and how it could affect the service the derivatives party is being offered.

We expect that a derivatives firm would not

- provide only generic disclosure,
- provide only partial disclosure that could mislead the derivatives party, or
- obscure conflicts of interest in overly detailed disclosure.

More specifically, we generally expect that disclosures are separated into two categories:

(i) general conflicts of interest disclosures applicable to all counterparties (those which affect all counterparties and transaction types, addressed in a written general disclosure) that could be disclosed to counterparties on an annual basis, and

(ii) disclosures specific to a counterparty or a specific contemplated transaction (i.e., disclosure regarding specific conflicts of interest that are material and specific to a counterparty or a particular transaction prior to entering into a transaction) by providing written notice of or disclosing the conflict to a trader of their derivatives party over a taped line prior to trading.

We recognize that it may be appropriate in some circumstances for a derivatives firm to disclose a conflict where it arises after the original transaction has taken place. This might arise, for example, in the case of an equity total return swap where subsequent to entering into a transaction with a derivatives party, the derivatives dealer becomes a mergers and acquisitions adviser in respect of the equity underlier (where the proposed merger and acquisition activity has been announced).

Examples of conflicts of interest

Specific situations where a derivatives firm could be in a conflict of interest and how to manage the conflict are described below.

Acting as both dealer and counterparty

When a derivatives firm enters into a transaction with or recommends a transaction to a derivatives party, and the derivatives firm or an affiliated entity of the derivatives firm is the counterparty to the derivatives party in the transaction, we expect that the derivatives firm would respond to the resulting conflict of interest by disclosing it to the derivatives party.

Competing interests of derivatives parties

If a derivatives firm deals with or provides advice to multiple derivatives parties, we expect the derivatives firm to make reasonable efforts to be fair to all such derivatives parties. We expect that a derivatives firm will have internal policies and procedures to evaluate the balance of these interests.

Acting on behalf of derivatives parties

When a derivatives firm, or the individuals acting on its behalf, exercise discretionary authority over the accounts of its derivatives parties to enter into transactions on their behalf, we expect the derivatives firm to have policies and procedures to address the potential conflicts of interest ensuing from the contractual relationship governing the exercise of discretionary authority.

Compensation practices

We expect that a derivatives firm would consider whether any benefits, compensation or remuneration practices are inconsistent with their obligations to derivatives parties, especially if the firm relies heavily on commission-based remuneration. For example, if there is a complex product that carries a high commission but may not be appropriate for the derivatives firm's derivatives parties, the derivatives firm may decide that it is not appropriate to offer that product.

Section 11 – Know your derivatives party

Derivatives firms act as gatekeepers of the integrity of the derivatives markets. They should not, by act or omission, facilitate conduct that brings the market into disrepute. As part of their gatekeeper role, derivatives firms are required to establish the identity of, and conduct due diligence on, their clients or counterparties under the know-your-derivatives party obligation in section 11 (the "**KYDP obligation"**). Complying with this obligation can help ensure that derivatives transactions are completed in accordance with securities laws.

The KYDP obligation requires derivatives firms to take reasonable steps to obtain and periodically update information about their derivatives parties. In the ordinary course, an annual request to a derivatives party from a derivatives dealer to confirm that nothing has changed in relation to the gatekeeper KYDP information in section 11 would satisfy this obligation.

Section 43 provides an exemption for derivatives firms from the obligations under this section for transactions that are executed on a derivatives trading facility where the identity of the counterparty is unknown prior to and at the time the transaction is executed.

Section 12 – Handling Complaints

General duty to document and respond to complaints

Section 12 requires a derivatives firm to document complaints in respect of its derivatives business and to effectively, fairly and promptly respond to them. We expect that a derivatives firm would document and respond to all complaints received from a derivatives party who has dealt with the derivatives firm in respect of the derivatives activity at issue (in this section, a "**complainant**").

Complaint handling

We are of the view that an effective complaint system would deal with all formal and informal complaints or disputes in a timely and fair manner. To achieve the objective of handling complaints fairly, we expect the

derivatives firm's compliance system to include standards allowing for objective factual investigation and analysis of the matters specific to the complaint.

We expect a derivatives firm to take a balanced approach to the gathering of facts that objectively considers the interests of

- the complainant,
- the individual or individuals acting on behalf of the derivatives firm, and
- the derivatives firm.

We also expect a derivatives firm to limit its consideration and handling of complaints for the purposes of the Instrument to those relating to possible violations of securities legislation.

Complaint monitoring

We expect a derivatives firm's complaint system to provide for specific procedures for reporting the complaints to superiors, in order to allow the detection of frequent and repetitive complaints made with respect to the same matter which may, on a cumulative basis, indicate a serious problem. We also expect the derivatives firm to take appropriate measures to promptly address the cause of a problem that is the subject of a complaint, particularly a serious problem.

Responding to complaints

Types of complaints

We expect a derivatives firm to provide an appropriate response to all complaints, including complaints relating to one of the following matters, by providing an initial and substantive response, promptly in writing:

- a trading or advising activity;
- a breach of the derivatives party's confidentiality;
- theft, fraud, misappropriation or forgery;
- misrepresentation;
- the fair dealing obligation;
- an undisclosed or prohibited conflict of interest; or
- personal financial dealings with a derivatives party.

A derivatives firm may determine that a complaint relating to matters other than the matters listed above is nevertheless of a sufficiently serious nature to be responded to in the manner described below. This determination should be made, in all cases, by considering if a derivatives party, acting reasonably, would expect a written response to its complaint.

Timeline for responding to complaints

We expect that a derivatives firm would

- promptly send an initial written response to a complainant within 5 business days of receipt of the complaint, and

- provide a substantive response to all complaints relating to the matters listed under "Types of complaints" above, indicating the derivatives firm's decision on the complaint.

A derivatives firm may also wish to use its initial response to seek clarification or additional information from the derivatives party.

We encourage derivatives firms to respond to and resolve complaints relating to the matters listed above within a reasonable timeframe depending on the nature of the dispute (in the ordinary course, within 90 days would be considered reasonable).

Section 13 – Tied selling

Section 13 prohibits a derivatives firm from imposing undue pressure on or coercing a person or company to obtain a product or service from a particular person or company, including the derivatives firm or any of its affiliates, as a condition of obtaining another product or service from the derivatives firm. These types of practices are known as "tied selling". In our view, this section would be contravened if, for example, a financial institution agreed to lend money to a derivatives party on the condition that the derivatives party hedged their loan through the same financial institution. In this example, we would take the view that a derivatives firm would not contravene section 13 if it required the derivatives party to enter into an interest rate derivative in connection with a loan agreement, as long as the derivatives party were permitted to transact in this derivative with the counterparty of their choice.

Section 13 is not intended to prohibit relationship pricing or other beneficial selling arrangements similar to relationship pricing. Relationship pricing refers to the practice of industry participants offering financial incentives or advantages to certain derivatives parties.

DIVISION 2 – ADDITIONAL OBLIGATIONS WHEN DEALING WITH OR ADVISING CERTAIN DERIVATIVES PARTIES

The obligations in Division 2 of Part 3 do not apply if a derivatives firm is dealing with or advising:

- an eligible derivatives party that is not an individual or an eligible commercial hedger; or
- an eligible derivatives party that is an individual or eligible commercial hedger that has waived these obligations.

Section 14 – Derivatives-party-specific needs and objectives

Information on a derivatives party's specific needs and objectives (referred to below as "**derivatives-party-specific KYC information**") forms the basis for determining whether transactions are suitable for a derivatives party. The obligations in section 14 require a derivatives firm to take reasonable steps to obtain and periodically update information about their derivatives parties.

The derivatives-party-specific KYC information may also be relevant in complying with policies and procedures that are aimed at ensuring fair terms of a derivative for a derivatives party under subsection 9(1).

Derivatives parties may have a variety of execution priorities. For example, a derivatives party may have as their primary objective executing the transaction as quickly as possible rather than trying to obtain the best available price. Factors to consider when evaluating execution include price, certainty, timeliness, and minimizing the impact of making a trading interest public.

Before transacting with a derivatives party, we expect a derivatives firm to have the appropriate information to assess the derivatives party's knowledge, experience and level of understanding of the relevant type of derivative, the derivative's party's objective in entering into the derivative and the financial and business risks involved, in order to assess whether the derivative is suitable for the derivatives party. The derivatives-party-specific KYC information is obtained with this goal in mind.

If the derivatives party chooses not to provide the necessary information that would enable the derivatives firm to assess suitability, or if the derivatives party provides insufficient information, we expect the derivatives party to be notified. The derivatives firm would be expected to advise the derivatives party that

- this information is required to determine whether the derivative is suitable for the derivatives party, and
- without this information there is a strong risk that it will not be able to determine whether the derivatives party has the ability to understand the derivative and the risks involved with transacting the derivative.

Derivatives-party-specific KYC information for suitability depends on circumstances

The extent of derivatives-party-specific KYC information that a derivatives firm needs in order to determine the suitability of a transaction or a derivatives party's priorities when transacting in the derivative will depend on factors that include

- the derivatives party's circumstances and objectives,
- the type of derivative,
- the derivatives party's relationship to the derivatives firm, and
- the derivatives firm's business model.

In some cases, a derivatives firm will need extensive derivatives-party-specific KYC information, for example, where the derivatives party would like to enter into a derivatives strategy using a range of asset classes to hedge a commercial activity and related risks. In these cases, we expect the derivatives firm to have a comprehensive understanding of the derivatives party's

- needs and objectives when entering into a derivative, including the derivatives party's time horizon for their hedging or speculative strategy,
- overall financial circumstances, and
- risk tolerance for various types of derivatives, taking into account the derivative party's knowledge of derivatives.

In other cases, a derivatives firm may need to obtain less derivatives-party-specific KYC information, for example, if the derivatives firm enters into a single derivative with a derivatives party who needs to hedge a loan that the derivatives firm extended to the derivatives party.

Subsection 14(2) corresponds to subsection 11(4) of MI 93-101 and subsection 13.2(4) of NI 31-103. In the context of NI 31-103, CSA Staff have generally interpreted this to mean the firm has to refresh the client specific KYC information at least once a year. Pursuant to subsection 14(1) of MI 93-101, any time that a derivatives firm makes a recommendation or accepts an order, it is required to make a suitability determination unless (i) the derivatives party is an eligible derivatives party, provided that it is not an eligible derivatives party that is an individual or eligible commercial hedger; or (ii) the derivatives party is an eligible derivatives party that is an individual or an eligible commercial hedger that has waived this requirement. Consequently, any time a firm makes a recommendation or accepts an order, the firm needs to know whether the client is an eligible derivatives party or a retail counterparty in order to know whether it has to satisfy the suitability obligation. As long as the firm complies with its obligation in subsection 11(4) to keep its derivatives-party-specific KYDP information current, and as long as the firm does not know otherwise, the firm can rely on existing representations.

Section 15 – Suitability

Subsection 15(1) requires a derivatives firm to take reasonable steps to ensure that a proposed transaction is suitable for a derivatives party before making a recommendation or accepting instructions from the derivatives party to transact in a derivative.

Suitability obligation

To meet the suitability obligation, a derivatives firm should have in-depth knowledge of all derivatives that it transacts with or for, or recommends to, its derivatives party. This is often referred to as the "know your product" or KYP obligation.

We expect a derivatives firm to know each derivative well enough to understand and explain to the derivatives party the derivative's risks, key features, and initial and ongoing obligations. The decision by a derivatives firm to include a type of derivative on its product shelf or approved list of products does not necessarily mean that the derivative will be suitable for each derivatives party. Individuals acting on behalf of a derivatives firm must still determine the suitability of each transaction for every derivatives party.

When assessing suitability, we expect a derivatives firm to take all reasonable steps to determine whether the derivatives party has the capability to understand the particular type of derivative and the risks involved.

In all cases, we expect a derivatives firm to be able to demonstrate a process for making suitability determinations that is appropriate under the circumstances.

Any direction from a derivatives party to override a suitability determination made by a derivatives firm should be made in writing or otherwise documented by the firm/individual acting on its behalf.

Suitability obligation cannot be delegated

A derivatives firm should not

- delegate its suitability obligation to anyone other than an officer or employee of the derivatives firm, or
- satisfy the suitability obligation by simply disclosing the risks involved with a transaction.

Sections 14 and 15 - Use of online services to determine derivatives party specific needs and objectives and suitability

The conduct obligations set out in the Instrument, including the derivatives-party-specific KYC and suitability obligations in sections 14 and 15, are intended to be "technology neutral". This means that these obligations are

the same for derivatives firms that interact with derivatives parties on a face-to-face basis or through an online platform.

Where the information necessary to fulfill a derivatives firm's obligations pursuant to sections 14 and 15 is solicited through an online service or questionnaire, we expect that this process would amount to a meaningful discussion with the derivatives party.

An online service or questionnaire is expected to achieve this objective if it

- uses a series of behavioural questions to establish risk tolerance and elicit other derivatives-party-specific KYC information,
- prevents a derivatives party from progressing further until all questions have been answered,
- tests for inconsistencies or conflicts in the answers and will not let the derivatives party complete the questionnaire until the inconsistencies or conflicts are resolved,
- offers information about the terms and concepts involved, and
- reminds the derivatives party that an individual from the derivatives firm is available to help them throughout the process.

Section 16 – Permitted referral arrangements

Subsection 1(1) defines a "referral arrangement" in broad terms. Referral arrangement means an arrangement in which a derivatives firm agrees to pay or receive a referral fee. The definition is not limited to referrals for providing derivatives, financial services or services requiring registration. It also includes receiving a referral fee for providing a derivatives party's name and contact information to an individual or a firm. "Referral fee" is also broadly defined. It includes any benefits received from referring a derivatives party, including sharing or splitting any commission resulting from a transaction.

Under section 16, parties to a referral arrangement are required to set out the terms of the arrangement in a written agreement. This is intended to ensure that each party's roles and responsibilities are made clear. This includes obligations for a derivatives firm involved in referral arrangements to keep records of referral fees (this includes records of all fees relating to referrals that were either paid by the derivatives firm to another person or company or received by the derivatives firm from another person or company). Payments do not necessarily have to go through a derivatives firm, but a record of all payments related to a referral arrangement must be kept.

We expect referral agreements to include

- the roles and responsibilities of each party,
- limitations on any party that is not a derivatives firm,
- the specific contents of the disclosure to be provided to referred derivatives parties, and
- who provides the disclosure to referred derivatives parties.

If the person or company receiving the referral is a derivatives firm or an individual acting on behalf of that derivatives firm, they would be responsible for carrying out all obligations of a derivatives firm towards the referred derivatives party in respect of the derivatives-related activities for which the derivatives party is referred and communicating with the referred derivatives party. However, if the referring person or company is a derivatives

firm, the referring derivatives firm is still required to comply with sections 16 [*Permitted referral arrangements*], 17 [*Verifying the qualifications of the person or company receiving the referral*] and 18 [*Disclosing referral arrangements to a derivatives party*].

If a derivatives party is referred by or to an individual acting on behalf of a derivatives firm, we expect the derivatives firm to be a party to the referral agreement. This ensures that the derivatives firm is aware of these arrangements so it can adequately supervise the individuals acting on its behalf and monitor compliance with the agreements. It does not preclude the individual acting on behalf of the derivatives firm from also being a party to the agreement.

A party to a referral arrangement may need to be registered depending on the activities that the party carries out. A derivatives firm cannot use a referral arrangement to assign, contract out of or otherwise avoid its regulatory obligations.

In making referrals, a derivatives firm should ensure that the referral itself does not constitute an activity that the derivatives firm is not authorized to engage in.

We generally are of the view that the compliance practices of investment dealers with respect to referral arrangements under NI 31-103 could similarly be employed to meet the requirements under the Instrument with respect to referral arrangements.

Section 17 – Verifying the qualifications of the person or company receiving the referral

Section 17 requires the derivatives firm, or individual acting on its behalf, making a referral to satisfy itself that the party receiving the referral is appropriately qualified to perform the services, and, if applicable, is appropriately registered. The derivatives firm, or individual acting on its behalf, is responsible for determining the steps that are reasonable in the circumstances. For example, this may include an assessment of the types of derivatives parties that the referred services would be appropriate for.

Section 18 – Disclosing referral arrangements to a derivatives party

The disclosure of information to a derivatives party required under section 18 is intended to help the derivatives party make an informed decision about the referral arrangement and to assess any conflicts of interest. We expect the disclosure to be provided to a derivatives party before or at the time the referred services are provided. We also expect a derivatives firm, and any individuals acting on behalf of the derivatives firm who is directly participating in the referral arrangement, to take reasonable steps so that a derivatives party understands

- which entity it is dealing with,
- what it can expect that entity to provide to it,
- the derivatives firm's key responsibilities to it,
- if applicable, the limitations of the derivatives firm's registration category or exemptive relief,
- if applicable, any relevant terms and conditions imposed on the derivatives firm's registration or exemptive relief,
- the extent of the referrer's financial interest in the referral arrangement, and
- the nature of any potential or actual conflict of interest that may arise from the referral arrangement.

PART 4
DERIVATIVES PARTY ACCOUNTS

DIVISION 1 – DISCLOSURE TO DERIVATIVES PARTIES

The obligations in this Division do not apply if a derivatives firm is dealing with or advising an eligible derivatives party that is not an individual or an eligible commercial hedger or an eligible derivatives party that is an individual or an eligible commercial hedger that has waived these obligations.

Section 19 – Relationship disclosure information

Content of relationship disclosure information

The Instrument does not prescribe a form for the relationship disclosure information required under section 19. A derivatives firm may provide this information in a single document, or in separate documents, which together give the derivatives party the prescribed information.

We expect that relationship disclosure information would contain accurate, complete, and up-to-date information. We suggest that derivatives firms review their disclosures annually or more frequently, as necessary. A derivatives firm must take reasonable steps to notify a derivatives party, in a timely manner, of significant changes in respect of the relationship disclosure information that has been provided.

To satisfy their obligations under subsection 19(1), an individual acting on behalf of a derivatives firm must spend sufficient time with a derivatives party in a manner consistent with their operations to adequately explain the relationship disclosure information that is delivered to the derivatives party. We expect a derivatives firm to have policies and procedures that reflect the derivatives firm's practices when preparing, reviewing, delivering and revising relationship disclosure documents.

Disclosure should occur before entering into an initial transaction, prior to advising a derivatives party in respect of a derivative and when there is a significant change in respect of the information delivered to a derivatives party. We expect that the derivatives firm will maintain evidence of compliance with their disclosure requirements.

Paragraphs 19(2)(a) to (k) – Required relationship disclosure information

Description of the nature or type of the derivative party's account

Under paragraph 19(2)(a), a derivatives firm must provide derivatives parties with a description of the nature or type of account that the derivatives party holds with the derivatives firm. In particular, we expect that a derivatives firm would provide sufficient information to enable the derivatives party to understand the manner in which transactions will be executed and any applicable contractual obligations. We also expect a derivatives firm to provide information regarding margin and collateral requirements, if applicable. Under paragraph 19(2)(k) the derivatives firm must disclose how the derivatives party assets will be held, used and invested.

We expect that the relationship disclosure information would also describe any related services that may be provided by the derivatives firm. If the firm is advising in derivatives, and the adviser has discretion over the derivatives party's account, we also expect this to be disclosed.

Describe the conflicts of interest

Under paragraph 19(2)(b) a derivatives firm must provide a description of the conflicts of interest that the derivatives firm is required to disclose under securities legislation. One such requirement is in section 10, which provides that a firm must take reasonable steps to identify and then respond to existing and potential material

conflicts of interest between the derivatives firm and the derivatives party. This includes disclosing the conflict, where appropriate.

Disclosure of charges, fees and other compensation

Paragraphs 19(2)(c), (d) and (e) require a derivatives firm to provide a derivatives party information on fees and costs they might be charged when entering into a transaction. These requirements ensure that a derivatives party receives all relevant information to evaluate the costs associated with the products and services they receive from the derivatives firm. We expect this disclosure to include information related to compensation or other incentives that the derivatives party may pay relating to a transaction.

We also expect a derivatives firm to provide the derivatives party with general information on any transaction and other charges that a derivatives party may be required to pay, including general information about potential break costs if a derivative is terminated prior to maturity, as well as other compensation the derivatives firms may receive from a third party as a result of their business relationship.

We recognize that a derivatives firm may not be able to provide all information about the costs associated with a particular derivative or transaction until the terms of the derivative have been agreed upon. However, before entering into an initial transaction, a derivatives firm must meet the applicable pre-transaction disclosure requirements in section 20.

Description of content and frequency of reporting

Under paragraph 19(2)(f) a derivatives firm is required to provide a description of the content and frequency of reporting to the derivatives party. Reporting to derivatives parties includes, as applicable

- valuation reporting under section 21,
- transaction confirmations under section 28, and
- derivatives party statements under section 29.

Further guidance about a derivatives firm's reporting obligations to a derivatives party is provided in Division 3 of this Part.

Know your derivatives party information

Paragraph 19(2)(i) requires a derivatives firm to disclose the type of information that it must collect from the derivatives party. We expect this disclosure will also indicate how this information will be used in assessing and determining the suitability of a derivatives party transaction.

Section 20 – Pre-transaction disclosure

The Instrument does not prescribe a form for the pre-transaction disclosure that must be provided to a derivatives party under section 20. The derivatives firm may provide this information in a single document, or in separate documents, which together give the derivatives party the prescribed information.

The disclosure document required under subsection 20(1) must be delivered to the derivatives party at a reasonably sufficient time prior to entering into the first transaction with the derivatives firm to allow the derivatives party to

assess the material risks and material characteristics of the type of derivative transacted. This disclosure document may be communicated by email or other electronic means.

Identify the derivatives-related products or services the derivatives firm offers

Under paragraph 20(1)(a), a derivatives firm must provide a general description of the derivatives products and services related to derivatives that the derivatives firm offers to a derivatives party. We expect the relationship disclosure information to explain which asset classes the derivatives firm deals in and explain the different types of derivative products that the derivatives firm can transact with the derivatives party. The information required to be delivered under paragraph 20(1)(a) may be provided orally or in writing.

Describe the types of risks that a derivatives party should consider

Subparagraph 20(1)(b)(i) requires a derivatives firm to provide an explanation of the risks associated with the derivatives products being transacted, including any specific risks relevant to the derivatives offered and strategies recommended to the derivatives party. The risks disclosed may include market, credit, liquidity, operational, legal and currency risks, as applicable.

The information required to be delivered under paragraph 20(1)(b) may be provided orally or in writing.

Describe the risks of using leverage to finance a derivative to a derivatives party

Paragraph 20(1)(c) contemplates that a derivatives firm will disclose the risk of leverage to all derivatives parties, regardless of whether or not the derivatives party uses leverage or the derivatives firm recommends the use of borrowed money to finance any part of a transaction. Using leverage means that derivatives parties are only required to deposit a percentage of the total value of the derivative when entering into a transaction. This effectively amounts to a loan by the derivatives firm to the derivatives party. However, the derivatives party's profits or losses are based on changes in the total value of the derivative. Leverage magnifies a derivatives party's profit or loss on a transaction, and losses can exceed the amount of funds deposited.

Posting of the disclosure on a derivatives firm's website in a readily accessible location will be sufficient for purposes of ensuring the relevant disclosure has been provided (and refreshed as appropriate) as long as the derivatives firm directs the relevant derivatives party to the website before executing a transaction with or on behalf of a derivatives party.

Subsection 20(2) – Disclosure before transacting in a derivative

We understand that the use of the term "price" is not always appropriate in relation to a derivative or transaction in a derivative. Therefore, under paragraph 20(2)(b), disclosure with respect to spreads, premiums, costs, etc., could be more appropriate than the price.

Section 21 – Valuation reporting

A derivatives dealer under subsection 21(1) does not have to make the daily mid-market mark (or valuation) available to a derivatives party for a derivative that is cleared through a qualifying clearing agency because we expect that derivatives parties will already be able to access valuation information from the clearing agency. However, the derivatives dealer should notify the derivatives party of its right to request and receive the clearing agency's daily mid-market mark.

This information should be available to a derivatives party in an electronic form (such as through an online platform that allows the derivatives party to see the value of its derivatives position). The derivatives firm should provide its derivatives parties with guidance on how to access this information before executing a transaction with or on behalf

of a derivatives party and whenever the derivatives firm makes a change to the way the information is provided to a derivatives party.

In respect of a transaction involving a managed account, we expect the derivatives dealer to make the information required under subsection 21(1) available to the derivatives adviser that is acting on behalf of the managed account. Whereas in respect of the same transaction, the derivatives adviser that is acting for a managed account for its client is only required to make the information required under subsection 21(2) available to the derivatives party (i.e., its client) at least once every three months, unless their client requests to receive that information monthly, in which case the derivatives advisor must make that information available for each one-month period. We expect that a derivatives adviser would typically make this information available to its client in a statement that also includes information with respect to its client's overall portfolio and may include the type of information contemplated in section 14.14 [*Account Statements*] of NI 31-103.

Section 22 – Notice to derivatives parties by non-resident derivatives dealers

The notice required under section 22 may be provided by a derivatives firm to a derivatives party in standard form industry documentation; a separate statement is not required to be provided to satisfy the obligations of this section.

DIVISION 2 – DERIVATIVES PARTY ASSETS

The provisions in this Division, other than sections 24 [*Application and interaction with other Instruments*] and 25 [*Segregating derivatives party assets*], do not apply if a derivatives firm is dealing with or advising (i) an eligible derivatives party that is not an individual or an eligible commercial hedger, or (ii) an eligible derivatives party that is an individual or an eligible commercial hedger that has waived these obligations.

Section 24 – Application and interaction with other instruments

A derivatives firm is exempt from the requirements of this Division in respect of derivatives party assets if the derivatives firm

- is subject to and complies with or is exempt from sections 3 to 8 of NI 94-102 in respect of the derivatives party assets. The exemption from the requirements of this Division set out in paragraph (a) also extends to derivatives firms that rely on substituted compliance under NI 94-102,

- is subject to and complies with Guideline E-22 Margin Requirements for Non-Centrally Cleared Derivatives issued by the federal Office of the Superintendent of Financial Institutions (OSFI), including derivatives firms that rely on an exemption from such rules because they are complying with the equivalent rules of a foreign jurisdiction;

- is subject to and complies with securities legislation relating to margin and collateral requirements or National Instrument 81-102 *Investment Funds*;

- is subject to and complies with the Autorité des marchés financiers' Guideline on margins for over-the-counter derivatives not cleared by a central counterparty.

The exemption from the requirements of this Division on this basis extends to derivatives firms that rely on exemptions from the requirements under securities legislation relating to margin and collateral requirements.

Section 25 – Segregating derivatives party assets

A derivatives firm is required to segregate derivatives party assets from its own property and from the property of the firm's other derivatives parties either by separately holding or separately accounting for derivatives party assets.

Section 26 – Holding initial margin

We expect a derivatives firm to take reasonable efforts to confirm that the permitted depository holding initial margin

- qualifies as a permitted depository under the Instrument,
- has appropriate rules, policies and procedures, including robust accounting practices, to help ensure the integrity of the derivatives party assets and minimize and manage the risks associated with the safekeeping and transfer of the derivatives party assets,
- maintains securities in an immobilized or dematerialized form for their transfer by book entry,
- protects derivatives party assets against custody risk through appropriate rules and procedures consistent with its legal framework,
- employs a robust system that ensures segregation between the permitted depository's own property and the property of its participants and segregation among the property of participants and, where supported by the legal framework, supports operationally the segregation of property belonging to a derivative party on the participant's books and facilitates the transfer of derivatives party assets,
- identifies, measures, monitors, and manages its risks from other activities that it may perform, and
- facilitates prompt access to initial margin, when required.

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

Section 27 – Investment or use of initial margin

Section 27 requires that a derivatives firm receive written consent from a derivatives party before investing or otherwise using collateral provided as initial margin. In order to provide consent a derivatives party needs to be made aware of and agree to any potential investment or use. If applicable, we expect such disclosure to take the form of the disclosures provided by paragraph 19(2)(k) [*Relationship disclosure information*], which requires the derivatives firm to disclose the manner in which the assets are used or invested and to provide a description of the risks and benefits to the derivatives party that arises from the derivatives firm having access to use or invest derivatives party assets.

DIVISION 3 – REPORTING TO DERIVATIVES PARTIES

The obligations in this Division, other than subsection 28(1) [*Content and delivery of transaction information*], do not apply if a derivatives firm is dealing with or advising an eligible derivatives party that is not an individual or an eligible commercial hedger, or an eligible derivatives party that is an individual or an eligible commercial hedger that has waived these obligations.

Section 28 – Content and delivery of transaction information

Requirement to deliver a confirmation to all derivatives parties

The requirement to provide a written confirmation under subsection 28(1) can be satisfied by electronic confirmations (including SWIFT confirmations) as well as confirmations (or certain provisions within a confirmation) that are otherwise capable of being represented in computer code in accordance with standards developed by relevant industry associations from time to time.

Paragraph 28(1)(b) allows for a confirmation to be delivered to a derivatives adviser on behalf of a derivatives party, provided the derivative party has consented to this in writing. A client typically authorizes or gives consent to its derivatives adviser to receive the transaction confirmation on its behalf in an investment management agreement. In our view, this practice is consistent with the requirement in paragraph 28(1)(b). We do not intend to alter the market practice for a derivatives dealer to deliver the confirmation to the derivatives adviser as agent for the derivatives party and we do not expect a derivatives adviser to obtain an entirely new and separate written direction from a derivatives party.

Where a transaction is executed on a derivatives trading facility (or analogous regulated trading venue), we understand the trade confirmation will be provided by the derivatives trading facility (i.e., a U.S. Commodity Futures Trading Commission (**CFTC**) regulated swap execution facility that is regulated as an exempt exchange in Canada) pursuant to the terms in its rulebook to each of the counterparties to the transaction and therefore, we would not expect a derivatives firm in this scenario to provide a separate and additional trade confirmation to a derivatives party.

Additional requirements, where applicable, for confirmations delivered to non-eligible derivatives parties

Subsection 28(2) applies only to transactions with a non-eligible derivatives party. This subsection is intentionally flexible – it requires information to be disclosed only to the extent that information applies to the transaction in question. We are of the view that the written description of the derivative transacted required by paragraph 28(2)(a) for transactions would be fulfilled by providing a plain language description of the asset class of the derivative and the features of the derivative (e.g., fixed for floating interest rate swap with CDOR as the reference rate).

Section 29 – Derivatives party statements

We interpret "delivery" of a statement referred to in subsection 29(1) to include a statement that is made available to a derivatives party through the derivatives firm website or that is posted to a derivative's party's online account with the derivatives firm.

We are of the view that the description of the derivative transacted required by paragraphs 29(2)(b) and (3)(a) would be fulfilled by providing a plain language description of the asset class of the derivative and the features of the derivative (e.g., fixed for floating interest rate swap with CDOR as reference rate).

PART 5
COMPLIANCE AND RECORDKEEPING

DIVISION 1 – COMPLIANCE

The objective of this Division is to further a culture of compliance and personal accountability within a derivatives firm. Section 32 imposes certain obligations on a senior derivatives manager of a derivatives dealer, further discussed below, with respect to ensuring compliance by individuals performing activities relating to transacting in, or advising in relation to, derivatives within the area of the business the senior derivatives manager is responsible for, which is referred to in the Instrument and below as a "derivatives business unit".

Sections 31 and 33 set out certain obligations on the derivatives dealer regarding policies and procedures relating to compliance and responding to material non-compliance. We are of the view that a derivatives dealer should be afforded flexibility with respect to who fulfills these obligations of the derivatives dealer. The obligations on the derivatives dealer under these sections may be carried out by, for example, one or more senior derivatives managers designated by the derivatives dealer.

Section 31 also sets out certain obligations on the derivatives adviser regarding policies and procedures relating to compliance; however, the "senior derivatives manager" requirements in this Division (sections 32 and 33) are not applicable to derivatives advisers.

Section 30 – Definitions

Derivatives business unit

The definition of "derivatives business unit" is not intended to dictate that a derivatives dealer must organize its derivatives activity in any particular organizational structure. Depending on the size of the derivatives dealer, a derivatives business unit could relate to, for example, a class of derivatives, an asset class or sub-asset class, a business line or a division of the derivatives department of the derivatives dealer.

Senior derivatives manager

The definition of "senior derivatives manager" refers to the individual designated as primarily responsible for a particular derivatives business unit and who manages or has significant influence over its activity on a day-to-day basis. This definition is intended to lead to the designation of the individual responsible for

- the management or conduct of a derivatives business unit, including implementing, within the derivatives business unit, management of business priorities, risk management and operational efficiency and streamlining processes with respect to a class of derivatives, an asset class or sub-asset class, a business line or a division of the derivatives department, and

- operationalizing, within the derivatives business unit, policies and procedures relating to compliance established by the department that is responsible for compliance of the derivatives dealer.

In a large financial institution, a "senior derivatives manager" may refer to a business manager.

Section 31 – Policies and procedures

General principle

A strong culture of compliance, which focuses not only on compliance with applicable rules and regulations but also emphasizes the importance of personal integrity and the need to deal with a derivatives party fairly, honestly and in good faith, is the responsibility of each individual acting on behalf of a derivatives firm in its derivatives operations with respect to derivatives activity.

Establishing a compliance system

Toward that end, section 31 requires a derivatives firm to establish, maintain and apply policies and procedures and a system (i.e., a "**compliance system**") of controls and supervision sufficient to provide reasonable assurance that

- the derivatives firm and those acting for it, as applicable, comply with applicable securities legislation,
- the derivatives firm and each individual acting on its behalf manage derivatives-related risks prudently,
- individuals performing a derivatives-related activity on behalf of the firm, prior to commencing the activity and on an ongoing basis,
    - possess the experience, education and training that a reasonable person would consider necessary to perform these activities in a competent manner, and
    - conduct themselves with integrity.

We expect that the policies, procedures and controls referred to in section 31 include internal controls and monitoring that are reasonably likely to identify non-compliance at an early stage and would allow the derivatives firm to correct non-compliance in a timely manner.

We do not expect that the policies, procedures and controls referred to in section 31 be applicable to derivatives firm's activities other than its activities relating to transacting in, or advising in relation to, derivatives. For example, a derivatives dealer may also be a reporting issuer. The policies, procedures and controls established to monitor compliance with the Instrument would not necessarily reference matters related only to the derivatives firm's status as a reporting issuer. Nevertheless, a derivatives firm would not be precluded from establishing a single set of policies, procedures and controls (i.e., a firm-wide policy) related to the derivatives firm's compliance with all applicable securities legislation.

We expect a derivatives firm, from time to time, to review, assess and update its policies, procedures and controls to adapt to or reflect changes in applicable securities legislation, as well as industry practices/norms (including, the adoption of voluntary codes of conduct).

We interpret "risks relating to its derivatives activities" in paragraph 31(1)(b) to include the risks inherent in derivatives trading (including credit risk, counterparty risk, and market risk) that relate to a derivatives firm's overall financial viability.

Paragraph 31(c) – Policies and procedures relating to individuals

Paragraph 31(c) establishes a reasonable person standard with respect to proficiency, rather than prescribing specific courses or other training requirements. However, we note that a derivatives firm and an individual transacting in, or providing advice in relation to, a derivative on behalf of the derivatives firm may be subject to

more specific education, training and experience requirements, including under other securities legislation, if applicable.

Subparagraph 31(c)(i) contemplates that industry experience can be a substitute for formal education and training. We are of the view that this is particularly relevant in respect of formal education and training prior to commencing an activity on behalf of the derivatives firm relating to transacting in, or providing advice in relation to, a derivative. However, we expect that all individuals who perform such activity receive appropriate training on an ongoing basis. We expect training program to include compliance training, periodic training sessions on fundamentals and other relevant developments to the derivatives market, as well as training on new derivatives products and services.

Subparagraph 31(c)(iii) relates to integrity of the individuals who perform an activity on behalf of the derivatives firm relating to transacting in, or providing advice in relation to, a derivative. We expect individuals performing such activities to conduct themselves with integrity, which includes honesty and good faith, particularly in dealing with clients.

Prior to employing an individual in a derivatives business unit, we expect that a derivatives firm will assess the integrity of the individual by having regard to the following:

- references provided by previous employers, including any relevant complaint of fraud or misconduct against the individual;

- if the individual has been subject to any disciplinary action by its previous employer or to any adverse finding or settlement in civil proceedings;

- whether the individual has been refused the right to carry on a trade, business or profession requiring a licence, registration or other professional designation;

- in light of the individual's responsibility, whether the individual's reputation may have an adverse impact on the firm for which the activity is to be performed.

On an ongoing basis, a firm-wide code of conduct/ethics policies can be relied on as part of satisfying the obligation under subparagraph 31(c)(iii). We also expect derivatives firms to require the employees in its derivatives business unit to read the code of conduct and for each employee to provide some form of an acknowledgement (typically updated annually) to the derivatives firm that they are complying with such code of conduct.

Section 32 – Designation and responsibilities of a senior derivatives manager

Paragraph 32(1)(a) imposes an obligation on a derivative dealer to designate a senior derivatives manager in respect of a derivatives business unit (unless the derivatives dealer is exempt from this obligation under section 44 [*Exemptions from certain requirements in this Instrument for certain notional amounts of commodity derivatives and other derivatives activity*].

Depending on its size, level of derivatives activity and organizational structure, a derivatives dealer may have a number of different derivatives business units and therefore, it would be appropriate to designate a senior derivatives manager for each business unit. For example, a large dealer with multiple trading desks covering different products may have a number of different senior managers. The specific title or job description of the individual designated as "senior derivatives manager" for a derivatives business unit could vary between derivatives dealers, depending once again on their size, level of derivatives activity and organizational structures. In general, we would not expect that the same individual would be designated as the senior derivatives manager for more than one derivatives business unit.

Except in a small derivatives dealer operating a single derivatives business unit, a senior derivatives manager should not be the same individual as the chief executive officer of the derivatives dealer, or another individual registered under securities legislation.

It is the responsibility of the derivatives dealer to identify within the organizational structure of their business the individual that should be designated as the senior derivatives manager of a derivatives business unit.

Following implementation of the Instrument, we expect to monitor the process derivatives dealers use to identify the individual or individuals that are designated as senior derivatives managers.

Paragraph 32(2)(b) – Responsibilities of a senior derivatives manager

Under paragraph 32(2)(b), an appropriate response to non-compliance is a contextual determination, depending on the harm or potential harm, of the non-compliance. We are of the view that an appropriate response could include one or more of the following, depending on the circumstances:

- rectifying the non-compliance;

- disciplining one or more individuals who perform an activity on behalf of the derivatives firm relating to transacting in, or providing advice in relation to, a derivative;

- working with a chief compliance officer or other person responsible for the policies, to improve (or recommending improvements to) processes, policies and procedures aimed at ensuring compliance with the Instrument, applicable securities legislation and the policies and procedures required under section 31 [*Policies and procedures*].

An appropriate response could include directing a subordinate to respond to the non-compliance.

A senior derivatives manager's responsibilities under this Division apply to the senior derivatives manager even in situations where that individual has delegated his or her responsibilities.

Subsection 32(3) – Senior derivatives manager's report to the board

Whether non-compliance with the Instrument or applicable securities legislation is "material" will depend on the specific circumstances. For example, material non-compliance with respect to a small, unsophisticated derivatives party may differ from the material non-compliance with respect to a large, more sophisticated derivatives party. Further, if the non-compliance is part of a continual pattern or practice of activities constituting non-compliance within the derivatives business unit or by an individual employee within the derivatives business unit, even if a single incident of non-compliance would not be material, the pattern of non-compliance itself may be "material". Any single incident of fraud, price fixing, manipulation of benchmark rates, or front-running of trades would be considered material.

We expect that in complying with the requirement to submit a report under paragraph 32(3)(b) to the board of directors, that reasonable care will be exercised in determining when and how often material non-compliance should be reported to the board. For example, in a case of serious misconduct, we expect the board to be made aware promptly of the misconduct. In the ordinary course, it may otherwise be appropriate to consolidate the senior derivatives manager's report into an annual report; however, the senior derivatives manager should be involved in preparing the report on behalf of the derivatives business unit, even in the circumstances where the senior derivatives manager's obligation to submit the report to the board of directors is being fulfilled by the derivatives dealer's chief compliance officer.

Section 33 – Responsibility of a derivatives dealer to report to the regulator or securities regulatory authority

The requirement on a derivatives dealer to make a report to the regulator under section 33 will depend on whether the particular non-compliance would reasonably be considered by the derivatives dealer to be non-compliance with the Instrument or applicable securities legislation and create a risk of material harm to a derivatives party or to capital markets, or otherwise reflect a significant pattern of non-compliance.

The derivatives dealer should establish a standard for determining when there is a risk of material harm to a derivatives party of the firm or to the capital markets. Whether the harm is "material" is dependent on the specific circumstances. Material harm to a small, unsophisticated derivatives party may differ from the material harm to a large, more sophisticated derivatives party.

We expect that the report to the regulator could be provided by any one of the following individuals:

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

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

(c) if the derivatives dealer has other significant business activities, the officer in charge of the division of the derivatives firm that acts as a derivatives dealer; or

(d) the chief compliance officer of the derivatives dealer.

See Appendix A of this Policy for the suggested form that a derivatives dealer may use to report the type of non-compliance contemplated in section 33 to the regulator.

This section does not apply to derivatives advisers.

DIVISION 2 – RECORDKEEPING

Section 34 – Derivatives party agreement

The Instrument does not prescribe a form of agreement. Appropriate subject matter for the derivatives party agreement typically includes terms addressing payment obligations, netting of payments, events of default or other termination events, calculation and netting of obligations upon termination, transfer of rights and obligations, governing law, valuation, and dispute resolution. In determining whether the requirements of section 34 are met, we would generally take into consideration harmonized disclosure, reporting and other documentary practices that may be developed from time to time by global trade associations in standard form industry documentation based on requirements applicable in the major global markets.

The process of reaching an agreement with a new counterparty may involve setting out the essential terms before the transaction, followed by more general terms (such as events of default) in the trade confirmation, prior to executing a master agreement. We would accept in some circumstances that this process could satisfy the obligations in section 34. We expect that the agreement would also cover other areas as appropriate in the context of the transactions into which the parties will enter. For example, where transactions will be subject to margin, we expect the agreement to include terms that cover margin requirements, assets that are acceptable as collateral, collateral valuation methods, investment and rehypothecation of collateral, and custodial arrangements for initial margin, if applicable.

We understand that it is not market practice by Canadian market participants for certain types of foreign exchange transactions to be documented in standard form industry documentation. Rather, firms will typically rely on a trade

confirmation (including a SWIFT confirmation) to evidence the agreement between the parties. In this circumstance, we would generally accept that the requirements in section 34 can also be satisfied through a trade confirmation (including a SWIFT confirmation) required to be delivered under subsection 28(1), which may not include all the terms that are otherwise typically included in standard form industry documentation.

Section 35 – Records

Section 35 imposes a general obligation on a derivatives firm to keep full and complete records relating to the derivatives firm's derivatives, transactions in derivatives, and all of its business activities relating to derivatives, trading in derivatives or advising in derivatives. These records must be kept in a form that is readily accessible and searchable. This list of records is not intended to be exhaustive but rather sets out the minimum records that must be kept. We expect a derivatives firm to consider the nature of its derivatives-related activity when determining the records that it must keep and the form of those records.

The principle underlying section 35 is that a derivatives firm should document, through its records,

- compliance with all applicable securities legislation (including the Instrument) for its derivatives-related activities,
- the details and evidence of each derivative which it has been a party or in respect of which it has been an agent,
- the circumstances surrounding the entry into and termination of those derivatives, and
- related post-transaction matters.

We expect, for example, a derivatives firm to be able to demonstrate, for each derivatives party, the details of compliance with the obligations in section 11 [*Know your derivatives party*] and, if applicable, the obligations in section 14 [*Derivatives-party-specific needs and objectives*] and section 15 [*Suitability*] (and if sections 14 and 15 are not applicable, the reason as to why they are not).

If a derivatives firm wishes to rely on any exemption or exclusion in the Instrument or other related securities legislation, it should be able to demonstrate that the conditions of the exemption or exclusion are met.

With respect to records required under paragraph 35(b), demonstrating the existence and nature of the derivatives firm's derivatives, and records required under paragraph 35(a) documenting the transactions relating to the derivatives, we expect

- a derivatives firm to accurately and fully document every transaction it enters into, and
- to keep records to the extent that they demonstrate the existence and nature of the derivative (this includes documentation capable of being represented in computer code, if the records meet the requirements in the Instrument).

We also expect a derivatives firm to maintain notes of communications that could have an impact on a derivatives party's account or its relationship with the derivatives firm. These records of communications kept by a derivatives firm may include notes of oral and written communications, including all communications by e-mail, regular mail, fax, instant messaging, chat rooms, mobile device, or other digital or electronic media performed across a technology platform.

While a derivatives firm may not need to save every voicemail or e-mail, or record all telephone conversations with every derivatives party, we expect a derivatives firm to maintain reasonable records of all communications with a

derivatives party relating to derivatives transacted with, for or on behalf of the derivatives party. What is "reasonable" for larger derivatives firms may be different from what is "reasonable" for a smaller derivatives firm.

Section 36 – Form, accessibility and retention of records

Derivatives firms are required to keep their records in a safe location. This includes ensuring that no one has unauthorized access to information, particularly confidential derivatives party and counterparty information. We expect a derivatives firm to be particularly vigilant if it maintains books and records in a location that may be accessible by a third party. In this case, we expect the derivatives firm to have a confidentiality agreement with the third party.

The Instrument requires records to be kept for 7 years (or 8 years in Manitoba) from the date such record is created. For greater certainty, this principle does not override the record retention requirements found in other CSA derivatives instruments that applicable firms are subject to, such as derivatives trade reporting rules.

PART 6
EXEMPTIONS

The Instrument provides several exemptions from the requirements in the Instrument. If a firm is exempt from a requirement in the Instrument, the individuals acting on its behalf are likewise exempt.

DIVISION 1 – EXEMPTION FROM THE INSTRUMENT

Section 37 – Exemption for foreign liquidity providers – transactions with derivatives dealers

General principle

This exemption allows foreign liquidity providers (i.e., foreign derivatives dealers) to transact with derivatives dealers that are located in Canada without being subject to the conduct requirements in the Instrument in order to facilitate access and liquidity in the inter-dealer market.

Availability of the exemption

There are no notice or filing requirements (or any additional conditions) imposed on foreign derivatives dealers relying on this exemption when they transact with local derivatives dealers. Foreign dealers that seek wider access to Canadian derivatives markets on an exempt basis would need to rely on the foreign derivatives dealer exemption in section 39 [*Exemption for foreign derivatives dealers*].

A derivatives dealer that is a Schedule I or Schedule II bank under the *Bank Act* (Canada) is not permitted to rely on this exemption; however, we intend for this exemption to be available to derivatives dealers that are Schedule III banks (foreign bank branches of foreign derivatives dealers authorized under the Bank Act to do business in Canada), since the exemption is intended to be available to a foreign bank (i.e., the foreign legal entity that is counterparty to a transaction with a local derivatives dealer).

For example, a derivatives dealer located in the U.S., regardless of whether it is a registered swaps dealer or otherwise operates under an exemption from having to be registered (because they fall below certain financial thresholds that would require them to register as a U.S. swaps dealer), is exempt from the conduct requirements in the Instrument when transacting with a Canadian financial institution that is a derivatives dealer. Similarly, the conduct requirements in the Instrument would not apply to a derivatives dealer solely in commodities that is located in the U.S., regardless of whether it is a registered swaps dealer or otherwise operates under an exemption from having to be registered (because they fall below certain financial thresholds that would require them to register as a U.S. swaps dealer), when they are transacting with a person or company referenced in paragraph 37(a).

For the purposes of this exemption, we consider "securities, commodity futures or derivatives legislation in a foreign jurisdiction" to include banking legislation of a foreign jurisdiction.

Section 38 – Exemption for certain derivatives end-users

Section 38 provides an exemption from the provisions of the Instrument for a person or company that (i) does not engage in the activities described in section 38 and (ii) does not have the status described in paragraph 38(2)(a) or 38(2)(b).

For example, a person or company that frequently and regularly transacts in derivatives to hedge business risk but that does not undertake any of the activities referred to in paragraphs 38(1)(a) to (e) may qualify for this exemption. It is also possible for a person or company to frequently engage in derivatives transactions for speculative purposes (i.e., for the purpose of gaining market returns) and qualify for the end-user exemption. Typically, in these cases, such a person or company would transact with a derivatives dealer who itself may be subject to some or all of the requirements of the Instrument.

Section 39 – Exemption for foreign derivatives dealers

General principle

Section 39 provides an exemption from the provisions of the Instrument for foreign derivatives dealers that are regulated under the laws of a foreign jurisdiction to conduct the activities it proposes to conduct with an eligible derivatives party in Canada that achieve comparable regulatory outcomes to the requirements in the Instrument.

Availability of the exemption

The exemption is available to foreign derivatives dealers whose head office or principal place of business is in a jurisdiction listed in Appendix A if the transaction is with persons or companies that are eligible derivatives parties and the foreign derivatives dealer otherwise satisfies the conditions in that section for relying on the exemption.

With respect to foreign derivatives dealers that are foreign banks whose home jurisdiction is listed on Appendix A and that operate a foreign bank branch in Canada (i.e., a Schedule III bank under the *Bank Act* (Canada)), this exemption will extend to its Canadian branches.

This exemption is only available where a foreign derivatives dealer complies with the laws of the foreign jurisdiction specified in Appendix A that are applicable to the dealer with respect to its derivatives activities with a derivatives party located in Canada. If a foreign derivatives dealer is not subject to laws in its 'home' jurisdiction with respect to its derivatives activities, including where it relies on an exclusion or an exemption (including discretionary relief) from those regulations in the foreign jurisdiction, the exemption in section 39 will not be available. If the foreign derivatives dealer relies on an exclusion or exemption in the foreign jurisdiction (or there is otherwise no regulatory regime that applies to its derivatives activities with a derivatives party) and is unable to rely on another exemption in the Instrument, it would need to apply to the relevant securities regulatory authorities for consideration of similar exemptive or discretionary relief to exempt the foreign derivatives dealer from the requirements of the Instrument.

For example, if a foreign derivatives dealer is licensed or registered in a foreign jurisdiction (e.g., is a CFTC registered swaps dealer), then we would expect that derivatives dealer to make use of this exemption for its derivatives activity with its counterparties that qualify as eligible derivatives parties and are located in a jurisdiction of Canada, unless the foreign derivatives dealer is relying on the exemption in section 37 [*Exemption for foreign liquidity providers – transactions with derivatives dealers*]), which is an outright exemption for transactions that take place with a local Canadian derivatives dealer. For greater certainty, because the U.S. is listed as a jurisdiction in Appendix A, then the expectation is that this exemption functions as an entity-level exemption – that is, the foreign derivatives dealer is

not expected to compare the rules of its home jurisdiction to the obligations found in the Instrument in order to rely on this exemption.

If, however, a foreign derivatives dealer is not registered, licensed or otherwise authorized in respect of its derivatives activity in its home jurisdiction, even if its home jurisdiction is listed in Appendix A, it will not be able to rely on the exemption provided in section 39 of the Instrument. Instead, the foreign derivatives dealer will have to rely on the other exemptions available to foreign derivatives dealers in the Instrument, if applicable, such as the exemption provided in section 37 of the Instrument for foreign liquidity providers or the exemption provided in section 44 of the Instrument for certain notional levels of derivatives activity. If the foreign derivatives dealer is unable to satisfy the requirements in the other available exemptions, then foreign derivatives dealer will have to either comply with the full requirements of the Instrument or apply to the relevant securities regulatory authorities for consideration of exemptive or discretionary relief.

Appendix A may be updated from time to time to include additional foreign jurisdictions once CSA Staff have had a chance to consider the regulatory regimes in these additional foreign jurisdictions. Industry associations, market participants, or foreign regulators with an interest in a particular jurisdiction that is not listed may make applications for exemptive relief or otherwise make submissions to CSA Staff in support of comparability assessments for jurisdictions that are not found in Appendix A for the purposes of future amendments to the Instrument.

Additional conditions

This exemption in section 39 is available if the foreign derivative dealer is dealing only with persons or companies that are eligible derivatives parties. The foreign derivatives dealer must comply with the conditions set out in subsection 39(2).

Foreign derivatives dealers are only expected to file one submission to jurisdiction form to the regulator. In other words, if a foreign derivative dealer files a Form 93-101F1 *Submission to Jurisdiction and Appointment of Agent for Service* with the regulator, this satisfies the filling requirement.

DIVISION 2 – EXEMPTIONS FROM SPECIFIC PROVISIONS IN THE INSTRUMENT

Section 41 – Investment dealers

Section 41 of the Instrument includes an exemption from certain provisions in the Instrument that are listed in Appendix B for a derivatives dealer that is a dealer member of CIRO provided the derivatives dealer complies with the corresponding CIRO rules relating to a transaction with a derivatives party. We regard compliance with applicable CIRO procedures, interpretations, notices, bulletins and practices as relevant to compliance with the applicable CIRO rules.

A derivatives dealer cannot rely on this exemption unless (i) they are complying with the CIRO requirements that correspond to the provisions specified in Appendix B and (ii) notify the regulator of material non-compliance with the CIRO requirements that correspond to the provisions specified in Appendix B.

Section 42 – Canadian financial institutions

Section 42 of the Instrument includes an exemption from certain provisions in the Instrument that are listed in Appendix C for a derivatives dealer that is a Canadian financial institution that is prudentially regulated by OSFI provided the derivative dealer complies with the corresponding OSFI requirements or *Bank Act* (Canada) provisions relating to a transaction with a derivatives party. We regard compliance with applicable Bank Act, OSFI guidelines, rules, regulations, interpretations, advisory and practices of OSFI as relevant to compliance with the applicable OSFI requirements.

A derivatives dealer cannot rely on this exemption unless (i) they are complying with the OSFI requirements or Bank Act requirements that correspond to the provisions specified in Appendix C and (ii) notify the regulator of material non-compliance with the OSFI requirements or Bank Act requirement that correspond to the provisions specified in Appendix C.

Section 43 – Derivatives transacted on a derivatives trading facility where the identity of the derivatives party is unknown

Where a derivatives dealer enters into a transaction with a derivatives party on a derivatives trading facility or an analogous regulated platform or trading venue (i.e., a trading facility referred to and regulated as a swap execution facility under CFTC rules or a multilateral trading facility under E.U. rules and regulated in Canada as an exempt exchange), in certain limited circumstances, it may not be possible for the derivatives dealer to establish the identity of the derivatives party prior to entering into the transaction because of rules or regulations that prohibit such regulated marketplace from disclosing the identity of a counterparty prior to entering into the derivative. This exemption is intended to address this practical limitation that results from those regulations - it is not intended to have broad use by any derivatives dealer outside this narrow context. We understand that such a trading facility would perform know-your-derivatives party diligence prior to accepting a derivatives party for trading on the platform, as well as provide trade confirmation to each counterparty to a transaction; accordingly, this section of the Instrument includes an exemption for the derivatives dealer in these circumstances, as well as other pre-transaction level requirements that cannot be fulfilled due to the fact that the identity of the derivatives party is unknown at the time the transaction is executed.

The types of rules that give rise to the context necessitating this exemption (e.g., the CFTC swap execution facility rules) do not permit non-eligible derivatives parties to transact on a derivatives trading facility. This exemption is not intended to be available if the transaction involves a non-eligible derivatives party.

Section 44 – Exemptions from certain requirements in this Instrument for certain notional amounts of certain commodity derivatives and other derivatives activity

Section 44 provides for exemptions (the **notional amount exemptions**) from the requirements in this Instrument, other than section 9 [*Fair dealing*], section 10 [*Conflicts of Interest*] and section 28 [*Content and delivery of transaction information*] if its aggregate notional amount of derivatives activity falls below certain financial thresholds. To rely on the notional amount exemptions, a derivatives dealer must either,

- have an aggregate month-end gross notional amount of derivatives outstanding in any of the previous 24 months that does not exceed CAD$250 million (subsection 44(1)) (the **general notional amount exemption**); or

- for derivatives dealers that deal solely in commodity derivatives, have an aggregate month-end gross notional amount of commodity derivatives outstanding in any of the previous 24 months that does not exceed CAD$10 billion (subsection 44(2)) (the **commodity derivatives dealer notional amount exemption**).

The calculation of the notional amount exemption threshold

For a local derivatives dealer, the "notional amount" referred to in subparagraphs 44(1)(c)(i) (i.e., the general notional amount exemption for local derivatives dealers) and 44(2)(d)(i) (i.e., the notional amount exemption for local physical commodity derivatives dealers) should be calculated by:

- determining the notional amount of all its transactions, minus inter-affiliate transactions; and

- adding the notional amount of all transactions of its affiliates that are a Canadian local counterparty, minus their inter-affiliate transactions.

For a foreign derivatives dealer, the "notional amount" in subparagraphs 44(1)(c)(ii) (i.e., the general notional amount exemption for foreign derivatives dealers) and 44(2)(d)(ii) (i.e., the commodity derivatives dealer notional amount exemption for foreign physical commodity derivatives dealers) should be calculated by:

- determining the notional amount of all its transactions with local counterparties, minus inter-affiliate transactions; and

- adding the notional amount of all transactions of its affiliates that are a local counterparty, minus their inter-affiliate transactions.

For greater certainty, local and foreign derivatives dealers exclude from their calculations all transactions of a foreign affiliate (provided the foreign affiliate is not a local counterparty, such as a guaranteed affiliate), regardless of who that affiliate is transacting with.

While in most cases, the notional amount for a particular derivative will be the monetary amount specified in the derivative, in some cases, the derivative may reference a non-monetary amount, such as a notional quantity (or volume) of an underlying asset. In these latter cases, calculating the monetary notional amount outstanding will require converting the notional quantity of the underlying asset into a monetary value. We expect the method that derivatives dealers use for determining how the monetary notional amount should be calculated is taken from the methodology specified in the Technical Guidance - *Harmonisation of critical OTC derivatives data elements (other than UTI and UPI)* published in April of 2018 by the Committee on Payments and Market Infrastructures and the Board of the International Organization of Securities Commissions. It is commonly referred to as the CDE methodology.

The local counterparty nexus

The purpose of including the reference to "local counterparty" in this section of the Instrument is to clarify the scope of the derivatives activity that is included for the purposes of calculating the notional amount exemption thresholds.

While the "local counterparty" concept is based on the harmonized definition of "local counterparty" under National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives*, as a practical matter, the term "local counterparty" as it is used in this section of the Instrument is essentially aligned with the "local counterparty" concept in the trade reporting rules (we note that the CSA's respective derivatives trade reporting rule contains a definition of "local counterparty" for the purposes of those rules; however, the definition in the trade reporting rules is not harmonized across jurisdictions).

Accordingly, the calculation of the "notional amount" is intended to capture transactions involving local counterparties under the trade reporting rules to be consistent with the derivatives data reported to a designated or recognized trade repository and collected by the CSA. Therefore, derivatives dealers that are reporting counterparties under the trade reporting rules can rely on the information they use to report transactions under those rules, for the purpose of calculating whether they are able to rely on a notional amount exemption. Similarly, we also expect that inter-affiliate transactions that are excluded from the calculation would generally be consistent with transactions that are reported as inter-affiliate transactions under the trade reporting rules.

Use of this exemption by certain foreign dealers

We expect most foreign derivatives dealers to rely on the exemptions in section 37 [*Exemption for foreign liquidity providers – transactions with derivatives dealers*] and section 39 [*Exemption for foreign derivatives dealers*] of the Instrument in respect of their derivatives business in Canada in lieu of relying on the notional amount exemptions.

However, there are certain circumstances where it may not be possible for a foreign dealer to rely on such exemptions. For example:

- if a U.S. derivatives dealer dealing solely in commodity derivatives is transacting with non-dealers in Canada that qualify as eligible derivatives parties, and the U.S. derivatives dealer is not registered with the CFTC, then the derivatives dealer is not able to rely on the exemption under section 39 [*Exemption for foreign derivatives dealers*]. Accordingly, it could potentially rely on a notional amount exemption (i.e., the commodity derivatives dealer notional amount exemption) provided the conditions for relying on the exemption are met.

The only requirements a derivatives dealer that relies on a notional amount exemption is subject to when they transact with eligible derivatives parties, are the following:

- section 9 [*Fair dealing*];
- section 10 [*Conflicts of Interest*]; and
- section 28 [*Content and delivery of transaction information*].

There are no other notice, filing or additional obligations imposed on derivatives dealers relying on a notional amount exemption.

Exemption not available to affiliates of derivatives dealers

As set out in paragraph 44(2)(c), the commodity derivatives dealer notional amount exemption is not an exemption that is available for a commodity derivatives dealer that is an affiliate of a derivatives dealer that is not itself solely a commodity derivatives dealer (e.g., is an affiliate of a bank). Rather, the commodity derivatives dealer notional amount exemption is intended to be exclusively available to derivatives dealers in commodities markets whose derivatives activity is ancillary to its physical commodities business.

The CSA will monitor the use and application of the notional amount exemptions, both generally and in commodity derivatives markets.

DIVISION 3 – EXEMPTIONS FOR DERIVATIVES ADVISERS

Section 45 – Advising generally

Section 45 contains an exemption from the requirements applicable to a derivatives adviser if advice does not purport to be tailored to the needs of the recipient.

In general, we would not consider advice to be tailored to the needs of the recipient if it

- is a general discussion of the merits and risks of a derivative or class of derivatives,

- is delivered through newsletters, articles in general circulation newspapers or magazines, websites, e-mail, internet chat rooms, bulletin boards, television or radio, and

- does not claim to be tailored to the needs and circumstances of any recipient.

This type of general advice can also be given at conferences. However, if a purpose of the conference is to solicit the audience and generate specific transactions in specific derivatives or class of derivatives, we may consider the advice to be tailored or we may consider the individual or firm giving the advice to be engaged in trading activity.

Under subsection 45(3), if an individual or a firm relying on the exemption has a financial or other interest in the derivative or class of derivatives it recommends, or in an underlying interest of the derivative, it must disclose the interest to the recipient when it makes the recommendation.

Section 46 – Foreign derivatives advisers

General principle

Section 46 provides, in respect of advice provided to a derivatives party, an exemption from the provisions in the Instrument for foreign derivatives advisers that are regulated under the laws of a foreign jurisdiction to conduct the activities it proposes to conduct with an eligible derivatives party in Canada that achieve comparable regulatory outcomes to the requirements in the Instrument.

There is a separate exemption in section 48 [*Registered advisers under securities or commodities futures legislation*] for derivatives advisers that are registered as an adviser under securities or commodity futures legislation.

Availability of the exemption

The exemption is available to foreign derivatives advisers whose head office or principal place of business is in a jurisdiction listed in Appendix D in respect of derivatives-related advice given to persons or companies that are eligible derivatives parties. Appendix D may be updated from time to time to include additional foreign jurisdictions once CSA Staff have had a chance to consider the regulatory regimes in these additional foreign jurisdictions. Industry associations, market participants, or foreign regulators with an interest in a particular jurisdiction that is not listed may make applications for exemptive relief or otherwise make submissions to CSA Staff in support of comparability assessments for jurisdictions that are not found in Appendix D for the purposes of future amendments to the Instrument.

This exemption is only available where a foreign derivatives adviser complies with the laws of the foreign jurisdiction specified in Appendix D that are applicable to the adviser with respect to its derivatives activities with a derivatives party located in Canada. If a foreign derivatives adviser is not subject to regulations in its 'home' jurisdiction with respect to its derivatives activities, including where it relies on an exclusion or an exemption (including discretionary relief) from those regulations in the foreign jurisdiction, the exemption in section 46 will not be available. If the foreign derivatives adviser relies on an exclusion or exemption in the foreign jurisdiction, it would need to apply to the relevant securities regulatory authorities for consideration of similar exemptive or discretionary relief from the Instrument.

Additional conditions

The foreign derivatives adviser must comply with each of the conditions set out in subsection 46(2). The disclosures provided in paragraph 46(2)(b) can be made by a derivatives adviser in account opening documentation.

Section 47 – Foreign derivatives sub-advisers

The exemption is available to foreign derivatives sub-advisers whose head office or principal place of business is in a jurisdiction listed in Appendix E.

This exemption permits a foreign derivatives sub-adviser to provide advice to certain derivatives advisers (and derivatives dealers), without having to register as an adviser in Canada. In these arrangements, the derivatives adviser or derivatives dealer is the foreign derivatives sub-adviser's client, and it receives the advice, either for its own benefit or for the benefit of its clients. One of the conditions of this exemption is that the derivatives adviser or derivatives dealer has entered into an agreement with its client that it is responsible for losses that arise out of certain failures by the sub-adviser. We expect that a derivatives firm taking on this liability will conduct appropriate

initial and ongoing due diligence on the sub-adviser and ensure the investments are suitable for their client. We also expect that the derivatives firm will maintain records of the due diligence conducted.

Section 48 – Registered advisers under securities or commodity futures legislation

Registered advisers under securities or commodities futures legislation are exempt from the provisions listed in Appendix F of the Instrument. This exemption is available to registered advisers provided they comply with the corresponding requirements in NI 31-103 in respect of their derivatives activity.

This exemption is intended to allow registered advisers to extend their existing compliance systems to cover their derivatives activities with their clients for requirements related to for example, among other things, the suitability requirement and referral arrangements (section 15 [*Suitability*] and section 16 [*Permitted referral arrangements*]). The remaining provisions that apply to registered advisers in respect of their derivatives activity are principles based and therefore, we similarly expect for their existing compliance systems to accommodate the application of the core principles such as the fair dealing obligations.

See Appendix B of this Policy for an overview of the parts, divisions and sections in MI 93-101 that still apply to registered advisers relying on this exemption, as well as a summary of the parts, divisions and sections in the Instrument that do not apply to registered advisers that comply with the corresponding requirements in NI 31-103 in respect of their derivatives activity. Appendix B of this Policy also lists the provisions under NI 31-103 that are generally applicable in respect of a registered adviser's derivatives activity if such registered adviser is relying on this section 48 exemption.

With respect to risk disclosure found in section 14.2 [*Relationship disclosure information*] of NI 31-103, we expect registered advisers to review their risk disclosure statement to be certain that it adequately discloses the risks associated with derivatives. For example, registered advisers can consider whether a statement similar to the statement in paragraph 20(1)(c) [*Pre-transaction disclosure*] of the Instrument is appropriate given the use of derivatives by that registered adviser in relation to its client's account or client's portfolio.

PART 8
TRANSITION AND EFFECTIVE DATE

Section 50 – Transition representations for existing derivatives parties

Under the Instrument, a derivatives firm may qualify for specific exemptions where each of its derivatives parties is an eligible derivatives party. The transition provision is intended to provide derivatives firms with a substantial period of time, following the effective date of the Instrument, to re-paper a derivatives party as an "eligible derivatives party" as defined in the Instrument in their respective contracts and relationship documentation. Accordingly, in circumstances where the derivatives firm has received any one of the representations contemplated in this section prior to the date the Instrument takes effect in the applicable local jurisdiction, such as

- permitted client,
- non-individual accredited investor (in Ontario),
- accredited counterparty (in Québec),
- a qualified party (in a number of jurisdictions),
- an eligible contract participant (in the United States),
- a financial counterparty (in the European Union and the United Kingdom) or a non-financial counterparty above certain clearing thresholds (in the European Union and the United Kingdom, which is generally referred to by the acronym **NFC+**),

the derivatives firm can treat obtaining such representation as having obtained the required eligible derivatives party representation for purposes of the transition period (the **Transition Representations**). For greater certainty,

for the purposes of the Transition Representations, the concept of financial counterparty and the concept of non-financial counterparty above certain clearing thresholds (i.e., NFC+) is also intended to include counterparties that are located in the United Kingdom that qualify as a financial counterparty, or as an NFC+ counterparty, as a result of United Kingdom legislation that onshores the *European Market Infrastructure Regulation*.

The transition period begins on the date the Instrument comes into force (the **Effective Date**) and expires 5 years thereafter.

If prior to the Effective Date, a derivatives firm has already obtained a Transition Representation from a derivatives party, including in documentation such as an ISDA agreement, account opening documentation, or an investment management agreement, the derivatives firm may treat the derivatives party as an eligible derivatives party for the purposes of the Instrument until the transition period expires. For example, if a derivatives firm enters into a derivatives transaction with a sophisticated derivatives party (such as a pension fund) following the Effective Date and the derivatives firm has already confirmed the derivatives party's status under an applicable Transition Representation in any of its documentation, the derivatives firm is able to treat the derivatives party as having represented to the derivatives firm in writing that the derivatives party is an eligible derivatives party for the purposes of the transition period.

For greater certainty, a deemed repetition of a Transition Representation with respect to a transaction entered into after the Effective Date still allows a derivatives firm to benefit from the transition provision under section 50 even if on a technical interpretation, such representation is made after the Effective Date.

After the Effective Date, if a derivatives firm is not able to rely on a Transition Representations in respect of a derivatives party, then the expectation is that a derivatives firm will confirm the derivatives party's status on the basis of the "eligible derivatives party" definition found in subsection 1(1) of the Instrument [*Definitions and interpretation*]. Practically, this means that unless the derivatives firm can rely on a Transition Representation, the derivatives firm has one year between when the Instrument is published in its final form and the Effective Date to obtain the necessary status representations from its counterparty or client in order to comply with the Instrument.

We understand that because of the registration exemption in subsection 35.1 (1) of the *Securities Act* (Ontario), certain Canadian banks may not have obtained "permitted client" status representations from their institutional counterparties; however, they may have obtained an "accredited investor" representation for the population of counterparties that would have otherwise qualified as "permitted clients" in relation to their over-the-counter derivatives activity. Accordingly, solely for the purposes of the transition period, the non-individual "accredited investor" status representation has been included as a Transition Representation since this population of counterparties would otherwise each qualify as a "permitted client" and "permitted client" is one of the Transition Representations.

The definitions of "permitted client" and "accredited investor" do not include an "eligible commercial hedger" concept. In any circumstance where a derivatives party is relying on the "eligible commercial hedger" category to qualify as an eligible derivatives party and is not able to rely on any of the Transition Representations in the local jurisdiction (e.g., "qualified party" or an "accredited counterparty" representation), the derivatives firm is required to confirm a derivatives party's status as an eligible derivatives party according to subsection 1(1) of the Instrument.

CSA Staff strongly encourage derivatives firms to update their internal compliance programs in anticipation of the Effective Date and as soon as practicable to begin the process of updating their documentation, as well as establishing a plan to conduct the necessary outreach to ensure the appropriate representations have been updated following the expiry of the transition period.

Section 51 – Transition for existing transactions that remain in place in accordance with their original terms

The fair dealing obligation (section 9 [*Fair dealing*]) applies to transactions executed prior to the Effective Date that remain in place in accordance with their original terms after the Effective Date (e.g., no material amendment or

modification which would result in a significant change in the value of a derivative, differing cash flows, change to the method of settlement or creation of upfront payments). Derivatives are not point-in-time specific transactions. There are ongoing relationships and obligations between the parties following implementation of the Instrument.

With respect to pre-existing transactions with non-eligible derivatives parties (i.e., retail clients), following the Effective Date, all applicable provisions in the Instrument apply to the extent that it is reasonably practicable. We note that for the population of firms that are registered with CIRO and offer over-the-counter derivatives to retail clients, they are already subject to business conduct obligations under CIRO's regulatory regime. The Instrument will now overlay those obligations and we expect those firms will be relying on the exemption available to CIRO registered firms for complying with the relevant CIRO provisions.

Section 52 - Transition for obtaining waivers for certain individuals and eligible commercial hedgers

Paragraph 8(2)(a) of the Instrument means that the additional protections in the Instrument are presumed to apply to eligible derivatives parties that are individuals or eligible commercial hedgers, unless they waive some or all of the additional protections in the Instrument. For the purposes of transitioning to the new regulatory framework, CSA Staff expect that it may take some time for a derivatives firm to obtain the necessary waivers from the population of clients that this provision may otherwise apply to. Accordingly, derivatives firms are given a period of one year following the Effective Date to obtain the waiver. During this period, the core obligations in the Instrument still apply. This transition period is intended to assist derivatives firms in circumstances where their client is an individual (and the waiver is still required to be obtained due to the application of paragraph 8(2)(a)), or where a client can only qualify as an eligible derivatives party on the basis of the eligible commercial hedger prong of the eligible derivatives party definition.

Section 53 – Effective Date

The Instrument comes into force on September 28, 2024 (the **in-force date**). Any transaction entered into by a derivatives firm from this date forward is subject to the terms of the Instrument.

In Saskatchewan, if the Instrument is filed with the Registrar of Regulations after the in-force date, the Instrument comes into force on the day on which they are filed with the Registrar of Regulations.

Appendix A

Suggested form of report for reportable material non-compliance under section 33 [*Responsibility of a derivatives dealer to report to the regulator or the securities regulatory authority*]

1. Identify any entities, business units, and/or individuals involved.

2. Provide details of the non-compliance, including:

    a. describe the context (how and by whom the issue was identified, derivatives party complaints, internal testing or audit, other surveillance);

    b. set out whether it relates to (a) a risk of material harm to a derivatives party, (b) a risk of material harm to capital markets, and/or (c) is part of a pattern of non-compliance.

3. Provide a timeline setting out the following:

    a. when the non-compliance occurred,

    b. when the non-compliance was discovered,

    c. when the non-compliance was remedied, and

    d. when the non-compliance was reported.

4. Provide details of what steps, if any, have been taken to address/remedy the non-compliance.

Appendix B

Summary of parts, divisions and sections under MI 93-101 that apply to registered advisers relying on section 48 [*Registered advisers under securities or commodity futures legislation*]

Relevant parts and divisions	**Sections that apply to registered advisers under MI 93-101**	**Sections registered advisers are exempt from under the Instrument if they are in compliance with the corresponding provisions of NI 31-103 with respect to their derivatives activities with a client**	**Corresponding provisions of NI 31-103 that apply, as applicable, in respect of a registered adviser's derivatives activity for the purposes of relying on the exemption under section 48**
Part 1, Definitions and interpretation	All sections, if applicable to derivatives advisers		
Part 2, Application and exemption	All sections, if applicable to derivatives advisers		
Part 3, Dealing with or advising derivatives parties **Division 1 – General obligations towards all derivatives parties**	Section 9, Fair dealing Section 10, Conflicts of interest Section 11, Know your derivatives party	Section 12, Handling complaints	Section 13.15, Handling complaints
		Section 13, Tied selling	Section 11.8, Tied selling
Part 3, Dealing with or advising derivatives parties **Division 2 – Additional obligations when dealing with or advising certain derivatives parties**	None	Section 14, Derivatives-party-specific needs and objectives	Paragraph 13.2(2)(c) and Subsection 13.2(4), Know your client
		Section 15, Suitability	Section 13.3, Suitability determination
		Section 16, Permitted referral arrangements	Section 13.8, Permitted referral arrangements
		Section 17, Verifying the qualifications of the person or company receiving the referral	Section 13.9, Verifying the qualifications of the person or company receiving the referral
		Section 18, Disclosing referral arrangements to a derivatives party	Section 13.10, Disclosing referral arrangements to clients

Part 4 – Derivatives party accounts **Division 1 – Disclosure to derivatives parties**	None	Section 19, Relationship disclosure information	Section 14.2, Relationship disclosure information
		Section 20, Pre-transaction disclosure	Section 14.2, Relationship disclosure information
		Subsection 21(2), Valuation Reporting	Subsection 14.14(3) Account statements
		Section 22, Notice to derivatives parties by non-resident derivatives dealers	Section 14.5, Notice to clients by non-resident registrants
Part 4 – Derivatives party accounts **Division 2 – Derivatives party assets**	None	Division 2, Derivatives party assets of Part 4, Derivatives party accounts	Division 3, Client assets and investment fund assets of Part 14, Handling client accounts – firms
Part 4 – Derivatives party accounts **Division 3 – Reporting to derivatives parties**	None	Section 29, Derivatives party statements	Section 14.14 Account statements, Section 14.14.1 Additional statements
Part 5 – Compliance and recordkeeping **Division 1 – Compliance**	Section 31, Policies and procedures	None	None
Part 5 – Compliance and recordkeeping **Division 2 – Recordkeeping**	None	Section 34, Derivatives party agreement	Section 11.5, General requirements for records
		Section 35, Records	Section 11.5, General requirements for records
		Section 36, Form, accessibility and retention of records	Section 11.6, Form, accessibility and retention of records