CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

CSA Notice and Request for Comment

Proposed National Instrument 94-102 *Derivatives: Customer Clearing and Protection of Customer Collateral and Positions*

Proposed Companion Policy 94-102CP *Derivatives: Customer Clearing and Protection of Customer Collateral and Positions*

January 21, 2016

I. Introduction

We, the Canadian Securities Administrators (the **CSA**) are publishing the following for a ninety (90) day comment period, expiring on April 19, 2016:

- Proposed National Instrument 94-102 *Derivatives: Customer Clearing and Protection of Customer Positions and Collateral* (the **Instrument**);
- Proposed Companion Policy 94-102CP *Derivatives: Customer Clearing and Protection of Customer Positions and Collateral* (the **CP**).

Collectively, the Instrument and the CP will be referred to as the **Proposed National Instrument**.

We are issuing this notice to provide interim guidance and solicit comments on the Proposed National Instrument.

We would also like to draw your attention to the recent publication of National Instrument 24-102 *Clearing Agency Requirements* and the upcoming publication of Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* and in particular the scope of application of mandatory clearing requirements. These publications, including the Proposed National Instrument, relate to central counterparty clearing. We therefore encourage the public to consider these publications comprehensively.

II. Background

On January 16, 2014, the CSA OTC Derivatives Committee (the **Committee**) published CSA Notice 91-304 *Proposed Model Provincial Rule on Derivatives: Customer Clearing and Protection of Customer Positions and Collateral* (the **Model Rule**). The Committee invited public comments on all aspects of the Model Rule. Twenty-two comment letters were received. A list of those who submitted comments, as well as a chart summarizing the comments received and the Committee's responses are attached in Annex A to this Notice. Copies of the comment

letters can be found on the CSA members' websites.[1]

The Committee has carefully reviewed the comments received and has made determinations on appropriate revisions to the Model Rule, which has been transformed into the Proposed National Instrument for the purpose of adopting a harmonized instrument across Canada.

Following the expiry of the comment period, the Committee will review all comment letters received in respect of the Proposed National Instrument to make recommendations on changes at a Committee level.

III. Substance and Purpose of the Proposed National Instrument

Canadian and international initiatives promoting the clearing of over-the-counter (**OTC**) derivative transactions will cause certain market participants, who are not clearing members at a derivatives clearing agency, to clear their OTC derivatives transactions indirectly through market participants that are clearing members or otherwise provide clearing services. The purpose of the Instrument is to ensure that customer clearing is carried out in a manner that protects customer collateral and positions and improves derivatives clearing agencies' resilience to a clearing member default. For a more detailed explanation of customer clearing please see CSA Consultation Paper 91-404 *Derivatives: Segregation and Portability in OTC Derivatives Clearing*.[2]

The Instrument contains requirements for the treatment of customer collateral by clearing intermediaries and derivatives clearing agencies, including requirements relating to the segregation and use of customer collateral. These requirements are intended to ensure that customer collateral is protected, particularly in the case of financial difficulties of a clearing intermediary. The Instrument includes detailed record-keeping, reporting and disclosure requirements intended to ensure that customer collateral and positions are readily identifiable. The Instrument also contains requirements relating to the transfer or porting of customer collateral and positions intended to ensure that, in the event of default or insolvency of a clearing intermediary, customer collateral and positions can be transferred to one or more non-defaulting clearing intermediaries without having to liquidate and re-establish the positions.

IV. Summary of the Instrument

Part 1 of the Instrument sets out relevant definitions, and specifies that the Instrument applies only to trades in derivatives where a customer, regulated clearing agency member or clearing intermediary has a specified nexus to a local jurisdiction.

Part 2 to Part 4 of the Instrument set out requirements applicable to clearing intermediaries with respect to treatment of customer collateral, record keeping and disclosure.
Part 2 of the Instrument sets out the manner in which customer margin and collateral is to be treated by clearing intermediaries. This Part sets out requirements in respect of the collection, holding and maintenance of customer collateral, the identification of excess margin as well as the

[1] Available at http://www.osc.gov.on.ca/en/43833.htm.
[2] Available at www.osc.gov.on.ca.

segregation, use and investment of customer collateral. Part 2 also sets out requirements for a clearing intermediary to be able to provide clearing services to a customer, and for appropriate risk management in respect of those services.

Under Part 3 of the Instrument, clearing intermediaries are required to keep and retain certain records and supporting documentation, and keep adequate and appropriately updated books and records that will facilitate the identification and protection of customer positions and collateral.

Part 4 of the Instrument sets out disclosure requirements for clearing intermediaries as well as reports required to be submitted to the regulator or the securities regulatory authority.

Part 5 to Part 7 of the Instrument are parallel to Part 2 to Part 4 of the Instrument, and set out similar requirements as they apply to regulated clearing agencies.

Part 5 of the Instrument sets out how customer margin and collateral is to be treated by regulated clearing agencies. This Part sets out requirements in respect of the collection, holding and maintenance of customer collateral, the identification of excess margin as well as the segregation, use and investment of customer collateral.

Under Part 6 of the Instrument, regulated clearing agencies are required to keep certain records and supporting documentation as well as keep adequate and appropriately updated books and records that will facilitate the identification and protection of customer positions and collateral.

Part 7 of the Instrument sets out disclosure requirements for regulated clearing agencies as well as reports required to be submitted to the regulator or the securities regulatory authority.

Part 8 of the Instrument sets out the requirements for a regulated clearing agency to facilitate the transfer of customer positions and collateral in the context of a clearing intermediary's default, or at the request of a customer, under certain specified conditions. Part 8 also requires a clearing intermediary to have policies and procedures for transferring of customer positions and collateral, when the clearing intermediary provides clearing services to an indirect intermediary.

Under Part 9 of the Instrument, clearing intermediaries and regulated clearing agencies located in foreign jurisdictions may be exempted from compliance with the Instrument where they meet certain requirements set out in the Instrument, including by complying with similar legislation in their home jurisdiction.

Part 10 of the Instrument contains provisions authorizing the regulator or the securities regulatory authority, as the case may be, to grant an exemption from any provision of the Instrument.

Part 11 of the Instrument sets out relevant effective dates for the Instrument.

V. Changes Reflected in the Proposed National Instrument

(a) Fundamental Changes to Model Rule

Acceptable Clearing Models

There are various customer clearing models available in the global OTC derivatives market.[3] The Committee believes that it is important for local customers to have the option to use the model or models that are most suitable for their needs, provided that each model available provides adequate protection for customer positions and collateral. A fundamental comment received during the consultation process was that the Model Rule did not facilitate the operation of certain widely used customer clearing models.[4] In response, the Committee has made significant revisions to the Instrument that make a broader range of clearing models available to local customers. This revised approach has led to revisions throughout the Instrument.

Due to the variety of customer clearing models and legal frameworks supporting these models, the Instrument, as revised, potentially permits a wider range of clearing agencies to offer their customer clearing models in Canada. To enhance customer protection, the approval and oversight process for recognized or exempt clearing agencies will involve a thorough review of the customer safeguards provided by each clearing agency offering customer clearing in a jurisdiction of Canada.

Scope of Application of the Instrument

The Model Rule was drafted in a broad manner to apply where any participant in the customer clearing chain (i.e., the customer, a clearing intermediary and/or the clearing agency) was located in a jurisdiction of Canada. Comments were received that this application was overly broad. The Instrument has been revised to apply to a clearing intermediary or foreign clearing agency only where it is involved in a transaction with a local customer. The requirements applicable to regulated clearing agencies apply to any regulated clearing agency located in a jurisdiction of Canada for transactions with both local and foreign customers.

(b) Other changes to the Model Rule

(i) Clearing Intermediaries

The Model Rule was designed such that only one clearing intermediary was permitted to be involved in a customer cleared transaction. The Committee acknowledges that this approach is not consistent with international market structures. Therefore, the Instrument has been revised to permit the involvement of multiple clearing intermediaries in a transaction. Each clearing intermediary involved in a transaction is therefore subject to the full requirements of the Instrument in order to ensure that no significant additional risk is introduced to the customer

[3] For example, the futures commission merchant model is available in the U.S. and the principal-to-principal model is available in the EU.

[4] In particular the comments received indicated that the Model Rule was not compatible with the principal-to-principal model.

clearing chain.

(ii) Substituted Compliance

Currently, OTC derivative clearing infrastructure and service providers are largely concentrated outside of Canada. Therefore, it is likely that many local customers' cleared transactions will involve foreign infrastructure or market participants. As a result, the Committee has carefully considered the interaction of the Instrument with other foreign customer clearing regimes that may also impact a transaction involving local market participants or infrastructures. The Committee is proposing substituted compliance in specified circumstances where a foreign entity is involved in a transaction and appropriate foreign laws apply.

(c) Miscellaneous drafting clarifications

There are a number of non-substantive drafting changes, including a re-ordering of the Parts to separate requirements applicable to clearing intermediaries from those applicable to regulated clearing agencies.

VI. Application of local rules for Derivatives: Product Determination

The Committee intends that Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination*,[5] Manitoba Securities Commission Rule 91-506 *Derivatives: Product Determination*,[6] Québec *Regulation 91-506 respecting Derivatives Determination*[7] and the Multilateral Instrument 91-101 *Derivatives: Product Determination*[8] (collectively, the **Product Determination Rules**) will be applicable to the Instrument. Therefore, in all local jurisdictions, transactions that are cleared on behalf of a customer that fall within the scope of the applicable Product Determination Rules would be subject to the Instrument. We note that once the Proposed National Instrument is in force, Regulation 91-506 respecting Derivatives Determination will be amended to apply to the Instrument. Accordingly, in Québec, *Regulation to amend Regulation 91-506 respecting Derivative Determination* is published by the *Autorité des marchés financiers* for consultation concurrently with the Proposed National Instrument.

VII. Anticipated Costs and Benefits

The Proposed National Instrument seeks to ensure that the Canadian market for clearing customer OTC derivatives develops in a safe and efficient manner. It proposes a robust investor protection regime for Canadian clearing customers equivalent to the protections offered in major international markets and should also provide systemic benefits to the Canadian market. There will be compliance costs for clearing service providers that may increase the cost of clearing for market participants. In the Committee's view, the benefits to the Canadian market of

[5] Available at https://www.osc.gov.on.ca/en/SecuritiesLaw_91-506.htm
[6] Available at http://docs.mbsecurities.ca/msc/irp/en/item/101711/index.doc
[7] Available at http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=3&file=/I_14_01/I14_01R0_1_A.HTM
[8] Available at http://www.albertasecurities.com, http://www.bcsc.bc.ca, http://www.nbsc-cvmnb.ca, http://nssc.novascotia.ca and http://www.fcaa.gov.sk.ca/Securities%20Division

implementing the Proposed National Instrument significantly outweigh the compliance costs to market participants. The major benefits and costs of the Proposed National Instrument are described below.

(a) Benefits

The two major benefits of the Proposed National Instrument are the reduction of systemic risk and the protection of customers and their assets when they indirectly clear OTC derivatives through clearing agencies.

(i) Mitigation of Systemic Risk

The G20 has agreed that requiring standardized and sufficiently liquid OTC derivatives transactions to be cleared through central counterparties will result in more effective management of counterparty credit risk. In addition, the clearing of derivatives may also contribute to greater stability of our financial markets and to a reduction in systemic risk.
The Proposed National Instrument is designed to create a framework for customer clearing that promotes stability of the OTC derivatives market by facilitating, to the greatest extent possible, the porting of customer positions and collateral. Portability of customer positions and related collateral is a key mechanism to ensure that in the event of a clearing intermediary default or insolvency, customer positions are not terminated and customer positions and collateral can be transferred to one or more non-defaulting clearing intermediaries without having to liquidate and re-establish a customer's positions. Portability can mitigate difficulties associated with stressed market conditions such as a market-wide reduction in liquidity and price dislocation, allow customers to maintain continuous clearing access and generally promotes efficient financial markets.

(ii) Customer Protection

The Proposed National Instrument is aimed at significantly reducing the likelihood that customers will suffer major financial losses in the event of a clearing service provider's insolvency. In general, customer clearing offers risk mitigation benefits to customers. However, if a robust customer protection regime is not in effect, there can be risks in the indirect clearing process, particularly if a clearing intermediary becomes insolvent. The Proposed National Instrument provides customer protections that should significantly reduce the likelihood of a range of negative potential consequences, that could occur in the event of a clearing intermediary's insolvency, including:

- forced liquidation of positions;
- loss or inaccessibility of collateral;
- loss of hedge positions necessitating re-entry into the market at time of stress to re-establish positions; and
- market uncertainty.

The Proposed National Instrument mitigates many of these risks to customers by establishing

robust collateral and record keeping requirements. It requires customer positions to be fully collateralized at the regulated clearing agency and obligates the regulated clearing agency and clearing intermediaries to keep records that identify customers and their positions in order to facilitate porting.[9]

(b) Costs

Generally, any increased costs resulting from compliance with the Proposed National Instrument stem from enhanced collateral protection, record keeping and reporting requirements for customer collateral and positions. Any costs associated with complying with the Proposed National Instrument will be borne by clearing intermediaries and regulated clearing agencies and would likely be passed on to customers through higher initial margins and/or higher fees for transactions. There is also a possibility that clearing service providers may be dissuaded from entering or remaining in the Canadian market due to the costs of complying with the Proposed National Instrument reducing Canadian customers' options for clearing service providers.

(i) Establishing Systems

Clearing intermediaries and regulated clearing agencies will incur up-front costs to develop record-keeping and account structure systems required to comply with the Proposed National Instrument. However, once systems are established, the incremental cost of on-going compliance should be less significant.

(ii) Loss of Potential Revenue for Clearing Intermediaries and Clearing Agencies

The Instrument places restrictions on the use and investment of customer collateral held by clearing intermediaries and clearing agencies. Customer collateral may only be invested in liquid and low-risk instruments. The Instrument also requires a regulated clearing agency to collect initial margin from clearing intermediaries for each customer on a gross basis. Gross margin promotes more effective porting of positions which benefits customers. However, this requirement means that less customer collateral will be held at and available for use by clearing intermediaries.[10] These requirements limit the potential revenue that clearing intermediaries and clearing agencies may earn through the use and investment of their customer's collateral.

(iii) Market Access Issues

Currently, OTC derivative clearing infrastructure and service providers are largely concentrated outside of Canada with the main clearing agencies and clearing intermediaries located in the United States and the European Union. Given the small size of the Canadian market there is a risk that the costs of analysing and complying with the Proposed National Instrument may result in some market participants choosing not to offer customer clearing in Canada which may limit Canadian customers' access to OTC derivative clearing services. However, as described above,

[9] The level of protection afforded by the Proposed National Instrument is dependent on the Proposed National Instrument's interaction with other foreign and domestic laws such as bankruptcy and insolvency laws and the *Payment Clearing and Settlement Act* (Canada) as well as provincial and territorial personal property security laws including as they apply to cash collateral.

[10] Clearing intermediaries would still have access to any excess collateral provided by customers.

the Committee is proposing substituted compliance for equivalently regulated foreign institutions and this could significantly reduce compliance costs associated with the Proposed National Instrument.

(c) Conclusion

Protection of customer positions and collateral is the fundamental principle of the Instrument. It is the Committee's view that the impact of the Proposed National Instrument, including anticipated compliance costs for market participants, is proportional to the benefits sought. The Instrument aims to provide a level of protection equal to that offered to customers in other jurisdictions. To achieve a balance of interests, the Proposed National Instrument is designed to deliver a high level of protection to customers transacting in OTC derivatives and create a safer environment in the Canadian market for customers to clear OTC derivatives, all while allowing clearing service providers a flexible and competitive market to operate in.

VIII. Contents of Annexes

The following annexes form part of this CSA Notice:

- Annex A – Summary of Comments and List of Commenters;
- Annex B – Proposed National Instrument 94-102 *Derivatives: Customer Clearing and Protection of Customer Positions and Collateral*; and
- Annex C - Proposed Companion Policy 94-102CP *Derivatives: Customer Clearing and Protection of Customer Positions and Collateral*.

IX. Comments

In addition to your comments on all aspects of the Instrument, the Committee also seeks specific feedback on the following question:

> Should clearing intermediaries be limited to clearing derivatives for local customers with regulated clearing agencies? Please explain what the impact of this limitation would be on your current clearing activities.

Please provide your comments in writing by **April 19, 2016**.

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

Thank you in advance for your comments.

Please address your comments to each of the following:

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

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

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, rue du Square-Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal (Québec) H4Z 1G3
Fax: 514-864-6381
consultation-en-cours@lautorite.qc.ca

Josée Turcotte
Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario M5H 3S8
Fax: 416-593-2318
comments@osc.gov.on.ca

Questions

Please refer your questions to any of:

Derek West
Co-Chairman, CSA Derivatives Committee
Senior Director, Derivatives Oversight
Autorité des marchés financiers
514-395-0337, ext. 4491
derek.west@lautorité.qc.ca

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

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

Martin McGregor
Legal Counsel, Corporate Finance
Alberta Securities Commission
403-355-2804
martin.mcgregor@asc.ca

Michael Brady
Manager, Derivatives
British Columbia Securities Commission
604-899-6561
mbrady@bcsc.bc.ca

Abel Lazarus
Senior Securities Analyst
Nova Scotia Securities Commission
902-424-6859
lazaruah@gov.ns.ca

Wendy Morgan
Legal Counsel, Securities
Financial and Consumer Services
Commission, New Brunswick
506-643-7202
wendy.morgan@fcnb.ca

ANNEX A

Summary of comments on *Model Provincial Rule – Derivatives: Customer Clearing and Protection of Customer Collateral and Positions*

1. Issue/Reference	2. Summary of Comments	3. Response
GENERAL COMMENTS		
Harmonization of rules	A number of commenters emphasized the importance of harmonizing the Canadian derivatives regime with international rules and standards.	The Committee agrees and is committed to implementing harmonized rules consistent with international standards. See also the substituted compliance section below.
	One commenter suggested that provincial rules should be consistent and implementation timelines should be coordinated to avoid regulatory arbitrage.	Change made. The Committee notes that it has now opted to develop a national instrument, given its intention that the substance of the Model Rule be the same across local jurisdictions and that market participants and derivative products receive the same treatment across Canada.
Amendments to personal property security and bankruptcy regimes	A number of commenters emphasized the importance of ensuring that personal property security and insolvency laws work with the Proposed National Instrument in order for Canadian participants to remain competitive on a global level.	The Committee is seeking to implement requirements which protect customer collateral, to the extent possible, under existing Canadian federal and provincial legal frameworks. The Committee notes that federal bankruptcy and provincial personal property security legislation are regimes which fall outside of the jurisdiction of the provincial securities regulatory authorities.
Customer protection model	Two commenters explained that the Model Rule is not compatible with the principal to principal model for customer clearing used in the European Union. One commenter asked which customer protection regime is proposed to be implemented in Canada.	Multiple changes made. The Instrument now facilitates the offering of various models of customer clearing including the principal to principal model.

Type of collateral accepted by a Derivatives Clearing Agency	A number of commenters suggested that the Committee should ensure that clearing agencies accept various types of Canadian collateral and/or increase the maximum amounts of such collateral they accept.	No change. The Committee recognizes the importance of Canadian clearing intermediaries and customers having the ability to utilize a broad range of collateral when posting collateral with a regulated clearing agency. Subject to the requirements and guidance provided in National Instrument 24-102 *Clearing Agency Requirements* and its companion policy, it is the Committee's view that it should generally not prescribe the types of collateral a regulated clearing agency should accept, nor the limits it should place on that collateral. A request that a regulated clearing agency accept specific forms of collateral should be made by a clearing intermediary to the clearing agency, which would then go through its normal risk management process.
Substituted compliance	One commenter suggested that foreign-based recognized clearing agencies be permitted to comply by way of substituted compliance so as to avoid duplicative and onerous regulation.	The Committee will consider substituted compliance where a regulated clearing agency is subject to equivalent regulation. See Part V, subparagraph (b)(ii) of the Notice for a description of the Committee's substituted compliance proposal.
PART 1: DEFINITIONS		
s. 1 – "clearing intermediary"	Two commenters suggested that the definition of "clearing intermediary" be expanded to include a scenario where there are multiple clearing intermediaries in a chain. One commenter suggested that financial intermediaries should be permitted to post collateral and meet reporting requirements on behalf of credit unions	Change made. The Instrument permits more than one clearing intermediary to be involved in a customer transaction. The Instrument does not prohibit clearing intermediaries from posting collateral on behalf of and fulfilling reporting requirements for their customers.

s. 1 – "customer collateral"	One commenter explained that the obligation to segregate variation margin is not possible for clearing agencies under certain customer protection models once the amount has been paid out to the clearing intermediary.	No change. Variation margin provided by a customer to its clearing intermediary is customer collateral and required to be segregated.
s. 1 – "excess margin"	One commenter suggested that the definition of "excess margin" be revised (i) to reflect that collateral is not excess margin until it is delivered to a clearing intermediary or clearing agency, and (ii) to clarify that any collateral delivered by a customer to a clearing agency or clearing intermediary which will be transformed should not be considered excess margin (i.e., it is the transformed collateral that is to be considered excess margin).	Change made. The definition has been revised to indicate that excess margin is customer collateral that has been delivered to a regulated clearing agency or clearing intermediary. Additionally, the CP has been revised to provide guidance clarifying that customer collateral initially delivered may be transformed and once transformed, only the transformed collateral is considered customer collateral and therefore excess margin.
	One commenter suggested that the definition be clarified to ensure that only collateral provided as margin for the customer's derivatives is included in the definition. Specifically, the commenter was concerned that confusion would arise where a customer provided a security interest in various collateral in accordance with standard customer account documentation (e.g., a security interest in all securities accounts or a security interest in all present and after-acquired property) that was not being used as margin for its derivative transactions. Another commenter suggested that the definition should be expanded to include collateral that is delivered by a customer in excess of the amount required by a clearing agency for operational efficiencies.	Change made. The definition has been revised to specify that excess margin is collateral in respect of a customer's cleared derivatives that is in excess of the amount of margin required by the regulated clearing agency to clear and settle such derivatives.

s. 1 – "permitted depository"	Two commenters suggested expanding the definition of "permitted depository" to include all entities through which collateral is currently being held by clearing agencies with global operations. Specifically, one commenter suggested expanding the definition to include securities settlement systems. The other commenter suggested that the definition should be broad enough to cover all potential securities intermediaries within an indirect holding system.	Change made. The definition in the Instrument covers various types of entities that are subject to a minimum amount of oversight required to ensure safekeeping of customer collateral including clearing intermediaries in the customer clearing chain that receive customer collateral. Other entities not covered by the definition may be granted an exemption on a case-by-case basis.
s. 1 – "permitted investment"	Two commenters suggested that minimum ratings (e.g., S&P, DBRS, Moody's) should be added as a requirement for an investment to be permitted and that the corresponding ratings be noted with the records of investment of customer collateral required under s. 23 of the Model Rule.	No change. The Committee has taken a principles based approach to permitted investments that does not rely on prescriptive requirements such as ratings.
PART 2: TREATMENT OF CUSTOMER COLLATERAL		
s. 2 – Collection of initial margin		
General Comments	Two commenters suggested that Canadian market participants should be given the choice to have initial margin requirements calculated in Canadian dollars.	No change. It is the Committee's view that it is not appropriate to include a requirement that could introduce foreign exchange risk. If collateral is only calculated, but not accepted in Canadian dollars, this would not be a useful service because the calculation would not represent the currency required to be delivered.
s. 2(1)	One commenter suggested amending the Model Rule so that initial margin can be collected by either gross or net methods. Another commenter also requested the Model Rule be amended to permit netting of collateral requirements.	No change. There is a greater likelihood that customer positions may be under-margined when collected on a net-basis. However, the Committee has amended the Model Rule to allow excess margin to be used to secure or extend credit to a customer.

s. 2(2)	One commenter suggested that it is not necessary to include a requirement for a clearing intermediary to collect initial margin given that s. 6 of the Model Rule obligates a clearing intermediary to keep sufficient property with a clearing agency.	Change made. The section has been removed from the Instrument.
	One commenter suggested that it be clarified whether a clearing intermediary may use its own property to fund initial margin requirements set by a clearing agency.	No change. There is no prohibition in the Instrument against a clearing intermediary using its own property; however, any property provided must be treated as customer collateral.
s. 3 – Segregation of customer collateral		
s. 3(2)	Two commenters suggested that the Model Rule should allow the option for customers to request that customer collateral be held using the Full Physical Segregation Model.	No change. The Committee is of the view that the Full Physical Segregation Model may be more costly than its alternatives and may not materially improve the degree of protection for customers of a clearing intermediary and therefore, there is no requirement that a clearing agency offer the Full Physical Segregation model. However, a customer may privately contract with a clearing intermediary or regulated clearing agency for Full Physical Segregation.
s. 3(3)	Two commenters requested that the Model Rule not prohibit portfolio margining, and also requested that a mechanism for allowing portfolio margining be included.	No change. The Committee will continue to monitor developments in the market, and may make changes to the Proposed National Instrument, as necessary.

s. 4 – Holding of customer collateral		
General Comments	One commenter pointed out that Part 2 of the Model Rule permits commingling of customer collateral from multiple customers by clearing agencies and clearing intermediaries and that this seemed to contradict the requirement for individually segregated accounts to be held at a permitted depository. Additionally, two commenters suggested that the Model Rule should permit commingling of customer collateral.	Change made. Additional guidance has been added to the CP clarifying that customer collateral of multiple customers may be commingled in an omnibus customer account. The Instrument requires that the clearing intermediaries and clearing agencies identify the positions and collateral held for each individual customer within an omnibus customer account. Where a clearing intermediary or clearing agency deposits customer collateral with a permitted depository, the clearing intermediary or clearing agency is responsible for ensuring the permitted depository maintains appropriate books and records to ensure customer collateral can be attributed to each customer.
s. 4(3)	One commenter expressed concern regarding the requirement that all customer collateral be held in a segregated account that clearly identifies the name of each customer or otherwise indicates that the property in the account is customer collateral. The commenter's concern was that this may jeopardize the absolute transfer characterization of cash in such circumstances.	Change made. The Instrument does not require that the name of each customer whose customer collateral is held at a permitted depository be identified on the account, provided that the account is identified as holding customer collateral.
s. 6 – Clearing member maintenance of customer account balance		
s. 6	Three commenters suggested clarifying that clearing agency margin calls are to take place once each day, and that clearing intermediaries will not be required to cure any customer collateral shortfall on a continuous basis.	No change. The clearing intermediary will be required to meet the margin requirements of the clearing agency within the time limits set out by the clearing agency.

s. 8 – Use of customer collateral		
s. 8	One commenter expressed the view that market participants should have the right to contract in respect of excess collateral as they deem appropriate without restriction, and thus that the Model Rule should expressly allow the re-hypothecation of excess margin to the extent it is held by a clearing agency or clearing intermediary.	Change made. The Instrument has been revised to articulate that customer collateral may be bought or sold pursuant to an agreement for resale or repurchase under prescribed conditions.
	One commenter suggested that the Model Rule should expressly allow a clearing intermediary or a clearing agency to offer collateral transformation services to the customer.	Change made. The CP explains that collateral transformation is acceptable and transformed collateral would be considered customer collateral.
	One commenter noted that the CFTC's rules expressly provide for the right to withdraw customer collateral from a customer account to margin, guarantee, secure, transfer, adjust or settle the customer's cleared transactions and requested that the Model Rule make this point distinctly.	Change made. The language in the Instrument expressly grants this right.
	One commenter noted that margin held at the clearing intermediary level should be permitted to secure other obligations of the customer to the clearing intermediary.	Change made. Excess margin held by a clearing intermediary may be used to secure or extend credit to the customer.
s. 9 – Investment of customer collateral		
s. 9(1)	One commenter suggested that customers should be permitted to restrict how customer collateral is invested.	No change. The Instrument restricts investment of customer collateral to conservative investments (determined using a principles-based approach) and it is the Committee's view that further restrictions should be a private contractual matter between customers and clearing intermediaries or clearing agencies.

	One commenter suggested that a requirement to report all losses and gains made on investments of customer collateral be added to the Model Rule.	No change. Section 26 of the Instrument requires that the customer receive a daily report setting out the current value of customer collateral. This report includes any daily changes in the value of invested customer collateral.
s. 9(2)	One commenter expressed concern that a clearing intermediary may be liable for the losses that result from collateral that is transformed for the customer.	Change made. The CP clarifies that investment losses relate only to investments made by a regulated clearing agency or clearing intermediary using customer collateral, not to the collateral that is transformed for a customer.
	One commenter suggested that the Model Rule allow any investment losses incurred by a clearing agency to be mutualised and allocated to clearing intermediaries.	Change made. The CP explains that investment losses incurred by a regulated clearing agency may be mutualised and allocated to clearing intermediaries, but not to customers.
s. 10 – Acting as a clearing intermediary		
s. 10	One commenter suggested that a clearing agency should not be required to approve the clearing intermediary's customers. Instead, a clearing agency should be allowed to request information about customers and to refuse access to clearing services to a customer of a clearing intermediary.	Change made. A regulated clearing agency is no longer required to approve indirect intermediaries and customers.

s. 13 – Same		
s. 13	Two commenters requested clarification on what is meant by "prudentially regulated" and "appropriate regulatory authority".	Change made. The CP clarifies that, in Canada, prudential regulation of federally regulated financial institutions is undertaken by the Office of the Superintendent of Financial Institutions. Other regulators that perform prudential oversight include the Investment Industry Regulatory Organization of Canada and certain provincial prudential market regulators, such as the Autorité des marchés financiers in Québec or other local securities regulatory authorities. An appropriate foreign regulatory authority would be one that applies comparable regulatory standards to those applied to Canadian entities.
PART 3: RECORD-KEEPING		
s.16 – Retention of records		
s.16	One commenter requested that this requirement not apply to clearing agencies that are exempt from recognition under s. 147 of the *Securities Act* (Ontario).	No change. Retention of records is a requirement for all regulated clearing agencies and clearing intermediaries falling within the scope of the Instrument. However, substituted compliance may be available. See the substituted compliance section above.
s. 17 – Books and records		
s. 17(4)	One commenter suggested removing the word "market" from "market value" to provide for a wider range of alternatives when calculating customer collateral held.	Change made. The word "market" has been removed to ensure that other accepted types of valuation methodologies can be utilized, where appropriate.

s. 20 – Separate records – derivatives clearing agency		
s. 20	One commenter suggested that the Model Rule should require clearing agencies to keep records of the positions and property of each customer only where the customer is a direct customer of a clearing intermediary, and therefore, identifiable to the clearing agency. The commenter also suggested that the Model Rule should allow clearing agencies to keep records of the positions and property of each clearing intermediary's customers at an aggregate level per clearing intermediary.	No change. Without records for customers clearing through clearing intermediaries, portability would be impeded.
PART 4: REPORTING AND DISCLOSURE		
General Comments	Two commenters expressed concern over confidentiality and public access to the customer collateral reports.	Reports will be treated as confidential by securities regulatory authorities, subject to applicable provisions of the freedom of information and protection of privacy legislation adopted by each province and territory. However, the Committee may share the reports with self-regulatory organizations or other relevant regulatory authorities.
s. 25 – Disclosure to clearing members and customers		
s. 25(4)	Two commenters expressed concern over the requirement to receive written acknowledgements from customers and one of the commenters suggested to either make the disclosure publicly available or incorporate the disclosure into the legal agreements between the parties.	Change made. The requirement to receive written acknowledgements from customers has been removed.

s. 28 – Customer collateral report		
s. 28(3) and s. 28(4)	One commenter requested that this requirement not apply to clearing agencies that are exempt from recognition under s. 147 of the *Securities Act* (Ontario). Another commenter suggested that the requirements under these subsections should not apply to foreign-based recognized clearing agencies and instead they should be permitted to comply by way of substituted compliance.	No change. See the substituted compliance section above. The Committee would consider foreign reporting requirements in our substituted compliance analysis. However, the information contained in the reports is necessary in order for the securities regulatory authorities to fulfill their mandates.
s. 28(5)	One commenter requested clarification on whether the reporting requirement applies in respect of (a) each individual derivatives transaction or an aggregate net exposure for all derivatives transactions for a customer, and (b) each individual type of customer collateral or collateral on an aggregate basis, regardless of collateral type. The commenter also suggested that the Model Rule should be revised to include asset type and quantity (in addition to the market value) of customer collateral that is posted by a clearing intermediary to a clearing agency on behalf of a customer.	Change made. The reporting requirement is intended to be applied in respect of aggregate net exposures for all derivatives transactions of each customer. The Instrument requires clearing intermediaries to report the current value, asset type and quantity of the collateral received.
s. 29 – Disclosure of customer collateral investment		
s. 29(1)	One commenter expressed concern over inadvertently requiring a clearing agency to publicly disclose proprietary information such as its investment guidelines and policies.	Change made. Regulated clearing agencies are only required to disclose their investment guidelines and policies directly to the customer and, if applicable, a direct intermediary.
s. 29(2)	One commenter expressed concern over the onerous requirement to receive written acknowledgements from customers and suggested that disclosure be incorporated into the legal agreements between the parties.	Change made. See response to comments on s. 25(4).

s. 29(3)	Two commenters noted that the timing for submitting the required report is not specified.	Change made. Monthly reporting to securities regulatory authorities on customer collateral is required to be delivered within 10 business days of the end of each calendar month.
PART 5: TRANSFER OF POSITIONS		
General Comments	One commenter noted that a clearing agency may not be in a position to ascertain whether or not a customer is in default and suggested that the provisions of this section be revised to reflect the solvency status of the customer's account (i.e., whether or not the collateral value is sufficient to cover the initial margin obligations).	Change made. The Instrument now provides that a regulated clearing agency and a direct intermediary may facilitate porting of a customer's positions and collateral only where the customer's account is not currently in default.
s. 30 - Transfer of customer collateral and positions		
s. 30(1)	One commenter suggested changing the language of the subsection from "transfer of the customer's positions and customer collateral" to "transfer of the customer's positions and customer collateral or its liquidation proceeds".	Change made. The Instrument now permits transfer of the liquidation proceeds of customer collateral.
	One commenter requested clarification on when a clearing intermediary that is to receive transferred customer positions and collateral, or its liquidation proceeds, provides its consent to the transfer (i.e., if consent would be provided pursuant to arrangements made between parties at the outset of the relationship or concurrently with an event of default).	Change made. Additional guidance has been provided in the CP setting out that it is the Committee's view that such consent for transfer should be obtained at the outset of the clearing relationship.
s. 30(3)	One commenter suggested adding a requirement that conditions (a) to (e) be met within a reasonable time that is to be predetermined by a clearing agency.	No change; however, the Committee has provided additional guidance in the CP with respect to the timing for customers and direct intermediaries to provide consent to a transfer.

List of Commenters:

1. Atlantic Central
2. Caisse de dépôt et placement du Québec
3. Canadian Investor Protection Fund
4. Canadian Life and Health Insurance Association Inc.
5. Canadian Market Infrastructure Committee
6. Capital Power Corporation
7. Central 1 Credit Union
8. Concentra Financial Services
9. Enbridge Inc.
10. ICE Clear Credit LLC
11. IGM Financial Inc.
12. International Swaps and Derivatives Association, Inc.
13. Investment Industry Association of Canada
14. LCH.Clearnet Group Limited
15. NB Investment Management Corp.
16. Pension Investment Association of Canada
17. RBC Global Asset Management Inc.
18. SaskEnergy Incorporated
19. Suncor Energy
20. The Canadian Commercial Energy Working Group
21. TMX Group Limited
22. TransCanada Corp.

ANNEX B

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

PART 1
DEFINITIONS, INTERPRETATION AND APPLICATION

Definitions and Interpretation

1. (1) In this Instrument,

"Canadian financial institution" means a Canadian financial institution as defined in National Instrument 45-106 *Prospectus Exemptions*;

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

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

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

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

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

(b) they are deposited on behalf of a customer by a clearing intermediary to satisfy the margin requirements of the customer's cleared derivatives at a regulated clearing agency;

"direct intermediary" means a person or company that

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

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

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

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

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

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

"indirect intermediary" means a person or company that

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

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

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

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

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

(b) a person or company to which one or more of the following applies:

(i) it is organized or incorporated under the laws of the local jurisdiction;

(ii) its head office is in the local jurisdiction;

(iii) its principal place of business is in the local jurisdiction;

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

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

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

(b) a regulated clearing agency;

(c) a foreign entity that

(i) is incorporated or organized under the laws of a permitted jurisdiction,

(ii) is regulated as a banking institution or trust company by the government, or an agency of the government, of a permitted jurisdiction, and

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

(d) either of the following, but only with respect to customer collateral that it receives from a customer or a clearing intermediary for which it provides clearing services:

(i) a registered investment dealer as defined in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*;

(ii) a prudentially regulated foreign entity, other than a foreign entity listed in paragraph (c) that is registered, licensed or otherwise permitted to perform the services of a clearing intermediary in accordance with the laws and regulations of a permitted jurisdiction;

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

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

(a) a country where the primary regulator of a Schedule III bank is located, or a political subdivision thereof;

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

(c) a jurisdiction approved by the regulator or the securities regulatory authority from time to time, subject to such conditions or restrictions as may be imposed in the approval;

"qualifying central counterparty" means an entity to which each of the following applies:

(a) it is licensed to operate as a central counterparty in a jurisdiction of Canada or a foreign jurisdiction by a government or regulatory authority;

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

"regulated clearing agency" means

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

(b) in Québec, a person recognized or exempted from recognition as clearing house or as a central securities depository under the Securities Act (Québec), and

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

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

"segregate" means to separately hold or account for customer collateral and customer positions;

"transaction" means any 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 clearing agency.

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

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

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

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

(c) the second party is a limited partnership and the general partner of the limited partnership is the first party.

Application

2. (1) This Instrument applies to all of the following:

(a) a regulated clearing agency located in a local jurisdiction that clears a cleared derivative entered into by, for or on behalf of a customer;

(b) a regulated clearing agency located in a foreign jurisdiction that clears a cleared derivative entered into by, for or on behalf of a local customer, but only in respect of that derivative;

(c) a clearing intermediary that provides clearing services for a cleared derivative entered into by, for or on behalf of a local customer, but only in respect of that derivative.

(2) This Instrument applies to each of the following:

(a) in Manitoba, a derivative as prescribed in Manitoba Securities Commission Rule 91-506 *Derivatives: Product Determination*;

(b) in Ontario, a derivative as prescribed in Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination*;

(c) in Québec, a derivative as specified in Regulation 91-506 respecting derivatives determination.

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

PART 2
TREATMENT OF CUSTOMER COLLATERAL BY A CLEARING INTERMEDIARY

Segregation of customer collateral – clearing intermediary

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

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

Holding of customer collateral – clearing intermediary

4. A clearing intermediary must hold all customer collateral in one or more accounts at a permitted depository and clearly identify such accounts as holding customer collateral.

Excess margin – clearing intermediary

5. A clearing intermediary must have rules, policies or procedures in place with respect to identifying and recording, at least once each business day, the value of excess margin that it holds that is attributable to each customer for which the clearing intermediary provides clearing services.

Use of customer collateral – clearing intermediary

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

(2) A clearing intermediary may use or permit the use of customer collateral of a customer to do either of the following:

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

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

(3) Other than with respect to excess margin used in accordance with paragraph (2)(b), a clearing intermediary must not impose or permit the imposition of a lien or claim on a customer's positions or customer collateral except to secure a claim resulting from a cleared derivative in favour of any of the following:

(a) the customer;

(b) the regulated clearing agency or clearing intermediary responsible for clearing the cleared derivatives of the customer to which the positions or customer collateral relate.

Investment of customer collateral – clearing intermediary

7. **(1)** A clearing intermediary must not invest customer collateral except in accordance with subsection (2).

(2) Subject to subsection (3), a clearing intermediary may

(a) invest property received as customer collateral in a permitted investment, and

(b) use customer collateral to buy or sell a permitted investment pursuant to an agreement for resale or repurchase if all of the following apply:

(i) the agreement is in writing;

(ii) the term of the agreement is no more than one business day;

(iii) written confirmation specifying the terms of the agreement is delivered to the customer immediately upon entering into the transaction;

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

(3) A loss resulting from an investment of customer collateral by the clearing intermediary must be borne by the clearing intermediary making the investment and not by the customer.

Use of customer collateral - indirect intermediary default

8. (1) Except as provided in subsection (2), a clearing intermediary must not apply customer collateral of a customer of an indirect intermediary for which the clearing intermediary provides clearing services to satisfy the obligations of that indirect intermediary.

(2) A clearing intermediary may apply the customer collateral of a customer in full or partial satisfaction of an indirect intermediary's obligations that arise or are accelerated as a consequence of the indirect intermediary's default only to the extent that those obligations are attributable to the cleared derivatives of the customer.

Acting as a clearing intermediary

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

(a) prudentially regulated by an appropriate regulatory authority in Canada;

(b) prudentially regulated by an appropriate regulatory authority in a permitted jurisdiction and registered, licensed or otherwise permitted to perform the services of a clearing intermediary in accordance with the laws and regulations of that permitted jurisdiction.

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

(a) except in Alberta, a regulated clearing agency, and

(b) in Alberta, a regulated clearing agency or a qualifying central counterparty.

Risk management – clearing intermediary

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

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

(b) manage a default of the indirect intermediary.

Risk management – indirect intermediary

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

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

PART 3
RECORD KEEPING BY A CLEARING INTERMEDIARY

Retention of records – clearing intermediary

12. A clearing intermediary must keep the records required under this Part and Part 4, and all supporting documentation, in a readily accessible location for at least 7 years after the date upon which the cleared derivative expires or terminates.

Books and records – clearing intermediary

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

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

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

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

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

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

(3) A clearing intermediary must record all of the following in its books and records for each customer:

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

(b) a description of the customer collateral held at each permitted depository;

(c) the current value of any customer collateral received from, for or on behalf of the customer, including, without limitation, all of the following at least once each business day:

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

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

(iii) any charges lawfully accruing to the customer;

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

Books and records – direct intermediary

14. A direct intermediary must record all of the following, at least once each business day, in its books and records for each customer:

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

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

Books and records – indirect intermediary

15. An indirect intermediary must record all of the following, at least once each business day, in its books and records for each customer:

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

(b) the aggregate sum of the amounts in paragraph (a);

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

Separate records – direct intermediary

16. A direct intermediary must keep separate books and records that, at any time, enable it to distinguish all of the following in its own accounts and in the accounts held with the regulated clearing agency:

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

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

Separate records – indirect intermediary

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

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

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

Separate records – multiple clearing intermediaries

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

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

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

Records of investment of customer collateral – clearing intermediary

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

(a) the date of the investment;

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

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

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

(e) the identity of each permitted depository where each asset, as applicable, or instrument is deposited;

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

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

Records of currency conversion – clearing intermediary

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

PART 4
REPORTING AND DISCLOSURE BY A CLEARING INTERMEDIARY

Clearing intermediary delivery of disclosure by regulated clearing agency

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

(a) the written disclosure provided under section 41 by each regulated clearing agency through which the direct intermediary clears a transaction for the customer or indirect intermediary;

(b) the investment guidelines and policy and any changes to such investment guidelines and policy provided under section 45 by each regulated clearing agency that invests customer collateral attributable to the customer.

Disclosure to customer by clearing intermediary

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

(2) After accepting the first cleared derivative from, for or on behalf of a customer of, each time there is a change to the treatment of customer collateral not held at a regulated clearing agency, the clearing intermediary must provide written disclosure to the customer, within a reasonable period of time, describing the change.

Disclosure to customer by indirect intermediary

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

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

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

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

Customer information – clearing intermediary

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

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

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

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

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

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

Customer collateral report - regulatory

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

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

Customer collateral report - customer

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

(a) the current value of the cleared derivative positions of the customer;

(b) the current value, asset type and quantity of customer collateral received from, for or on behalf of the customer that is held by the clearing intermediary and the location of each permitted depository at which the customer collateral is held;

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

(i) a regulated clearing agency;

(ii) another clearing intermediary.

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

(a) the current value of the cleared derivative positions of the customer;

(b) the current value, asset type and quantity of customer collateral received from the indirect intermediary on behalf of the customer that is held by the clearing intermediary and the location of each permitted depository at which the customer collateral is held;

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

(i) a regulated clearing agency;

(ii) another clearing intermediary.

Disclosure of investment of customer collateral

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

(2) A clearing intermediary that invests customer collateral must promptly disclose in writing any change to its investment guidelines and policy directly to the customer, or, if applicable, to the indirect intermediary that is providing clearing services to the customer.

PART 5
TREATMENT OF CUSTOMER COLLATERAL BY A REGULATED CLEARING AGENCY

Collection of initial margin

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

Segregation of customer collateral – regulated clearing agency

29. A regulated clearing agency must segregate customer collateral from the property of other persons or companies including the property of the regulated clearing agency.

Holding of customer collateral – regulated clearing agency

30. (1) A regulated clearing agency must hold all customer collateral in one or more accounts at a permitted depository and clearly identify such accounts as holding customer collateral.

(2) A regulated clearing agency must hold all customer collateral of each customer separately from all other property of such customer that is not customer collateral.

Excess margin – regulated clearing agency

31. A regulated clearing agency must have rules, policies or procedures in place with respect to identifying and recording, at least each business day, the value of excess margin that it holds for or on behalf of each customer.

Use of customer collateral – regulated clearing agency

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

(2) A regulated clearing agency may use or permit the use of customer collateral of a customer to do either of the following:

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

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

(3) Other than with respect to excess margin used in accordance with paragraph (2)(b), a regulated clearing agency must not impose or permit the imposition of a lien or claim on a customer's positions or customer collateral except to secure a claim resulting from a cleared derivative in favour of any of the following:

(a) the customer;

(b) the regulated clearing agency or a clearing intermediary responsible for clearing the cleared derivatives of the customer to which the positions or customer collateral relate.

Investment of customer collateral – regulated clearing agency

33. (1) A regulated clearing agency must not invest customer collateral except in accordance with subsection (2).

(2) Subject to subsection (3), a regulated clearing agency may

(a) invest property received as customer collateral in a permitted investment, and

(b) use customer collateral to buy or sell a permitted investment pursuant to an agreement for resale or repurchase to which all of the following apply:

(i) the agreement is in writing;

(ii) the term of the agreement is no more than one business day;

(iii) written confirmation specifying the terms of the agreement is delivered to the customer immediately upon entering into the transaction;

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

(3) Any loss resulting from an investment of customer collateral by the regulated clearing agency must be borne by the regulated clearing agency making the investment and not by any customer.

Use of customer collateral - clearing intermediary default

34. (1) Except as otherwise provided in subsection (2), a regulated clearing agency must not apply customer collateral to satisfy the obligations of a clearing intermediary to which the regulated clearing agency provides clearing services.

(2) A regulated clearing agency may apply the customer collateral of a customer in full or partial satisfaction of a clearing intermediary's obligations that arise or are accelerated as a consequence of the clearing intermediary's default only to the extent that those obligations are attributable to the cleared derivatives of the customer.

Risk management –NI 24-102 applies

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

PART 6
RECORD KEEPING BY A REGULATED CLEARING AGENCY

Retention of records – regulated clearing agency

36. A regulated clearing agency must keep the records required under this Part and Part 7, and all supporting documentation, in a readily accessible location for at least 7 years after the date upon which the cleared derivative expires or terminates.

Books and records – regulated clearing agency

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

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

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

(2) A regulated clearing agency must record all of the following in its books and records for each customer:

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

(b) a description of the customer collateral held at each permitted depository;

(c) the current value of any customer collateral received from, for or on behalf of the customer, including, without limitation, all of the following at least once each business day:

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

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

(iii) any charges lawfully accruing to the customer;

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

Separate records – regulated clearing agency

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

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

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

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

Records of investment of customer collateral – regulated clearing agency

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

(a) the date of the investment;

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

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

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

(e) the identity of each permitted depository where each asset, as applicable, or instrument is deposited;

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

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

Records of currency conversion – regulated clearing agency

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

PART 7
REPORTING AND DISCLOSURE BY A REGULATED CLEARING AGENCY

Disclosure to direct intermediaries by regulated clearing agency

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

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

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

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

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

Customer information – regulated clearing agency

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

Customer collateral report - regulatory

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

Customer collateral report – direct intermediary

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

(a) the current value of the cleared derivative positions of each customer of the direct intermediary;

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

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

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

Disclosure of investment of customer collateral

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

(2) A regulated clearing agency that invests customer collateral must promptly disclose in writing any change to its investment guidelines and policy to the direct intermediary through which the derivative is cleared.

PART 8
TRANSFER OF POSITIONS

Transfer of customer collateral and positions

46. (1) Subject to subsection (3), a regulated clearing agency and a defaulting direct intermediary must facilitate a transfer of customer positions and customer collateral or their liquidation proceeds from the defaulting direct intermediary to one or more non-defaulting direct intermediaries.

(2) Subject to subsection (3), a regulated clearing agency and a non-defaulting direct intermediary must facilitate a transfer of the customer's positions and customer collateral

from the non-defaulting direct intermediary to one or more non-defaulting direct intermediaries.

(3) Each of a regulated clearing agency and a direct intermediary may facilitate a transfer described in subsection (1) or (2) in respect of a customer only if all of the following apply:

(a) the customer has requested or consented to the transfer;

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

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

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

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

Transfer from a clearing intermediary

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

PART 9
SUBSTITUTED COMPLIANCE

48. (1) A clearing intermediary located in a foreign jurisdiction is deemed to satisfy the Parts and sections of this Instrument listed in Appendix A in respect of a cleared derivative entered into by, for or on behalf of a local customer if

(a) the cleared derivative is cleared at a regulated clearing agency, and

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

(i) registered, licensed or otherwise permitted to perform the services of a clearing intermediary in the jurisdiction where its primary regulator is located;

(ii) in compliance with the requirements of the laws of a foreign jurisdiction as set out in Appendix A.

(2) A regulated clearing agency located in a foreign jurisdiction is deemed to satisfy the Parts and sections of this Instrument listed in Appendix A in respect of a cleared derivative entered into by, for or on behalf of a local customer if the regulated clearing agency is in compliance with all of the following:

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

(b) the requirements of the laws of a foreign jurisdiction as set out in Appendix A.

PART 10
EXEMPTIONS

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

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

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

PART 11
EFFECTIVE DATE

Effective date

50. This Instrument comes into force on **[•]**.

APPENDIX A

PART A
EQUIVALENT REQUIREMENTS FOR PARTS AND SECTIONS RELATING TO CLEARING INTERMEDIARIES

Further to section 48(1) of this Instrument, a clearing intermediary that satisfies the requirements of section 48(1) is deemed to satisfy the Parts and sections of this Instrument listed in the table below where the clearing intermediary is in compliance with the provisions of the laws of the foreign jurisdiction as set out opposite the Part or section of this Instrument.

Parts and sections of this Instrument applicable to a clearing intermediary	Compliance with foreign customer protection regime required to permit substituted compliance

PART B
EQUIVALENT REQUIREMENTS FOR PARTS AND SECTIONS RELATING TO REGULATED CLEARING AGENCIES

Further to section 48(2) of this Instrument, a regulated clearing agency that satisfies the requirements of section 48(2) is deemed to satisfy the Parts and sections of this Instrument listed in the table below where the regulated clearing agency is in compliance with the provisions of the laws of the foreign jurisdiction as set out opposite the Part or section of this Instrument.

Parts and sections of this Instrument applicable to a regulated clearing agency	Compliance with foreign customer protection regime required to permit substituted compliance

FORM 94-102F1 *CUSTOMER COLLATERAL REPORT: DIRECT INTERMEDIARY*

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

Reporting Date	DD/MM/YY
Reporting Period[1]	DD/MM/YY – DD/MM/YY

Reporting direct intermediary
Name and LEI[2]

Table A is to be completed by each direct intermediary that receives customer collateral from a customer or from an indirect intermediary in accordance with the Instrument. In Section 1, complete a separate line for each customer that has posted customer collateral to the reporting direct intermediary. In Section 2, complete a separate line for each customer of an indirect intermediary for whom the indirect intermediary has posted customer collateral to the reporting direct intermediary. Where a LEI is not available please provide an Interim LEI or, if not available, the complete legal name of the customer.

Table A

		Customer collateral			
A.	LEI of customer	Total value of non-cash customer collateral posted to the direct intermediary as of the last business day of the Reporting Period	Total value of customer collateral posted to the direct intermediary as of the last business day of the Reporting Period	Maximum value of customer collateral posted to the direct intermediary during the Reporting Period	Average value of customer collateral posted to the direct intermediary over the Reporting Period

[1] The Reporting Period is the calendar month preceding the Reporting Date

[2] Where a LEI is not available, please provide an Interim LEI or, if not available, please provide the complete legal name of the reporting direct intermediary together with the complete address of its head office.

Section 1.	[Any customer that has posted customer collateral to the reporting direct intermediary]				
Section 2.	[Any customer for whom an indirect intermediary has posted customer collateral to the reporting direct intermediary]				
	Aggregate total				

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

Table B

B.	LEI of permitted depository or reporting direct intermediary	Customer collateral			
		Total value of non-cash customer collateral held by or for the direct intermediary as of the last business day of the Reporting Period	Total value of customer collateral held by or for the direct intermediary as of the last business day of the Reporting Period	Maximum value of customer collateral held by or for the direct intermediary during the Reporting Period	Average value of customer collateral held by or for the direct intermediary over the Reporting Period
1.	[Reporting direct intermediary, if holding customer collateral itself]				
2.	[Any permitted depository holding customer collateral for the reporting direct intermediary]				
	Aggregate total				

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

Table C

C.	LEI of regulated clearing agency	Customer collateral			
		Total value of non-cash customer collateral deposited with a regulated clearing agency as of the last business day of the Reporting Period	Total value of customer collateral deposited with a regulated clearing agency as of the last business day of the Reporting Period	Maximum value of customer collateral deposited with a regulated clearing agency during the Reporting Period	Average value of customer collateral deposited with a regulated clearing agency over the Reporting Period
1.	[Any regulated clearing agency with which the reporting direct intermediary has deposited customer collateral]				
	Aggregate total:				

FORM 94-102F2 *CUSTOMER COLLATERAL REPORT: INDIRECT INTERMEDIARY*

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

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

Reporting indirect intermediary
Name and LEI[4]

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

Table A

A.	LEI of customer	Customer collateral			
		Total value of non-cash customer collateral posted to the indirect intermediary as of the last business day of the Reporting Period	Total value of customer collateral posted to the indirect intermediary as of the last business day of the Reporting Period	Maximum value of customer collateral posted to the indirect intermediary during the Reporting Period	Average value of customer collateral posted to the indirect intermediary over the Reporting Period
1.	[Any customer that has posted customer collateral to the reporting indirect intermediary]				
	Aggregate total				

[3] The Reporting Period is the calendar month preceding the Reporting Date.

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

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

Table B

B.	LEI of permitted depository or reporting indirect intermediary	Customer collateral			
		Total value of non-cash customer collateral held by or for the indirect intermediary as of the last business day of the Reporting Period	Total value of customer collateral held by or for the indirect intermediary as of the last business day of the Reporting Period	Maximum value of customer collateral held by or for the indirect intermediary during the Reporting Period	Average value of customer collateral held by or for the indirect intermediary over the Reporting Period
1.	[Reporting indirect intermediary, if holding customer collateral itself]				
2.	[Any permitted depository holding customer collateral for the reporting indirect intermediary]				
	Aggregate total:				

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

Table C

C.	LEI of direct intermediary	Customer collateral			
		Total value of non-cash customer collateral posted to a direct intermediary as of the last business day of the Reporting Period	Total value of customer collateral posted to a direct intermediary as of the last business day of the Reporting Period	Maximum value of customer collateral posted to a direct intermediary during the Reporting Period	Average value of customer collateral posted to a direct intermediary over the Reporting Period
1.	[Any direct intermediary with which the reporting indirect intermediary has posted customer collateral]				
	Aggregate total:				

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

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

Reporting Date	DD/MM/YY
Reporting Period[5]	DD/MM/YY – DD/MM/YY

Reporting regulated clearing agency
Name and LEI[6]

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

Table A

A.	LEI of direct intermediary	Customer collateral			
		Total value of non-cash customer collateral posted to the regulated clearing agency as of the last business day of the Reporting Period	Total value of customer collateral posted to the regulated clearing agency as of the last business day of the Reporting Period	Maximum value of customer collateral posted to the regulated clearing agency during the Reporting Period	Average value of customer collateral posted to the regulated clearing agency over the Reporting Period
1.	[Any direct intermediary that has posted customer collateral with the reporting regulated				

[5] The Reporting Period is the calendar month preceding the Reporting Date.
[6] Where a LEI is not available, please provide an Interim LEI or, if not available, please provide the complete legal name of the reporting regulated clearing agency together with the complete address of its head office.

	clearing agency]				
	Aggregate total:				

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

Table B

B.	LEI of permitted depository or reporting regulated clearing agency	Customer collateral			
		Total value of non-cash customer collateral held by or for the regulated clearing agency as of the last business day of the Reporting Period	Total value of customer collateral held by or for the regulated clearing agency as of the last business day of the Reporting Period	Maximum value of customer collateral held by or for the regulated clearing agency during the Reporting Period	Average value of customer collateral held by or for the regulated clearing agency over the Reporting Period
1.	[Reporting regulated clearing agency, if holding customer collateral itself]				
2.	[Any permitted depository holding customer collateral for the reporting regulated clearing agency]				
	Aggregate total				

ANNEX C

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

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PART 1
GENERAL COMMENTS

Introduction

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

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

Unless otherwise stated, any reference to a Part, section, subsection, paragraph, subparagraph or definition in this CP is a reference to the corresponding Part, section, subsection, paragraph, subparagraph or definition in the Instrument.

Definitions and interpretation

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

Interpretation of terms used in the Instrument and in this CP

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

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

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

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

- The term "position" refers to the aggregate amount of a derivative cleared by a regulated clearing agency for a customer at a point in time.

- "PFMI Report" means the April 2012 final report entitled *Principles for financial market infrastructures* published by the Bank for International Settlements' Committee on Payments and Market Infrastructure (formerly the Committee on Payment and Settlement Systems) and the Technical Committee of the International Organization of Securities Commissions, as amended from time to time.

Interpretation of terms defined in the Instrument

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

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

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

We expect that, subject to any available exemption, a clearing intermediary offering clearing services to a customer must register as a derivatives dealer when such requirement is in place. CSA Consultation Paper 91-407 *Derivatives: Registration* ("Consultation Paper 91-407") outlines the recommended business trigger for determining whether a person is in the business of

trading derivatives.[1] These factors include intermediating transactions and providing clearing services to third-parties. Please refer to Consultation Paper 91-407 for further details.

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

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

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

An "indirect intermediary" is a person or company that is not a participant of the regulated clearing agency where a transaction is submitted but that facilitates clearing on behalf of a customer. In order to clear its customer's transaction, the indirect intermediary would enter into an agreement with a direct intermediary (or another indirect intermediary that would in turn submit the transaction to a direct intermediary) that would submit the transaction to the regulated clearing agency to be cleared. This clearing relationship is often referred to as "indirect customer clearing". It is possible that a person or company that is a direct intermediary at one regulated clearing agency could also act as an indirect intermediary in order to access another regulated clearing agency, of which it is not a participant. The classification as a direct intermediary or indirect intermediary is not exclusive. A clearing intermediary can be a direct intermediary for some transactions and an indirect intermediary for others. A person or company providing services in respect of a cleared derivative would be considered a clearing intermediary for the purposes of the Instrument if it requires, receives or holds collateral from, for or on behalf of a customer. Accordingly, an intermediary that does not receive, hold or transfer collateral from, for on behalf of a customer would not be subject to the requirements under the Instrument even if it

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

facilitates some limited aspects of the relationship between a clearing intermediary and a customer with respect to cleared derivatives (e.g., organizing orders for derivatives).

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

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

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

In recognition of the international nature of the derivatives market, paragraph (c) of the definition permits foreign banks or trust companies to act as permitted depositories and hold customer collateral, provided they are regulated as a bank or trust company in a permitted jurisdiction. Subparagraph (d)(ii) of the definition also permits a prudentially regulated foreign entity other than a bank or trust company to act as a permitted depository for customer collateral, provided that it is registered, licensed or otherwise permitted to perform the services of a clearing intermediary in a permitted jurisdiction.

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

We are of the view that a clearing intermediary or regulated clearing agency that invests customer collateral in accordance with the Instrument should ensure such investment is:

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

We are also of the view that a clearing intermediary or regulated clearing agency should not invest customer collateral in its own securities or those of its affiliated entities. Examples of instruments that would be considered permitted investments by the local securities regulatory authority include each of the following:

- debt securities issued by or guaranteed by the Government of Canada or the government of a province or territory of Canada;

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

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

Paragraph (a) of the definition of "permitted jurisdiction" captures jurisdictions where the primary regulators of 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. The following countries and their political subdivisions are included: Belgium, France, Germany, Ireland, Japan, Netherlands, Singapore, Switzerland, United Kingdom (including Scotland) and the United States of America.

For Paragraph (b) of the definition of "permitted jurisdiction," in the case of the euro, where the currency does not have a single "country of origin", the provision will be read to include all countries in the euro area[2] and countries using the euro under a monetary agreement with the European Union.[3]

The definition of "qualifying central counterparty" is based on the qualifying central counterparty standard set out in the July 2012 final report entitled *Capital requirements for bank exposures to central counterparties*[4] published by the Basel Committee on Banking Supervision ("BCBS"). The BCBS has further stated[5] that if a regulator of a central counterparty has provided a public statement that the central counterparty has the status of a qualifying central counterparty, then the central counterparty may be considered to be a qualifying central counterparty. We are similarly of the view that a local counterparty may rely on a public statement by a regulator of a central counterparty that the central counterparty is a qualifying central counterparty. The qualifying central counterparty standard is also discussed in CSA Multilateral Staff Notice 24-311 *Qualifying Central Counterparties*.

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

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[2] European Union, Economic and Financial Affairs, *What is the euro area?*, May 18, 2015, online: European Union (http://ec.europa.eu/economy_finance/euro/adoption/euro_area/index_en.htm).
[3] European Union, Economic and Financial Affairs, *The euro outside the euro area*, April 9, 2014, online: European Union (http://ec.europa.eu/economy_finance/euro/world/outside_euro_area/index_en.htm).
[4] Basel Committee on Banking Supervision (BCBS), *Capital requirements for bank exposures to central counterparties*, July 2012, online: Bank for International Settlements (http://www.bis.org).
[5] BCBS, Basel III counterparty credit risk and exposures to central counterparties – Frequently asked questions, updated December 2012, online: Bank for International Settlements (http://www.bis.org).

Application

2. The Instrument applies to a clearing intermediary or foreign regulated clearing agency that provides clearing services to a local customer, but only in respect of a local customer's cleared derivatives. For example, a clearing intermediary providing clearing services to a local customer would be subject to the requirements of the Instrument only as they relate to the local customer and the cleared derivatives of the local customer. The Instrument is not applicable to the clearing intermediary when providing clearing services to foreign customers. The Instrument has broader application with respect to a regulated clearing agency located in a local jurisdiction; such a regulated clearing agency is subject to the requirements of the Instrument in respect of the cleared derivatives of all of its customers (whether they are local customers or not).

PART 2
TREATMENT OF CUSTOMER COLLATERAL BY A CLEARING INTERMEDIARY

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

Segregation of customer collateral – clearing intermediary

3. (1) Subsection 3(1) requires a clearing intermediary to segregate customer collateral from its own property, including from collateral advanced for a proprietary position. For example, a direct intermediary's proprietary positions (i.e., a house account) would be required to be held or accounted for separately from customer positions. Similarly, an indirect intermediary would be required to establish a separate account for its customers with its direct intermediary, so that the indirect intermediary's proprietary positions are held or accounted for separately from those of its customers. Records maintained by a clearing intermediary must make it clear that customer accounts are for the benefit of customers only.

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

Holding of customer collateral – clearing intermediary

4. We are of the view that a clearing intermediary that holds customer collateral at a permitted depository in accordance with the Instrument should take reasonable commercial efforts to confirm that the permitted depository:

- qualifies as a permitted depository under the Instrument;

- has appropriate rules, policies and procedures, including robust accounting practices, to help ensure the integrity of the customer collateral and minimize and manage the risks associated with the safekeeping and transfer of the collateral;

- maintains securities in an immobilised or dematerialised form for their transfer by book entry;

- protects customer collateral against custody risk through appropriate rules and procedures consistent with its legal framework;

- employs a robust system that ensures segregation between the permitted depository's own property and the property of its participants and segregation among the property of participants, and where supported by the legal framework, supports operationally the segregation of property belonging to a participant's customers on the participant's books and facilitates the transfer of customer collateral;

- identifies, measures, monitors, and manages its risks from other activities that it may perform;

- facilitates prompt access to customer collateral, when required.

If a clearing intermediary meets the requirements set out in the definition of a permitted depository, it may hold collateral itself and is not required to hold such customer collateral at a third party depository. For example, a Canadian financial institution that acts as a clearing intermediary would be permitted to hold customer cash or securities provided it did so in accordance with the requirements of the Instrument.

The customer collateral of multiple customers may be commingled in an omnibus customer account. However, the record-keeping obligations in the Instrument require the clearing intermediary to identify the positions and collateral held for each individual customer within an omnibus customer account. Where a clearing intermediary deposits customer collateral with a permitted depository, the clearing intermediary is responsible for ensuring the permitted depository maintains appropriate books and records to ensure customer collateral can be attributed to each customer.

Excess margin – clearing intermediary

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

Use of customer collateral – clearing intermediary

6. (2) The use of customer collateral attributable to one customer to satisfy the obligations of another customer is not permitted. Although customer collateral may be held in one omnibus account, such collateral is not available to satisfy customer obligations generally. Therefore, a clearing model that allows recourse to a non-defaulting customer's collateral, including any

model that permits fellow customer risk, violates this provision and would not be permitted to be offered to customers. For certainty, fellow customer risk is found in a clearing model that allows the customer collateral of a non-defaulting customer to be used to settle the obligations of a defaulting customer. The pooling of customer collateral held by a clearing intermediary pursuant to applicable bankruptcy and insolvency laws would not be considered a use of customer collateral by the clearing intermediary and is permitted where required by applicable laws.

(3) Subsection 6(3) recognizes that certain clearing arrangements involve the granting of security interests in customer collateral. Should an improper lien be imposed on customer collateral, the clearing intermediary must take all commercially reasonable steps to promptly address the improper lien. However, a lien over excess collateral is not restricted where the lien is imposed to secure or extend credit to the customer.

Investment of customer collateral – clearing intermediary

7. (3) Although losses in the value of invested customer collateral are not be to allocated to a customer, we are of the view that parties should be free to contract for the allocation of gains resulting from a clearing intermediary's investment activities in accordance with the Instrument. Subsection 7(3) provides that any loss resulting from a permitted investment of customer collateral must be borne by the investing clearing intermediary and not by a customer. This requirement relates only to investments made by a clearing intermediary using customer collateral, not to collateral provided by a customer. If, for example, a customer provided government bonds as collateral, and those bonds lost market value, the clearing intermediary would not be required to bear those losses. Similarly, where a customer provided collateral to a clearing intermediary and it was transformed into government bonds to be used as customer collateral posted to a regulated clearing agency, the clearing intermediary would not be required to bear any loss in market value of the transformed customer collateral.

Use of customer collateral – indirect intermediary default

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

Acting as a clearing intermediary

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

Paragraph 9(1)(b) applies to clearing intermediaries located in a foreign jurisdiction. In order to provide clearing services to a local customer, such clearing intermediaries must be registered, licensed or otherwise permitted to perform the services of a clearing intermediary in a permitted jurisdiction and must do so in accordance with the laws and regulations of that permitted jurisdiction. This would include, for example, a Commodity Futures Trading Commission ("CFTC") registered futures commission merchant authorized to provide clearing services for OTC derivatives by the CFTC.

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

(2) For greater certainty, pursuant to the application provisions of subsection 2, the requirement for a clearing intermediary to clear all transactions through a regulated clearing agency only applies to transactions with local customers.

Risk management – clearing intermediary

10. Rules, policies and procedures designed to identify, monitor and manage material risks arising from offering clearing services to an indirect intermediary and management of a default by an indirect intermediary should include all of the following:

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

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

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

Risk management – indirect intermediary

11. Rules, policies and procedures designed to identify, monitor and manage material risks arising from offering indirect clearing services to customers should include all of the following:

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

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

PART 3
RECORD-KEEPING BY A CLEARING INTERMEDIARY

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

Retention of records – clearing intermediary

12. The records required to be prepared pursuant to this Part and Part 4 must be retained for at least 7 years and in accordance with record-retention practice in Canada and the timing requirements under the limitations acts in each local jurisdiction. Records prepared in relation to a cleared derivative include any customer profiles or other information collected from a customer prior to the date upon which a transaction for the customer is entered into and must be kept for at least 7 years after the date upon which a customer's last cleared derivative expires or terminates.

Books and records – clearing intermediary

13. (3) The description of customer collateral in respect of paragraph 13(3)(b) should include an industry standard security identifier such as a CUSIP or ISIN code or, if an identifier is not available, a plain language description of the collateral.

We are of the view that accurate record-keeping requires, at minimum, daily valuations of customer collateral using industry standard best practice methodologies. With respect to records required to be kept under paragraph 13(3)(c):

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

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

- subparagraph (iii) refers to charges that have accrued, or may accrue, against the customer and have been agreed to between the clearing intermediary and the customer; such charges may include, for example, transaction or currency exchange charges, or charges relating to the settlement or termination of a cleared derivative.

Separate records – multiple clearing intermediaries

18. Where a clearing intermediary allows a person or company to act as an indirect intermediary, the clearing intermediary assumes record-keeping obligations relating to the indirect intermediary and its customers. The effect of paragraphs 18(a) and (b) together is to enable the

indirect intermediary to easily identify its own positions and property, and the positions and collateral held for, or on behalf, of each customer.

Records of investment of customer collateral – clearing intermediary

19. We are of the view that the requirement in subsection 19(d) would be fulfilled by providing a unique identifier from an industry-accepted identifying standard, such as an ISIN or CUSIP number or, if an identifier is not available, a plain language description of each instrument or asset.

Records of currency conversion – clearing intermediary

20. We are of the view that currency conversion trade records should include, at minimum, all of the following:

- the identity of the customer as represented by its legal entity identifier ("LEI") or the name or other identifier of the customer where the customer is ineligible for a LEI;
- the date of the currency exchange;
- the amount and original currency of the funds to be exchanged;
- the exchange rate at which the currency exchange is made;
- the amount and new currency resulting from the exchange;
- the name of the institution which made the exchange and/or provided the exchange rate.

PART 4
REPORTING AND DISCLOSURE BY A CLEARING INTERMEDIARY

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

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

Where clearing intermediaries are already engaged in transactions relating to cleared derivatives with regulated clearing agencies, other clearing intermediaries or customers before the

Instrument comes into force, the written disclosure required to be delivered under this Part must be delivered before receiving or submitting the first cleared derivative after the Instrument comes into force.

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

Clearing intermediary delivery of disclosure by regulated clearing agency

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

Disclosure to customer by clearing intermediary

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

The information given in the written disclosure should assist customers in evaluating: (i) the level of protection provided, (ii) the manner in which segregation and the transfer of assets is achieved (including the method for determining the value at which customer positions will be transferred) and (iii) any risks or uncertainties associated with such arrangements. Disclosure helps customers assess the related risks and conduct due diligence when entering into transactions that are cleared at the regulated clearing agency through one or more clearing intermediaries.

Examples of the information that the disclosure should provide include all of the following:

- which bankruptcy and insolvency laws apply and how they may impact the clearing intermediary's ability in relation to its regulated clearing agency, clearing intermediaries and customers, to expeditiously terminate such relationships, transfer customer collateral, and enforce rights in relation to customer collateral;

- the process for recovering or transferring customer collateral should the clearing

intermediary default;

- analysis of applicable laws governing clearing intermediaries;
- how the applicable legal framework protects customer collateral and any risks associated with that framework;
- where a customer is required to take proactive steps to protect its collateral, information on what steps a customer can take to do so, e.g., filing financing statements under laws regulating the creation and registration of security interests in personal property such as the *Personal Property Security Act* (Ontario) or such similar legislation in the local jurisdiction;
- the interaction of domestic and foreign laws applicable to customer collateral held by the clearing intermediary.

Disclosure to customer by indirect intermediary

23. The indirect intermediary should disclose to a customer any information relating to additional risks to customer positions and customer collateral that arise as a result of the indirect clearing relationship.

Customer information – clearing intermediary

24. In order to facilitate a timely transfer of collateral and positions in a default scenario, a regulated clearing agency should have sufficient information to identify each customer of a clearing intermediary, and each customer's positions and customer collateral. This identifying information must be submitted by the direct intermediary to each relevant regulated clearing agency, and must include the LEI, where the customer is eligible to be assigned a LEI in accordance with standards set by the Global Legal Entity Identifier System, or the name or other identifier of the customer.

Customer collateral report - regulatory

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

Customer collateral report – customer

26. The customer collateral report required under this section could be made available to the customer or indirect intermediary through either direct electronic access available to the

customer or indirect intermediary at any time or a daily report sent to the customer or indirect intermediary.

Disclosure of investment of customer collateral

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

PART 5
TREATMENT OF COLLATERAL BY A REGULATED CLEARING AGENCY

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

Collection of initial margin

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

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

Segregation of customer collateral – regulated clearing agency

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

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

Holding of customer collateral – regulated clearing agency

30. (1) A regulated clearing agency is a permitted depository under the Instrument and therefore may hold collateral itself if it offers depository services and is not required to hold customer collateral at a third-party permitted depository. The customer collateral of multiple customers may be commingled in an omnibus customer account. However, the record-keeping obligations in the Instrument require the regulated clearing agency to identify the positions and collateral held for each individual customer within an omnibus customer account.

We are of the view that a regulated clearing agency that holds customer collateral at a third-party permitted depository in accordance with the Instrument should take reasonable commercial efforts to confirm that the permitted depository:

- qualifies as a permitted depository under the Instrument;
- has appropriate rules, policies and procedures, including robust accounting practices, to help ensure the integrity of the customer collateral and minimize and manage the risks associated with the safekeeping and transfer of the collateral;
- maintains securities in an immobilised or dematerialised form for their transfer by book entry;
- protects customer collateral against custody risk through appropriate rules and procedures consistent with its legal framework;
- employs a robust system that ensures segregation between the permitted depository's own property and the property of its participants and segregation among the property of participants, and where supported by the legal framework, supports operationally the segregation of property belonging to a participant's customers on the participant's books and facilitates the transfer of customer collateral;
- identifies, measures, monitors, and manages its risks from other activities that it may perform; and
- facilitates prompt access to customer collateral, when required.

(2) Subsection 30(2) also requires a regulated clearing agency to hold customer collateral relating to cleared derivatives separately from any other type of customer property, including any other property posted by a customer as collateral relating to another position, investment or financial instrument. For example, the customer collateral of a customer may not be commingled with collateral relating to a futures transaction, or any other property or collateral, of the same customer or of any other customer.

Excess margin – regulated clearing agency

31. We would interpret the requirement that a regulated clearing agency identify and record the excess margin that it holds as only applying to that excess margin. For example, a regulated

clearing agency would not be required to keep records relating to excess margin held by a clearing intermediary.

Use of customer collateral – regulated clearing agency

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

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

(3) Subsection 32(3) allows a regulated clearing agency to place a lien on customer collateral where the lien arises in connection with the cleared derivative. This exception recognizes that certain clearing arrangements involve the granting of security interests in customer collateral. A regulated clearing agency is prohibited from imposing or permitting improper liens on customer collateral and should an improper lien be placed on customer collateral, the regulated clearing agency must take all commercially reasonable steps to promptly address the improper lien. However, liens over excess collateral are not restricted where the lien is imposed to secure or extend credit to the customer.

Investment of customer collateral – regulated clearing agency

33. (3) Although losses in the value of invested customer collateral are not to be allocated to a customer, we are of the view that parties should be free to contract for the allocation of gains resulting from a regulated clearing agency's investment activities in accordance with the Instrument. Subsection 33(3) provides that any loss resulting from a permitted investment of

customer collateral must be borne by the investing regulated clearing agency and not by the customer. Where a regulated clearing agency's rules provide for investment loss mutualisation and allocation to clearing intermediaries, this would not violate the requirement.

This requirement relates only to investments made by a regulated clearing agency using customer collateral, not to collateral provided by a customer. If, for example, a customer provided government bonds as collateral, and those bonds lost market value, the regulated clearing agency would not be required to bear those loses. Similarly, where a customer provided collateral to a regulated clearing agency and it was transformed into government bonds to be used as customer collateral, the regulated clearing agency would not be required to bear any loss in market value of the transformed customer collateral.

Use of customer collateral – clearing intermediary default

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

Risk management –NI 24-102 applies

35. Once in force, NI 24-102 will apply to all regulated clearing agencies providing clearing services to local customers as opposed to only those clearing agencies that are recognized. Therefore, NI 24-102 will apply to clearing agencies that are exempt from recognition if they clear customer transactions.

PART 6
RECORD-KEEPING BY A REGULATED CLEARING AGENCY

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

Retention of records – regulated clearing agency

36. The records required to be prepared pursuant to this Part and Part 7 must be retained for at least 7 years and in accordance with record retention practice in Canada and the timing requirements under the limitations acts in each local jurisdiction. Records prepared in relation to a cleared derivative include any customer profiles or other information collected from a customer prior to the date upon which a transaction for the customer is entered into and must be kept for at least 7 years after the date upon which a customer's last cleared derivative expires or terminates.

Books and records – regulated clearing agency

37. (2) Paragraph 37(2)(b) requires a description of the customer collateral held at each permitted depository. The description should include an industry standard security identifier such as a

CUSIP or ISIN code or, if an identifier is not available, a plain language description of the collateral.

We are of the view that accurate record-keeping requires, at minimum, daily valuations of customer collateral using industry standard best practice methodologies. With respect to records required to be kept under paragraph 37(2)(c):

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

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

- subparagraph (iii) refers to charges that have accrued, or may accrue, against the customer and have been agreed to between the regulated clearing agency and the customer; such charges may include, for example, transaction or currency exchange charges or charges relating to the settlement or termination of a cleared derivative.

Separate records – regulated clearing agency

38. A regulated clearing agency has record-keeping obligations relating to all customers for which it clears cleared derivatives.

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

Records of investment of customer collateral – regulated clearing agency

39. We are of the view that the requirement in paragraph 39(d) would be fulfilled by providing a unique identifier from an industry-accepted identifying standard, such as an ISIN or CUSIP number or, if an identifier is not available, a plain language description of each instrument or asset.

Records of currency conversion – regulated clearing agency

40. We are of the view that currency conversion trade records should include, at minimum, all of the following:

- the identity of the customer as represented by its LEI or the name of the customer where the customer is ineligible for a LEI;

- the date of the currency exchange;

- the amount and original currency of the funds to be exchanged;

- the exchange rate at which the currency exchange is made;
- the amount and new currency resulting from the exchange;
- the name of the institution which made the exchange and/or provided the exchange rate.

PART 7
REPORTING AND DISCLOSURE BY A REGULATED CLEARING AGENCY

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

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

Where a regulated clearing agency is already providing clearing services before the Instrument comes into force, the written disclosure required to be delivered in this Part must be delivered before accepting the first cleared derivative after the Instrument comes into force.

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

Disclosure to direct intermediaries by regulated clearing agency

41. (1) The information given in the written disclosure should assist customers in: (i) evaluating the level of protection provided, (ii) the manner in which segregation and the transfer of assets is achieved, including the method for determining the value at which customer positions will be transferred, and (iii) any risks or uncertainties associated with such arrangements. Disclosure helps customers assess the related risks and conduct due diligence when entering into transactions that are cleared through a direct intermediary of the regulated clearing agency.

Examples of the information that the disclosure should provide include:

- which bankruptcy and insolvency laws apply and how they may impact the regulated clearing agency's ability, in relation to its clearing intermediaries and customers, to expeditiously terminate such relationships, transfer customer collateral and enforce rights

in relation to customer collateral;

- the process for recovering or transferring customer collateral should the clearing intermediary default;
- analysis of applicable laws governing the regulated clearing agency including whether the regulated clearing agency is described or named under the *Payment and Clearing Settlement Act* (Canada);
- how the applicable legal framework protects customer collateral and any risks associated with that framework;
- where a customer is required to take proactive steps to protect its collateral, information on what steps a customer can take to do so such as, filing financing statements under laws regulating the creation and registration of security interests in personal property, such as the *Personal Property Security Act* (Ontario) or such other similar legislation in the local jurisdiction;
- the interaction of domestic and foreign laws applicable to customer collateral held by the regulated clearing agency.

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

Customer information – regulated clearing agency

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

Customer collateral report - regulatory

43. We are of the view that regular reporting on customer collateral deposits and holdings will assist the provincial securities regulatory authorities in monitoring customer collateral arrangements and developing and implementing rules to protect customer assets that are responsive to market practices. To that end, section 43 sets out reporting requirements for regulated clearing agencies regarding customer collateral. A completed Form 94-102F3 will provide the local securities regulatory authority with a snapshot of the value of collateral held by the regulated clearing agency.

Customer collateral report – direct intermediary

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

Disclosure of investment of customer collateral

45. We are of the view that the requirements to provide disclosure under subsection 45(1) and subsection 45(2) may be satisfied by directing a customer to the disclosure on the regulated clearing agency's website.

PART 8
TRANSFER OF POSITIONS

Part 8 provides for the transfer of customer collateral and positions from one clearing intermediary to another, either in a default scenario or upon request of the customer. Part 8 also addresses, in part, the following recommendation included in *CSA Consultation Paper 91-404 – Derivatives: Segregation and Portability in OTC Derivatives Clearing*:

> "Each CCP shall have rules facilitating the termination of contractual relationships between a clearing member and its customers and the transfer of positions."

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

Transfer of customer collateral and positions

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

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

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

The regulated clearing agency's ability to transfer customer collateral and related positions in a timely manner may depend on such factors as market conditions, sufficiency of information on

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

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

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

(2) A regulated clearing agency must be structured, including by having the necessary rules and procedures in place, to facilitate the transfer of the customer collateral and positions of a customer from one direct intermediary to another at the request of the customer. This is also known as a "business-as-usual transfer".

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

(3) Where a transfer of customer collateral and positions is facilitated under subsection 46(1) or 46(2), a regulated clearing agency may promptly transfer the customer's positions and related customer collateral, as a single portfolio or in portions, as requested by the customer, to one or more direct intermediaries.

Subsection 46(3) sets out certain pre-conditions for the transfer of customer collateral and positions, in either a default or business-as-usual transfer. The regulated clearing agency must

obtain the consent of the customer with respect to the transfer of the customer collateral and positions of the customer to the particular transferee direct intermediary. We are of the view that this consent may be best obtained at the outset of a clearing relationship, and by allowing a customer to identify direct intermediaries to which it consents *a priori* to such a transfer. If there are circumstances where this consent would not be obtained, or where the prior consent would not be followed, those circumstances should be set out in the rules, policies or procedures of the regulated clearing agency.

The regulated clearing agency must also obtain the consent of the receiving direct intermediary as to which positions and customer collateral are to be transferred. We are of the view that the consent of the direct intermediary is also best obtained at the outset of the customer's relationship with the regulated clearing agency. If there are circumstances where the consent of the direct intermediary would not be obtained *a priori* to a transfer, those circumstances should be set out in the rules, policies or procedures of the regulated clearing agency.

Transfer from a clearing intermediary

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

PART 9
SUBSTITUTED COMPLIANCE

48. (1) Subsection 48(1) contemplates substituted compliance by foreign clearing intermediaries that are regulated under the laws of a foreign jurisdiction that achieve substantially the same objectives as the Instrument. Substituted compliance will only apply to the provisions of the Instrument specified in Appendix A where the clearing intermediary is in compliance with the corresponding laws of the foreign jurisdiction set out next to such provision of the Instrument in Appendix A. The provisions specified for substituted compliance will be determined on a jurisdiction by jurisdiction basis, and will depend on a review of the laws and regulatory framework of the foreign jurisdiction.

(2) Subsection 48(2) contemplates substituted compliance by foreign regulated clearing agencies that are recognized or exempt from recognition by a Canadian securities regulatory authority and are in compliance with the laws of a foreign jurisdiction that achieve substantially the same objectives as the Instrument. Substituted compliance will only apply to the provisions of the Instrument specified in Appendix A where the regulated clearing agency is in compliance with the corresponding laws of the foreign jurisdiction set out next to such provision of the Instrument in Appendix A.

BMO Capital Markets

BMO Capital Markets
100 King Street West
3rd Floor Podium
Toronto, Ontario
M5X1H3

BY EMAIL ONLY

April 19, 2016

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
consultation-en-cours@lautorite.qc.ca

Josée Turcotte
Secretary
Ontario Securities Commission
comments@osc.gov.on.ca

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

Re: Proposed NI 94-102 Derivatives: Customer Clearing and Protection of Customer Collateral and Positions

Dear Sirs/Mesdames:

BMO Nesbitt Burns Inc. ("NBI") welcomes the opportunity to comment on Proposed *NI 94-102 Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* ("NI 94-102"). NBI supports international guidelines such as BCBS/IOSCO's Principles for Financial Market Infrastructure ("PFMI") to ensure that Canada's financial derivatives market continues to maintain the confidence of its participants. We also support creating a domestic regime for customer protection that is appropriately calibrated for the Canadian market.

We would like to have the scope of NI 94-102 clarified regarding the treatment of OTC options market -- specifically, the range of customized financial instruments that are cleared at CDCC. Equity options that are cleared at CDCC offer institutional clients the ability to customize certain eligible single-name equities and exchange-traded funds (ETF) in order to meet the client's unique hedging needs. Bringing equity options within the scope of NI 94-102 would be inconsistent with their treatment under other developed regimes.

BMO Capital Markets

BMO Capital Markets
100 King Street West
3rd Floor Podium
Toronto, Ontario
M5X1H3

NBI endorses the views expressed in the response letter submitted by TMX Group in relation to the "Treatment of the Option Market". To the extent that the CSA see benefit in including equity options within the scope of NI 94-102, we respectfully ask that an impact assessment be conducted to determine the operational, technological and legal impact of such a change. NBI welcomes the opportunity to discuss this response with you to further the dialogue on protection of customer collateral and position. Please feel free to contact Herman Gonzalez, Market Infrastructure, at herman.gonzalez@bmo.com.

Yours sincerely,

Lino Morra
Managing Director - Sales, Global Equity Products

April 19, 2016

BY EMAIL

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

Me Anne-Marie Beaudoin, Corporate Secretary
Autorité des marchés financiers
800, rue du Square-Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal (Québec) H4Z 1G3
consultation-en-cours@lautorite.qc.ca

and

Josée Turcotte, Secretary
Ontario Securities Commission
20 Queen Street West Suite 1900, Box 55
Toronto, Ontario M5H 3S8
comments@osc.gov.on.ca

Dear Sirs/Mesdames:

Re: Proposed National Instrument 94-102 *Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* (the "Proposed National Instrument")

The Canadian Advocacy Council[1] for Canadian CFA Institute[2] Societies (the CAC) appreciates the opportunity to provide the following general comments on the Proposed National Instrument.

[1]The CAC represents more than 15,000 Canadian members of the CFA Institute and its 12 Member Societies across Canada. The CAC membership includes portfolio managers, analysts and other investment professionals in Canada who review regulatory, legislative, and standard setting developments affecting investors, investment professionals, and the

We were satisfied with many of the responses of the CSA to comment letters on the prior Model Rule, and the responsiveness to concerns previously raised by commentators with respect to both harmonization of rules across Canada and substituted compliance with other jurisdictions.

As set out in the notice accompanying the Proposed National Instrument, OTC derivatives clearing currently takes place outside of Canada, most likely through clearing intermediaries located in the United States and Europe. In the United States, we understand that the CFTC regulations set forth customer protection standards for swaps, commonly known as the "LSOC", or "Legal Segregation with Operational Commingling". The standards generally affect cleared swaps customer positions and related collateral, and are intended to reduce the risk from other customers of the clearing agency and protect collateral in the event of certain defaults. Canadian participants in the US derivatives market would equally be subject to such US clearing agency protections, and as a result, the concept of substituted compliance is extremely important for the efficient functioning of the derivatives markets.

Revisions already made to the Proposed National Instrument will facilitate the operation of additional customer clearing models, for example, in Europe, in which many different models are already prevalent.

Given our comments above supporting substituted compliance, we query whether the requirement for clearing intermediaries to report on posted customer collateral in Forms 94-102F1 and 94-102F2 on a customer by customer basis is appropriate, where in jurisdictions such as the United States our understanding is that reporting is only required on an aggregated basis.

We are strongly supportive of the initiatives taken by the CSA to transform the former Model Rule into a harmonized National Instrument across Canada, in order for market participants to operate efficiently across the country.

Concluding Remarks

We thank you for the opportunity to provide these comments. We would be happy to address any questions you may have or to meet with you to discuss these and related issues in greater detail. We appreciate the time you are taking to consider our points of view.

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capital markets in Canada. See the CAC's website at http://www.cfasociety.org/cac. Our Code of Ethics and Standards of Professional Conduct can be found at http://www.cfainstitute.org/ethics/codes/ethics/Pages/index.aspx.

[2] CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion for ethical behavior in investment markets and a respected source of knowledge in the global financial community. The end goal: to create an environment where investors' interests come first, markets function at their best, and economies grow. CFA Institute has more than 135,000 members in 151 countries and territories, including 128,000 CFA charterholders, and 145 member societies. For more information, visit www.cfainstitute.org.

Please feel free to contact us at chair@cfaadvocacy.ca on this or any other issue in future.

(Signed) *Michael Thom*

Michael Thom, CFA
Chair, Canadian Advocacy Council

Canadian Market
Infrastructure Committee

April 19, 2016

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

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, rue du Square-Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal (Québec) H4Z 1G3
E-mail: consultation-en-cours@lautorite.qc.ca

Josée Turcotte
Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario M5H 3S8
E-mail: comments@osc.gov.on.ca

Dear Sirs/Mesdames:

Re: Canadian Securities Administrators ("CSA") Staff Notice and Request for Comment – Proposed National Instrument 94-102: *Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* and related Proposed Companion Policy 94-102CP (collectively, the "Proposed Instrument")

Substitute Compliance

The Canadian Market Infrastructure Committee ("**CMIC**")[1] welcomes the opportunity to comment on the Proposed Instrument[2]. Given that the OTC derivative clearing infrastructure and clearing

[1] CMIC was established in 2010, in response to a request from Canadian public authorities, to represent the consolidated views of certain Canadian market participants on proposed regulatory changes in relation to over-the-counter ("**OTC**") derivatives. The members of CMIC who are responsible for this letter are: Alberta Investment Management Corporation, Bank of America Merrill Lynch, Bank of Montreal, Bank of Tokyo-Mitsubishi UFJ (Canada), Caisse de dépôt et placement du Québec, Canada Pension Plan Investment Board, Canadian Imperial Bank of Commerce, Citigroup Global Markets Inc., Deutsche Bank A.G., Canada Branch, Fédération des Caisses Desjardins du Québec, Healthcare of Ontario Pension Plan, HSBC Bank Canada, JPMorgan Chase Bank, N.A., Toronto Branch, Manulife Financial Corporation, National Bank of Canada, OMERS Administration Corporation, Ontario Teachers' Pension Plan Board, Public Sector Pension Investment Board, Royal Bank of Canada, Sun Life Financial, The Bank of Nova Scotia, and The Toronto-Dominion Bank. CMIC brings a unique voice to the dialogue regarding the appropriate framework for regulating the Canadian over-the-counter ("**OTC**") derivatives market. The membership of CMIC has been intentionally designed to present the views of both the 'buy' side and the 'sell' side of the Canadian OTC derivatives market, including both domestic and foreign owned banks operating in Canada. As it has in all of its submissions, this letter reflects the consensus of views within CMIC's membership about the proper Canadian regulatory regime for the OTC derivatives market.

intermediaries are largely concentrated outside of Canada, CMIC wishes to reiterate, in the context of this Proposed Instrument, its position concerning the importance of an effective substitute compliance regime. To the extent foreign clearing intermediaries and foreign clearing agencies that clear transactions on behalf of local customers are faced with customer collateral requirements in Canada that are stricter than, conflict with, or duplicate the customer collateral requirements in their home jurisdiction, such intermediaries and clearing agencies may decide that Canadian rules are overly burdensome. This could lead to such intermediaries and clearing agencies deciding not to deal with Canadian customers, or charge higher fees, which would negatively affect access to clearing at a reasonable cost for Canadian market participants.

To that end, CMIC supports (i) the narrowing of the scope of the Proposed Instrument from the previous version of the rule such that Canadian clearing intermediaries are not subject to the rule if they are not clearing a transaction with a local customer, and (ii) the inclusion of new substitute compliance provisions. With regard to substitute compliance, CMIC would support the CSA identifying in Appendix A the laws of the major OTC derivatives jurisdictions, such as the United States and Europe. In addition, CMIC would also support the CSA, in determining which provisions of the Proposed Instrument will benefit from substitute compliance, taking a holistic approach and concluding that foreign customer protection rules qualify for substitute compliance as long as they offer the same level of overall protection as set out under the Proposed Instrument. If, for example, the rules of a foreign jurisdiction do not require that the books and records of a clearing intermediary record all of the items set out in Section 13(3) of the Proposed Instrument, CMIC submits that such fact alone should not disqualify the foreign rules from substitute compliance of Section 13 of the Proposed Instrument.

Customer Collateral Report - Regulatory

Section 25 of the Proposed Instrument provides that direct and indirect intermediaries receiving customer collateral must electronically file, on a monthly basis, a completed Form 94-102F1 and Form 94-102F2, respectively. These forms require direct and indirect intermediaries to report customer collateral on an individual customer basis. However, we note that futures commission merchants ("**FCMs**") under Dodd Frank are required to report customer positions to the U.S. Commodity Futures Trading Commission (the "**CFTC**") and to their designated self-regulatory organization only on an aggregate basis and not on an individual customer basis.[3] In light of this, CMIC recommends that Forms 94-102F1 and 94-102F2 be modified such that only the aggregate total of customer collateral positions will have to be reported by direct and indirect intermediaries.

At the very least, if the above recommendation is not accepted, CMIC believes that section 25 of the Proposed Instrument should be one of the sections listed in Appendix A of the Proposed Instrument for which substitute compliance is available for clearing intermediaries that are in compliance with the requirements of Dodd Frank.

Perfection of Cash Collateral

Finally, it would be remiss if we were to submit a comment letter on the issue of customer collateral without taking the opportunity to comment on the importance of amending the personal property security legislation in Canada to permit the perfection by way of control of a security interest in cash

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[2] See Notice and Request for Comment available at: http://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20160121_94-102_derivatives-customer-collateral.htm.

[3] See CFTC Regulation 22.2(g) and corresponding Statement of Cleared Swaps Customer Segregation Requirements and Funds in Cleared Swaps Customer Accounts under 4d(f) of the U.S. Commodity Exchange Act contained in the Form 1-FR-FCM .

collateral held outside a securities account.[4] As we noted in our prior response letter[5], it has become market standard for parties to rely on the absolute transfer and right of set-off mechanic in order to have priority with respect to cash collateral. When using that mechanic, in order to avoid recharacterization, it is recommended that the "secured party" treat the cash as property of the "secured party" and not as property of the "pledgor". Best practices dictate that the account in which such cash is held should not be in the name of the "pledgor" or refer to the cash as belonging to the "pledgor". CMIC acknowledges that the Proposed Instrument includes a wording change to try and address this issue by providing that the clearing agency must "treat any property transferred as collateral by or on behalf of the customer", instead of the previous requirement that all customer collateral be held in a "segregated account clearly identifying the name of each customer or otherwise indicating that the property in the account is customer collateral". However, CMIC is still concerned about the potential risk that such arrangements could be recharacterized as creating a security interest which could lead to secured parties losing their priority with respect to cash collateral.

We acknowledge that amending personal property security legislation is outside the jurisdiction of the CSA. However, we encourage the CSA to impress upon the provincial governments how important such amendments are to the clearing process, the protection of customer collateral and ultimately, satisfying Canada's G20 commitments in an effective manner.

CMIC welcomes the opportunity to discuss this response with you. The views expressed in this letter are the views of the following members of CMIC:

Alberta Investment Management Corporation
Bank of America Merrill Lynch
Bank of Montreal
Bank of Tokyo-Mitsubishi UFJ (Canada)
Caisse de dépôt et placement du Québec
Canada Pension Plan Investment Board
Canadian Imperial Bank of Commerce
Citigroup Global Markets Inc.
Deutsche Bank A.G., Canada Branch
Fédération des Caisses Desjardins du Québec
Healthcare of Ontario Pension Plan
HSBC Bank Canada
JPMorgan Chase Bank, N.A., Toronto Branch
Manulife Financial Corporation
National Bank of Canada
OMERS Administration Corporation
Ontario Teachers' Pension Plan Board
Public Sector Pension Investment Board
Royal Bank of Canada
Sun Life Financial
The Bank of Nova Scotia
The Toronto-Dominion Bank

[4] This issue applies in Canada to all provinces and territories, other than the Province of Quebec. On April 21, 2015, legislation was adopted in the Province of Quebec whch came into force on January 1, 2016 allowing a secured party to perfect by way of control a security interest in bank deposits and cash transferred to secure an obligation.

[5] CMIC letter dated March 19, 2014 to CSA Staff Notice 91-304 Model Provincial Rule – Derivatives: Customer Clearing and Protection of Customer Collateral and Positions; Available at: http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20140319_91-304_canadian-market-infrastructure.pdf

Submission by Chicago Mercantile Exchange Inc. (CME) in response to Proposed National Instrument 94-102 and Proposed Companion Policy 94-102CP, *Derivatives: Customer Clearing and Protection of Customer Collateral and Positions*

CME Group

Sunil Cutinho
President, CME Clearing

19 April 2016

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

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, rue du Square-Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal (Québec)
H4Z 1G3

Josée Turcotte
Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario
M5H 3S8

Re: ***CSA Notice and Request for Comment: Proposed National Instrument 94-102 and Proposed Companion Policy 94-102CP, Derivatives: Customer Clearing and Protection of Customer Collateral and Positions***

To all interested parties:

CME Group Inc. ("CME Group") appreciates the opportunity to provide comments on the Canadian Securities Administrators' (the "CSA") *Proposed National Instrument 94-102 ("*Proposed NI*") and Proposed Companion Policy 94-102CP ("*Proposed CP*"), Derivatives: Customer Clearing and Protection of Customer Collateral and Positions*. The Proposed NI and Proposed CP are referred to herein collectively as Proposed NI 94-102.

CME Group is the parent of Chicago Mercantile Exchange Inc. ("CME") and of CME's clearing division ("CME Clearing"). CME Clearing is one of the largest central counterparty ("CCP") clearing services for regulated derivatives contracts, offering clearing and settlement services for exchange-traded derivatives contracts and for over-the-counter ("OTC") derivatives transactions, including interest rate swaps, credit default swaps, agricultural swaps, and other OTC contracts. The U.S. Commodity Futures Trading Commission ("CFTC") is the primary regulator for CME's clearing operations. CME is exempt

from the requirement to be recognized as a clearing agency in Ontario under Section 147 of the *Securities Act* (Ontario). CME is also exempt from the requirement to be recognized as a clearing house under section 12 of the *Derivatives Act* (Quebec) and the derivatives qualification requirement and the derivatives authorization requirement under section 82 of the *Derivatives Act* (Quebec).

Introduction

CME Group fully supports the fundamental principle behind Proposed NI 94-102 of protecting customer positions and collateral. Our primary concern with Proposed NI 94-102 is the possibility for significant regulatory overlap and duplicative requirements depending on how the CSA apply substitute compliance. As the CSA recognize in their notice accompanying the proposed instrument, OTC derivatives clearing infrastructure and service providers are largely concentrated outside of Canada, primarily in the United States and the European Union. We believe the activities of CME Clearing involving local Canadian counterparties are already subject to requirements analogous in all materials respects to those set forth in Proposed NI 94-102 by virtue of applicable US laws and regulations. While narrower in scope than the CSA's Proposed Model Rule[1], we are concerned that Proposed NI 94-102 could still impose a burden on clearing intermediaries and regulated clearing agencies (including overlapping and duplicative requirements) that could deter participants from offering clearing services to Canadian local counterparties absent a broad application of substitute compliance.

Substitute Compliance

We appreciate the CSA proposing substitute compliance as a way to minimize compliance burdens for equivalently regulated foreign market clearing providers. We would encourage the CSA to take an outcomes-based approach to substitute compliance determinations without requiring strict equivalence between Proposed NI 94-102 and the applicable provisions of foreign law as a condition to granting equivalence. Imposing a layer of potentially duplicative or conflicting regulatory requirements on foreign clearing agencies that wish to clear derivatives on behalf of Canadian local counterparties would run contrary to the stated regulatory goal of encouraging central clearing of OTC derivatives. Many of the provisions of Proposed NI 94-102, if applied to cross-border activity with local Canadian counterparties, could discourage foreign participation in Canadian derivatives markets and potentially limit Canadian market participants' access to global clearing infrastructure and intermediaries.

We understand that the CSA propose to implement substitute compliance on rule by rule basis. Specifically, the CSA propose to include an Appendix to the final national instrument that will list specific provisions of foreign law that can be observed by eligible clearing agencies in order to satisfy their obligations under the corresponding provisions of the national instrument. We would encourage the CSA to amend Proposed NI 94-102 to allow, where appropriate, for more broad-based substitute compliance decisions that cover the customer clearing regimes of foreign jurisdictions as a whole (as

[1] References in this letter to the "Proposed Model Rule" are to the CSA OTC Derivatives Committee's *Proposed Model Provincial Rule on Derivatives: Customer Clearing and Protection of Customer Positions and Collateral* published on January 16, 2014 as CSA Notice 91-304.

opposed to on a rule by rule basis). Such a holistic approach would allow a foreign clearing agency to satisfy the requirements of Proposed NI 94-102 by adhering to the same requirements when dealing with Canadian local counterparties that it applies when transacting with clients in its own home jurisdiction (e.g., the US). If there were particular areas where foreign requirements were not considered sufficient by the CSA, the CSA could impose conditions on any substituted compliance decision. However, we believe such an approach (as opposed to a rule by rule approach) would greatly simplify the implementation of substitute compliance, particularly in the case of jurisdictions where the CSA conclude there is significant overlap between the requirements of that foreign regime and the requirements contemplated in Proposed NI 94-102.

Portfolio Margining

We reiterate concerns raised by commenters in the context of the Proposed Model Rule about imposing a prohibition on portfolio margining. We believe portfolio margining of OTC derivatives with other products such as futures can provide important commercial benefits to market participants (such as capital savings) without significantly increasing the risk of customer shortfalls in the event of a clearing intermediary's default. CME Clearing has obtained relief for this type of cross-margining from the CFTC. In reliance on that relief, CME Clearing currently offers its US customers the ability to cross-margin across nineteen cleared OTC interest rate swap currencies, CBOT treasury futures, CME Eurodollar futures and USD deliverable swap futures.

Section 32 of Proposed NI 94-102 would not permit cross-margining of futures and OTC cleared derivatives (although discretionary relief is contemplated in Section 32 of the Proposed CP). To reduce the regulatory burden on foreign clearing agencies, we would encourage the CSA where appropriate to recognize existing foreign exemptive relief as part of its substitute compliance determinations so that foreign clearing agencies do not have to apply for the same relief in order to make cross-margining available to local Canadian participants (both for clearing intermediaries and clients). Given the effort and expense required to obtain separate relief from Canadian securities regulatory authorities to extend cross-margining to local Canadian counterparties, foreign clearing agencies may decide not to make this option available in Canada. For Canadian clearing intermediaries and clients that utilize portfolio margining today, this element of Proposed NI 94-102 would restrict them from continuing to do so (at least temporarily until exemptive relief is obtained).

If cross-margining is not permitted for Canadian local counterparties, clearing agencies will have to implement controls to prevent Canadians from accessing their offerings. For CME Group, this process of identifying Canadian clients and blocking access would be highly manual. The additional time and resources required for clearing agencies to block access for Canadian accounts would deter firms from making clearing services available to Canadian clients. We submit that Canadian local customers would benefit from being able to access the cross-margining of futures and OTC derivatives made available by CME. We note that futures which are portfolio margined with OTC swaps receive protections applicable to OTC swaps, including a longer five day margin period of risk (as opposed to the normal one day for

futures)[2]. Canadian clients would be subjected to significantly higher margin requirements if their futures and swaps cannot be commingled and cross-margined. We would ask the CSA to consider this fact, and the potential operational and implementation burden involved in blocking access for Canadian accounts, when addressing the issues of commingling and cross-margining in the final national instrument.

Segregation of "Customer Collateral"

CME Group believes it is important for Proposed NI 94-102 to differentiate between customer collateral (that is deposited to satisfy margin requirements such as initial margin) and cash or other assets that are paid or deposited to settle the change in price of an open OTC derivatives contract over a settlement cycle. Annex A of the CSA Notice and Request for Comment that accompanied the publication of Proposed NI 94-102 includes a discussion of the comments received on the Proposed Model Rule and the CSA's responses to those comments. With respect to the definition of "customer collateral", the CSA state that "variation margin provided by a customer to its clearing intermediary is customer collateral and required to be segregated."

In all cases, US DCOs must segregate customer initial and variation margin from house initial and variation margin. It is not clear whether the Proposed Instrument requires only this level of segregation or contemplates segregation of customer variation margin payments from other customers of the same clearing member. We recommend against the latter approach as it would result in gross or individual settlement of variation payments on behalf of each customer. CME Clearing and other CCPs settle the customer origin settlement variation requirements for each clearing member on a net basis.

Investment Losses

Section 33 of the Proposed CP explains that any investment losses incurred as a result of a permitted investment by a regulated clearing agency must be borne by the regulated clearing agency and not the customer. It goes on to say that, while such losses may not be passed on to customers, it is permissible for the losses to be mutualised and allocated among clearing intermediaries (presumably by contract). We would note that under equivalent US rules the regulated clearing agency (or DCO) must incur the loss and no provision is made for mutualisation among clearing members. We would request that the CSA reconsider whether the proposal in Section 33 of the Proposed CP to permit mutualisation of such losses among clearing members is appropriate from a risk management and policy perspective or if such losses should always be borne by the regulated clearing agency.

Record Retention

[2] Margin period of risk (MPOR) refers to the period of time from the most recent exchange of collateral covering a exposure to financial instruments with a defaulting counterparty until the financial instruments are closed out and the resulting market risk is re-hedged.

Proposed NI 94-102 contemplates a seven year period for retention of records for all regulated clearing agencies that fall within its scope. CME Group would note that the equivalent record keeping requirements under applicable US laws is five years. While we understand that seven years may apply in other areas of Canadian securities regulation, we believe the regulatory burden associated with requiring two additional years for regulated clearing agencies doing business with local Canadian counterparties is disproportionate and, as noted above, a disincentive for foreign firms to continue to provide clearing services into Canada. We would request that the CSA consider reducing the retention period from seven years to five years or, in the context of granting substituted compliance determinations, permit US record retention requirements to suffice for purposes of compliance by foreign clearing agencies.

We also request that the timeline apply and be measured in relation to each individual transaction. Section 36 of the Proposed CP would require that records for all transactions be retained "for at least 7 years after the date upon which a customer's last cleared derivative expires or terminates". In the context of a long-term customer relationship, this could require regulated clearing agencies to maintain records for the relevant customer transactions far beyond a seven year period. We believe the timeline should apply in respect of each individual transaction and would ask the CSA to consider revising Proposed NI 94-102 accordingly.

We would also ask the CSA to clarify the meaning of "in a readily accessible location" in paragraph 36 of Proposed NI 94-102. We note that under regulations application to US derivatives clearing organizations, records are required to be readily accessible via real time electronic access throughout the life of a swap and for two years following the final termination of the swap; thereafter they are required to be retrievable within three business days through the remainder of the period following final termination of the swap during which the record is required to be kept.

We would also request that the CSA clarify the scope of the records which regulated clearing agencies are required to retain under section 36 of Proposed NI 94-102. For example, a great deal of customer information is collected by clearing intermediaries and then shared by those clearing intermediaries with the regulated clearing agency. This is true of the customer information which a direct intermediary must provide to a regulated clearing agency under section 24 of Proposed NI 94-102. While regulated clearing agencies receive this information in connection with clearing customer transactions, we believe the record retention requirement should fall on the clearing intermediaries. We would request that the CSA revise section 36 of Proposed NI 94-102 and the corresponding provisions in the Proposed CP to reflect this allocation of responsibility for record retention.

Books and Records – Collateral Information

Section 37(1)(2) of Proposed NI 94-102 requires a regulated clearing agency to record in its books and records certain customer collateral information for each customer. We believe that the level of detail contemplated is not appropriate or necessary given the type of customer segregation model which is permitted under section 29 of Proposed NI 94-102. Pursuant to section 29 and the related provisions in the Proposed CP, regulated clearing agencies must segregate customer collateral but may also

commingle collateral of multiple customers in an omnibus customer account. This model is similar to the LSOC (legally separate, operationally commingled) model followed under the rules of the CFTC in the US. In the context of such a regime, we believe it is adequate to record the value of collateral attributable to each customer. However, section 37(2) of Proposed NI 94-102 also requires regulated clearing agencies to record a description of the customer collateral held at each permitted depository. In the corresponding provisions of the Proposed CP, it says that this description should include "an industry standard security identifier such as a CUSIP or ISIN code or, if an identifier is not available, a plain language description of the collateral." We would submit that identifying specific items of collateral attributable to individual customers is inconsistent with the segregation model contemplated elsewhere in the proposed instrument. By way of comparison, under the LSOC model in the US, a clearing agency is only required to ascribe a value of collateral attributable to each customer, not identify the type(s) of collateral attributable to each customer. Recording this level of detail could also be misinterpreted by customers to mean that specific items of collateral are individually segregated for their benefit, whereas the commingling of customer collateral which is contemplated does not completely eliminate fellow customer risk. Indeed, as acknowledged in section 32 of the Proposed CP, the pooling of customer collateral and pro rata sharing of customer collateral cannot be avoided under certain bankruptcy and insolvency laws.

In light of the above, we would ask the CSA to reconsider the requirements in section 37(2)(b) of Proposed NI 94-102 on the basis the segregation model contemplated elsewhere in the instrument should only require the recording of collateral value. Assuming the CSA agrees, we would ask that section 30(1) of the Proposed CP be amended to clarify that the record-keeping obligation with respect to collateral means collateral value only. We would also ask that section 44(b) (customer collateral reports) be amended to remove the references to "asset type and quantity of customer collateral" (again on the basis that "current value" should be sufficient).

Books and Records – Separate Records of Customer Positions and Collateral Value

Sections 38(b) and (c) of Proposed NI 94-102 require a regulated clearing agency to keep separate books and records that, at any time, enable it and each of its direct intermediaries to distinguish in the accounts held at the regulated clearing agency: " (b) the positions and value of customer collateral held for or on behalf of the direct intermediary's customers; and (c) the positions and value of customer collateral held for or on behalf of customers of each indirect intermediary for which the direct intermediary provides clearing services." CME Group notes that the US regime only requires a DCO to record the value of customer collateral held in satisfaction of DCO margin requirements, but not excess collateral posted by the customer as would appear to be required under Section 38(b). We respectfully request the CSA reconsider whether Section 38(b) should apply against non-Canadian clearing agencies such as those in the U.S., which are subject to different regulatory requirements and which have built operational systems accordingly. Further, CME Group requests that the CSA revise Section 38(b) to clarify that clearing agencies are not required to distinguish the value of customer collateral on an individually segregated basis (i.e., it can be recorded within an omnibus customer account)

With respect to Section 38(c), we would note that the types of indirect clearing arrangements for OTC derivatives contemplated by this provision are not (to our knowledge) currently available although we recognize they may be offered in the future. To the extent they are made available in the future, we would note that the CFTC has stated it intends, to the extent the indirect intermediary is not a US entity, to treat such indirect intermediary's accounts as a single customer for purposes of applying segregation requirements for OTC cleared swaps (although the CFTC recognizes further segregation may be required under applicable foreign laws). To align with the CFTC approach in this regard, we would ask the CSA to provide that Sections 38(b) and (c) only apply to a non-Canadian direct intermediary or indirect intermediary to the extent such intermediary is required to provide that level of protection under applicable foreign laws. We would also ask the CSA to clarify that Sections 38(b) and (c) only apply to a direct intermediary or indirect intermediary in respect of their Canadian local customers (and not all of their customers).

Disclosure

In the case of CME Group, much of the information which is required to be disclosed under section 41 of Proposed NI 94-102 is available on our public website (including our rules, policies and procedures as well as CME's PFMI disclosure document). Pursuant to Part 39.37 of the CFTC's rules, CME Clearing is required to make public disclosure as a systemically important derivatives clearing organization ("SIDCO"), including "rules, policies, and procedures concerning segregation and portability of customers' positions and funds", including whether cleared swaps customer collateral is "(i) protected on an individual or omnibus basis or (ii) subject to any constraints, including any legal or operational constraints that may impair the ability of [CME] to segregate or transfer the positions and related collateral of [its] customers".

Rule changes must be filed with the CFTC and disseminated. For this purpose, "rule" is defined broadly and includes "any constitutional provision, article of incorporation, bylaw, rule, regulation, resolution, interpretation, stated policy, advisory, terms and conditions, trading protocol, agreement or instrument corresponding thereto, including those that authorize a response or establish standards for responding to a specific emergency, and any amendment or addition thereto or repeal thereof, made or issued by a registered entity or by the governing board thereof or any committee thereof, in whatever form adopted." While some rules may be self-certified, material changes to how CME Clearing operates are subject to an advance notice period as CME Clearing is a SIDCO. The filings are disclosed on our website and through various advisories.

For CME Group and similarly situated clearing agencies subject to US rules, we would request that substitute compliance be available to permit reliance on the existing disclosures to satisfy the requirements proposed in section 41 of Proposed NI 94-102. We would also ask that regulated clearing agencies which have previously made these disclosures available to existing local Canadian customers (either directly or through clearing intermediaries) not be required to make the same disclosures again (or notify customers that such information is available on a website) upon the coming into force of the new national instrument.

Reporting to Canadian Regulators

While CME Group fully supports increased transparency for regulators, we request that to the extent possible the reporting obligations be designed and implemented in a way that minimizes costly and duplicative reporting requirements for foreign clearing agencies and other providers of clearing services. In the case of CME Clearing, we already report information to certain Canadian securities regulatory authorities as a condition to existing exemptive relief from local recognition requirements. In addition, information regarding OTC derivatives (including cleared OTC derivatives) is currently reported to trade repositories pursuant to derivatives trading reporting requirements in effect in Ontario, Quebec and Manitoba. Similar reporting requirements will go live in the remaining jurisdictions in Canada in July 2016. In light of these existing reporting requirements and the information already available to regulatory authorities in Canada regarding cleared derivatives, we would ask the CSA to reconsider imposing additional reporting obligations on CME and similarly situated foreign clearing agencies under Proposed NI 94-102.

A significant portion of the information that clearing intermediaries would have to disclose pursuant to Form 94-102F3 is not currently reported by CME to other regulatory authorities. For example, we do not currently report (i) the maximum value of customer collateral posted to CME during reporting periods (column 3 under "Customer collateral" in Table A of Form 94-102F3) or (ii) the average value of customer collateral posted to CME over a reporting period (column 4 under "Customer collateral" in Table A of Form 94-102F3). Also, we do not report collateral values by location as contemplated in Table B of Form 94-102F3. Given the significant burden involved in developing separate reporting just for Canadian customers, we would ask the CSA to reconsider these parts of Proposed NI 94-102. With respect to the remaining information contemplated in Table A of Form 94-102F3, we believe it would be appropriate for CME to report customer collateral information for customer positions of our Canadian clearing intermediary members. We do not believe it would be appropriate to require reporting for every clearing member of CME. We have no means to differentiate in our reporting between Canadian and non-Canadian customers and, given the relatively small proportion of our business which involves Canadian local customers, it is unclear how the aggregate collateral holdings of our non-Canadian clearing members would assist the CSA in fulfilling their monitoring functions. For these reasons, we would ask the CSA to reconsider the reporting obligations of clearing agencies and, at a minimum, limit the reporting obligation to information related to collateral held by Canadian intermediaries. To the extent the CSA would like to receive additional information, we believe that the best source for such information would be clearing members as opposed to requiring customer level reporting by regulated clearing agencies.

Portability and Transferability

CME Group agrees with the CSA regarding the importance of being able to transfer customer positions and collateral in certain pre-default and post-default scenarios. CME Group also appreciates the fact the CSA have recognized in the Proposed CP some of the difficulties and challenges in ensuring transfer and portability arrangements work as intended in all circumstances. On that basis, CME Group would ask that the obligation in section 46(1) recognize more explicitly the issues and challenges discussed in the

Proposed CP (perhaps by substituting the words “must facilitate” with “must facilitate to the extent practicable” or words to similar effect). We also suggest that the CSA amend section 46(3)(a) to reflect the fact that customer consent to transfer will not always be obtained. In lieu of explicit customer consent, certain default scenarios rely on negative consent (in connection with auction procedures, for example). Also, as acknowledged in the Proposed CP, the ability to transfer positions and collateral without client consent may actually be explicitly set out in the policies or procedures of the regulated clearing agency. On this basis, in order not to create any doubt about when transfers are permitted, we support amending section 46(3)(a) along the lines suggested above.

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CME Group appreciates the opportunity to submit feedback to the CSA on Proposed NI 94-102. Please feel free to contact the undersigned via email at sunil.cutinho@cmegroup.com or Maureen Guilfoile at maureen.guilfoile@cmegroup.com if you have any questions.

Yours sincerely,

Mr. Sunil Cutinho
Senior Managing Director & President, CME Clearing
Chicago Mercantile Exchange Inc.
20 South Wacker Drive
Chicago, Illinois 60606

2001 Pennsylvania Avenue NW
Suite 600 I Washington, DC 20006
T 202 466 5460
F 202 296 3184

April 18, 2016

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

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, rue du Square-Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal (Québec)
H4Z 1G3

Josée Turcotte
Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario
M5H 3S8

Re: *CSA Notice and Request for Comment: Proposed National Instrument 94-102 and Companion Policy 94-102CP, Derivatives: Customer Clearing and Protection of Customer Collateral and Positions*

Dear Sirs/Mesdames:

The Futures Industry Association, Inc.[1] ("**FIA**"), appreciates the opportunity to provide comments to the Canadian Securities Administrators (the "**CSA**") on Proposed National Instrument 94-102 *Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* (the "**Proposed Rule**"*)* and the related companion policy thereto (the "**Companion Policy**," and together with the Proposed Rule, "**Proposed NI 94-102**").

[1] FIA is the leading global trade organization for the futures, options and cleared derivatives markets, with offices in London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries as well as technology vendors, lawyers and other professionals serving the industry. FIA's mission is to support open, transparent and competitive markets, protect and enhance the integrity of the financial system and promote high standards of professional conduct. FIA's primary members, which act as the majority clearing members of U.S. exchanges, handle more than 90 percent of the customer funds held for trading on U.S. futures exchanges.

Introduction

FIA supports the principles underlying Proposed NI 94-102, namely the protection of customer positions and collateral. However, FIA is concerned that Proposed NI 94-102 may result in overlapping, duplicative and unnecessarily burdensome regulatory requirements depending on whether, and how, the CSA implement a substitute compliance regime.

The CSA recognized in the notice accompanying Proposed NI 94-102 that the over-the-counter (**"OTC"**) derivatives clearing infrastructure is largely located outside of Canada, primarily in the United States and Europe. It therefore should be unsurprising that certain of our non-Canadian members clear OTC derivatives transactions for local Canadian counterparties ("**Canadian Activities**"). The Canadian Activities of our members that are registered with the U.S. Commodity Futures Trading Commission (the "**CFTC**") as futures commission merchants (**"FCMs"**) are subject to requirements under U.S. federal law that, although not identical in every respect, are not materially different to those set forth in the Proposed Rule. Accordingly, and most importantly, CFTC-regulated FCMs provide an equivalent level of protection to all of their customers, including their Canadian customers.

Although the scope of Proposed NI 94-102 is narrower than originally contemplated in CSA Notice 91-304 (the "**Proposed Model Rule**"), FIA continues to believe that the imposition of costly and operationally burdensome regulatory requirements that would apply to regulated clearing agencies and clearing intermediaries (collectively, "**Clearing Service Providers**") under Proposed NI 94-102 may cause such market participants to withdraw from the Canadian market, absent an appropriately accommodating and practicable substitute compliance regime.

Substitute Compliance – Proposed NI 94-102 Should Generally Recognize Foreign OTC Derivatives Clearing Regimes In Their Entirety, Not on a "Rule-by-Rule" Basis

FIA appreciates the CSA proposing substitute compliance as a way to minimize compliance costs and burdens for appropriately regulated foreign Clearing Service Providers.

However, we believe the substitute compliance regime will not be effective in its proposed form. Under Proposed NI 91-102, substitute compliance would be implemented on a granular, "rule-by-rule" basis by publishing an Appendix that lists specific provisions of foreign law. If a foreign Clearing Service Provider is subject to and in compliance with any such provision, it will be deemed to satisfy the corresponding provisions of Proposed NI 94-102 listed in the Appendix.

FIA encourages the CSA to implement a more accommodating and practicable substitute compliance approach, whereby the OTC derivatives customer clearing regimes of foreign jurisdictions would be recognized in their entirety, as opposed to providing for substitute compliance only on a "rule-by-rule" basis. This approach would allow for a foreign Clearing Service Provider to be compliant with all of Proposed NI 94-102 if it is adhering to applicable home country requirements when dealing with Canadian customers. That is, so long as (i) a foreign Clearing Service Provider deals with Canadian customers in a manner that complies with the Clearing Service Provider's local law; (ii) such local law does not permit foreign customers of a Clearing Service Provider to be dealt with materially differently

than local customers; and (iii) the CSA has recognized the relevant local law for substitute compliance purposes, such foreign Clearing Service Provider would be deemed in compliance with Proposed NI 94-102. If there are particular areas where foreign law is not considered to sufficiently protect Canadian customers, the CSA could impose conditions on any particular substitute compliance decision, such that in a particular area compliance with Proposed NI 94-102 would be required.

FIA believes such an approach – whereby the CSA would typically recognize a foreign jurisdiction's customer collateral protection regime in its entirety for substitute compliance purposes – would simplify the implementation of Proposed NI 94-102 significantly, particularly in the case of jurisdictions, such as the U.S. and in Europe, where the local rules overlap significantly with the requirements contemplated by Proposed NI 94-102.

Imposing a layer of duplicative and potentially conflicting Canadian regulation on foreign Clearing Service Providers that seek to clear derivatives for Canadian customers would run contrary to the CSA's stated regulatory goal of encouraging central clearing of OTC derivatives. Many of the provisions of Proposed NI 94-102, if applied to cross-border activity with Canadian customers, could discourage foreign participation in the Canadian derivatives market and potentially limit Canadian market participants' access to global Clearing Service Providers.

Portfolio and Cross-Margining

FIA reiterates concerns raised by comments on the Proposed Model Rule regarding imposing a prohibition on portfolio and cross-margining. FIA believes that portfolio and cross-margining of OTC derivatives with other products, such as futures, can provide important commercial benefits to market participants (such as capital savings) without meaningfully increasing the risk of customer shortfalls in the event of a clearing intermediary's default. For example, the clearing division of the Chicago Mercantile Exchange Inc. ("**CME Clearing**") has obtained orders from the CFTC that permit cross-margining of cleared swaps products and futures.[2] In reliance on these orders, CME Clearing currently offers customers of FCMs the ability to cross-margin across nineteen cleared OTC interest rate swap currencies, CBOT treasury futures, CME Eurodollar futures and USD deliverable swap futures. In addition, the CFTC has issued an order authorizing ICE Clear Europe Limited and its FCM members to implement portfolio margining of cleared swaps products with certain non-U.S. futures.[3] The CFTC and

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[2] See Orders of the CFTC dated March 3, 2006 and September 26, 2008, regarding "Treatment of Funds Held in Connection with the Clearing of Over-the-Counter Products by the Chicago Mercantile Exchange." Links provided here: http://www.cftc.gov/files/tm/tmcmeotc4dorder030306.pdf and http://www.cftc.gov/stellent/groups/public/@requestsandactions/documents/ifdocs/cbot4dorder9-26-08.pdf .

[3] See Order of the CFTC dated August 8, 2012, regarding "Treatment of Funds Held in Connection with Clearing by ICE Clear Europe Limited of Contracts Traded on ICE Futures Europe." Link provided here: http://www.cftc.gov/stellent/groups/public/@requestsandactions/documents/ifdocs/iceclearеurope4dorder8-9-12.pdf.

the U.S. Securities Exchange Commission have also issued orders to permit ICE Clear Credit LLC to offer customers of FCMs the ability to portfolio margin and carry credit default index swaps and credit default single-name security-based swaps together in a CFTC-regulated cleared swaps account.[4]

Sections 6 and 32 of Proposed NI 94-102 would not, absent discretionary relief, permit portfolio or cross-margining of futures and OTC cleared derivatives. To reduce the regulatory burden on foreign Clearing Service Providers, we would encourage the CSA to recognize, where appropriate, existing foreign regulatory relief as part of its substitute compliance determinations so that foreign Clearing Service Providers are not required to apply for the same relief in Canada in order to make portfolio and cross-margining programs available to Canadian customers.

The effort and expense required to obtain separate relief from Canadian regulators in order to make these programs available to Canadian customers is such that foreign Clearing Service Providers may simply opt not to. This would be to the detriment of Canadian market participants, who would then not be permitted to participate in programs that may result in significant capital savings without meaningfully increasing any such customer's (i) exposure to a clearing intermediary insolvency or (ii) risk that its cleared OTC derivatives positions will be ported to another clearing intermediary in the event of such an insolvency.

Record Retention Obligations

Proposed NI 94-102 provides that all Clearing Service Providers "must keep the records required" under Proposed NI 94-102 "and all supporting documentation, in a readily accessible location for at least 7 years . . . ." FIA notes that the equivalent requirements under U.S. law provide for a five year record retention period.

FIA acknowledges that seven years is the typical record retention period applicable in other areas of Canadian securities regulation. However, we believe that the burden associated with requiring U.S. Clearing Service Providers to retain records related to Canadian customers for two additional years is disproportionate to any marginal benefit associated with the additional retention period, and ultimately a disincentive for such Clearing Service Providers to continue to clear for Canadian customers. We ask that the CSA consider reducing the retention period from seven years to five years.

More broadly, we would ask that the CSA, in the context of its substitute compliance determinations, provide that compliance with U.S. record retention requirements is deemed to satisfy Canadian requirements. We would further ask that the CSA limit the information and records required to be retained by a foreign Clearing Service Provider to those required under applicable foreign law.

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[4] See, e.g., Order of the CFTC dated January 14, 2013, regarding "Treatment of Funds Held in Connection with Clearing by ICE Clear Credit of Credit Default Swaps." Link provided here: http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/icecreditclearorder011413.pdf .

We also request that the retention period apply and be measured in relation to each individual transaction. Section 36 of Proposed NI 94-102 provides that records for **all transactions** are required to be retained by a regulated clearing agency "for at least 7 years after the date upon which a customer's **last** cleared derivative expires or terminates" (emphasis added). Section 12 of Proposed NI 94-102 imposes the same requirement on clearing intermediaries. In the context of a long-term customer relationship, this could require Clearing Service Providers to maintain records for the relevant customer transactions far beyond a seven year period, which could prove extremely burdensome.

Books and Records – Collateral Information

Sections 13 and 37 of the Proposed Rule require Clearing Service Providers to record certain customer collateral information for each customer. FIA believes that the level of detailed information contemplated is not appropriate given the customer segregation model that is permitted under sections 3 and 29 of Proposed NI 94-102.

Under sections 3 and 29 of the Proposed Rule, Clearing Service Providers are required to segregate customer collateral from collateral securing proprietary positions (which is held in the "house" account). Customer collateral, however, may be commingled with the collateral of other customers in a single "omnibus" customer account. This model is similar to the "legally segregated operationally commingled" ("**LSOC**") model followed under the rules of the CFTC in the United States.

FIA believes it is adequate (and appropriate), in the context of a regime that permits the collateral of all cleared OTC derivatives customers to be held in a single customer account, to record the value of collateral attributable to each customer. However, sections 13(3) and 37(2) of the Proposed Rule also require Clearing Service Providers to record a description of the customer collateral held at each permitted depository. The corresponding provisions of the Companion Policy state that this description should include "an industry standard security identifier such as a CUSIP or ISIN code or, if an identifier is not available, a plain language description of the collateral."

We submit that identifying specific items of collateral attributable to individual customers is inconsistent with the segregation model contemplated elsewhere in Proposed NI 94-102. By way of comparison, under the LSOC model in the United States, DCOs and FCMs are only required to ascribe a value to the collateral attributable to a particular customer, not identify the type(s) of collateral attributable to each customer. Recording this level of detail could be misinterpreted by customers as meaning that specific items of collateral are individually segregated for their benefit, which is incorrect – the commingling of customer collateral permitted under LSOC and Proposed NI 94-102 does not completely eliminate fellow customer risk.

In light of the above, we would ask the CSA to reconsider the requirements in sections 13(3) and 37(2) of the Proposed Rule on the basis that the segregation model contemplated elsewhere in the instrument should only require the recording of collateral value. Assuming the CSA agrees, we would ask that sections 4 and 30(1) of the Companion Policy be amended to clarify that the recordkeeping obligation with respect to collateral extends to collateral value only. We would also ask that sections 26(1)(b) (customer collateral report – customer) and 44(b) (customer collateral report – direct intermediary) of

the Proposed Rule be amended to remove the references to "asset type and quantity of customer collateral."

Books and Records – Excess Margin

Sections 5 and 31 of the Proposed Rule require Clearing Service Providers to have "rules, policies or procedures in place with respect to identifying and recording, at least once each business day, the value of excess margin" that they hold that is attributable to each customer. FIA asks that the CSA reconsider this approach. The calculations required to be performed by FCMs under the CFTC's LSOC regime identify daily excess margin in the LSOC account across all customers, and not necessarily at a per customer level.[5] In the interest of harmonizing regulation across jurisdictions and encouraging Canadian access to international OTC derivatives clearing infrastructure, we submit that it would be appropriate for the CSA to adopt the same approach.

Disclosure – Clearing Intermediary Disclosure to Customers

Sections 21, 22, 23, 26 and 27 of the Proposed Rule impose disclosure obligations on clearing intermediaries regarding, among other things, (i) the regulated clearing agencies that a clearing intermediary clears through; (ii) the investment policies and guidelines of any such regulated clearing agency; (iii) the treatment of customer collateral not held at a regulated clearing agency, including the impact of relevant bankruptcy and insolvency laws and reasonably prompt disclosure of any change to such treatment; (iv) the risks associated with receiving clearing services through an indirect intermediary and the rules, policies or procedures for transferring positions and customer collateral in the event of an indirect intermediary's default (including reasonably prompt disclosure of any change to any such rules); (v) daily reporting regarding, among other things, the current value, asset type and quantity of customer collateral held by the clearing intermediary and the location of each permitted depository at which customer collateral is held; and (vi) written disclosure regarding investment policies with respect to customer collateral.

Attached hereto as Exhibits A (the "**Rule 1.55(k) Disclosure**") and B (the "**Default Disclosure**") are examples of FIA disclosure templates that are typically provided by U.S. FCMs to their customers as part of the account opening process. FIA is hopeful that, as part of its substitute compliance determinations, the CSA will deem U.S. customer disclosure rules equivalent to the disclosure rules in Proposed NI 94-102. However, even if this result is expected to be achieved, we would nonetheless ask the CSA to consider aligning its customer disclosure rules with the market practice evidenced by the Rule 1.55(k) Disclosure and the Default Disclosure. In the absence of substitute compliance, the prescribed disclosures the CSA has proposed would impose a meaningful regulatory impediment to providing clearing services to Canadian customers.

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[5] Pursuant to CFTC Rule 22.13, FCMs that offer "LSOC with excess", where excess collateral is posted to and held by a DCO, must identify the excess collateral of each customer so held on a daily basis. FCMs, however, are not required to offer LSOC with excess to its customers.

We wish to highlight, in particular, the requirement that, before receiving an OTC derivative from or on behalf of a customer, a clearing intermediary must provide "written disclosure to the customer describing the treatment of customer collateral not held at a regulated clearing agency, including the impact of relevant bankruptcy and insolvency laws, in the event of a default by the clearing intermediary." Further, clearing intermediaries must disclose any change regarding the treatment of customer collateral "within a reasonable period of time."

Unless substitute compliance is available, these rules would require U.S. clearing intermediaries to provide disclosures to Canadian customers that they do not currently provide to U.S. and other global customers. Notably, the Rule 1.55(k) Disclosure provides that "[Firm] will update this information annually and as necessary to take account of any material change to its business operations, financial condition or other factors that [Firm] believes may be material to a customer's decision to do business with the [Firm]." Non-material changes in treatment of customer collateral do not trigger an intra-year update to the disclosure. Under Proposed NI 94-102, however, U.S. FCMs would appear to be required to provide such non-material update to Canadian customers.

Moreover, neither the Rule 1.55(k) Disclosure nor the Default Disclosure provides in-depth bankruptcy or insolvency analysis. The approach is instead to provide more generalized "default risk" disclosure along with links to relevant clearing house rules and other documents (including a link to FIA's "Protection of Customer Funds Frequently Asked Questions" document).

FIA submits that it would be extremely difficult, if not impossible, to create and provide detailed cross-border bankruptcy disclosures for Canadian customers. The nature of complex cross-border bankruptcies, including the application of equitable principles that underpin bankruptcy laws in the U.S., Canada and elsewhere, renders outcomes difficult to predict with certainty. Indeed, for this reason, a detailed disclosure of the kind that would be required by Proposed NI 94-102 could be inaccurate or misleading.

An additional disclosure requirement that FIA feels is inconsistent with U.S. rules is the obligation, under section 26 of the Proposed Rule, to make available daily collateral reports to customers, including the "location of each permitted depository at which customer collateral is held." Such reporting of collateral is required to be provided to customers only on a monthly basis under the U.S. regime and the location of depositories is not required to be disclosed to customers.[6]

A final disclosure requirement that FIA wishes to highlight is the requirement under section 27 of the Proposed Rule that a clearing intermediary that invests customer collateral disclose in writing its investment policy to the customer. This disclosure is not required under U.S. law and would be burdensome and unnecessary, particularly in light of the fact that CFTC Rule 1.25 is more restrictive than

[6] FCMs may only use qualifying depositories that sign a CFTC-required acknowledgement letter that obligates the depository, among other things, to provide the CFTC the ability to obtain account balance information for such accounts. See CFTC Rule 1.20.

the CSA's proposal regarding permitted investments in respect of customer collateral. For example, CFTC Rule 1.25 limits the type of instruments that may be used as well as imposes requirements as to the liquidity, concentration, and time-to-maturity of such instruments.

Reporting to Canadian Regulators

Although FIA supports increased transparency for regulators, we request that to the extent possible the reporting obligations be designed and implemented in a way that minimizes costly and duplicative reporting requirements for foreign Clearing Service Providers. The FIA would, for example, support a proposal that would permit U.S. FCMs to provide to Canadian regulators the same reports provided to the CFTC and/or the National Futures Association, with information regarding non-Canadian customers deleted from the version provided to Canadian regulators.

Portability and Transferability

FIA agrees with the CSA regarding the importance of being able to transfer customer positions and collateral in certain pre-default and post-default scenarios. FIA also appreciates the fact the CSA have recognized in the Companion Policy some of the difficulties and challenges in ensuring transfer and portability arrangements work as intended in all circumstances. On that basis, FIA would ask that the obligation in section 46(1) of the Proposed Rule recognize more explicitly the challenges discussed in the Companion Policy (perhaps by substituting the words "must facilitate" with "must facilitate to the extent practicable" or words to similar effect). We also suggest that the CSA amend section 46(3)(a) of the Proposed Rule to reflect the fact that customer consent to transfer will not always be obtained. In lieu of explicit customer consent, certain default scenarios rely on negative consent (for example, in connection with auctions). Also, as acknowledged in the Companion Policy, the ability to transfer positions and collateral without client consent may actually be explicitly set out in the policies or procedures of the regulated clearing agency. On this basis, in order not to create doubt regarding when transfers are permitted, we support amending section 46(3)(a) along the lines suggested above.

Investment of Customer Collateral

FIA is generally supportive of the constraints placed on the investment of customer collateral by Proposed NI 94-102. We believe, however, that the requirement that any repurchase or reverse repurchase agreement in respect of permitted investment collateral be confirmed in writing to the customer is inappropriate and unduly onerous. There is no analogous requirement in the United States and, further, the customer does not bear any risk of loss on, and does participate in any profits with respect to, any such agreement, and therefore should not require notification. See CFTC Rule 1.29.

Definition of "Clearing Services"

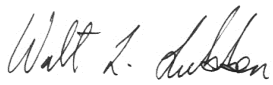
FIA is concerned that the definition "clearing services" in Proposed NI 94-102 is inappropriately broad and may capture activity which should not be regulated as clearing activity. For example, the language with respect to "submitting customer transactions" could be interpreted to extend to persons/entities regulated as "introducing brokers" in the United States, for which compliance with the regime in

Proposed NI 94-102 would serve no purpose as they do not custody customer collateral. In addition, FIA notes that the prong of the definition that includes persons that "monitor[ ] credit and liquidity limits" is vague, particularly as the meaning of "liquidity limits" is unclear.

* * * * * * * * *

FIA appreciates the opportunity to submit these comments to the CSA on Proposed NI 94-102. If CSA staff has any questions concerning the matters discussed in this letter, please contact Allison Lurton, FIA's Senior Vice President and General Counsel, at (202) 772-3057 or alurton@fia.org.

Yours sincerely,



Walt L. Lukken
President and Chief Executive Officer

EXHIBIT A

RULE 1.55(k) DISCLOSURE

EXHIBIT A

COMMODITY FUTURES TRADING COMMISSION RULE 1.55(K):
FCM-SPECIFIC DISCLOSURE DOCUMENT

The Commodity Futures Trading Commission (Commission) requires each futures commission merchant (FCM), including [Firm], to provide the following information to a customer prior to the time the customer first enters into an account agreement with the FCM or deposits money or securities (funds) with the FCM.[1] Except as otherwise noted below, the information set out is as of [DATE]. [Firm] will update this information annually and as necessary to take account of any material change to its business operations, financial condition or other factors that [Firm] believes may be material to a customer's decision to do business with [Firm].[2] Nonetheless, [Firm's] business activities and financial data are not static and will change in non-material ways frequently throughout any 12-month period.

[NOTE: [Firm] is a subsidiary of [Holding Company]. Information that may be material with respect to [Firm] for purposes of the Commission's disclosure requirements may not be material to [Holding Company] for purposes of applicable securities laws.

Firm and its Principals

(1) FCM's name, address of its principal place of business, phone number, fax number and email address.

(6) FCM's DSRO and DSRO's website address.

(2) The name, title, business address, business background, areas of responsibility and the nature of the duties of each principal as defined in § 3.1(a).

Firm's Business

(3) The significant types of business activities and product lines engaged in by the futures commission merchant, and the approximate percentage of FCM's assets and capital that are used in each type of activity.[3]

This section should also include all registrations and exchange and clearing organization memberships.

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[1] The objective of the disclosures is to provide prospective and existing customers of the FCM with material information that could have an impact on their decision to engage in a relationship with the FCM. The Commission is not mandating the form in which the required information is conveyed, provided it is responsive to the information requirements of § 1.55 and provides such information in a clear, concise, and understandable manner. An FCM is not in compliance with § 1.55 if the annual report information does not disclose the information required by § 1.55 as it relates to the FCM.

[2] Each FCM will need to assess the materiality of changes and use its judgment to determine whether the Firm Specific Disclosure Document should be revised.

[3] The regulation is intended to provide the public with information concerning the major businesses activities that an FCM engages in to provide information regarding the benefits and risks of using such firm to conduct transactions in commodity interests. The rule requires disclosure of material non-regulated, as well as regulated, businesses that an FCM may engage in.

Activity/Product Line	Percentage of Assets	Percentage of Capital
Financing (Resales, Borrows)		
Inventory by Business Line		
FICC		
Equities		
Other Inventory		
Goodwill and Tangible Assets		
Receivable from Broker-Dealers and Customers		
Investments in Subsidiaries and Receivable from Affiliates		
Fixed and All Other Assets		

FCM Customer Business

(4) FCM's business on behalf of its customers, in its capacity as such, including:

- Types of customers: *e.g.*, institutional (asset managers, pension funds, insurance companies, banks); retail; commercial (agricultural, energy); proprietary (HFT)
- Markets traded: *e.g.*, financial, agricultural, energy, security futures, swaps
- International businesses: Europe, Asia, Latin America
- Exchange and Swap Execution Facility Memberships

Exchange Memberships	SEF Memberships
Cantor Futures Exchange LP	360 Trading Networks, Inc.
CBOE Futures LLC	BGC Derivatives Markets LP
Chicago Board of Trade	Chicago Mercantile Exchange, Inc.
Chicago Mercantile Exchange, Inc.	DW SEF LLC
Commodity Exchange Inc.	EOX Exchange LLC
ELX Futures LP	GFI Swaps Exchange LLC
Eris Exchange LLC	GTX SEF LLC
ICE Futures US, Inc.	ICAP Global Derivatives Limited
Minneapolis Grain Exchange, Inc.	ICAP SEF (US) LLC
Nasdaq OMX Futures Exchange, Inc.	ICE Swap Trade LLC
New York Mercantile Exchange, Inc.	INFX SEF Inc.

Nodal Exchange LLC	Javelin SEF LLC
North American Derivatives Exchange	LatAm SEF LLC
NYSE Liffe US, LLC	MarketAxess SEF Corporation
One Chicago LLC	SDX Trading LLC
trueEX LLC	SwapEx LLC
	TeraExchange LLC
	Thomson Reuters (SEF) LLC
	tpSEF Inc.
	Tradition SEF Inc.
	trueEX LLC
	TW SEF LLC

- Clearinghouses used: member, non-member

Clearing Organization	**[Firm] a Member**	**[Firm] Affiliate a Member**
ASX Clear		
ASX Clear (Futures)		
Chicago Mercantile Exchange		
Eurex Clearing		
ICE Clear US Inc.		
ICE Clear Europe		
ICE Clear Credit LLC		
LCH.Clearnet LLC		
LCH.Clearnet Limited		
LCH.Clearnet SA		
Minneapolis Grain Exchange Clearing House		
New York Portfolio Clearing		
North American Derivatives Exchange		
Options Clearing Corporation		
Singapore Exchange Derivatives Clearing		

- carrying brokers used: affiliates, non-affiliates

Carrying Brokers US/Non-US	**Affiliated with [FCM] Y/N**

Permitted Depositories and Counterparties

FCM's policies and procedures concerning the choice of bank depositories, custodians and counterparties to permitted transactions under § 1.25.[4]

[Consider inserting from risk management program: Rule 1.11(e)(3)(i)(A) and (F)]

Material Risks

(5) The material risks, accompanied by an explanation of how such risks may be material to its customers, of entrusting funds to FCM, including, without limitation:[5]

> (i) the nature of investments made by FCM (including credit quality, weighted average maturity and weighted average coupon);[6]
>
> **Overview: In order to assure that it is in compliance with its regulatory capital requirements and that it has sufficient liquidity to meet its ongoing business obligations, [Firm] holds a significant portion of its assets in cash and US Treasury securities guaranteed as to principal and interest. [Firm] also invests in other short-term highly liquid instruments such as money market instruments, commercial paper, and certificates of deposit. [Firm] also invests a limited amount of its in state and municipal securities and certain highly-rated corporate debt securities. The average weighted maturity of all investments held is ___ [months], and the average weighted coupon is ___ percent.**

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[4] The term "counterparties" is limited to § 1.25 counterparties.

[5] We suggest that the information each firm provides in response to subparagraphs (i)-(iv) be based, to the extent practicable, on the notes in the firm's financial statements. In particular, with the exception of the discussion credit quality, weighed average maturity and average coupon of Rule 1.25 investments under subparagraph (i), we suggest that it is unnecessary to provide numerical values.

The Commission rejected FIA's suggestion that the term "risks" be replaced with the term "information." The Commission believes customers (particularly retail and less sophisticated customers) would benefit from an FCM providing its assessment of the risks of the firm, accompanied by an explanation of such risks. The disclosures contemplated by the rule go to the full operation of the FCM and not just its regulated or futures activities.

[6] We suggest that information regarding credit quality, weighed average maturity and average coupon be limited to investments of customer funds under Rule 1.25. Subject to the foregoing, an FCM must provide information regarding its general investments and not just the investment of customer funds. The disclosures contemplated by the rule go to the full operation of the FCM and not just its regulated or futures activities.

(ii) FCM's creditworthiness, leverage, capital, liquidity, principal liabilities, balance sheet leverage and other lines of business;[7]

(iii) risks to FCM created by its affiliates and their activities, including investment of customer funds in an affiliated entity; and

(iv) any significant liabilities, contingent or otherwise, and material commitments.

Material Complaints or Actions

(7) Any material administrative, civil, enforcement or criminal complaints or actions filed against FCM where such complaints or actions have not concluded, and any enforcement complaints or actions filed against FCM during the last three years.[8]

Customer Funds Segregation.

(8) A basic overview of customer fund segregation, FCM management and investments, FCMs and joint FCM/broker dealers.

Customer Accounts. FCMs may maintain up to three different types of accounts for customers, depending on the products a customer trades:

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[7] The requirement to disclose leverage information would be met by an FCM providing the leverage information required under § 1.10 and NFA regulations. An FCM should define the leverage calculation in the Disclosure Document and may provide any other information necessary to make the information meaningful for the public, but if materially different from the then prevailing NFA methodology, should provide an explanation of the differences therefrom.

[8] The rule is not intended to cover open or closed investigations that have not resulted in the filing of a complaint.

FIA had recommended the Commission confirm that the disclosure required under this paragraph would be limited to matters required to be disclosed in accordance with § 4.24(l)(2), *i.e.*, an action will be deemed material if: (1) the action would be required to be disclosed in the footnotes to a commodity pool's financial statements under generally accepted accounting principles as adopted in the US; (2) the action was brought by the Commission and resulted in a civil monetary penalty in excess of $50,000; and (3) the action was brought by any other federal or state regulatory agency, a non-US regulatory agency, or an SRO and involved allegations of fraud or other willful misconduct.

In response, the Commission did not comment on (1) above. With respect to (2) and (3), the Commission stated that FCMs should disclose all Commission disciplinary actions that are pending or have been concluded against the FCM without regard to the amount of the civil monetary penalty that may have been imposed. With regard to actions brought by other regulatory and self-regulatory agencies, there may be circumstances in addition to fraud or other willful misconduct that should be disclosed to customers to allow customers to better appreciate the potential risks of entering into a business relationship with an FCM.

Note: Notwithstanding the Commission's comment, it should be noted that the statutory disqualifications in sections 8a(2) and (3), which are indicative of "material" actions, are generally limited to actions involving fraud or willful misconduct. Other actions that we may want to consider including are actions relating to conduct that also requires an early warning notice under Rule 1.12, *e.g.*: (i) violation of the net capital requirements; (ii) failure to keep current books and records; (iii) material inadequacy; (iv) violation of the segregation requirements; and (v) violation of Rule 1.25. Any such violations should be more than technical. Rather, we believe only material actions brought by other regulatory and self-regulatory agencies, evidencing a weakness in internal controls or other systemic problems would be required to be disclosed.

(i) a **Customer Segregated Account** for customers that trade futures and options on futures listed on US futures exchanges;

(ii) a **30.7 Account** for customers that trade futures and options on futures listed on foreign boards of trade; and

(iii) a **Cleared Swaps Customer Account** for customers trading swaps that are cleared on a DCO registered with the Commission.

The requirement to maintain these separate accounts reflects the different risks posed by the different products. Cash, securities and other collateral (collectively, **Customer Funds**) required to be held in one type of account, *e.g.*, the Customer Segregated Account, may not be commingled with funds required to be held in another type of account, *e.g.*, the 30.7 Account, except as the Commission may permit by order. For example, the Commission has issued orders authorizing ICE Clear Europe Limited, which is registered with the Commission as a DCO, and its FCM clearing members: (i) to hold in Cleared Swaps Customer Accounts Customer Funds used to margin both (a) Cleared Swaps and (b) foreign futures and foreign options traded on ICE Futures Europe, and to provide for portfolio margining of such Cleared Swaps and foreign futures and foreign options; and (ii) to hold in Customer Segregated Accounts Customer Funds used to margin both (c) futures and options on futures traded on ICE Futures US and (d) foreign futures and foreign options traded on ICE Futures Europe, and to provide for portfolio margining of such transactions.

Customer Segregated Account. Funds that customers deposit with an FCM, or that are otherwise required to be held for the benefit of customers, to margin futures and options on futures contracts traded on futures exchanges located in the US, *i.e.*, designated contract markets, are held in a **Customer Segregated Account** in accordance with section 4d(a)(2) of the Commodity Exchange Act and Commission Rule 1.20. **Customer Segregated Funds** held in the Customer Segregated Account may not be used to meet the obligations of the FCM or any other person, including another customer.

All Customer Segregated Funds may be commingled in a single account, *i.e.*, a customer omnibus account, and held with: (i) a bank or trust company located in the US; (ii) a bank or trust company located outside of the US that has in excess of $1 billion of regulatory capital; (iii) an FCM; or (iv) a DCO. Such commingled account must be properly titled to make clear that the funds belong to, and are being held for the benefit of, the FCM's customers. Unless a customer provides instructions to the contrary, an FCM may hold Customer Segregated Funds only: (i) in the US; (ii) in a money center country;[9] or (iii) in the country of origin of the currency.

An FCM must hold sufficient US dollars in the US to meet all US dollar obligations and sufficient funds in each other currency to meet obligations in such currency. Notwithstanding the foregoing, assets denominated in a currency may be held to meet obligations denominated in another currency (other than the US dollar) as follows: (i) US dollars may be held in the US or in money center countries to meet obligations denominated in any other currency; and (ii) funds in money center currencies[10] may be held in the US or in money center countries to meet obligations denominated in currencies other than the US dollar.

30.7 Account. Funds that **30.7 Customers** deposit with an FCM, or that are otherwise required to be held for the benefit of customers, to margin futures and options on futures contracts traded on foreign

[9] Money center countries means Canada, France, Italy, Germany, Japan, and the United Kingdom.

[10] Money center currencies mean the currency of any money center country and the Euro.

boards of trade, *i.e.*, **30.7 Customer Funds**, and sometimes referred to as the **foreign futures and foreign options secured amount**, are held in a **30.7 Account** in accordance with Commission Rule 30.7.

Funds required to be held in the 30.7 Account for or on behalf of 30.7 Customers may be commingled in an omnibus account and held with: (i) a bank or trust company located in the US; (ii) a bank or trust company located outside the US that has in excess of $1 billion in regulatory capital; (iii) an FCM; (iv) a DCO; (v) the clearing organization of any foreign board of trade; (vi) a foreign broker; or (vii) such clearing organization's or foreign broker's designated depositories. Such commingled account must be properly titled to make clear that the funds belong to, and are being held for the benefit of, the FCM's 30.7 Customers. As explained below, Commission Rule 30.7 restricts the amount of such funds that may be held outside of the US.

Customers trading on foreign markets assume additional risks. Laws or regulations will vary depending on the foreign jurisdiction in which the transaction occurs, and funds held in a 30.7 Account outside of the US may not receive the same level of protection as Customer Segregated Funds. If the foreign broker carrying 30.7 Customer positions fails, the broker will be liquidated in accordance with the laws of the jurisdiction in which it is organized, which laws may differ significantly from the US Bankruptcy Code. Return of 30.7 Customer Funds to the US will be delayed and likely will be subject to the costs of administration of the failed foreign broker in accordance with the law of the applicable jurisdiction, as well as possible other intervening foreign brokers, if multiple foreign brokers were used to process the US customers' transactions on foreign markets.

If the foreign broker does not fail but the 30.7 Customers' US FCM fails, the foreign broker may want to assure that appropriate authorization has been obtained before returning the 30.7 Customer Funds to the FCM's trustee, which may delay their return. If both the foreign broker and the US FCM were to fail, potential differences between the trustee for the US FCM and the administrator for the foreign broker, each with independent fiduciary obligations under applicable law, may result in significant delays and additional administrative expenses. Use of other intervening foreign brokers by the US FCM to process the trades of 30.7 Customers on foreign markets may cause additional delays and administrative expenses.

To reduce the potential risk to 30.7 Customer Funds held outside of the US, Commission Rule 30.7 generally provides that an FCM may not deposit or hold 30.7 Customer Funds in permitted accounts outside of the US except as necessary to meet margin requirements, including prefunding margin requirements, established by rule, regulation, or order of the relevant foreign boards of trade or foreign clearing organizations, or to meet margin calls issued by foreign brokers carrying the 30.7 Customers' positions. The rule further provides, however, that, in order to avoid the daily transfer of funds from accounts in the US, an FCM may maintain in accounts located outside of the US an additional amount of up to 20 percent of the total amount of funds necessary to meet margin and prefunding margin requirements to avoid daily transfers of funds.

Cleared Swaps Customer Account. Funds deposited with an FCM, or otherwise required to be held for the benefit of customers, to margin swaps cleared through a registered DCO, *i.e.*, **Cleared Swaps Customer Collateral**, are held in a **Cleared Swaps Customer Account** in accordance with the provisions of section 4d(f) of the Act and Part 22 of the Commission's rules. Cleared Swaps Customer Accounts are sometimes referred to as LSOC Accounts. LSOC is an acronym for "legally separated, operationally commingled." Funds required to be held in a Cleared Swaps Customer Account may be commingled in an omnibus account and held with: (i) a bank or trust company located in the US; (ii) a bank or trust company located outside of the US that has in excess of $1 billion of regulatory capital;

(iii) a DCO; or (iv) another FCM. Such commingled account must be properly titled to make clear that the funds belong to, and are being held for the benefit of, the FCM's Cleared Swaps Customers.

Investment of Customer Funds. Section 4d(a)(2) of the Act authorizes FCMs to invest Customer Segregated Funds in obligations of the United States, in general obligations of any State or of any political subdivision thereof, and in obligations fully guaranteed as to principal and interest by the United States. Section 4d(f) authorizes FCMs to invest Cleared Swaps Customer Collateral in similar instruments.

Commission Rule 1.25 authorizes FCMs to invest Customer Segregated Funds, Cleared Swaps Customer Collateral and 30.7 Customer Funds in instruments of a similar nature. Commission rules further provide that the FCM may retain all gains earned and is responsible for investment losses incurred in connection with the investment of Customer Funds. However, the FCM and customer may agree that the FCM will pay the customer interest on the funds deposited.

Permitted investments include:

(i) Obligations of the United States and obligations fully guaranteed as to principal and interest by the United States (U.S. government securities);

(ii) General obligations of any State or of any political subdivision thereof (municipal securities);

(iii) Obligations of any United States government corporation or enterprise sponsored by the United States government (U.S. agency obligations);[11]

(iv) Certificates of deposit issued by a bank (certificates of deposit) as defined in section 3(a)(6) of the Securities Exchange Act of 1934, or a domestic branch of a foreign bank that carries deposits insured by the Federal Deposit Insurance Corporation;

(v) Commercial paper fully guaranteed as to principal and interest by the United States under the Temporary Liquidity Guarantee Program as administered by the Federal Deposit Insurance Corporation (commercial paper);

(vi) Corporate notes or bonds fully guaranteed as to principal and interest by the United States under the Temporary Liquidity Guarantee Program as administered by the Federal Deposit Insurance Corporation (corporate notes or bonds); and

(vii) Interests in money market mutual funds.

The duration of the securities in which an FCM invests Customer Funds cannot exceed, on average, two years.

An FCM may also engage in repurchase and reverse repurchase transactions with non-affiliated registered broker-dealers, provided such transactions are made on a delivery versus payment basis and involve only permitted investments. All funds or securities received in repurchase and reverse

[11] Obligations issued by the Federal National Mortgage Association or the Federal Home Loan Mortgage Association are permitted only while these entities operate under the conservatorship or receivership of the Federal Housing Finance Authority with capital support from the United States.

repurchase transactions with Customer Funds must be held in the appropriate Customer Account, *i.e.*, Customer Segregated Account, 30.7 Account or Cleared Swaps Customer Account. Further, in accordance with the provisions of Commission Rule 1.25, all such funds or collateral must be received in the appropriate Customer Account on a delivery versus payment basis in immediately available funds.[12]

[No SIPC Protection. Although [Firm] is a registered broker-dealer, it is important to understand that the funds you deposit with [Firm] for trading futures and options on futures contracts on either US or foreign markets or cleared swaps are not protected by the Securities Investor Protection Corporation.]

[Further, Commission rules require [Firm] to hold funds deposited to margin futures and options on futures contracts traded on US designated contract markets in Customer Segregated Accounts. Similarly, [Firm] must hold funds deposited to margin cleared swaps and futures and options on futures contracts traded on foreign boards of trade in a Cleared Swaps Customer Account or a 30.7 Account, respectively. In computing its Customer Funds requirements under relevant Commission rules, [Firm] may only consider those Customer Funds actually held in the applicable Customer Accounts and may not apply free funds in an account under identical ownership but of a different classification or account type (*e.g.*, securities, Customer Segregated, 30.7) to an account's margin deficiency. In order to be used for margin purposes, the funds must actually transfer to the identically-owned undermargined account.]

For additional information on the protection of customer funds, please see the Futures Industry Association's "Protection of Customer Funds Frequently Asked Questions" located at www.futuresindusty.org/[insert link].

Filing a Complaint

(9) Information on how a customer may obtain information regarding filing a complaint about FCM with the Commission or with FCM's DSRO.

A customer that wishes to file a complaint about [Firm] or one of its employees with the Commission can contact the Division of Enforcement either electronically at https://forms.cftc.gov/fp/complaintform.aspx or by calling the Division of Enforcement toll-free at 866-FON-CFTC (866-366-2382).

A customer that may file a complaint about the [Firm] or one of its employees with the National Futures Association electronically at http://www.nfa.futures.org/basicnet/Complaint.aspx or by calling NFA directly at 800-621-3570.

[If the CME is Firm's DSRO.] A customer that wishes to file a complaint about the [Firm] or one of its employees with the Chicago Mercantile Exchange electronically at: http://www.cmegroup.com/market-regulation/file-complaint.html or by calling the CME at 312.341.3286.

Relevant Financial Data

(6) The location where [Firm's] annual audited financial statements are made available.

(10) Financial data as of the most recent month-end when the Disclosure Document is prepared.

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[12] As discussed below, NFA publishes twice-monthly a report, which shows for each FCM, *inter alia*, the percentage of Customer Funds that are held in cash and each of the permitted investments under Commission Rule 1.25. The report also indicates whether the FCM held any Customer Funds during that month at a depository that is an affiliate of the FCM.

(i) the FCM's total equity, regulatory capital, and net worth, all computed in accordance with U.S. Generally Accepted Accounting Principles and Rule 1.17, as applicable;

(ii) the dollar value of the FCM's proprietary margin requirements as a percentage of the aggregate margin requirement for futures customers, cleared swaps customers, and 30.7 customers;[13]

(iii) the number of futures customers, cleared swaps customers, and 30.7 customers that comprise 50 percent of the FCM's total funds held for futures customers, cleared swaps customers, and 30.7 customers, respectively;

(iv) the aggregate notional value, by asset class, of all non-hedged, principal over-the counter transactions into which the FCM has entered;[14]

(v) the amount, generic source and purpose of any unsecured lines of credit (or similar short-term funding) the FCM has obtained but not yet drawn upon.[15]

(vi) the aggregated amount of financing the FCM provides for customer transactions involving illiquid financial products for which it is difficult to obtain timely and accurate prices;

(vii) the percentage of futures customer, cleared swaps customer, and 30.7 customer receivable balances that the FCM had to write-off as uncollectable during the past 12-month period, as compared to the current balance of funds held for futures customers, cleared swaps customers, and 30.7 customers.

Additional financial information on all FCMs is also available on the Commission's website at: http://www.cftc.gov/MarketReports/FinancialDataforFCMs/index.htm.

Customers should be aware that the National Futures Association (**NFA**) publishes on its website certain financial information with respect to each FCM. The FCM Capital Report provides each FCM's most recent month-end adjusted net capital, required net capital, and excess net capital. (Information for a twelve-month period is available.) In addition, NFA publishes twice-monthly a Customer Segregated Funds report, which shows for each FCM: (i) total funds held in Customer Segregated Accounts; (ii) total funds required to be held in Customer Segregated Accounts; and (iii) excess segregated funds, *i.e.*, the FCM's Residual Interest. This report also shows the percentage of Customer Segregated Funds that are held in cash and each of the permitted investments under Commission Rule 1.25. Finally, the report indicates whether the FCM held any Customer Segregated Funds during that month at a depository that is an affiliate of the FCM.

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[13] The Commission believes that information regarding an FCM's proprietary trading is necessary for customers to appropriately assess the risks of entrusting their funds to an FCM. The Customers would benefit from some measure of the FCM's proprietary trading rather than a simple statement that the firm does or does not engage in such trading. **Note:** Neither the Federal Register accompanying the proposed rule nor the Federal Register release accompanying the final rule states whether the term "proprietary" includes affiliates. Our initial view is that the term would include an affiliate that, directly or indirectly, is controlled by or is under common control with, such FCM.

[14] The objective is for an FCM to disclose the extent of the risk it is exposed to from over-the-counter transactions that are not hedged or for which the FCM does not hold margin from the counterparty sufficient to cover the exposure. As with subparagraph (5), above, we suggest that the information provided be based, to the extent practicable, on the notes in the firm's financial statements.

[15] The Commission agrees that it would be more appropriate to disclose committed lines of credit and to exclude lines of credit that could be withdrawn by the potential lender.

The report shows the most recent semi-monthly information, but the public will also have the ability to see information for the most recent twelve-month period. A 30.7 Customer Funds report and a Customer Cleared Swaps Collateral report provides the same information with respect to the 30.7 Account and the Cleared Swaps Customer Account.

The above financial information reports can be found by conducting a search for a specific FCM in NFA's BASIC system (http://www.nfa.futures.org/basicnet/) and then clicking on "View Financial Information" on the FCM's BASIC Details page.

(11) A summary of FCM's current risk practices, controls and procedures.

[Consider inserting from [Holding Company] MD&A discussion]

This Disclosure Document was first used on _____.

EXHIBIT B

DEFAULT DISCLOSURE

EXHIBIT B

DISCLOSURE FOR CLEARED SWAPS CUSTOMERS

Default of a Non-Clearing Futures Commission Merchant

[FCM] may not be a clearing member of the derivatives clearing organization that you have selected to clear the Cleared Swaps that you may enter into. In such circumstances, [FCM] will enter into an agreement with a clearing member of such derivatives clearing organization that is registered with the CFTC as a futures commission merchant ("Clearing Broker"), pursuant to which [FCM] will maintain an omnibus account of behalf of all of its Cleared Swaps Customers ("Omnibus Account").

In compliance with CFTC Rule 22.16, we are advising you that, in the event of [FCM's] default, the agreement between the Clearing Broker and [FCM] provides that Clearing Broker, in its sole discretion, may terminate, liquidate and/or accelerate any and all Cleared Swaps, close out the Omnibus Account or any open positions of [FCM] in whole or in part, cancel any or all pending orders, and/or terminate [FCM's] right to trade in the Omnibus Account. Further, the Clearing Broker may, but is not required to, transfer all non-defaulting customer positions to another futures commission merchant. Any such action that Clearing Broker may take will be in accordance with Applicable Law, including but not limited to the CFTC's rules governing the protection of Cleared Swaps Customer Collateral. Therefore, in the event [FCM's] default is caused by the default of one or more customers that are part of the Omnibus Account, Clearing Broker may not use the funds of non-defaulting customers to satisfy the obligations of the defaulting customers.

Default of a Clearing Futures Commission Merchant

Each derivatives clearing organization is required to have rules that govern the use of Cleared Swaps Customer Collateral, and the transfer, neutralization of risks, and liquidation of Cleared Swaps in the event of a default by a clearing futures commission merchant relating to a Cleared Swaps Customer Account.

In further compliance with CFTC Rule 22.16 (17 CFR 22.16), we are providing you with the URL links to the rules of the relevant derivatives clearing organizations. Please note that such rules and the URL links are susceptible to change. If you encounter difficulty accessing these rules, please contact your [FCM] Representative for an updated URL link.

http://www.cmegroup.com/rulebook/CME/index.html

https://www.theice.com/publicdocs/clear_credit/ICE_Clear_Credit_Rules.pdf

http://www.lch.com/rules_and_regulations/ltd/default.asp

THE INCLUSION OF A DERIVATIVES CLEARING ORGANIZATION ON THIS LIST DOES NOT MEAN THAT YOUR ACCOUNT IS ELIGIBLE TO CLEAR ANY OR ALL PRODUCTS ON THAT DERIVATIVES CLEARING ORGANIZATION. SHOULD YOU REQUIRE ADDITIONAL INFORMATION OR HAVE ANY QUESTIONS CONCERNING THE ABOVE, PLEASE CONTACT YOUR [FCM] REPRESENTATIVE.

BY EMAIL ONLY

April 19, 2016

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
consultation-en-cours@lautorite.qc.ca

Me Josée Turcotte
Secretary
Ontario Securities Commission
comments@osc.gov.on.ca

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

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RE: Proposed NI 94-102 Derivatives: Customer Clearing and Protection of Customer Collateral and Positions

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Dear Sirs/Mesdames:

TMX Group Limited ("TMX Group") appreciates the opportunity to comment on Proposed NI 94-102 Derivatives: Customer Clearing and Protection of Customer Collateral and Positions ("NI 94-102" or "Proposed Rule"). In line with the representations that were made to the regulators with respect to Notice 91-304 Proposed Model Provincial Rule on Derivatives: Customer Clearing and Protection of Customer Collateral and Positions, TMX Group believes that the regulators should apply an approach to the Proposed Rule that is consistent with foreign jurisdictions and which will be applied consistently across provincial jurisdictions. Such approach is necessary to ensure a global and national level playing field for entities based in different

jurisdictions. Specifically, TMX Group would like to take this opportunity to comment on a few additional drafting points which would provide helpful clarity.

TMX Group

TMX Group's key subsidiaries operate cash and derivatives markets for multiple asset classes, including equities, fixed income and energy. The Canadian Derivatives Clearing Corporation ("CDCC"), a subsidiary of TMX Group, offers central clearing counterparty services for both exchange-traded derivatives ("ETDs") products and a range of customized financial instruments (OTC cleared), including options on single-name equities and exchange-traded funds ("ETFs").

GENERAL COMMENTS

TMX is supportive of a domestic regime for customer protection that is consistent with the international regulation and which follows a coherent and realistic implementation timeline across the different markets. TMX Group is cognizant of the importance to offer enhanced customer protection in line with the Principles for Financial Market Infrastructures ("PFMIs" or the "Principles") published by the Committee on Payments and Market Infrastructures and the International Organization of Securities Commissions ("CPMI-IOSCO"). However, in line with the primary objectives of the PFMIs which are to promote the safety and efficiency of the FMIs, TMX Group calls on its regulator to ensure that the proposed changes are required to achieve such objectives and provide for minimal impact to the legal, technological and operational infrastructures of all of the CCPs' stakeholders. In addition, TMX Group would like to have clarifications as to the scope of NI 94-102.

SCOPE OF THE INSTRUMENT

i. Products

NI 94-102 defines the term Cleared Derivative as "a transaction in a derivative that is, directly or indirectly, submitted to and cleared by a clearing agency". This implies that all derivatives, including ETDs, are covered by the definition contrary to the scope of the instrument. Indeed, subsection 2(2) specifies that the Instrument extends only to derivatives covered by Rule or Regulation 91-506 or 91-101- on Product Determination, which means "derivatives that are not traded on an exchange and to derivatives that are traded on a derivatives trading facility[1]. For consistency, and to ensure that the scope of the instrument does not span beyond its intended objective, we suggest that the term "Cleared Derivatives" should be directly tied to the derivatives covered by Rule/Regulation 91 506/91-101, accordingly.

In line with the above comment, we would like to have clarifications as to the intended scope of the Proposed Rule as it relates to the clearing agency. As it currently stand, and contrary to subsection 2(1)(b) and (c), it appears that NI 94-102 is applicable at the clearing agency level for all cleared derivatives, including ETDs for those clearing agencies that offer both ETDs and non-ETDs clearing services. For consistency, we recommend that section 2(1)(a), similarly to subsections 2(1) (b) and (c), specifies that the requirements apply to regulated clearing agencies as it relates to the derivatives covered by the NI.

[1] Quebec Regulation 91-506 respecting derivatives determination, Derivatives Act.

ii. Account Structure

We note that Section 30 with respect to the holding of customer collateral by a regulated clearing agency permits the use of "one or more accounts" without clarifying in what circumstances a single account instead of several accounts should be used. In addition, in the absence of the use of the term "segregate" or "commingle", the standard set under Section 30 appears unclear. We note that the Companion Policy indicates that "the customer collateral of multiple customers may be commingled in an omnibus customer account" while individually identifying the collateral with the position, we purport that the rule should explicitly permit commingling and the use of an omnibus account for further clarity.

Section 30 (2) requires a clearing agency to hold customer collateral of each customer separately from all other properties of such customer that is not customer collateral. Unless the rule contemplates that the clearing agency must offer individually separate accounts, which would contradict with the CP, the language found under Section 30(2) may be misleading. In addition, considering the definition of "Customer Collateral" which would include Variation Margin, the standard of segregation would require a clearing agency to hold a separate bank account for such portion of a collateral, a significant change from the current practice. Furthermore, considering the definition of "Customer and Customer Collateral", and Section 2 (1), it is unclear if a Clearing Agency is required to hold a separate account for Customer Collateral stemming from the derivatives covered by the instrument as per Section 2(2) and a distinct one for collateral required to support ETDs that such a customer may hold.

STANDARD OF PROTECTION

i. Beneficiary of Protection

The definition of "Customer" under the Proposed Rule points to the end-user or ultimate counterparty to the derivatives, implying the beneficial owner of the position. We do not see the benefits of expanding the scope of this rule in this way. We submit that the rule cannot extend to the ultimate end user but should be limited to the clearing agency participant's (the direct intermediary) customer. Section 38 (c) requires a clearing agency to hold information on the indirect intermediary's customers. While, in addition to segregation and proper margin level, holding customer information is meant to increase the likelihood of portability. However, in practical terms, a clearing agency is unlikely to succeed in porting a customer position and associated collateral if it has to protect the customer several layers down the intermediary ladder.

ii. Portability Provisions

Section 46 requires the porting of a customer account if the customer's account is not currently in default. The clearing agency rules do not govern the relationship between the clearing agency participant and its direct client and in a principal model, there is no privity of contract between the clearing agency and the customer, therefore the clearing agency will not be in a position to assess if the customer has defaulted from its obligation.

iii. Variation Margin

Section 28 requires a clearing agency to collect gross Margin. The CP indicates that the "regulated clearing agency may not, and may not permit its direct intermediaries to offset initial margin positions of different customers against one another". The clearing agency's rules do not prescribe the level of margin that a participant must request from its own customers. The absence of a contractual relationship with the customer would, in fact, make it impossible for a clearing agency to monitor or enforce such requirement.

TREATMENT OF THE OPTION MARKET

In addition to the requested clarifications, we note that the proposed NI 94-102 extends the segregation and portability regime to the options market. While portability may be very desirable to the OTC Options market, especially as it relates to equity, given the predominance of institutional clients, we question the need for the level of segregation underlying the regime. Options, which are often assimilated to securities in many foreign jurisdictions, have a specific margining process and are treated on a gross basis. Indeed, long positions in Options do not require Initial Margin whereas Short positions do. As a result, there can be no netting of opposite positions and resulting margin, thus Initial Margin is collected on a gross basis. This in itself should ensure a margin level sufficient to permit portability. TMX Group is of the view that the level of segregation required under NI 94-102 will adversely limit the margin efficiency that the institutional investors are looking for when using OTC Options in parallel with ETD Options, especially as it relates to the Options Equity Market and will impose a significant burden on Equity Options market participants with no additional benefits.

Options, especially Equity Options under the US regulations, are not subject to the LSOC regime, which only applies to Swaps; whereas in Europe, no specific regime is imposed for Options. TMX Group purports that the level of customer protection prescribed under NI 94-102 as it relates to cleared derivatives other than swaps is unjustified and inconsistent with the global approach, thus setting the standards of customer protection for Canadian clearing agencies unnecessarily high for a market that is not elsewhere considered to be a particularly risky market.

TIMELINE OF IMPLEMENTATION AND IMPACT ON THE CANADIAN OTC MARKET

In the absence of a similar customer protection regime currently in place for the Canadian ETD markets, TMX Group stresses the need for a realistic implementation timeline for NI 94-102. The Proposed Rule, as it currently stands, will imply significant technological, operational and rule changes for clearing agencies and will require significant investment which may adversely affect the Non-ETD clearing value proposition.

TMX Group appreciates the opportunity to provide comments with respect to the Proposed Rule and looks forward to further dialogue on protection of customer collateral and position. We hope that you will consider our concerns and suggestions and would be happy to discuss at greater length. Please feel free to contact Marlene Charron-Geadah, Legal Counsel Derivatives at MCharron-Geadah@m-x.ca.

Respectfully submitted,

Alain Miquelon
Managing Director, CDCC
President and CEO, Montréal Exchange
And Group Head of Derivatives, TMX Group