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CSA Notice of Republication and Request for Comment

Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing Of Derivatives*

Proposed Companion Policy 94-101CP *Mandatory Central Counterparty Clearing Of Derivatives*

February 24, 2016

Introduction

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

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

Together, the Clearing Rule and the Clearing CP will be referred to as the "Proposed National Instrument".

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

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

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

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

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

Background

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

Summary of Changes to the Proposed National Instrument

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

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

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

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

Substance and Purpose of the Proposed National Instrument

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

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

Summary of the Clearing Rule

a) Mandatory central counterparty clearing and exemptions

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

(i) a participant subscribing to the services of a regulated clearing agency for a mandatory clearable derivative;

(ii) an affiliated entity of a participant described in (i);

(iii) a local counterparty that, together with its local affiliated entities, has an aggregate gross notional amount of more than $500 000 000 000 in outstanding derivatives as specified under the Scope Rules, excluding intragroup transactions.

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

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

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

b) Determination of mandatory clearable derivatives

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

IRD category includes interest rate swaps and forward rate agreements. In making this Proposed Determination, the Committee has considered factors including

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

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

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

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

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

The list of proposed mandatory clearable derivatives for all jurisdictions of Canada, other than Québec, is included in the Clearing Rule as Appendix A. In Québec, the list of mandatory clearable derivatives will be published in a decision from the Autorité des marchés financiers.

[1] Regulation 91-507 respecting Trade Repositories and Derivatives Data Reporting (Québec); Ontario Securities Commission Rule 91-507 *Trade Repositories and Derivatives Data Reporting*; Manitoba Securities Commission Rule 91-507 *Trade Repositories and Derivatives Data Reporting*; and Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting*.

Following the review of OTC derivatives against the criteria presented above, the Committee is proposing that the following classes of IRD be mandatory clearable derivatives:

Interest Rate Swaps

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

Forward Rate Agreements

Forward rate	LIBOR	USD	3 days to 3 years	Single currency	No	Constant or

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

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

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

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

The Committee would appreciate your input on the following questions.

1. The scope of counterparties subject to the clearing requirement has been significantly scaled back since the publication of the Draft National Instrument. In your view, is the scope in the Proposed National Instrument appropriate considering the Proposed Determination?

2. Is the Proposed Determination appropriate for the Canadian market? Please provide specific concerns relating to any or all of the following:

(i) US IRD;
(ii) GBP IRD;
(iii) EUR IRD;
(iv) CAD IRS;
(v) any other derivatives.

3. What additional risks to the market or regulated clearing agencies would result from the Proposed Determination?

4. As currently contemplated, the Proposed National Instrument and the Proposed Determination would become effective simultaneously. Do you agree with this approach or should a transition period be provided after the Proposed National Instrument has come into force and before mandatory clearable derivatives must be cleared? Please identify significant consequences that could arise from the current approach and what length of time would be appropriate if you deem that a phase-in is necessary.

5. Please discuss any significant consequences that could arise from a determination of CAD IRS as a mandatory clearable derivative absent a corresponding CAD IRS mandate in one or more foreign jurisdictions.

6. Are the characteristics used in Appendix A and the table above to define mandatory clearable derivatives adequate? If not, what other variables should be considered?

Anticipated Costs and Benefits of the Proposed National Instrument

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

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

Moreover, the narrow scope of application of the Clearing Rule will provide relief for certain categories of market participants. We note that the current approach of the Clearing Rule will provide the provincial regulators time to establish a derivatives registration regime under which a category would be contemplated for larger derivatives participants who could become subject to the Clearing Rule. We will continue to monitor trade repository data to assess the characteristics

of the markets for derivatives mandated to be cleared to inform whether the $500 000 000 000 threshold for an entity to be subject to mandatory clearing should be lowered and if so, what carve-outs might be appropriate for certain types of entities.

With respect to the Proposed Determination, while we acknowledge that CAD IRS are systemically important to the Canadian market, as noted above, there may be potential costs associated with requiring CAD IRS to be cleared without international harmonisation. In the absence of foreign regulators also mandating clearing of CAD IRS, Canadian banks, for example, subject to the Proposed National Instrument could be impacted negatively if foreign counterparties withdraw from the market and reduced the ability of Canadian banks to hedge their risks. This risk is particularly relevant to the cleared CAD IRS market where approximately half of all outstanding positions are cleared by foreign clearing members.

Content of Annexes

The following annexes form part of this CSA Notice:

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

Request for Comments

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

We cannot keep submissions confidential because securities legislation in certain provinces requires publication of a summary of the written comments received during the comment period. In addition, all comments received will be posted on the websites of each of the Alberta Securities Commission at www.albertasecurities.com, 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:

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Questions

Please refer your questions to any of the following:

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ANNEX A

COMMENT SUMMARY AND CSA RESPONSES

Section Reference	Issue/Comment	Response
General Comment	A commenter suggested that the rule use a more principles-based approach.	No change. A clearing requirement is necessary to ensure the objective of enhancing central clearing is accomplished.
S. 1 – Definitions	A commenter requested that we define derivative to be harmonized with Proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting.*	Change made. An application section was added to explain that derivative has the same meaning as in securities legislation and the local Rule 91-506 *Derivatives: Product Determination* and Proposed Multilateral Instrument 91-101 *Derivatives: Product Determination.*
S. 1 – Definitions: Financial entity	Several commenters pointed out that, until there is a registration regime in place, it would be difficult for a participant to determine if it is a financial entity or not.	Change made. The definition of "financial entity" was removed since the distinction between a financial and non-financial entity was solely for the purpose of the end-user exemption which was deleted.
S.1 – Definitions: Local counterparty	A number of commenters requested additional guidance on concepts such as "head office", "principal place of business" and "affiliate".	Partial change. We note that the interpretation of "affiliated entity" was changed to harmonize with other Canadian derivatives rules. The other concepts are commonly used terms with judicially considered definitions.
	A few commenters asked what is meant by "responsible for the liabilities of that affiliated party".	Change made. The Clearing Rule now specifies that the responsibility is for all or substantially all the liabilities of the affiliated entity.
S.1 – Definitions: Mandatory Clearable Derivatives	A commenter requested that the definition should be harmonized across Canada and internationally.	No change. Although the definition provides that mandatory clearable derivatives will be determined in a decision in Québec, while other jurisdictions of Canada will list

		them in Appendix A of the Clearing Rule, the intent of the Committee is to harmonize the determinations across Canada. When proposing mandatory clearable derivatives, the Committee intends to take into account whether the derivatives are mandated to be cleared in foreign jurisdictions.
S.1 – Definitions: Regulated clearing agency	A commenter suggested that the definition be restricted to a person or company that acts as a central counterparty.	The Clearing CP now explains that a regulated clearing agency acts as a central counterparty.
Former S.3 – Interpretation of the term affiliated entity	Two commenters opined that definitions should be the same across rules. Another commenter requested that partnerships and unincorporated entities be included in the definition.	Change made. We included a broader definition of affiliated entity that includes partnerships and trusts for greater harmonization with other derivatives rules.
Former S. 4 – Interpretation of hedging	Many commenters expressed the need for clarification regarding the meaning of "speculating", the "intent to reduce risk", the "list of risks" and the "normal course of business".	This section was deleted since non-financial entities are no longer required to clear their transactions unless they fall into the scope of revised subsection 3(1).
Former S. 5 – Duty to clear	A few commenters highlighted the difficulties relating to access to clearing for certain market participants. Many commenters requested an exemption or an exclusion from the scope of the duty to clear for smaller financial entities or non-systemic entities such as pension schemes.	Change made. See revised subsection 3(1) where the scope of the duty to clear was narrowed to capture only the largest entities, and those with direct access to a regulated clearing agency.
	A commenter expressed the concern that the Clearing Rule would not provide for situations where a local counterparty accesses a regulated clearing agency directly without being a clearing member.	Change made. The definition of "participant" referring to a person or company in a contractual relationship with a regulated clearing agency and bound by its rules has been added to the Clearing Rule.

	A commenter proposed to extend the clearing requirement to foreign entities whose transactions have a direct, substantial and foreseeable effect in Canada or are aimed at evading the clearing requirement.	No change. We note that, although the obligation to clear rests on local counterparties, a transaction with a foreign counterparty must be cleared if the foreign counterparty is also subject to subsection 3(1).
	Three commenters were concerned about the lack of substituted compliance within Canada and with foreign jurisdictions available for a counterparty subject to the duty to clear in more than one jurisdiction.	Partial change. Regarding substituted compliance within Canada, Alberta, New Brunswick and Nova Scotia were added to the list of jurisdictions which provide substituted compliance where a transaction is cleared at a clearing agency regulated in any jurisdiction of Canada. It is the Committee's view that an application for exemptive relief may be made in a local jurisdiction that do not provide substituted compliance. With regard to equivalence with foreign jurisdictions, we note that only local counterparties under paragraph (b) of that definition should benefit from substituted compliance, since the Clearing Rule would only apply when there is a local counterparty in scope involved in the transaction if the Clearing Rule is the stricter rule applicable to the transaction.
	A commenter submitted that the requirement to submit transactions for clearing before the end of the day of execution is too short since it does not allow the overnight file transfer and could impact liquidity.	No change. We note that this requirement is consistent with foreign regulation.
Former S. 6 – Non-application	Several commenters expressed their concern that this section confers an advantage to crown corporations over their competitors. Some commenters added that the	No change. We note that the regulators retain the right to modify the applicability of all exemptions.

	non-application section should provide objective criteria.	
	Two commenters requested that the non-application section be available for entities wholly-owned by or acting as agent for the government and who do not benefit from a guarantee of its obligations by that government.	No change. The non-application section includes a crown corporation for which the government where the crown corporation was constituted is responsible for all or substantially all of the crown corporation's liabilities. We note that crown corporations are not required to clear their transactions unless they fall into the scope of revised subsection 3(1).
	A commenter suggested adding the International Monetary Fund to the list of entities.	Change made. The International Monetary Fund was added to the non-application section. We note that the non-application section has not been extended to recognize other supra-national agencies. The Committee anticipates exemption requests would be sent to regulators as required.
	A commenter suggested that former section 6 apply to a financial entity that is wholly owned by one or more government(s) as long as all or substantially all the liabilities of the entity are guaranteed by one or more of that or these government(s). It was also noted that a government of a foreign jurisdiction in former paragraph 6(a) should include both sovereign and subsovereign governments.	Change made. The language in the non-application section has been adapted to include entities wholly-owned by more than one government. The Clearing CP now includes guidance on the interpretation of a foreign government.
Former Part 3 - Exemptions	A commenter suggested that an exemption should be available for a transaction resulting from a multilateral portfolio compression exercise where the previous transactions were not cleared and were entered into	Change made. An exemption was added in section 8 of the Clearing Rule for certain transactions resulting from a multilateral portfolio compression exercise.

	prior to the effective date of the clearing requirement for the derivative.	
Former S. 9 – End-user exemption	Many commenters requested that the exemption be broadened to be available for small financial entities, pension funds and property and casualty insurers. Three commenters believed this exemption should be available to a registrant hedging the risk of a non-financial affiliated entity.	This section was deleted in consideration of the new scope of application.
Former S. 10 – Intragroup exemption	Many commenters thought that the intragroup exemption should be available for entities that are not prudentially supervised on a consolidated basis or that do not have consolidated financial statements.	No change. The Committee notes that the approach used in the Clearing Rule is harmonized with exemptions found in foreign regulations.
	A commenter asked that financial statements using Canadian or U.S. GAAP or GAAP of the local jurisdiction be allowed.	No change. The Committee notes that Canadian and U.S. GAAP are included in National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards*.
	Two commenters expressed the need for clarification as to the agreement between the affiliated entities.	No change. The Committee notes that the requirement that the counterparties agree to rely on the exemption provides sufficient flexibility for them to choose in which form to express their intent to rely on the exemption.
	Four commenters asked for clarification on the level of detail of the written agreement required and whether written confirmations are required for each transaction.	No change. The Committee notes that the written agreement required provides flexibility.
	A commenter urged that former subsection 10(3) include "or cause to be submitted" to allow a counterparty that centralizes its compliance and reporting functions to another entity to submit the form through this	Change made. See revised subsection 7(2) where "or cause to be delivered" was added.

	entity.	
	A commenter requested clarification regarding whether Form 94-101F1 should be submitted for every transaction between two affiliated entities.	Change made. See revised subsection 7(2). We are of the view that Form 94-101F1 must be delivered only once per pair of counterparties to be valid for all transactions between the pair.
	A commenter suggested the elimination of a form filing requirement.	No change. The Committee notes that regulators could review filed Forms 94-101F1 to determine whether the exemption was properly relied on.
	A commenter proposed that a corporate group be permitted to file only one Form 94-101F1.	No change. We note that the exemption is available on a bilateral basis and not on a group basis.
	Two commenters proposed that Form 94-101F1 be submitted to a trade repository. A commenter suggested that only one regulator should receive the form and share it with the other regulators.	No change. The regulators do not have arrangements in place with trade repositories regarding the Clearing Rule. The Committee notes that there is no agreement in place between regulators for sharing the information received on Form 94-101F1. Furthermore, it is the Committee's view that it would not be overly burdensome for market participants to send the same form to several regulators.
Former S. 11 – Recordkeeping	Some commenters sought clarification on the requirements for the end-user exemption regarding factual representations and documentation on a portfolio level.	The end-user exemption and related requirements were deleted.
Former S. 12 – Submission of information on clearing services for derivatives by a regulated clearing agency	Two commenters asked about the authority to make top-down determinations.	Change made. See revised sections 10 and 12 of the Clearing CP that discuss top-down determinations.
Former S. 13 – Other exemption	A commenter requested clarification on the impact of the	No change. We believe that market participants will have

	clearing requirement on a market participant who submitted an application for an exemption.	sufficient time ahead of a determination to submit an application for a discretionary exemption. However, a transition period was added to section 3.
Former S. 14 – Transition – regulated clearing agency filing requirement	A commenter proposed that products already offered for clearing by a clearing agency be presumed eligible for clearing.	No change. It is the Committee's view that the information required in Form 94-101F2 is an important element for regulators in making or proposing a determination as to which derivatives should be mandatory clearable derivatives.
Form 94-101F1	A commenter requested that Form 94-101F1 be kept confidential	Change made. The Clearing CP includes a provision about the confidentiality of this form.
Form 94-101F2	A commenter requested that regulated clearing agencies provide specific information on the end-to-end testing conducted with its participants.	No change. We note that the information requested from regulated clearing agencies is only one part of the determination process which considers multiple factors as set out in the notice.
Appendix A – Mandatory clearable derivatives	<u>Determination</u> Many commenters provided their insight on which types of derivatives should or should not be mandatory clearable derivatives. Several commenters suggested that the process for the determination of mandatory clearable derivatives should be harmonized with international standards and across all jurisdictions of Canada. Two commenters asked that the list of mandatory clearable derivatives be kept in one place. Some commenters also suggested that mandatory clearable derivatives and derivatives excluded from the scope should be harmonized with foreign jurisdictions.	No change. It is the Committee's intention that the mandatory clearable derivatives will not include derivatives that are outside the scope of the Scope Rule. Other than in Québec, all mandatory clearable derivatives will be listed in Appendix A to the Clearing Rule. In Québec, the same mandatory clearable derivatives would be determined in a decision by the Autorité des marchés financiers. The timing for implementation of each determination will be aligned across all jurisdictions of Canada. It is the Committee's view that foreign determinations of derivatives mandated to be cleared are important criteria when determining what

		derivatives should be a mandatory clearable derivative under the Clearing Rule.
	Consultation Many commenters requested that either the Clearing Rule or the Clearing CP contain a statement to insure that the regulators will seek public comment prior to determining a mandatory clearable derivative. A commenter suggested that the determinations follow a simplified approach that does not follow the full rulemaking process and that is harmonized in all jurisdictions of Canada.	No change. Any subsequent determinations of a mandatory clearable derivative will require that Appendix A of the Clearing Rule be amended to include the new derivative or class of derivatives. In some jurisdictions of Canada, such an amendment would be a material change requiring a public consultation. Since the Clearing Rule is a national instrument, every jurisdiction of Canada would align with the longest public consultation period. It is the Committee's view that the public consultation required to make an amendment will allow sufficient time for market participants to comment and prepare for the new clearing requirements.
	Timing A commenter was concerned that a derivative would be determined a mandatory clearable derivative before mutual recognition across Canada and substituted compliance are provided. Another commenter raised the concern that no timing is provided for when determinations are made which makes it difficult for market participants to predict when they can expect a determination to be published. Several commenters mentioned that the clearing requirement should not become effective until the registration regime for OTC derivatives is finalized.	No change. We note that the regulators intend to adopt a "stricter rule applies" principle in the case of cross-border discrepancies. As a result, when a foreign counterparty transacts with a local counterparty in a derivative that is subject to mandatory clearing under the Clearing Rule, the transaction must be cleared even if an exemption exists in the foreign counterparty's jurisdiction. We also note that the Committee continues to monitor the development of cross-border guidance with respect to substituted compliance on clearing requirements. Considering the changes to the Clearing Rule, qualification as a

		registrant is no longer a criteria.
	Phase-in A few commenters provided comments on the phase-in approach and which market participants should be caught and when.	The phase-in approach was deleted as client clearing services are not readily available yet. We intend to monitor the situation and reassess in the future whether the application of the Clearing Rule should be made broader.

List of Commenters

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

ANNEX B

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

PART 1
DEFINITIONS AND INTERPRETATION

Definitions and interpretation

1. (1) In this Instrument

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

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

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

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

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

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

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

(a) except in Québec, listed in Appendix A, and

(b) in Québec, determined by the Autorité des marchés financiers to be subject to mandatory central counterparty clearing;

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

"regulated clearing agency" means

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

(b) in Québec, a person recognized or exempted from recognition as a clearing house, and

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

"transaction" means any of the following:

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

(b) a novation of a derivative, other than a novation resulting from submitting the derivative to a regulated clearing agency.

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

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

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

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

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

Application

2. (1) This Instrument applies to:

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

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

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

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

PART 2
MANDATORY CENTRAL COUNTERPARTY CLEARING

Duty to submit for clearing

3. (1) A local counterparty to a transaction in a mandatory clearable derivative must submit, or cause to be submitted, the transaction for clearing to a regulated clearing agency that provides clearing services in respect of the mandatory clearable derivative if one or more of the following applies to each counterparty to the transaction:

(a) it is a participant of a regulated clearing agency that offers clearing services in respect of the mandatory clearable derivative and it subscribes for clearing services for the class of derivative to which the mandatory clearable derivative belongs;

(b) it is an affiliated entity of a participant referred to in paragraph (a);

(c) it is a local counterparty in any jurisdiction of Canada that has or has had a month-end gross notional amount under all outstanding derivatives, of the local counterparty and each affiliated entity that is a local counterparty in any jurisdiction of Canada, exceeding $500 000 000 000 after excluding transactions to which section 7 applies.

(2) Unless subsection (3) applies, a local counterparty must submit a transaction for clearing under subsection (1) no later than

(a) if the transaction is executed during the business hours of the regulated clearing agency, the end of the day of execution, or

(b) if the transaction is executed after the business hours of the regulated clearing agency, the end of the next business day.

(3) A local counterparty that exceeds the month-end outstanding gross notional amount specified in paragraph (1)(c) is not required to comply with subsection (1) until the 90th day after the end of the month in which the amount was first

exceeded unless paragraphs (1)(a) or (b) apply.

(4) A local counterparty required to submit a transaction for clearing under subsection (1) must submit the transaction in accordance with the rules of the regulated clearing agency, as amended from time to time.

(5) A local counterparty that is a local counterparty solely pursuant to paragraph (b) of the definition of "local counterparty" satisfies subsection (1) if the transaction is submitted for clearing in accordance with the laws of a foreign jurisdiction that

(a) except in Québec, is listed in Appendix B, and

(b) in Québec, appears on a list determined by the Autorité des marchés financiers.

Notice of rejection

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

Public disclosure of clearable and mandatory clearable derivatives

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

PART 3
EXEMPTIONS FROM MANDATORY CENTRAL COUNTERPARTY CLEARING

Non-application

6. The following counterparties are excluded from the application of this Instrument:

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

(b) a crown corporation for which the government of the jurisdiction where the crown corporation was constituted is responsible for all or substantially all the liabilities;

(c) an entity wholly owned by one or more governments, referred to in paragraph (a), that are responsible for all or substantially all the liabilities of the entity;

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

(e) the Bank for International Settlements;

(f) the International Monetary Fund.

Intragroup exemption

7. (1) Despite any other section of this Instrument, a local counterparty is under no obligation to clear a transaction in a mandatory clearable derivative if all of the following apply:

(a) the transaction is between either of the following:

(i) two counterparties that are prudentially supervised on a consolidated basis;

(ii) a counterparty and its affiliated entity if the financial statements for the counterparty and the affiliated entity are prepared on a consolidated basis in accordance with "accounting principles" as defined in the National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards*;

(b) both counterparties to the transaction agree to rely on this exemption;

(c) the transaction is subject to centralized risk evaluation, measurement and control procedures reasonably designed to identify and manage risks;

(d) there is a written agreement between the counterparties setting out the terms of the transaction between the counterparties.

(2) No later than the 30th day after a local counterparty first relies on subsection (1) with each affiliated entity, the local counterparty must deliver or cause to be delivered to the regulator, in an electronic format, a completed Form 94-101F1 *Intragroup Exemption*.

(3) No later than the 10th day after a local counterparty becomes aware that the information in a previously delivered Form 94-101F1 *Intragroup Exemption* is no longer accurate, the local counterparty must deliver to the regulator, in an electronic format, an amended Form 94-101F1 *Intragroup Exemption*.

Multilateral portfolio compression exemption

8. Despite any other section of this Instrument, a local counterparty to a mandatory clearable derivative resulting from a multilateral portfolio compression exercise is under no obligation to clear the resulting transaction if all of the following apply:

(a) the resulting transaction is entered into as a result of more than two counterparties changing or terminating and replacing prior transactions;

(b) the prior transactions do not include a transaction entered into after the effective date on which the derivative or class of derivatives became a mandatory clearable derivative;

(c) the prior transactions were not cleared by a regulated clearing agency;

(d) the resulting transaction is entered into by the same counterparties as the prior transactions;

(e) the multilateral portfolio compression exercise is conducted by a third-party provider.

Recordkeeping

9. (1) A local counterparty to a transaction that relies on section 7 or section 8 must keep records demonstrating that the conditions referred to in those sections, as applicable, were satisfied.

(2) The records required to be maintained under subsection (1) must be

(a) kept in a safe location and in a durable form,

(b) provided to the regulator within a reasonable time following request,

(c) except in Manitoba, kept for a period of 7 years following the date on which the transaction expires or terminates, and

(d) in Manitoba, kept for a period of 8 years following the date on which the transaction expires or terminates.

PART 4
MANDATORY CLEARABLE DERIVATIVES

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

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

PART 5
EXEMPTION

Exemption

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

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

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

PART 6
TRANSITION AND EFFECTIVE DATE

Transition – regulated clearing agency filing requirement

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

Effective date

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

APPENDIX A

MANDATORY CLEARABLE DERIVATIVES

Interest Rate Swaps

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

Forward Rate Agreements

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

APPENDIX B

EQUIVALENT CLEARING LAWS OF FOREIGN JURISDICTIONS PURSUANT TO PARAGRAPH 3(7)(a)

Jurisdiction	Law, Regulation and/or Instrument

FORM 94-101F1

INTRAGROUP EXEMPTION

Type of Filing: ☐ **INITIAL** ☐ **AMENDMENT**

Section 1 – Information on the counterparty delivering this Form

1. Provide the following information with respect to the counterparty delivering this Form for a transaction:

   Full legal name:
   Name under which it conducts business, if different:

   Head office:
   Address:
   Mailing address (if different):
   Telephone:
   Website:

   Contact employee:
   Name and title:
   Telephone:
   E-mail:

   Other offices:
   Address:
   Telephone:
   Email:

   Canadian counsel (if applicable)
   Firm name:
   Contact name:
   Telephone:
   E-mail:

2. In addition to providing the information required in item 1, if this Form is delivered for the purpose of reporting a name change on behalf of the counterparty referred to in item 1, provide the following information:

   Previous full legal name:
   Previous name under which the counterparty conducts business:

Section 2 – Combined notification on behalf of other counterparties within the group to which the counterparty delivering this Form belongs

1. Provide a statement confirming that both counterparties to each transaction to which this Form relates agree to rely on the exemption in section 7 of the Instrument and describe how the counterparties comply with paragraph 7(1)(a).

2. Provide a statement confirming that each transaction between the pair of counterparties to which this Form relates is subject to centralized risk evaluation, measurement and control procedures reasonably designed to identify and manage risks. Describe those procedures.

3. State the legal entity identifier of both counterparties to each transaction to which this Form relates in the same manner as required under securities legislation.

4. For each transaction between the pair of counterparties to which this Form relates, describe the ownership and control structure of the counterparties.

5. For each transaction between the pair of counterparties to which this Form relates, state whether there is a written agreement setting out the terms of the transaction and, if so, state the date of the agreement and the signatories to the agreement and describe the agreement.

Section 3 – Certification

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

DATED at _____ this _____ day of _____, 20____

_____
(Print name of authorized person)

_____
(Print title of authorized person)

_____
(Signature of authorized person)

_____
(Email)

_____
(Phone number)

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

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

FORM 94-101F2
DERIVATIVES CLEARING SERVICES

Type of Filing: ☐ **INITIAL** ☐ **AMENDMENT**

Section 1 – Regulated clearing agency information

1. Full name of regulated clearing agency:

2. Contact information of person authorized to deliver this form:

   Name and title:
   Telephone:
   E-mail:

Section 2 – Description of derivatives

1. Identify each derivative or class of derivatives for which the regulated clearing agency provides clearing services, for which a Form 94-101F2 has not previously been delivered.

2. For each derivative or class of derivatives referred to in item 1, describe all significant attributes of the derivative or class of derivative including

   (a) the standard practices for managing any life-cycle events, as defined in the securities legislation, associated with the derivative or class of derivative,

   (b) the extent to which the transaction is electronically confirmable,

   (c) the degree of standardization of the contractual terms and operational processes,

   (d) the market for the derivative or class of derivatives, including its participants, and

   (e) data supporting the availability of pricing and liquidity of the derivative or class of derivatives within Canada and internationally.

3. Describe the impact of providing clearing services for each derivative or class of derivatives referred to in item 1 on the regulated clearing agency's risk management framework and financial resources, including the protection of the regulated clearing agency upon the default of a participant and the effect of such a default on the other participants.

4. Describe the extent to which the regulated clearing agency would face difficulties complying with its regulatory obligations should the regulator or securities regulatory

authority determine any derivative or class of derivatives referred to in item 1 to be a mandatory clearable derivative.

5. Describe the clearing services provided for each derivative or class of derivatives referred to in item 1.

6. If applicable, attach a copy of any notice the regulated clearing agency provided to its participants for consultation in connection with the launch of the clearing service for a derivative or class of derivative referred to in item 1 and a summary of any concerns received in response to any such notice.

Section 3 – Certification

CERTIFICATE OF REGULATED CLEARING AGENCY

I certify that I am authorized to deliver this form on behalf of the regulated clearing agency named below and that the information in this form is true and correct.

DATED at _____ this _____ day of _____, 20____

_____
(Print name of regulated clearing agency)

_____
(Print name of authorized person)

_____
(Print title of authorized person)

_____
(Signature of authorized person)

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

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

ANNEX C

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

GENERAL COMMENTS

Introduction

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

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

SPECIFIC COMMENTS

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

In this Companion Policy, "Product Determination Rule" means,

in Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan and Yukon, Multilateral Instrument 91-101 *Derivatives: Product Determination*,

in Manitoba, Manitoba Securities Commission Rule 91-506 *Derivatives: Product Determination*,

in Ontario, Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination*, and

in Québec, Regulation 91-506 respecting Derivatives Determination.

In this Companion Policy, "TR Instrument" means,

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

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

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

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

PART 1
DEFINITIONS AND INTERPRETATION

Definitions and interpretation

1. (1)

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

The Instrument uses the term "transaction" rather than the term "trade" in part to reflect that "trade" is defined in the securities legislation of some jurisdictions as including the termination of a derivative. We do not think the termination of a derivative should trigger a requirement to submit the derivative for central clearing. Similarly, the definition of transaction in NI 94-101 excludes a novation resulting from the submission of a transaction to a regulated clearing agency as this is already a cleared transaction. Finally, the definition of "transaction" is not the same as the definition found in the TR Instrument as the latter does not include a material amendment since the TR Instrument expressly provides that an amendment must be reported.

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

include any modification which would result in a significant change in the value of the transaction, differing cash flows or the creation of upfront payments.

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

PART 2
MANDATORY CENTRAL COUNTERPARTY CLEARING

Duty to submit for clearing

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

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

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

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

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

a consolidated basis or whose financial statements are prepared on a consolidated basis, which are exempted in section 7.

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

PART 3
EXEMPTIONS FROM MANDATORY CENTRAL COUNTERPARTY CLEARING

Non-application

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

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

Intragroup exemption

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

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

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

(2) Within 30 days of the first transaction between two entities relying on the intragroup exemption, a completed Form 94-101F1 *Intragroup Exemption* ("Form 94-101F1") must be delivered to the regulator to notify the regulator that the exemption

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

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

Multilateral portfolio compression exemption

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

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

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

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

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

Recordkeeping

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

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

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

PART 4
MANDATORY CLEARABLE DERIVATIVES

and

PART 6
TRANSITION AND EFFECTIVE DATE

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

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

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

- the level of standardization of the derivative, such as the availability of electronic processing, the existence of master agreements, product definitions and short form confirmations;

- the effect of central clearing of the derivative on the mitigation of systemic risk, taking into account the size of the market for the derivative and the available resources of the regulated clearing agency to clear the derivative;

- whether mandating the derivative to be cleared would bring undue risk to regulated clearing agencies;

- the outstanding notional amount of counterparties transacting in the derivative or class of derivatives, the current liquidity in the market for the derivative or class of derivatives and the availability of reliable and timely pricing data;

- the existence of third-party vendors providing pricing services;

- with regards to a regulated clearing agency, the existence of an appropriate rule framework, and the existence of capacity, operational expertise and resources, and credit support infrastructure to clear the derivative on terms that are consistent with the material terms and trading conventions on which the derivative is traded;

- whether a regulated clearing agency would be able to manage the risk of the additional derivatives that might be submitted due to the clearing requirement determination;

- the effect on competition, taking into account appropriate fees and charges applied to clearing, and whether mandating clearing of the derivative could harm competition;

- alternative derivatives or clearing services co-existing in the same market;

- the public interest.

FORM 94-101F1
INTRAGROUP EXEMPTION

Submission of information on intragroup transactions by a local counterparty

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

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

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

FORM 94-101F2
DERIVATIVES CLEARING SERVICES

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

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

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

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

- statistics regarding the percentage of activity of participants on their own behalf and for customers,

- average net and gross positions including the direction of positions (long or short), by type of market participant submitting transactions directly or indirectly, and

- average trading activity and concentration of trading activity among participants by type of market participant submitting transactions directly or indirectly.

April 22, 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

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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 94-101 Mandatory Central Counterparty Clearing of Derivatives*** **(the "Proposed National Instrument")**

The Canadian Advocacy Council[1] for Canadian CFA Institute[2] Societies (the CAC) appreciates the opportunity to respond to the following questions with respect to 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 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

As a general comment, we would like to commend the CSA for taking a pragmatic approach to requirements relating to mandatory central counterparty clearing. We would like to continue to stress the importance for our legislation to be harmonized, to the extent possible, with the requirements of the other G20 countries. If parties to transactions are required to clear them in Canada through a central counterparty but are not required to do so elsewhere, it could lead to regulatory arbitrage opportunities.

1. *The scope of counterparties subject to the clearing requirement has been significantly scaled back since the publication of the Draft National Instrument. In your view, is the scope in the Proposed National Instrument appropriate considering the Proposed Determination?*

We strongly support the narrowing of the scope of the Proposed National Instrument requiring mandatory central counterparty clearing of standardized derivatives effectively to the largest participants in the OTC market. In the future, if the threshold for the month-end gross notional amount of outstanding OTC derivatives were to be reduced, it is likely that the largest of buy-side participants that would then become subject to the Proposed National Instrument would already be clearing those derivatives in other markets and would therefore already have the infrastructure in place to clear if facing a Canadian dealer. However, it is possible that some Canadian end-users would not be clearing. We note that there are large market imposed impediments to central clearing, in that many intermediaries require a large minimum annual fee guarantee in order to accept an entity as a client. As a result, prior to reducing the minimum it will be important to analyze whether or not the participants that would become subject to the Proposed National Instrument could in practice actually find an entity to assist them to clear. We recommend that the CSA continue to monitor the data and once participants have easier access to clearers it may be possible to lower the threshold further.

2. *Is the Proposed Determination appropriate for the Canadian market? Please provide specific concerns relating to any or all of the following: (i) US IRD; (ii) GBP IRD; (iii) EUR IRD; (iv) CAD IRS; (v) any other derivatives.*

We do not have sufficient market data to determine what percentage of the CAD IRS market is between two dealers in Canada, between two international dealers or between one dealer in Canada and one international dealer. If CAD IRS were included in the category of a mandatory clearable derivative, it could result in Canadian dealers utilizing their non-Canadian affiliates to trade in order to avoid the requirement. The requirement could be helpful to the extent the data illustrates that most trades in CAD IRS only occurs between Canadian dealers, but if the data were to prove otherwise, imposing a clearing requirement would only further fragment the market.

In practice, an end-user will clear in the market where liquidity is present. For example, we understand that the Japanese Yen would not be subject to mandatory clearing in Canada, but it is required in Europe and the United States. If a participant has the infrastructure to clear, it is likely

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.

they will choose to clear on an optional basis. Once mandatory clearing in Europe has been in place for a period of time, it is likely that the liquidity in these interest rate products subject to mandatory clearing in Europe will further shift to the cleared space.

We believe that including CAD IRS should be delayed until such time as either data with respect to where the participants who trade in those instruments are located is more readily available, or when foreign mandates for those instruments are in place, in order to avoid the impact on the competitiveness of local counterparties that are subject to the Proposed National Instrument.

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. 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

Via Email: consultation-en-cours@lautorite.qc.ca
comments@osc.gov.on.ca

Canadian Market
Infrastructure Committee

May 19, 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

Dear Sirs/Mesdames:

Re: CSA Notice ("Notice") and Request for Comments – Proposed NI 94-101 (the "Clearing Rule") and Proposed Companion Policy 94-101CP (the "Clearing CP" and with the Clearing Rule, the "Proposed National Instrument") ***Mandatory Central Counterparty Clearing of Derivatives (2nd Publication)***

INTRODUCTION

The Canadian Market Infrastructure Committee ("**CMIC**")[1] welcomes the opportunity to comment on the Proposed National Instrument.[2]

CMIC Responses to Questions Posed

CMIC has the following responses to the six questions posed by the CSA in its Notice.

1. *The scope of counterparties subject to the clearing requirement has been significantly scaled back since the publication on February 12, 2015 of the draft National Instrument (the "**Previous Draft***

[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 current 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.

[2] See http://osc.gov.on.ca/en/SecuritiesLaw_csa_20150224_94-101_roc-derivatives.htm

National Instrument"). *In your view, is the scope in the Proposed National Instrument appropriate considering the Proposed Determination?*

Response: CMIC appreciates and fully supports the narrowing of the scope of counterparties that are subject to the Proposed National Instrument. As the Canadian OTC derivatives market is small as compared with other global markets, we believe this narrowing of scope is entirely appropriate as we indicated in our previous response letter (the "**May 2015 CMIC Letter**").[3]

In terms of whether the three categories of counterparties set out in section 3(1)(a), (b) and (c) of the Clearing Rule are appropriate, CMIC is of the view that requiring counterparties that are participants of a regulated clearing agency ("**clearing participants**") to clear mandatory clearable derivatives to be appropriate, as set out under section 3(1)(a). However, with respect to the categories of counterparties under section 3(1)(b) and (c), we have some concerns from the perspective of the (i) identification of counterparties, (ii) inclusion of non-systemically important counterparties, and (iii) readiness to clear.

With respect to identification of counterparties subject to mandatory clearing, it will not be obvious at the time a mandatory clearable derivative is entered into whether a counterparty satisfies the requirements of sections 3(1)(b) or (c). Without amending the Clearing Rule, the only way to determine the status of each counterparty is for counterparties to conduct an outreach to their clients. As we have seen with respect to the similar outreach undertaken in connection with the Canadian trade reporting rules, it is unlikely that such an outreach will receive a 100% response rate, not to mention the costly use of resources to conduct and follow up on such an outreach. Further, the consequences of not receiving a response from a client is significantly different in the clearing context as opposed to the trade reporting context. In the clearing context, the parties will need to know whether the transaction will be cleared before entering into the transaction as it will affect the pricing and settlement of the transaction. It is not as simple as asking the counterparty whether it falls within the requirements of sections 3(1)(b) or (c) immediately before trading. If the counterparty does fall under sections 3(1)(b) or (c), time is required to ensure that all clearing documents are in place, which, in CMIC's view, is a process that could easily take 12 months to complete. This timing issue is discussed further below under the heading, "Readiness to clear".

CMIC therefore recommends that the Clearing Rule be amended to place an obligation on all counterparties that enter into mandatory clearable derivatives to notify their counterparties if they satisfy the requirements under section 3(1)(a), (b) or (c). This obligation should apply to all counterparties as long as one of the counterparties to the mandatory clearable derivative is a local counterparty. In order for this to work from an operational perspective, CMIC recommends that each counterparty that proposes to enter into a mandatory clearable derivative must notify its proposed counterparty during the transition period recommended by CMIC below (being the 12 month period commencing on the effective date of the Clearing Rule) as to whether it satisfies the requirements under section 3(1) (b) or (c). If a mandatory clearable derivative is being entered into for the first time with a counterparty after this transition period, or, in the case of counterparties satisfying the requirements under section 3(1)(a), the Clearing Rule should provide that each counterparty must notify its proposed counterparty prior to the trade date of the mandatory clearable derivative whether it satisfies the requirements under section 3(1)(a), (b) or (c).

[3] See CMIC letter dated May 13, 2015, available at: https://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20150513_94-101_canadian-market-infrastructure-committee.pdf

In addition to placing such an obligation on all counterparties, the Clearing Rule should expressly provide that counterparties can rely on such self-declaration, or lack of a self-declaration if one is not received by the trade date, in determining whether section 3(1) of the Clearing Rule applies to a mandatory clearable derivative. Since the pricing of a trade will vary depending on whether it will be cleared, the Clearing Rule should also expressly provide that such reliance on self-declaration, or lack thereof, remains in effect for the entire term of the trade. Any change in status should only apply to trades entered into after the change in status is disclosed to the relevant counterparty.

Non-systemically important counterparties

CMIC recommends that the scope of counterparties included under section 3(1)(b) be narrowed to exclude an affiliate of a clearing participant if the monthly aggregate notional amount of all OTC derivative transactions of such affiliate, excluding inter-affiliate transactions[4], is less than 5% of the aggregate notional amount, measured quarterly, of all OTC derivative transactions of such participant, excluding inter-affiliate transactions[4]. In CMIC's view, this is a reasonable approach in trying to balance the regulators' concern that a clearing participant might avoid having to clear trades by transacting through an affiliate, against the concern that small entities, that are perhaps effectively end-users, are required to mandatorily clear trades simply because they are affiliated with a clearing participant. CMIC believes that this exclusion is appropriate, given that the purpose of the Proposed National Instrument is to reduce systemic risk in the derivatives market and increase financial stability. Mandatory clearable derivatives entered into by such small affiliates of clearing participants do not contribute to systemic risk nor to financial instability.

Readiness to clear

Finally, with respect to readiness to clear, even if a counterparty is an affiliate of a clearing participant, it does not mean that it will be able to enter into clearing agreements immediately upon the Clearing Rule coming into effect. Similarly, if a local counterparty has a large volume of derivatives transactions outstanding, it does not mean that it is ready to clear mandatory clearable transactions immediately. CMIC recognizes that once a counterparty satisfies the requirements under section 3(1)(c), and doesn't otherwise satisfy the requirements under section 3(1)(a) or (b), section 3(3) of the Clearing Rule allows a 90 day transition period starting from the end of the month in which such counterparty satisfies such requirements, before it is required to start clearing mandatory clearable derivatives. However, in CMIC's view, this transition period should be extended to 12 months and should also apply from the effective date of the Clearing Rule, even if a counterparty satisfies the requirements under section 3(1)(c) on the effective date. Further, CMIC recommends that there should be a similar transition period for counterparties that satisfy the requirements under section 3(1)(b), given the fact that while such counterparties may be affiliated with clearing participants, they may be smaller entities, sometimes acting in an end-user capacity and therefore require more time to prepare for clearing.

2. *Is the Proposed Determination appropriate for the Canadian market? Please provide specific concerns relating to any or all of the following: (i) US IRD; (ii) GBP IRD; (iii) EUR IRD; (iv) CAD IRS; (v) any other derivatives.*

Response: Generally speaking, the Proposed Determination is appropriate for the Canadian market, subject to the following comments.

[4] We propose to exclude inter-affiliate transactions from this calculation in order to measure market-facing transactions only.

First, we have specific concerns with respect to CAD IRS, which we discuss below in our response to Question 5.

Second, we note that the stated Maturity for Overnight Index Swaps ("**OIS**") in USD, EUR and GBP is 7 days to 30 years. To our knowledge, none of the other jurisdictions has a requirement to clear OIS trades in those currencies where the maturity extends to 30 years. We note that OIS in CAD is 7 days to 2 years, which is consistent with the U.S. Commodity Futures Trading Commission (the "**CFTC**") clearing requirements for OIS in USD, EUR and GBP, and accordingly, we recommend that the CSA change the maturity for these currencies to 7 days to 2 years.

Third, we believe the Proposed Determination should clarify when the Clearing Rule applies to (i) swaptions (i.e. options to enter into an interest rate swap) vis-à-vis the effective date of the Clearing Rule and physical settlement or amendments to a swaption and (ii) extendible swaps vis-à-vis the extension of the swap. In our view, if an interest rate swaption or extendible swap is entered into prior to the effective date of the Clearing Rule, even if the swaption is physically settled by entering into an interest rate swap after this effective date or the extendible swap is extended after this effective date, mandatory clearing would not apply to the interest rate swap or extended swap as the cost of clearing the underlying swap may not have been reflected in the price of the swaption or extendible swap. On the other hand, if a cash settled swaption is entered into before the effective date of the Clearing Rule, but is amended after the effective date to switch to physical settlement, mandatory clearing would apply to the interest rate swap entered into upon settlement of the swaption as this is a material change to the terms of the contract. This approach is consistent with the approach taken under Dodd-Frank[5] where the clearing requirement only applies to swaps resulting from the exercise of a swaption or extendible swap extension if the clearing requirement would have been applicable to the underlying swap or extended swap at the time the counterparties executed the swaption or extendible swap.

Fourth, it is CMIC's view that the Proposed Determination should provide guidance with respect to swaps (listed in Appendix A to the Clearing Rule) that a clearing agency cannot accept for clearing due to non-standard terms. In addition, guidance is required for complex swaps (such as bespoke products, for example, an extendible swap which has an embedded optionality) and packaged transactions, similar to the approach taken under Dodd-Frank.[6] The key difference between a complex swap and a packaged transaction is that a component of the packaged transaction can be cleared without disentangling the product, whereas with a complex swap, in order to clear a component, the product would need to be disentangled. Specifically, CMIC is of the view that the Clearing Rule should clarify that market participants need not disentangle a complex transaction in order to clear a component of that transaction which is a mandatory clearable derivative. On the other hand, for packaged transactions, even though the product may be priced together and executions are contingent, if the packaged transaction contains a component that is a mandatory clearable derivative, that component should be cleared even if the balance of the packaged transaction is not cleared.

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[5] CFTC Clearing Requirement Determination under Section 2(h) of the CEA, 17 CFR Parts 39 and 50 at page 121. Available at: http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/federalregister112812.pdf

[6] *Ibid*.

3. *What additional risks to the market or regulated clearing agencies would result from the Proposed Determination?*

Response: The Proposed Determination results in additional operational burden and cost for smaller affiliates of clearing participants, some of whom may be end-users. This additional operational burden and cost are, in CMIC's view, unnecessary from a systemic risk perspective.

As for additional risks relating to the Clearing Rule in general, as we mentioned in the May 2015 CMIC Letter,[7] any proposed OTC derivatives clearing regulatory regime in Canada is incomplete unless Provincial personal property security law in the common law provinces is amended to allow the perfection of security interests in cash collateral by way of control. The importance of this amendment cannot be over-emphasized. If these amendments are not made, clearing arrangements will not work effectively and will not achieve their intended purpose. Implementing these amendments will cause Canadian law to be harmonized with U.S. personal property security law in this respect. International clearing rules require this perfection to be achievable. In times of market stress, secured parties will have a preference for cash collateral. In the absence of a Canadian common law regime in relation to perfecting cash collateral by way of control, the ability of Canadian counterparties in the common law provinces to clear transactions will clearly reduce appreciably in times of market stress as foreign banks may not be prepared to take this risk. Furthermore, this legislative gap is not just relevant to the cleared market – it equally compromises the uncleared swap market.

As a business matter, we understand that the absence of such perfection and priority over cash collateral may be the reason why clearing agencies will be less willing to accept Canadian banks as clearing intermediaries. While a US clearing intermediary will have the same risks as a Canadian clearing intermediary facing a Canadian client posting cash collateral, due to the fact that a Canadian bank will face a proportionately higher number of Canadian clients may be sufficient cause for concern on the part of clearing agencies. This could place Canadian banks at a competitive disadvantage as they would not be able to offer clearing services to clients. Further, it could decrease the available choices of clearing intermediaries for Canadian buy-side market participants.

Finally, it is our understanding that certain global banks and other financial institutions impose higher pricing on trades involving Canadian counterparties to compensate for this Canadian risk. Since the relevant jurisdiction is the head office of the party posting collateral, ideally legislation in all Canadian common law jurisdictions should be similarly amended (other than Quebec, where this issue has already been addressed).

While CMIC recognizes that amending the personal property security legislation is outside the jurisdiction of the CSA, 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 effectively.

4. *As currently contemplated, the Proposed National Instrument and the Proposed Determination would become effective simultaneously. Do you agree with this approach or should a transition period be provided after the Proposed National Instrument has come into force and before mandatory clearable derivatives must be cleared? Please identify significant consequences that could arise from the current approach and what length of time would be appropriate if you deem that a phase-in is necessary.*

[7] *Ibid.*

Response: In CMIC's view, the Proposed National Instrument and Proposed Determination could come into effect simultaneously only for participants described in section 3(1)(a) of the Clearing Rule. For the other two categories of counterparties described in section 3(1)(b) and (c), please see our comments under our response to Question 1 where we recommend a transition period of 12 months from the time the Proposed National Instrument becomes effective until the time mandatory clearable derivatives must be cleared.

In addition, we refer you to our response to Question 5 below where we describe a further transition period in respect of CAD IRS.

5. *Please discuss any significant consequences that could arise from a determination of CAD IRS as a mandatory clearable derivative absent a corresponding CAD IRS mandate in one or more foreign jurisdictions.*

Response: CMIC agrees with the CSA's view that CAD IRS is an appropriate category of mandatory clearable derivative under Canadian rules. However, as CAD IRS is not currently a mandatory clearable derivative under EMIR or Dodd Frank, the Clearing Rule would not be harmonized on this point, thus providing a potential for regulatory arbitrage. In CMIC's view, such lack of harmonization could negatively affect liquidity of this product. Without a similar clearing requirement under EMIR or Dodd Frank, foreign banks may decide not to offer this product to local counterparties, or offer the product at a higher price. As a result, CMIC recommends a phase-in approach and would support having the requirement to clear CAD IRS becoming effective immediately where the CAD IRS is entered into between two local counterparties as defined in paragraph (a) of that definition (subject to our other comments on transition periods under our response to Question 4). As CAD IRS entered into between Canadian banks are currently largely being cleared on a voluntary basis, it will not present a significant hardship on market participants if this requirement became effective immediately. However, where a CAD IRS is entered into where one of the counterparties is not a local counterparty under paragraph (a) of that definition, we would recommend delaying the clearing requirement until it becomes a clearing requirement under either EMIR or Dodd Frank.

6. *Are the characteristics used in Appendix A and the table above to define mandatory clearable derivatives adequate? If not, what other variables should be considered?*

Response: Other than the stated maturity for OIS as referred to in our response to question 2, in CMIC's view, the characteristics used in Appendix A are considered adequate to define mandatory clearable derivatives.

Other Comments

Substituted Compliance

CMIC fully supports the substituted compliance provisions under Section 3(5) of the Clearing Rule which would allow a foreign affiliate to clear a mandatory clearable derivative pursuant to equivalent foreign rules. In addition, CMIC fully supports that, at a minimum, Dodd-Frank and EMIR be listed in Appendix B to the Clearing Rule as foreign rules which are equivalent to the Clearing Rule.

Intragroup exemption

One of the conditions to be satisfied under the Proposed National Instrument before parties can qualify for the intragroup exemption is that a local counterparty must submit a Form F1 to the

regulator. Submitting the form directly to the regulator, rather than to a trade repository (which is the case under Dodd-Frank), is overly burdensome as this would require submission to multiple provincial regulators. CMIC recommends that Form F1 should be submitted to an approved trade repository.

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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

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May 24, 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
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Dear Sirs/Mesdames:

The Canadian Bankers Association (**CBA**)[1] appreciates the opportunity for market participants to comment on Proposed National Instrument 94-101 – *Mandatory Central Counterparty Clearing of*

[1] The CBA works on behalf of 59 domestic banks, foreign bank subsidiaries and foreign bank branches operating in Canada and their 280,000 employees. The CBA advocates for effective public policies that contribute to a sound, successful banking system that benefits Canadians and Canada's economy. The CBA also promotes financial literacy

Derivatives (the **Proposed Rule**) published by the Canadian Securities Administrators (**CSA**) on February 24, 2016. This comment letter is submitted on behalf of Bank of Montreal, Bank of Nova Scotia, Canadian Imperial Bank of Commerce, Royal Bank of Canada and Toronto Dominion Bank (together, the **Canadian Banks**).

In the Proposed Rule, the CSA Derivatives Committee (the **Committee**) has requested the views of market participants on whether the scope of counterparties subject to the clearing requirement is appropriate considering the determination of certain derivatives as being mandatorily clearable. The CBA appreciates that the Committee has significantly scaled back the scope of counterparties subject to the clearing requirements relative to the previous version of the Proposed Rule. We note, however, that the reduction in scope means that the clearing requirements would – at this time – effectively only apply to the Canadian Banks. As federally regulated financial institutions, the Canadian Banks are already subject to the clearing requirements set out in Guideline B-7 *Derivatives Sound Practices*, issued by the Office of the Superintendent of Financial Institutions (**OSFI**).

Further, the Canadian Banks are already subject to OSFI's compliance oversight and enforcement authority in this area. Given the systemic risk implications of clearing requirements, and given that the Proposed Rule will have the greatest impact on the Canadian Banks, we believe that oversight and enforcement of clearing requirements applicable to the Canadian Banks properly rests within the prudential mandate and jurisdictional authority of OSFI. Therefore, we caution against the prescriptive rule-based approach of the Proposed Rule and the creation of provincial compliance oversight and enforcement mechanisms that duplicate, or could conflict with, OSFI's authority over the Canadian Banks with respect to clearing requirements. We are particularly concerned about prospective rules that could require lengthy consultations for revisions or amendments between multiple regulatory authorities (both provincial and federal) in response to market events that require swift regulatory actions. In the context of clearing, the principles-based approach to regulation permits prudential regulators to implement such regulatory actions in a timely manner. Having noted these concerns, we would like to highlight aspects of the Proposed Rule that pose particular challenges for the Canadian Banks.

Identification of Counterparties

We are supportive of the requirement in subsection 3(1)(a) of the Proposed Rule, which requires counterparties that are participants of a regulated clearing agency to clear mandatory clearable derivatives. We do, however, have concerns about the obligation to identify the category of counterparties under subsections 3(1)(b) and (c) of the Proposed Rule. As the Proposed Rule is currently drafted, the only way for a Canadian Bank to determine whether a counterparty satisfies the requirements of subsections 3(1)(b) or (c) is by conducting an outreach to each and every client in order to confirm their status. Guideline B-7 does not give rise to this requirement relating to identification of counterparties. The Canadian Banks' experience with similar outreach in the context of the trade reporting rules indicates that it is highly unlikely that the Canadian Banks will receive a 100% response rate to such outreach, notwithstanding the time, efforts and resources expended by the Canadian Banks in procuring responses from clients. Not receiving a client's response in the clearing context has more significant negative consequences than trade reporting context because, in the former case, the parties to the transaction need to know

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whether the transaction will be cleared because of the impact of clearing on pricing and settlement of the transaction.

Filing Requirement for Intragroup Exemption

Another aspect of the Proposed Rule that is of concern to us is that a local counterparty must file a Form F1 with the regulators before parties are able to transact in reliance on the intragroup exemption. Guideline B-7 does not give rise to a requirement relating to documentation necessary to rely on the intragroup exemption. In the current Canadian context, this would mean that the Canadian Banks would have to submit the form to multiple regulators. In contrast, the U.S. *Dodd-Frank Act* permits the form to be filed with a trade repository.

Non-systemically Important Counterparties

The Proposed Rule would capture bank affiliates that are largely end-users of derivatives where the notional trading activity is *de minimis* and not of systemic importance simply because they are affiliated with a clearing participant that is a Canadian Bank. The purpose of establishing clearing requirements is to reduce systemic risk in the derivatives market and increase financial stability. Mandatory clearable derivatives entered into by such small affiliates of clearing participants do not contribute to systemic risk or to financial instability.

Terminating or Suspending Clearing Obligations

The Proposed Rule may not be sufficiently responsive to market developments, as there is currently no mechanism in the Proposed Rule to terminate or suspend a mandatory clearing mandate. Under OSFI's prudential supervision, Canadian Banks are given clear incentives to centrally clear derivatives through reduced capital requirements. However, Canadian Banks have the operational and business flexibility under Guideline B-7 to suspend or terminate clearing in response to a crisis involving an important central clearing counterparty (**CCP**) that clears that product. For example, the clearing mandate for a class of contracts may need to be suspended if the liquidity of the class has deteriorated, making it difficult for the CCP to manage the risk of that class. Other circumstances where clearing may need to be suspended or terminated is when a CCP that clears a specific class of instruments is de-authorized or de-recognized or when a CCP is subject to recovery and resolution measures because of multiple member defaults. Market events such as default could take place very rapidly and may require a decision in a matter of days. If there was a need to suspend or withdraw the clearing obligation because of such a rapid market event, an agile, principles-based approach is needed to ensure that there are no adverse unintended market consequences. We are concerned that the CSA's approach to rule-making or amendments to the Proposed Rule would not be sufficiently agile to meet market needs, as consensus with multiple regulatory authorities (both provincial and federal) could be required to suspend or terminate a mandatory clearing mandate. In line with our comments, the European Securities and Markets Authority identified the lack of a mechanism to temporarily suspend the clearing obligation when the situation would require such suspension as the most problematic issue with regard to the European Market Infrastructure Regulation (**EMIR**). Similarly, the European Systemic Risk Board calls for swift processes for the removal or suspension of mandatory clearing obligations if the relevant market situation so requires. Finally, the International Swaps and Derivatives Association is also advocating for provisions permitting the temporary suspension of the clearing obligation under EMIR.

Proper Application of the Rule

We appreciate the opportunity to contribute to the process of developing a coherent regulatory framework for OTC derivatives in Canada. However, consistent with our practice in these

matters, our comments in this letter are meant to address the provisions of the Proposed Rule without regard to the manner or extent (if any) to which the Proposed Rule may properly apply to the Canadian Banks. In particular, there is a long-standing and unresolved tension in Canada between the positions of federal and provincial regulatory authorities as to whether Canadian chartered banks are properly subject to regulations promulgated under the legislative authority of the provinces in relation to the derivatives trading activities of the banks. In light of this uncertainty, our comments in this letter are made without prejudice to or limitation on any future assertions we or the Canadian Banks may make that the Proposed Rule, in whole or part, does not properly apply to the Canadian Banks or their business. Accordingly, this letter should not be taken to suggest that the Canadian Banks accept or accede to the jurisdiction or authority in this context of provincial securities laws, provincial derivatives laws or the rules promulgated by provincial securities or derivatives regulatory authorities.

We would appreciate the opportunity to discuss our concerns further with the Committee and believe it would be helpful to have such discussions jointly with OSFI and the other relevant federal regulators. Thank you for the opportunity to provide our views on this important issue. Please contact us with any questions or comments.

Yours truly,

LCH The Markets' Partner

VIA E-MAIL TO: comments@osc.gov.on.ca and consultation-en-cours@lautorite.qc.ca

May 24, 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

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Me Anne-Marie Beaudoin
Corporate Secretary
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Montréal, Québec H4Z 1G3

Re: Draft Regulation 94-101 respecting Mandatory Central Counterparty Clearing of Derivatives; Proposed Policy Statement to Regulation 94-101 respecting Mandatory Central Counterparty Clearing of Derivatives

Dear Sirs/Madams:

LCH Limited, LCH SA and LCH LLC (together "LCH") [1] welcomes the opportunity to respond to this request for comment from the Canadian Securities Administrators ("CSA") on proposed National Instrument 94-101, *Mandatory Central Counterparty Clearing of Derivatives* ("Instrument") and related proposed Companion Policy 94-101CP ("Companion Policy" or "CP"). LCH Limited is recognized as a clearing agency by the Ontario Securities Commission ("OSC") and the Autorité des marchés financiers ("AMF") Quebec.

[1] The LCH Group is the leading multi-asset class and multi-national group of clearing houses, serving major international exchanges and platforms as well as a range of OTC markets. It clears a broad range of asset classes including securities, exchange-traded derivatives, commodities, energy, freight, foreign exchange derivatives, interest rate swaps, credit default swaps, and euro and sterling denominated bonds and repos. LCH Group Limited is majority owned by the London Stock Exchange Group (LSEG), a diversified international exchange group.

LCH has supported regulatory reform enhancements to the global structure governing derivatives markets that have resulted in a comprehensive, stronger and more robust risk management framework for central counterparties ("CCP"), clearing members and end-users of derivatives. We continue to work with regulators and the industry to strengthen the resiliency of CCPs and the safety and soundness of the broader derivatives industry.

LCH commends the CSA Derivatives Committee's work on implementation of the G20 mandate through the broader regulatory framework being developed.[2]

Our responses to specific questions in the Companion Policy 94-101CP are included below:

…

2. Is the Proposed Determination appropriate for the Canadian market? Please provide specific concerns relating to any or all of the following:

(i) US IRD;
(ii) GBP IRD;
(iii) EUR IRD;
(iv) CAD IRS;
(v) any other derivatives.

The Proposed Determination is consistent with international standards and appropriate for Canadian markets.

…

4. As currently contemplated, the Proposed National Instrument and the Proposed Determination would become effective simultaneously. Do you agree with this approach or should a transition period be provided after the Proposed National Instrument has come into force and before mandatory clearable derivatives must be cleared? Please identify significant consequences that could arise from the current approach and what length of time would be appropriate if you deem that a phase-in is necessary.

LCH supports a simultaneous effective date for both the Proposed National Instrument and the Proposed Determination. A majority of mandatory clearable derivatives are already cleared by mandates of other jurisdictions.

5. Please discuss any significant consequences that could arise from a determination of CAD IRS as a mandatory clearable derivative absent a corresponding CAD IRS mandate in one or more foreign jurisdictions.

LCH recognizes the importance of CAD IRS to the financial stability of the Canadian market. In terms of LCH clearing volumes, CAD IRS currently falls within the top six: (1) EUR, (2) USD, (3) GBP, (4) JPY, (5) AUD, (6) CAD.[3]

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[2] *See* Proposed National Instrument 94-102 *Derivative Customer Clearing and Protection of Customer Positions and Collateral* and National Instrument 24-102 *Clearing Agency Requirements.*

Indeed, other jurisdictions have also proposed expanding the scope of their clearing mandates in the absence of similar mandates in foreign jurisdictions. The EU has responded to a similar question with respect to Swedish Krona (SEK), Norwegian Krone (NOK), and Polish Zloty (PLN) IRD. Under the European Market Infrastructure Regulation (EMIR), there are proposals to mandate SEK, NOK and, PLN, which is inconsistent globally yet designed to level the playing field in Europe while balancing the financial stability considerations across the region.[4]

6. Are the characteristics used in Appendix A and the table above to define mandatory clearable derivatives adequate? If not, what other variables should be considered?

LCH agrees with the criterion proposed.

* * *

We appreciate the opportunity to comment on the Instrument and Companion Policy. Please do not hesitate to contact us regarding any questions raised by this submission or to discuss our comments in greater detail.

Yours sincerely,

Jonathan Jachym
Head of North America Regulatory Strategy & Government Relations

[3] See Daily Volumes, LCH: http://www.lch.com/asset-classes/otc-interest-rate-derivatives/volumes

[4] ESMA Final Report: Draft technical standards on the Clearing Obligation – Interest rate OTC Derivatives in additional currencies, https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2015-1629_-_final_report_clearing_obligation_irs_other_currencies.pdf

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May 24, 2016

VIA ELECTRONIC MAIL

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: Comments on Proposed National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives

Dear Sir or Madam:

I. INTRODUCTION

On behalf of The Canadian Commercial Energy Working Group ("**Working Group**"), Sutherland Asbill & Brennan LLP hereby submits this letter in response to the request for public comment on Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* ("**Proposed Clearing Rule**") and Proposed Companion Policy 94-101CP ("**Proposed Clearing Companion Policy**").[1] The Working Group largely supports

[1] *See* CSA Notice and Request for Comment on Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* and Proposed Companion Policy 94-101CP (Feb. 24, 2016) ("**CSA Clearing Notice**"), *available at* http://www.albertasecurities.com/Regulatory%20Instruments/5226897-v1-CSA_Notice_of_Republication_Proposed_NI_94-101.pdf.

the Proposed Clearing Rule and the Proposed Clearing Companion Policy, and is submitting this letter mainly to confirm its understanding of certain aspects of the Proposed Clearing Rule and Proposed Clearing Companion Policy.

The Working Group is a diverse group of commercial firms that are active in the Canadian energy industry whose primary business activity is the physical delivery of one or more energy commodities to others, including industrial, commercial, and residential consumers. Members of the Working Group are producers, processors, merchandisers, and owners of energy commodities. The Working Group considers and responds to requests for comment regarding developments with respect to the trading of energy commodities, including derivatives, in Canada.

The Working Group would first like to commend the Canadian Securities Administrators ("**CSA**") for its continued dedication to establishing a workable derivatives regulatory regime that appropriately balances costs and benefits. Coordinating a multijurisdictional regulatory reform effort is highly difficult, and the Working Group greatly appreciates that the CSA has been receptive to feedback and has adjusted its proposals to reflect such feedback, when appropriate. Specifically, the Working Group appreciates that the CSA incorporated suggestions into the Proposed Clearing Rule and the Proposed Clearing Companion Policy that it received from public comments submitted on the 2015 Draft Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* and Draft Proposed Companion Policy 94-101CP (collectively, the "**Draft Clearing Rule**").[2]

II. COMMENTS OF THE WORKING GROUP

The Proposed Clearing Rule and the Proposed Clearing Companion Policy are significant improvements from the Draft Clearing Rule, and the Working Group largely supports them. The Working Group, however, would like the CSA to confirm the Working Group's understanding of certain aspects of the Proposed Clearing Rule and the Proposed Clearing Companion Policy that pertain to the following: (i) the concept of a "participant of a regulated clearing agency"; and (ii) Canadian entities with foreign affiliate clearing members.

A. CONCEPT OF A "PARTICIPANT OF A REGULATED CLEARING AGENCY"

As the CSA knows, one of the triggers that could subject an entity to mandatory central clearing is if that entity is a participant of, or affiliated with a participant of, a regulated clearing agency that offers clearing services in respect of the mandatory clearable derivative and it subscribes for clearing services for the class of derivative to which the mandatory clearable derivative belongs.[3] However, the proposed scope of what constitutes a "participant of a regulated clearing agency" may be broader than is intended with respect to Canadian energy markets because of the Natural Gas Exchange's ("**NGX**") unique clearing structure.

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[2] *See generally* CSA Notice and Request for Comment on Draft Proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* and Draft Proposed Companion Policy 94-101CP (Feb. 12, 2015), *available at* http://www.albertasecurities.com/Regulatory%20Instruments/5022685-v5-Proposed_NI_94-101_package.pdf.

[3] *See* Proposed Clearing Rule at Section 3(1).

Specifically, the Proposed Clearing Rule defines "participant" as "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."[4] Because of NGX's unique structure, a broad reading of that definition could potentially capture any market participant clearing through NGX since NGX's operational structure allows any market participant to clear transactions without using a clearing member.[5] In short, any entity transacting on NGX is potentially a "participant" because they do not clear through a clearing member.

The Working Group believes it was not the CSA's intent to potentially subject each market participant on NGX to mandatory clearing. Comments from Canadian regulators on the scope of applicability of mandatory clearing in another context support this conclusion. Specifically, in discussing this concept, Canadian regulators referred to a "participant" as a "clearing member."[6] Since NGX does not use a clearing member construct, the Working Group does not think the CSA intended for a "participant" to include those clearing through NGX.

The Working Group understands that the products NGX currently clears are not "specified derivatives"[7] under the various Scope Rules[8] and are outside the scope of the Proposed Clearing Rule. Therefore, NGX, under its current formulation, would not be offering clearing services in respect of a mandatory clearable derivative even if certain energy derivatives were subject to mandatory clearing. However, the Working Group requests that the CSA make clear that NGX's clearing model would not cause market participants using the platform to be "participants" in the event NGX did offer a derivative that could be subjected to mandatory clearing.

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4 *See id*. at Section 1(1).

5 *See NGX Clearinghouse Overview 2015 Q4* at 6 and 11, NGX.com, http://www.ngx.com/presentations/NGX%20Clearing%20Overview%20WEBSITE%20-%20Q1%202016.pdf (last visited May 24, 2016).

6 *See* PowerPoint from the February 24, 2016 Webinar Hosted by the Alberta Securities Commission and the British Columbia Securities Commission at 47 (discussing the scope of the clearing mandate). Information regarding this Webinar is posted on the British Columbia Securities Commission's website. *See Industry Events – Learn How to Comply with Derivatives Trade Reporting Rules*, BCSC.bc.ca, http://www.bcsc.bc.ca/About_Us/Events/Industry_Events/Learn_how_to_comply_with_Derivatives_Trade_Reporting_Rules/ (last visited May 24, 2016).

7 *See*, *e.g.*, National Instrument 91-101 at Section 2(1)(g) (providing that a "specified derivative" does not include a contract or instrument that is traded on an exchange if that exchange is recognized or exempt by a securities regulatory authority in a jurisdiction of Canada). NGX is recognized in Alberta and has received exemption orders in the following Canadian jurisdictions: Ontario; Manitoba; Saskatchewan; British Columbia; and Québec. *See Regulatory & Compliance*, NGX.com, http://www.ngx.com/?page_id=396 (last visited May 24, 2016).

8 *See* Proposed Clearing Companion Policy at 1 (Specific Comments). The Scope Rule for each province and territory of Canada is as follows:

- For each Ontario, Manitoba, and Québec, the Scope Rule is a local regulation numbered 91-506.
- For the remaining Canadian jurisdictions, the Scope Rule is National Instrument 91-101.

B. CANADIAN ENTITIES WITH FOREIGN AFFILIATE CLEARING MEMBERS

As the CSA is aware, the Proposed Clearing Rule applies to "an affiliate of an entity that is a participant of a regulated clearing agency...."[9] It is the Working Group's understanding that a Canadian entity would not be subject to mandatory clearing under the Proposed Clearing Rule simply because it has foreign affiliates that are clearing members of clearinghouses in non-Canadian jurisdictions.

First, such clearinghouses would have to be regulated clearing agencies in Canada for the Proposed Clearing Rule to apply. *Second*, the products that the foreign affiliate clears through the clearinghouse would have to be "specified derivatives" under the Scope Rule for the Proposed Clearing Rule to apply. Thus, the Working Group would like to confirm that unless both of those conditions are satisfied, the Proposed Clearing Rule would not apply to an entity in this context.

III. CONCLUSION

The Working Group appreciates any response the CSA can provide regarding the Working Group's understanding discussed herein of the Proposed Clearing Rule and the Proposed Clearing Companion Policy.

If you have any questions, please contact the undersigned.

Respectfully submitted,
/s/ R. Michael Sweeney, Jr.
R. Michael Sweeney, Jr.
Alexander S. Holtan
Blair Paige Scott

[9] *See* Proposed Clearing Rule at Section 3(1)(b).