CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

CSA Notice and Request for Comment
Proposed Amendments to
National Instrument 94-101
Mandatory Central Counterparty Clearing of Derivatives
and Proposed Changes to Companion Policy 94-101
Mandatory Central Counterparty Clearing of Derivatives

October 12, 2017

Introduction

The Canadian Securities Administrators (the **CSA** or **we**) are publishing the following, for a 90-day comment period expiring on January 10, 2018:

- proposed amendments (the **Proposed Rule Amendments**) to National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (the **National Instrument**), and

- proposed changes (the **Proposed CP Changes**) to Companion Policy 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (the **CP**).

Together, the Proposed Rule Amendments and the Proposed CP Changes are referred to as the **Proposed Amendments**. We are issuing this notice to solicit comments on the Proposed Amendments.

Background

The CSA is proposing the Proposed Amendments based on consultations with and feedback from various market participants, and in order to more effectively and efficiently promote the underlying policy aims of the National Instrument.

The National Instrument was published on January 19, 2017 and came into force on April 4, 2017 (with the exception of Saskatchewan where it came into force on April 5, 2017). The purpose of the National Instrument is to reduce counterparty risk in the over-the-counter (**OTC**) derivatives market by requiring certain counterparties to clear certain prescribed derivatives through a central clearing counterparty (the **Clearing requirement**).

The Clearing requirement became effective for certain counterparties on the coming into force date of the National Instrument, and was initially scheduled to become effective for certain other counterparties on October 4, 2017. To facilitate the rule-making process for the Proposed Amendments, including this publication for comment, the CSA jurisdictions (except Ontario) have exempted from the Clearing requirement until August 20, 2018 those counterparties that

would have been subject to the Clearing requirement on October 4, 2017.[1] In Ontario, the Ontario Securities Commission has amended the National Instrument to extend the effective date of the Clearing requirement for those counterparties until August 20, 2018.[2]

Substance and Purpose of the Proposed Amendments

The purpose of the Proposed Amendments is to refine the scope of counterparties to which the Clearing requirement applies and the types of derivatives that are subject to the Clearing requirement.

The Proposed CP Changes correspond to the Proposed Rule Amendments.

Summary of the Proposed Rule Amendments

Subsection 3(1) of the National Instrument currently requires a local counterparty to a transaction in a mandatory clearable derivative to submit it for clearing to a regulated clearing agency if one or more of the following apply:

- under paragraph 3(1)(a), the counterparty is a participant of the regulated clearing agency and subscribes to clearing services for the class of derivatives to which the mandatory clearable derivative belongs;

- under paragraph 3(1)(b), the counterparty is an affiliated entity of a participant referred to in paragraph 3(1)(a) and has a month-end gross notional amount under all outstanding derivatives exceeding $1 billion, excluding derivatives to which paragraph 7(1)(a) applies;

- under paragraph 3(1)(c), the counterparty is a local counterparty in any jurisdiction of Canada, other than a counterparty to which paragraph 3(1)(b) applies, and has had a month-end gross notional amount exceeding $500 billion combined with each affiliated entity that is a local counterparty in Canada, excluding derivatives to which paragraph 7(1)(a) applies.

Paragraphs 3(1)(b) and (c) are the subject of the Ontario amendment to the relevant effective date and the Blanket Order exemptions in all other jurisdictions, discussed above.

The proposed amendments to paragraphs 3(1)(b) and (c) of the National Instrument would exclude from the Clearing requirement a trust or an investment fund that is an affiliated entity of either (i) a participant of a regulated clearing agency who subscribes to the clearing services in respect of a mandatory clearable derivative, or (ii) a local counterparty whose month-end gross notional amount under all outstanding derivatives, combined with each Canadian affiliated entity, exceeds $500 billion. As a result, those investment funds and trusts would not be subject

[1] Blanket Order 94-501, available on the website of the securities regulatory authority in the local jurisdiction.
[2] See, in Ontario, Ontario Securities Commission, Amendment to National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives*, published July 6, 2017.

to the Clearing requirement.

Further, in calculating the gross notional amount outstanding for the purpose of the $500 billion threshold under paragraph 3(1)(c), the gross notional amount outstanding of an investment fund or a trust would no longer be aggregated with other affiliated entities.

In addition, the Clearing requirement under paragraph 3(1)(c) would no longer apply to a local counterparty with a gross notional amount of outstanding derivatives of $1 billion or less excluding the notional amount of mandatory clearable derivatives to which paragraph 7(1)(a) applies.

Finally, the proposed amendments relating to Appendix A of the National Instrument would remove overnight index swaps with variable notional type and forward rate agreements with variable notional type from the list of mandatory clearable derivatives as those are not currently offered for clearing by regulated clearing agencies.

Local Matters

Annex E to this notice is being published in any local jurisdiction where any additional information is relevant to that jurisdiction only.

Contents of Annexes

The following annexes form part of this CSA Notice:

Annex A — Proposed Amendments to National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives*

Annex B — Blackline of National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* showing the Proposed Rule Amendments

Annex C — Proposed Changes to Companion Policy 94-101 *Mandatory Central Counterparty Clearing of Derivatives*

Annex D — Blackline of Companion Policy 94-101 *Mandatory Central Counterparty Clearing of Derivatives* showing the Proposed CP Changes

Annex E — Local Matters

Request for Comments

Please provide your comments in writing by **January 10, 2018**. 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 and the Autorité des marchés financiers at www.lautorite.qc.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
Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

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

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

Grace Knakowski
Secretary
Ontario Securities Commission
20 Queen Street West
22nd floor
Toronto, Ontario M5H 3S8
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comments@osc.gov.on.ca

Questions

Please refer your questions to any of:

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ANNEX A

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

1. National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives is amended by this Instrument.

2. Subsection 1(1) is amended by adding the following definition:

"investment fund" has the meaning ascribed to it in National Instrument 81-106 *Investment Fund Continuous Disclosure*;**.**

3. Subsection 3(1) is amended by

(a) replacing paragraph (b) with the following:

(b) the counterparty

(i) is an affiliated entity of a participant referred to in paragraph (a),

(ii) is not an investment fund or a trust, and

(iii) has had, at any time after the date on which this Instrument comes into force, a month-end gross notional amount under all outstanding derivatives exceeding $1 000 000 000 excluding derivatives to which paragraph 7(1)(a) applies;**,** ***and***

(b) replacing paragraph (c) with the following:

(c) the counterparty

(i) is a local counterparty in any jurisdiction of Canada,

(ii) is not an investment fund or a trust,

(iii) has had, at any time after the date on which this Instrument comes into force, a month-end gross notional amount under all outstanding derivatives, combined with each affiliated entity that is not an investment fund or a trust and that is a local counterparty in any jurisdiction of Canada, exceeding $500 000 000 000 excluding derivatives to which

paragraph 7(1)(a) applies, and

(iv) has had, at any time after the date on which this Instrument comes into force, a month-end gross notional amount under all outstanding derivatives exceeding $1 000 000 000 excluding derivatives to which paragraph 7(1)(a) applies..

4. Section 5 is amended by replacing "all***" with "***both***".***

5. Subsection 7(1) is amended

(a) by deleting "the application of***", and***

(b) in paragraph (a) by replacing "if***" with "***and***".***

6. Section 8 is amended

(a) by deleting "the application of***", and***

(b) in paragraph (e) by replacing "is***" with "***was***".***

7. Section 12 is amended by replacing "offers***" with "***offered***".***

8. Section 13 is amended

(a) by replacing "paragraphs***" with "***paragraph***".***

(b) by replacing "(3)(1)(a)***" with "***3(1)(a)***".***

9. Appendix A is replaced with the following:

APPENDIX A
TO
NATIONAL INSTRUMENT 94-101

MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES
MANDATORY CLEARABLE DERIVATIVES
(Subsection 1(1))

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
Overnight index swap	FedFunds	USD	7 days to 3 years	Single currency	No	Constant
Overnight index swap	EONIA	EUR	7 days to 3 years	Single currency	No	Constant
Overnight index swap	SONIA	GBP	7 days to 3 years	Single currency	No	Constant

Forward Rate Agreements

Type	**Floating index**	**Settlement currency**	**Maturity**	**Settlement currency type**	**Optionality**	**Notional type**
Forward rate agreement	LIBOR	USD	3 days to 3 years	Single currency	No	Constant
Forward rate agreement	EURIBOR	EUR	3 days to 3 years	Single currency	No	Constant
Forward rate agreement	LIBOR	GBP	3 days to 3 years	Single currency	No	Constant

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

ANNEX B

BLACKLINE OF NATIONAL INSTRUMENT 94-101 *MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES* SHOWING THE PROPOSED RULE AMENDMENTS

This Annex sets out a blackline showing the Proposed Rule Amendments to National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives*, as set out in Annex A.

PART 1
DEFINITIONS AND INTERPRETATION

Definitions and interpretation

1. (1) In this Instrument

"investment fund" has the meaning ascribed to it in National Instrument 81-106 *Investment Fund Continuous Disclosure*;

"local counterparty" means a counterparty to a derivative 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) the person or company is organized under the laws of the local jurisdiction;

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

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

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

"mandatory clearable derivative" means a derivative within a class of derivatives listed in Appendix A;

"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 Alberta, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan 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,

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

(c) in Québec, a person recognized or exempted from recognition as a clearing house;

"transaction" means any of the following:

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

(b) the novation of a derivative, other than a novation with a clearing agency or clearing house.

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

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

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

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

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

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

(4) In this Instrument, in Alberta, British Columbia, New Brunswick, Newfoundland

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

Application

2. This Instrument applies to,

(a) in Manitoba,

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

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

(b) in Ontario,

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

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

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

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

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 mandatory clearable derivative for clearing

to a regulated clearing agency that offers clearing services in respect of the mandatory clearable derivative, if one or more of the following applies to each counterparty:

(a) the counterparty

(i) is a participant of a regulated clearing agency that offers clearing services in respect of the mandatory clearable derivative, and

(ii) subscribes to clearing services for the class of derivatives to which the mandatory clearable derivative belongs;

(b) the counterparty

(i) is an affiliated entity of a participant referred to in paragraph (a),

(ii) is not an investment fund or a trust, and

(iii) ~~(ii)~~ has had, at any time after the date on which this Instrument comes into force, a month-end gross notional amount under all outstanding derivatives exceeding $1 000 000 000 excluding derivatives to which paragraph 7(1)(a) applies;

(c) the counterparty

(i) is a local counterparty in any jurisdiction of Canada, ~~other than a counterparty to which paragraph (b) applies, and~~

(ii) is not an investment fund or a trust,

(iii) ~~(ii)~~ has had, at any time after the date on which this Instrument comes into force, a month-end gross notional amount under all outstanding derivatives, combined with each affiliated entity that is not an investment fund or a trust and that is a local counterparty in any jurisdiction of Canada, exceeding $500 000 000 000 excluding derivatives to which paragraph 7(1)(a) applies~~.~~, and

(iv) has had, at any time after the date on which this Instrument comes into force, a month-end gross notional amount under all outstanding derivatives exceeding $1 000 000 000 excluding derivatives to which paragraph 7(1)(a) applies.

(2) Unless paragraph (1)(a) applies, a local counterparty to which paragraph (1)(b) or (1)(c) applies is not required to submit a mandatory clearable derivative for clearing to a regulated clearing agency if the transaction in the mandatory clearable derivative was executed before the 90th day after the end of the month in which the month-end gross notional amount first exceeded the amount specified in subparagraph (1)(b)(ii) or (1)(c)(ii), as applicable.

(3) Unless subsection (2) applies, a local counterparty to which subsection (1) applies must submit a mandatory clearable derivative for clearing no later than

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

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

(4) A local counterparty to which subsection (1) applies must submit the mandatory clearable derivative for clearing in accordance with the rules of the regulated clearing agency, as amended from time to time.

(5) A counterparty that is a local counterparty solely pursuant to paragraph (b) of the definition of "local counterparty" in section 1 is exempt from this section if the mandatory clearable derivative is submitted for clearing in accordance with the law of a foreign jurisdiction to which the counterparty is subject, set out in Appendix B.

Notice of rejection

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

Public disclosure of clearable and mandatory clearable derivatives

5. A regulated clearing agency must do ~~all~~both of the following:

(a) publish a list of each derivative or class of derivatives for which the regulated clearing agency offers clearing services and state whether each derivative or class of derivatives is a mandatory clearable derivative;

(b) make the list accessible to the public at no cost on its website.

PART 3
EXEMPTIONS FROM MANDATORY CENTRAL COUNTERPARTY CLEARING

Non-application

6. This Instrument does not apply to the following counterparties:

(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 liable for all or substantially all the liabilities;

(c) a person or company wholly owned by one or more governments referred to in paragraph (a) if the government or governments are liable for all or substantially all the liabilities of the person or company;

(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) A local counterparty is exempt from ~~the application of~~ section 3, with respect to a mandatory clearable derivative, if all of the following apply:

(a) the mandatory clearable derivative is between a counterparty and an affiliated entity of the counterparty ~~if~~and each of the counterparty and the affiliated entity are consolidated as part of the same audited consolidated financial statements prepared in accordance with "accounting principles" as defined in National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards*;

(b) both counterparties to the mandatory clearable derivative agree to rely on this exemption;

(c) the mandatory clearable derivative is subject to a centralized risk management program reasonably designed to assist in monitoring and managing the risks associated with the derivative between the counterparties through evaluation, measurement and control procedures;

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

(2) No later than the 30th day after a local counterparty first relies on subsection (1) in respect of a mandatory clearable derivative with a counterparty, the local counterparty must deliver electronically to the regulator or securities regulatory authority 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 or cause to be delivered electronically to the regulator or securities regulatory authority an amended Form 94-101F1 *Intragroup Exemption*.

Multilateral portfolio compression exemption

8. A local counterparty is exempt from ~~the application of~~ section 3, with respect to a mandatory clearable derivative resulting from a multilateral portfolio compression exercise, if all of the following apply:

(a) the mandatory clearable derivative is entered into as a result of more than 2 counterparties changing or terminating and replacing existing derivatives;

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

(c) the existing derivatives were not cleared by a clearing agency or clearing house;

(d) the mandatory clearable derivative is entered into by the same counterparties as the existing derivatives;

(e) the multilateral portfolio compression exercise ~~is~~was conducted by an independent third-party.

Recordkeeping

9. (1) A local counterparty to a mandatory clearable derivative that relied on section 7 or 8 with respect to a mandatory clearable derivative 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 kept in a safe location and in a durable form for a period of

(a) except in Manitoba, 7 years following the date on which the mandatory clearable derivative expires or is terminated, and

(b) in Manitoba, 8 years following the date on which the mandatory clearable derivative expires or is terminated.

PART 4
MANDATORY CLEARABLE DERIVATIVES

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

10. No later than the 10th day after a regulated clearing agency first offers clearing services for a derivative or class of derivatives, the regulated clearing agency must deliver electronically to the regulator or securities regulatory authority 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 May 4, 2017, a regulated clearing agency must deliver electronically to the regulator or securities regulatory authority a completed Form 94-101F2 *Derivatives Clearing Services*, identifying all derivatives or classes of derivatives for which it ~~offers~~offered clearing services on April 4, 2017.

Transition – certain counterparties' submission for clearing

13. A counterparty specified in ~~paragraphs~~paragraph 3(1)(b) or (c) to which paragraph ~~(~~3~~)~~(1)(a) does not apply is not required to submit a mandatory clearable derivative for clearing to a regulated clearing agency until October 4, 2017.

Effective date

14. (1) This Instrument comes into force on April 4, 2017.

(2) In Saskatchewan, despite subsection (1), if these regulations are filed with the Registrar of Regulations after April 4, 2017, these regulations come into force on the day on which they are filed with the Registrar of Regulations.

APPENDIX A
TO
NATIONAL INSTRUMENT 94-101

MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES
MANDATORY CLEARABLE DERIVATIVES
(Subsection 1(1))

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 3 years	Single currency	No	Constant ~~or variable~~
Overnight index swap	EONIA	EUR	7 days to 3 years	Single currency	No	Constant ~~or variable~~
Overnight index swap	SONIA	GBP	7 days to 3 years	Single currency	No	Constant ~~or variable~~

Forward Rate Agreements

Type	Floating index	Settlement currency	Maturity	Settlement currency type	Optionality	Notional type
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
TO
NATIONAL INSTRUMENT 94-101
MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES

LAWS, REGULATIONS OR INSTRUMENTS OF FOREIGN JURISDICTIONS APPLICABLE FOR SUBSTITUTED COMPLIANCE
(Subsection 3(5))

Foreign jurisdiction	Laws, regulations or instruments
European Union	Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories
United States of America	Clearing Requirement and Related Rules, 17 C.F.R. pt. 50

FORM 94-101F1
INTRAGROUP EXEMPTION

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

Section 1 – Information on the entity delivering this Form

1. Provide the following information with respect to the entity delivering this Form:

   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:
   Email:

   Other offices
   Address:
   Telephone:
   Email:

   Canadian counsel (if applicable)
   Firm name:
   Contact name:
   Telephone:
   Email:

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 entity referred to in item 1, provide the following information:

   Previous full legal name:
   Previous name under which the entity conducted business:

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

1. For the mandatory clearable derivatives to which this Form relates, provide all of the following information in the table below:

   (a) the legal entity identifier of each counterparty in the same manner as required under the following instruments:

      (i) 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*;

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

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

      (iv) in Québec, Regulation 91-507 respecting Trade Repositories and Derivatives Data Reporting;

   (b) whether each counterparty is a local counterparty in a jurisdiction of Canada.

Pairs	LEI of counterparty 1	Jurisdiction(s) of Canada in which counterparty 1 is a local counterparty	LEI of counterparty 2	Jurisdiction(s) of Canada in which counterparty 2 is a local counterparty
1				

2. Describe the ownership and control structure of the counterparties identified in item 1.

Section 3 – Certification

I certify that I am authorized to deliver this Form on behalf of the entity delivering this Form and on behalf of the counterparties identified in Section 2 of this Form 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)

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:
   Email:

Section 2 – Description of derivatives

1. Identify each derivative or class of derivatives for which the regulated clearing agency offers clearing services in respect of 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 derivatives including

   (a) the standard practices for managing life-cycle events associated with the derivative or class of derivatives, as defined in the following instruments:

      (i) 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*;

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

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

      (iv) in Québec, Regulation 91-507 respecting Trade Repositories and Derivatives Data Reporting,

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

   (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) 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 on the default of a participant and the effect of the default on the other participants.

4. Describe the impact, if any, on the regulated clearing agency's ability to comply with its regulatory obligations should the regulator or securities regulatory authority determine a derivative or class of derivatives referred to in item 1 to be a mandatory clearable derivative.

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

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

ANNEX C

PROPOSED CHANGES TO
COMPANION POLICY 94-101 *MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES*

1. Companion Policy 94-101 Mandatory Central Counterparty Clearing of Derivatives is changed by this Document.

2. Subsection 3(1) is replaced with the following:

Subsection 3(1) – Duty to submit for clearing

The duty to submit a mandatory clearable derivative for clearing to a regulated clearing agency 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, we would not expect a local counterparty to submit the mandatory clearable derivative for clearing. Therefore, we would not expect a local counterparty to clear a mandatory clearable derivative entered into as a result of a counterparty exercising a swaption that was entered into before the effective date of the Instrument or the date on which the derivative became a mandatory clearable derivative. Similarly, we would not expect a local counterparty to clear an extendible swap that was entered into before the effective date of the Instrument or the date on which the derivative became a mandatory clearable derivative and extended in accordance with the terms of the contract after such date.

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 derivative will be subject to the mandatory central counterparty clearing requirement.

Where a derivative is not subject to the mandatory central counterparty 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 complex swap with non-standard terms that regulated clearing agencies cannot accept for clearing, adherence to the Instrument would not require market participants to structure such derivative in a particular manner or disentangle the derivative in order to clear the component which is a mandatory clearable derivative if it serves legitimate business purposes. However, considering that it would not require disentangling, we would expect the component of a packaged transaction that is a mandatory clearable derivative to be cleared.

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 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. For example, a local counterparty under any of paragraphs (a), (b) or (c) must clear a mandatory clearable derivative entered into with another local counterparty under any of paragraphs (a), (b) or (c). As a further example, a local counterparty under any of paragraphs (a), (b) or (c) must also clear a mandatory clearable derivative with a foreign counterparty under paragraphs (a) or (b). For instance, a local counterparty that is an affiliated entity of a foreign participant would be subject to mandatory central counterparty clearing for a mandatory clearable derivative with a foreign counterparty that is an affiliated entity of another foreign participant considering that there is one local counterparty to the transaction and both counterparties meet the criteria under paragraph (b).

An investment fund or a trust would not be subject to the Instrument unless the investment fund or the trust is a participant under paragraph (a).

A local counterparty that has not had a month-end gross notional amount of outstanding derivatives exceeding the $1 billion threshold in subparagraph (b)(iii) or (c)(iv), for any month following the entry into force of the Instrument, would not be subject to the Instrument.

Pursuant to paragraph (c) a local counterparty that is not an investment fund or a trust and that has had a month-end gross notional amount of outstanding derivatives that exceeds the $500 billion threshold in subparagraph (c)(iii) must clear a mandatory clearable derivative entered into with another counterparty that meets the criteria under paragraph (a), (b) or (c). In order to determine whether the $500 billion threshold in subparagraph (c)(iii) is exceeded, a local counterparty must add the gross notional amount of all outstanding derivatives of its affiliated entities that are also local counterparties, to its own. However, investments funds and trusts that are affiliated entities of the local counterparty are not included in the calculation.

Where a local counterparty is a member of a group of affiliated entities that exceeds the $500 billion threshold but that local counterparty is not itself over the $1 billion threshold in subparagraph (c)(iv), it is not required to clear.

The calculation of the gross notional amount outstanding under paragraphs (b) and (c) excludes derivatives with affiliated entities whose financial statements are prepared on a consolidated basis.

A local counterparty that is a participant at a regulated clearing agency, but does not subscribe to clearing services for the class of derivatives to which the mandatory clearable derivative belongs would still be required to clear if it is subject to paragraph (c).

A local counterparty subject to mandatory central counterparty clearing that engages in a mandatory clearable derivative is responsible for determining whether the other counterparty is also subject to mandatory central counterparty clearing. To do so, the local counterparty may rely on the factual statements made by the other counterparty, provided that it does not have reasonable grounds to believe that such statements are false.

We would not expect that all the counterparties of a local counterparty provide their status as most counterparties would not be subject to the Instrument. However, a local counterparty cannot rely on the absence of a declaration from a counterparty to avoid the requirement to clear. Instead, when no information is provided by a counterparty, the local counterparty may use factual statements or available information to assess whether the mandatory clearable derivative is required to be cleared in accordance with the Instrument.

We would expect counterparties subject to the Instrument to exercise reasonable judgement in determining whether a person or company may be near or above the thresholds set out in paragraphs (b) and (c). We would expect a counterparty subject to the Instrument to solicit confirmation from its counterparty where there is reasonable basis to believe that the counterparty may be near or above any of the thresholds.

The status of a counterparty under this subsection should be determined before entering into a mandatory clearable derivative. We would not expect a local counterparty to clear a mandatory clearable derivative entered into after the Instrument came into effect, but before one of the counterparties was captured under one of paragraphs (a), (b) or (c) unless there is a material amendment to the derivative.

3. These changes become effective on [*insert date here*].

ANNEX D

BLACKLINE OF COMPANION POLICY 94-101 *MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES* SHOWING THE PROPOSED CP CHANGES

This Annex sets out a blackline showing the Proposed Changes to Companion Policy 94-101 *Mandatory Central Counterparty Clearing of Derivatives*, as set out in Appendix C.

COMPANION POLICY 94-101
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 the 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

Subsection 1(1) – Definition of "participant"

A "participant" of a regulated clearing agency is bound by the rules and procedures of the regulated clearing agency due to the contractual agreement with the regulated clearing agency.

Subsection 1(1) – Definition of "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 (a) of this definition is to allow, for certain enumerated jurisdictions, 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, but that is recognized or exempted in another jurisdiction of Canada. Paragraph (a) does not supersede any provision of the securities legislation of a 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.

Subsection 1(1) – Definition of "transaction"

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 mandatory central counterparty clearing. Similarly, the definition of transaction in NI 94-101 excludes a novation resulting from the submission of a derivative to a clearing agency or clearing house 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 expression "material amendment" is used to determine whether there is a new transaction, considering 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 central counterparty clearing requirement, if applicable, as it would be considered a new transaction. 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 notional amount, the terms and conditions of the contract evidencing the derivative, the trading methods or the risks related to its use, but 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 derivative is a material amendment. Examples of a modification to an existing derivative that would be a material amendment include any modification which would result in a significant change in the value of the derivative, differing cash flows, a change to the method of settlement or the creation of upfront payments.

PART 2
MANDATORY CENTRAL COUNTERPARTY CLEARING

Subsection 3(1) – Duty to submit for clearing

The duty to submit a mandatory clearable derivative for clearing to a regulated clearing agency 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, we would not expect a local counterparty to submit the mandatory clearable derivative for clearing. Therefore, we would not expect a local counterparty to clear a mandatory clearable derivative entered into as a result of a counterparty exercising a swaption that was entered into before the effective date of the Instrument or the date on which the derivative became a mandatory clearable derivative. Similarly, we would not expect a local counterparty to clear an extendible swap that was entered into before the effective date of the Instrument or the date on which the derivative became a mandatory clearable derivative and extended in accordance with the terms of the contract after such date.

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 derivative will be subject to the mandatory central counterparty clearing requirement.

Where a derivative is not subject to the mandatory central counterparty 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 complex swap with non-standard terms

that regulated clearing agencies cannot accept for clearing, adherence to the Instrument would not require market participants to structure such derivative in a particular manner or disentangle the derivative in order to clear the component which is a mandatory clearable derivative if it serves legitimate business purposes. However, considering that it would not require disentangling, we would expect the component of a packaged transaction that is a mandatory clearable derivative to be cleared.

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 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. For example, a local counterparty under any of paragraphs (a), (b) or (c) must clear a mandatory clearable derivative entered into with another local counterparty under any of paragraphs (a), (b) or (c). As a further example, a local counterparty under any of paragraphs (a), (b) or (c) must also clear a mandatory clearable derivative with a foreign counterparty under paragraphs (a) or (b). For instance, a local counterparty that is an affiliated entity of a foreign participant would be subject to mandatory central counterparty clearing for a mandatory clearable derivative with a foreign counterparty that is an affiliated entity of another foreign participant considering that there is one local counterparty to the transaction and both counterparties ~~respect~~meet the criteria under paragraph (b).

An investment fund or a trust would not be subject to the Instrument unless the investment fund or the trust is a participant under paragraph (a).

A local counterparty that has not had a month-end gross notional amount of outstanding derivatives exceeding the 1 billion threshold in ~~paragraphs~~subparagraph (b)(iii) or (c)(iv), for any month following the entry into force of the Instrument, would not be subject to the Instrument.

Pursuant to paragraph (c) a local counterparty that is not an investment fund or a trust and that has had a month-end gross notional amount of outstanding derivatives that exceeds the 500 billion threshold in subparagraph (c)(iii) must clear ~~all its subsequent transactions in~~ a mandatory clearable derivative entered into with another counterparty that meets the criteria under ~~one or more of~~ paragraph~~s~~ (a), (b)~~,~~ or (c). In order to determine whether the 500 billion threshold in subparagraph (c)(iii) is exceeded, a local counterparty must add the gross notional amount of all outstanding derivatives of its affiliated entities that are also local counterparties, to its own. However, investments funds and trusts that are affiliated entities of the local counterparty are not included in the calculation.

Where a local counterparty is a member of a group of affiliated entities that exceeds the 500 billion threshold but that local counterparty is not itself over the 1 billion threshold in subparagraph (c)(iv), it is not required to clear.

The calculation of the gross notional amount outstanding under paragraphs (b) and (c) excludes

derivatives with affiliated entities whose financial statements are prepared on a consolidated basis~~, which would be exempted under section 7 if they were mandatory clearable derivatives~~.~~In addition, a local counterparty determines whether it exceeds the threshold in paragraph (c) by adding the gross notional amount of all outstanding derivatives of its affiliated entities that are also local counterparties, to its own.~~

A local counterparty that is a participant at a regulated clearing agency, but does not subscribe to clearing services for the class of derivatives to which the mandatory clearable derivative belongs would still be required to clear if it is subject to paragraph (c).

A local counterparty subject to mandatory central counterparty clearing that engages in a mandatory clearable derivative is responsible for determining whether the other counterparty is also subject to mandatory central counterparty clearing. To do so, the local counterparty may rely on the factual statements made by the other counterparty, provided that it does not have reasonable grounds to believe that such statements are false.

We would not expect that all the counterparties of a local counterparty provide their status as most counterparties would not be subject to the Instrument. However, a local counterparty cannot rely on the absence of a declaration from a counterparty to avoid the requirement to clear. Instead, when no information is provided by a counterparty, the local counterparty may use factual statements or available information to assess whether the mandatory clearable derivative is required to be cleared in accordance with the Instrument.

We would expect counterparties subject to the Instrument to exercise reasonable judgement in determining whether a person or company may be near or above the thresholds set out in paragraphs (b) and (c). We would expect a counterparty subject to the Instrument to solicit confirmation from its counterparty where there is reasonable basis to believe that the counterparty may be near or above any of the thresholds.

The status of a counterparty under this subsection should be determined before entering into a mandatory clearable derivative. We would not expect a local counterparty to clear a mandatory clearable derivative entered into after the Instrument came into effect, but before one of the counterparties was captured under one of paragraphs (a), (b) or (c) unless there is a material amendment to the derivative.

Subsection 3(2) – 90-day transition

This subsection provides that only transactions in mandatory clearable derivatives executed on or after the 90th day after the end of the month in which the local counterparty first exceeded the threshold are subject to subsection 3(1). We do not intend that transactions executed between the 1st day on which the local counterparty became subject to subsection 3(1) and the 90th day be back-loaded after the 90th day.

Subsection 3(3) – Submission to a regulated clearing agency

We would expect that a transaction subject to mandatory central counterparty 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 regulated clearing agency, the next business day.

Subsection 3(5) – Substituted compliance

Substituted compliance is only available to a local counterparty that is a foreign affiliated entity of a counterparty organized under the laws of the local jurisdiction or with a head office or principal place of business in the local jurisdiction and that is responsible for all or substantially all the liabilities of the affiliated entity. The local counterparty would still be subject to the Instrument, but its mandatory clearable derivatives, as per the definition under the Instrument, may be cleared at a clearing agency pursuant to a foreign law listed in Appendix B if the counterparty is subject to and compliant with that foreign law.

Despite the ability to clear pursuant to a foreign law listed in Appendix B, the local counterparty is still required to fulfill the other requirements in the Instrument, as applicable. These include the retention period for the record keeping requirement and the submission of a completed Form 94-101F1 *Intragroup Exemption* to the regulator or securities regulatory authority in a jurisdiction of Canada when relying on an exemption regarding mandatory clearable derivatives entered into with an affiliated entity.

PART 3
EXEMPTIONS FROM MANDATORY CENTRAL COUNTERPARTY CLEARING

Section 6 – Non-application

A mandatory clearable derivative involving a counterparty that is an entity referred to in section 6 is not subject to the requirement under section 3 to submit a mandatory clearable derivative for clearing 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.

Section 7 – Intragroup exemption

The Instrument does not require an outward-facing transaction in a mandatory clearable derivative entered into by a foreign counterparty that meets paragraph 3(1)(a) or (b) to be cleared in order for the foreign counterparty and its affiliated entity that is a local counterparty subject to the Instrument to rely on this exemption. However, we would expect a local counterparty to not abuse this exemption in order to evade mandatory central counterparty clearing. It would be considered evasion if the local counterparty uses a foreign affiliated entity or another member of its group to enter into a mandatory clearable derivative with a foreign counterparty that meets paragraph 3(1)(a) or (b) and then do a back-to-back transaction or enter into the same derivative relying on the intragroup exemption where the local counterparty would otherwise have been

required to clear the mandatory clearable derivative if it had entered into it directly with the non-affiliated counterparty.

Subsection 7(1) – Requisite conditions for intragroup exemption

The intragroup exemption is based on the premise that the risk created by mandatory clearable derivatives entered into between counterparties in the same group 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 use the intragroup exemption for a mandatory clearable derivative.

The expression "consolidated financial statements" in paragraph (a) is interpreted as financial statements in which the assets, liabilities, equity, income, expenses and cash flows of each of the counterparty and the affiliated entity are consolidated as part of a single economic entity.

Affiliated entities may rely on paragraph (a) for a mandatory clearable derivative as soon as they meet the criteria to consolidate their financial statements together. Indeed, we would not expect affiliated entities to wait until their next financial statements are produced to benefit from this exemption if they will be consolidated.

If the consolidated financial statements referred to in paragraph 7(1)(a) are not prepared in accordance with IFRS, Canadian GAAP or U.S. GAAP, we would expect that the consolidated financial statements be prepared in accordance with the generally accepted accounting principles of a foreign jurisdiction where one or more of the affiliated entities has a significant connection, such as where the head office or principal place of business of one or both of the affiliated entities, or their parent, is located.

Paragraph (c) refers to a system of risk management policies and procedures designed to monitor and manage the risks associated with a mandatory clearable derivative. We expect that such procedures would be regularly reviewed. 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. We would expect that, for a risk management program to be considered centralized, the evaluation, measurement and control procedures would be applied by a counterparty to the mandatory clearable derivative or an affiliated entity of both counterparties to the derivative.

Paragraph (d) refers to the terms governing the trading relationship between the affiliated entities for the mandatory clearable derivative that is not cleared as a result of the intragroup exemption. We would expect that the written agreement be dated and signed by the affiliated entities. An ISDA master agreement, for instance, would be acceptable.

Subsection 7(2) – Submission of Form 94-101F1

Within 30 days after two affiliated entities first rely on the intragroup exemption in respect of a mandatory clearable derivative, a local counterparty must deliver, or cause to be delivered, to the regulator or securities regulatory authority a completed Form 94-101F1 *Intragroup Exemption* ("Form 94-101F1") to notify the regulator or securities regulatory authority that the exemption is being relied upon. The information provided in the Form 94-101F1 will aid the regulator or securities regulatory authority in better understanding the legal and operational structure allowing counterparties to benefit from the intragroup exemption. The parent or the entity responsible to perform the centralized risk management for the affiliated entities using the intragroup exemption may deliver the completed Form 94-101F1 on behalf of the affiliated entities. For greater clarity, a completed Form 94-101F1 could be delivered for the group by including each pairing of counterparties that seek to rely on the intragroup exemption. One completed Form 94-101F1 is valid for every mandatory clearable derivative between any pair of counterparties listed on the completed Form 94-101F1 provided that the requirements set out in subsection (1) are complied with.

Subsection 7(3) – Amendments to Form 94-101F1

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) the addition of a new local jurisdiction for a counterparty. This form may also be delivered by an agent.

Section 8 – Multilateral portfolio compression exemption

A multilateral portfolio compression exercise involves more than two counterparties who wholly change or terminate some or all of their existing derivatives submitted for inclusion in the exercise and replace those derivatives with, depending on the methodology employed, 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 replaced by 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 the aggregate gross number or notional amounts of outstanding derivatives.

Under paragraph (c), the existing derivatives submitted for inclusion in the exercise were not cleared either because they did not include a mandatory clearable derivative or because they were entered into before the class of derivatives became a mandatory clearable derivative or because the counterparty was not subject to the Instrument.

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 a participant to the 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, we would expect existing derivatives that would be reasonably likely to significantly increase the risk exposure of the participant to not be included in the multilateral portfolio compression exercise in order for this exemption to be available.

We would generally expect that a mandatory clearable derivative resulting from the multilateral portfolio compression exercise would have the same material terms as the derivatives that were replaced with the exception of reducing the number or notional amount of outstanding derivatives.

Section 9 – Recordkeeping

We would generally expect that reasonable supporting documentation kept in accordance with section 9 would include 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, as applicable.

A local counterparty subject to the mandatory central counterparty clearing requirement is responsible for determining whether, given the facts available, an 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 mandatory clearable derivatives benefiting from the exemption.

PART 4
MANDATORY CLEARABLE DERIVATIVES

and

PART 6
TRANSITION AND EFFECTIVE DATE

Section 10 – Submission of Form 94-101F2 & Section 12 – Transition for the submission of Form 94-101F2

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 offering 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 regulator or securities regulatory authority has the power to determine by rule or otherwise which derivative or class of derivatives will be subject to mandatory central counterparty clearing. Furthermore, the CSA may consider the information required by Form 94-101F2 to determine whether a derivative or class of derivatives will be subject to mandatory central counterparty clearing.

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

(a) the derivative is available to be cleared on a regulated clearing agency;

(b) 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;

(c) 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;

(d) whether mandating the derivative or class of derivatives to be cleared would bring undue risk to regulated clearing agencies;

(e) the outstanding notional amount of the counterparties transacting in the derivative or class of derivatives, the current liquidity in the market for the derivative or class of derivatives, the concentration of participants active in the market for the derivative or class of derivatives, and the availability of reliable and timely pricing data;

(f) the existence of third-party vendors providing pricing services;

(g) 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;

(h) whether a regulated clearing agency would be able to manage the risk of the additional derivatives that might be submitted due to the mandatory central counterparty clearing requirement determination;

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

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

(k) the public interest.

FORM 94-101F1
INTRAGROUP EXEMPTION

Submission of information on intragroup transactions by a local counterparty

In paragraph (a) of item 1 in section 2, we refer to information required under section 28 of the TR Instrument.

We intend to keep the forms delivered by or on behalf of a local counterparty under the Instrument 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 we intend for Form 94-101F1 and any amendments to it to be kept generally confidential, if the regulator or securities regulatory authority 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 economic terms is a key input in the determination process.

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. Assessing whether a derivative or class of derivatives should be a mandatory clearable derivative may involve, in terms of liquidity and price availability, considerations that are different from, or in addition to, the considerations used by the regulator or securities regulatory authority 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. We expect that the data presented cover a reasonable period of time of no less than 6 months. Suggested information to be provided on the market includes:

(a) statistics regarding the percentage of activity of participants on their own behalf and for customers,

(b) average net and gross positions including the direction of positions (long or short), by type of market participant submitting mandatory clearable derivatives directly or indirectly, and

(c) average trading activity and concentration of trading activity among participants by type of market participant submitting mandatory clearable derivatives directly or indirectly to the regulated clearing agency.

ANNEX E

LOCAL MATTERS

There are no applicable local matters in Alberta to consider at this time.

December 19, 2017

BY EMAIL

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

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

Grace Knakowski, Secretary
Ontario Securities Commission
20 Queen Street West 22nd floor
Toronto, Ontario M5H 3S8
comments@osc.gov.on.ca

Dear Sirs/Mesdames:

Re: Request for Comments on Proposed Amendments to National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* and Proposed Changes to Companion Policy 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (the "Proposed Amendments")

The Canadian Advocacy Council[1] for Canadian CFA Institute[2] Societies (the CAC) appreciates the opportunity to comment on the Proposed Amendments.

We understand that the Proposed Amendments would narrow down the type of counterparties that would be subject to the National Instrument, generally certain trusts and investment funds, as well as remove certain derivatives that would otherwise be subject to

[1]The CAC represents more than 15,000 Canadian members of 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 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 149,603 members in 163 countries, including 143,386 CFA charterholders and 148 member societies. For more information, visit www.cfainstitute.org.

the clearing requirements, specifically, overnight index swaps and forward rate agreements with variable notional type.

We are supportive of these pragmatic changes. With respect to the type of derivatives subject to the clearing requirements, the notice accompanying the text of the Proposed Amendments indicates that the two types of derivatives to be removed are not currently offered for clearing by regulated clearing agencies. 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. In connection with excluding certain trusts and investment funds from the scope of the National Instrument, we agree that there is likely not significant counterparty risk with such entities. Our understanding is that the use of OTC derivatives for those counterparties would commonly be limited to F/X hedges, and if any issues arose, the solution would usually only involve posting additional collateral.

We believe the Proposed Amendments will not have a negative impact on the stated purpose of the National Instrument to reduce counterparty risk in the OTC derivatives market.

Concluding Remarks

We thank you for the opportunity to provide these comments. We would be happy to address any questions you may have and 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) *The Canadian Advocacy Council for*
Canadian CFA Institute Societies

The Canadian Advocacy Council for
Canadian CFA Institute Societies

Canadian Market
Infrastructure Committee

Confidential

Via e-mail to: Me Anne-Marie Beaudoin, Corporate Secretary
consultation-en-cours@lautorite.qc.ca
Grace Knakowski, Secretary
comments@osc.gov.on.ca

Alberta Securities Commission
Autorité des marchés financiers
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

December 19, 2017

Dear Sirs/Mesdames:

Re: Proposed Amendments (the "Proposed Amendments") to National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* ("NI 94-101") and Related Companion Policy (the "Companion Policy")

INTRODUCTION

CMIC is pleased to provide this comment letter on the Proposed Amendments.

CMIC was established in 2010, in response to a request from Canadian public authorities,[1] to represent the consolidated views of certain Canadian market participants on proposed regulatory and legislative changes in relation to over-the-counter ("**OTC**") derivatives. The members of CMIC who are responsible for this letter are: Bank of America Merrill Lynch, Bank of Montreal, Bank of Tokyo-Mitsubishi UFJ, Ltd., Canada Branch, 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 Trust Fund, HSBC Bank Canada, Invesco Canada Ltd., JPMorgan Chase Bank, N.A., Toronto Branch, Manulife Financial Corporation, Morgan Stanley, National Bank of Canada, OMERS Administration Corporation, Ontario Teachers' Pension Plan Board, Royal

[1] "Canadian public authorities" means representatives from Bank of Canada, Canadian Securities Administrators, Department of Finance and The Office of the Superintendent of Financial Institutions.

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 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, but not limited to, both domestic and foreign owned banks operating in Canada as well as major Canadian institutional market participants (including a number of major pension funds) in the Canadian derivatives market. This letter reflects the consensus of views within CMIC's membership about the proper Canadian regulatory and legislative regime applicable to the OTC derivatives market.

GENERAL COMMENTS

CMIC is supportive of the main policy objective of the Proposed Amendments to effectively exclude trusts and investment funds from the clearing requirement. While we believe the Proposed Amendments accomplish this stated objective, we wanted to highlight for your consideration some of what we anticipate may be unintended consequences of the current drafting.

AMENDING THE DEFINITIONS OF AFFILIATES AND CONTROL

We note that the Canadian Securities Administrators (the "**CSA**") have taken the approach of excluding trusts and investment funds from the clearing requirement by excluding them from Sections 3(1)(b) and (c) of NI 94-101. By taking this approach, rather than excluding them from the affiliate and control provisions under Sections 1(2) and (3), the ISDA Canadian Clearing Classification Letter[2] (the "**Classification Letter**") will need to be amended, in particular in respect of the definition of "Exempt Entity" in the Classification Letter. The Classification Letter allows market participants to provide their counterparties with status information in order to determine if they are in scope for purposes of NI 94-101. This risks confusing foreign market participants who, in our view, will already be reluctant to complete the letter. If, however, sections 1(2) and (3) of NI 94-101 were amended instead[3] of Sections 3(1)(b) and (c), the Classification Letter would not need to be amended as it incorporates the term "affiliate" and "affiliated" as defined in NI 94-101. Changes to the Classification Letter will result in delaying client outreach efforts until the Proposed Amendments have been finalized.

NARROWING OF THE EXEMPTION UNDER S. 3(1)(C)

In CMIC's view, the changes to Section 3(1)(c) appear to narrow the number of market participants that would otherwise have been in scope prior to the Proposed Amendments, by effectively creating a new exemption by adding Section 3(1)(c)(iv). This new provision exempts from the clearing requirement a local counterparty that is a member of a group whose gross notional amount of outstanding derivatives exceeds $500 billion (excluding inter-affiliate trades) but itself does not exceed $1 billion in gross notional amount. This could permit, for example, a pension fund that is not a clearing member but is over the $500 billion threshold to incorporate a new

[2] Available at: https://www.isda.org/2017/03/30/canadian-clearing-classification-letter/.

[3] CMIC submits that such amendment would clarify that trusts and investment funds are not considered affiliates of another person even if the trustee of such trust or fund is controlled by, or controls, such other person, or they are controlled by the same person.

subsidiary, or several subsidiaries, which would not be required to clear as long as each subsidiary remains below the $1 billion threshold. Mandatory clearable derivatives entered into by such subsidiary with another entity in scope under Section 3(1) would not be required to be cleared. However, if instead the pension fund itself entered into such mandatory clearable derivative, such a transaction would need to be cleared based on the facts in our example. CMIC is not opposed to the creation of this additional exemption but simply wanted to point out the effect of the Proposed Amendments.

If the CSA's intent was simply to exclude from Section 3(1)(c) affiliates of participants referred to in Section 3(1)(a) since they are already in-scope under Section 3(1)(b), CMIC submits that the more effective way to do this would be to delete Section 3(1)(c)(iv) and re-word Section 3(1)(c)(i) as follows:

> (c)(i) is a local counterparty in any jurisdiction of Canada, other than an affiliated entity of a participant referred to in paragraph (a).

LACK OF HARMONIZATION WITH OTHER RULES

CMIC notes that the definitions of "affiliated entity" and "control" in Sections 1(2) and (3) of NI 94-101 are very similar to those definitions in Sections 1(3) and (4) of Quebec Regulation 91-507 ("**Quebec 91-507**") and Sections 1(2) and (3) of Multilateral Instrument 96-101 ("**MI 96-101**"). It is therefore inconsistent to have a carve out or clarification for trusts and investment funds in NI 94-101, but not in Quebec 91-507 or MI 96-101. Otherwise, an inference could be created to the effect that these reporting rules require trades between a bank and its managed funds and trusts to be reported as inter-affiliate trades. In CMIC's view, this would be very undesirable as it is inconsistent with how these provisions are currently being interpreted by market participants. In addition, we believe such an inference would be contrary to Ontario Securities Commission Rule 91-507 and Manitoba Securities Commission Rule 91-507, which have more restrictive language regarding affiliates under Sections 1(2) and (3) of the *Securities Act* (Ontario).

Accordingly, while CMIC supports the exclusion of trusts and investment funds from the clearing requirement by excluding them from the definitions of affiliate and control under NI 94-101, we strongly support changing the wording of the CSA notice and the related Companion Policy to provide that the Proposed Amendments are interpreted as only being made to remove any risk that trusts and investments funds are included in the definition of "affiliates" and "control" under NI 94-101. We also highlight the need for ongoing efforts to harmonize these defined terms across all Canadian OTC derivatives rules.

TIMING OF CALCULATION OF THRESHOLD

As currently drafted under Sections 3(1)(b)(iii) and (c)(iii), the calculation of month-end gross notional amount is required to be performed "at any time after the date on which [the] Instrument comes into force". This means that if a counterparty referred to in Section 3(1)(b) or 3(1)(c) happened to exceed the applicable threshold only in respect of one month subsequent to the instrument coming into force, it would forever be required to clear OTC derivatives under NI 94-101. For example, such a counterparty may have exceeded the applicable threshold in April of 2017 (which is the month the instrument came into effect), but by August of 2018 (when mandatory clearing for such counterparties is scheduled to commence), 16 months later, such counterparty may be below the applicable threshold. CMIC submits that such a

counterparty would not be systemically important and therefore, should not be required to forever clear OTC derivatives under NI 94-101. It is CMIC's view that the clearing requirement should be applicable under Section 3(1)(b) and (c) only if the applicable thresholds are exceeded at the time the relevant clearable derivative is entered into (subject to Section 3(2)). However, for operational purposes, instead of potentially testing these thresholds on any day, CMIC submits that these thresholds should only be tested annually, similar to the annual testing of the $12 billion threshold under OSFI Guideline E-22 Margin Requirements for Non-Centrally Cleared Derivatives and CSA Consultation Paper 95-401 Margin and Collateral Requirements for Non-centrally Cleared Derivatives. Take, for example, a counterparty that exceeds the threshold and is subject to the mandatory clearing mandate. If the counterparty falls below the clearing threshold during that year, that counterparty would still be required to clear in-scope transactions until the next annual testing of the threshold and must be below the threshold on the testing date to no longer be subject to the mandatory clearing mandate. CMIC therefore recommends that Sections 3(1)(b)(iii) and (c)(iii) should be amended accordingly.

CMIC recognizes that this comment is unrelated to the Proposed Amendments, however, the fact that the clearing requirement for counterparties under Sections 3(1)(b) and (c) has been delayed until August 2018 highlights this issue given the length of time that will have passed since the date on which the instrument came into force and the date on which mandatory clearing will become effective for these counterparties.

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:

Bank of America Merrill Lynch
Bank of Montreal
Bank of Tokyo-Mitsubishi UFJ, Ltd., Canada Branch
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 Trust Fund
HSBC Bank Canada
Invesco Canada Ltd.
JPMorgan Chase Bank, N.A., Toronto Branch
Manulife Financial Corporation
Morgan Stanley
National Bank of Canada
OMERS Administration Corporation
Ontario Teachers' Pension Plan Board
Royal Bank of Canada
Sun Life Financial
The Bank of Nova Scotia
The Toronto-Dominion Bank

ISDA® Safe, Efficient Markets

January 10, 2018

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

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

and

Grace Knakowski
Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8
Fax: 416-593-2318
comments@osc.gov.on.ca

Re: Comments with respect to Proposed Amendments to National Instrument 94-101 *and* Companion Policy 94-101 – *Mandatory Central Counterparty Clearing of Derivatives*

The International Swaps and Derivatives Association, Inc. (***ISDA***[1]) appreciates the opportunity to provide comments with respect to the proposed amendments (the

[1]Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 68 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and

International Swaps and Derivatives Association, Inc.
10 East 53rd Street, 9th Floor
New York, NY 10022
P 212 901 6000 **F** 212 901 6001
www.isda.org

NEW YORK WASHINGTON
LONDON BRUSSELS
HONG KONG SINGAPORE
TOKYO

Proposed Rule Amendments) to National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (the ***National Instrument***) and the proposed changes (the ***Proposed CP Changes***) to Companion Policy 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (the ***CP***). In this letter, we refer to the Proposed Rule Amendments and the Proposed CP Changes together as the ***Proposed Amendments***.

The Proposed Amendments were published by the Canadian Securities Administrators (***CSA***) on October 12, 2017 and would refine the scope of counterparties to which the clearing requirement under the National Instrument applies as well as the types of derivatives mandated for clearing under the National Instrument.

ISDA has been actively engaged for a number of years with providing input on regulatory reforms impacting derivatives in major jurisdictions globally, including Canada. ISDA provided comments to the CSA during the consultation process which led up to the publication of the National Instrument and the CP in January 2016. To help facilitate compliance with the new requirements, ISDA published a Canadian Clearing Classification Letter (the ***Classification Letter***) on March 30, 2017 in order to allow market participants to exchange information and determine whether their transactions are in scope for mandatory clearing. A copy of the Classification Letter is attached to this letter as Appendix A.

ISDA is pleased to provide feedback regarding the Proposed Amendments on behalf of its members.

COMMENTS:

1. **Exclusion of Investment Funds and Trusts from Affiliate Definition**

   ISDA agrees that investment funds and trusts should not be caught by the mandatory clearing requirement solely on the basis that they are "affiliates" of a clearing participant or a large notional counterparty, or, in the case of trusts, because they have a common trustee. However, as opposed to the approach taken in the Proposed Amendments, we recommend that the exclusion of investment funds and trusts from the clearing requirement be accomplished through amendments to the definitions of "affiliated entity" and "control" in sections 1(2) and 1(3) of the National Instrument. For example, the CSA could add language to those sections (or the corresponding paragraphs of the CP) which provides that no investment fund or trust shall be considered an affiliated entity of another person or company for purposes of Sections 3(1)(b) and (c) of the National Instrument.

   If the approach in the Proposed Amendment is adopted, ISDA will have to make changes to the Classification Letter which many market participants have already started incorporating into their implementation plans prior to the publication of the Proposed Amendment. The introduction of a revised Classification Letter will be

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international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

confusing for market participants, many of whom are already dealing with a large number of onboarding and classification documents from their dealer counterparties. To avoid any delays, ISDA would encourage the CSA to amend the National Instrument in a manner that allows the Classification Letter to be used in its current form.

2. Potential for Confusion Around the Definition of Affiliate

There is a lack of harmonization in how the term "affiliate" is defined for purposes of different OTC derivatives rules across Canadian jurisdictions. This inconsistency was acknowledged by the OSC at the time Ontario's trade repository and derivatives data reporting rules were amended to exclude certain inter-affiliate transactions. In the relevant Notice of Amendment from 2015, the OSC stated as follows:

a. "We acknowledge that the term affiliated companies used in the TR Rule and defined in the *Securities Act* (Ontario) (the **Act**), is not fully harmonized with similar defined terms used to refer to affiliates in the securities legislation of other Canadian jurisdictions. The Committee plans to address inconsistencies between the definitions in the future." [2]

The definitions of "affiliated entity" and "control' in the National Instrument are almost identical to the definitions given to those terms in the trade reporting regulation in Quebec[3] and in the multilateral instrument[4] governing trade reporting in all Canadian jurisdictions other than Ontario, Manitoba and Quebec. The trade reporting rules in Manitoba rely on the affiliate definition in the *Securities Act* (Manitoba), which, similar to Ontario, only refers to affiliated companies.

Until such time as the CSA addresses the definition of affiliate more broadly, ISDA believes it is important that the Proposed Amendments not create additional uncertainty as to how the term affiliate is to be applied in the context of other derivatives rules (including derivatives trade reporting rules). For example, it would be confusing and contrary to market practice if the Proposed Amendments created an inference that derivative transactions between a derivatives dealer and an investment fund or a derivatives dealer and a trust should be reported under the derivative trade reporting rules as affiliate transactions. We request that the CSA finalize the Proposed Amendments in a way that minimizes the potential for additional uncertainty. ISDA would also support a broader effort to address inconsistencies in the definition of affiliate more generally.

3. New CAD $1 Billion Threshold Exception

The changes in the Proposed Amendment to section 3(1)(c) of the National Instrument create a new CAD $1 billion threshold exemption from the clearing requirement. Specifically, when a local counterparty is a member of a group whose gross notional amount of outstanding derivatives exceeds CAD $ 500 billion

[2] (2016), 39 OSCB 4519

[3] Autorité des marchés financiers Regulation 91-507 respecting Trade Repositories and Derivatives Data Reporting, sections 1(3) and 1(4).

[4] Multilateral Instrument 96-101, sections 1(2) and 1(3).

(excluding inter-affiliate trades), the local counterparty will not be subject to mandatory clearing if its month-end gross notional of derivatives (excluding inter-affiliates trades) does not exceed CAD $1 billion. This is a material departure from the original National Instrument and it is unclear why this new exemption has been included as part of the amendment. We note that this exemption would allow a local counterparty that is not a clearing member but is over the CAD $500 billion threshold to incorporate a new entity that would not be subject to mandatory clearing if it remains below the CAD $1 billion threshold. Given that ISDA's members are not aware of any local counterparties (other than direct clearing participants) that are currently in scope for mandatory clearing under the CAD $500 billion category, it is unclear why this additional exemption is necessary. Among other things, the introduction of this new exemption would require amendments to the Classification Letter. For the reasons articulated above under Comment 1, ISDA believes it would be disruptive to have to republish the Classification Letter, including resulting in the delay of client outreach efforts until after the Proposed Amendment has been finalized. If the exemption is retained in the final amendment, we would ask the CSA to draft the Proposed Amendment in a manner which does not require changes to be made to the Classification Letter.

4. Timing of Calculation Threshold

Sections 3(1)(b)(iii) and 3(1)(c)(iii) require the calculation of month-end gross notional amount be performed "at any time after the date on which [the] Instrument comes into force". A counterparty under Section 3(1)(b) or 3(1)(c) which exceeds the applicable threshold only in respect of one month after the National Instrument coming into force would be required to clear OTC derivatives under the National Instrument.

ISDA believes that counterparties which subsequently fall below the applicable threshold would not be systemically important and, therefore, should not be required to clear OTC derivatives under the National Instrument. For operational purposes, ISDA suggests annual testing on a predetermined date for the mandatory clearing thresholds (similar to the annual testing of the $12 billion threshold under OSFI Guideline E-22 Margin Requirements for Non-Centrally Cleared Derivatives and CSA Consultation Paper 95-401 Margin and Collateral Requirements for Non-centrally Cleared Derivatives). If, on the annual testing date, a counterparty is above the application threshold, then that counterparty will be required to mandatorily clear in-scope products until the next annual testing date. If, on the subsequent testing date, the counterparty falls below the clearing threshold, it will not be required to clear in-scope products until the next annual testing date.

* * * * * *

ISDA and its members would like to reiterate our appreciation to the CSA for the opportunity to provide feedback on the Proposed Amendments. We are happy to discuss our comments and to provide any additional information that may be helpful.

Please contact the undersigned if you have any questions or concerns.

Sincerely,

Katherine Darras
General Counsel
International Swaps and Derivatives Association, Inc.

Appendix A

ISDA Safe, Efficient Markets

International Swaps and Derivatives Association, Inc.

CANADIAN CLEARING CLASSIFICATION LETTER

Published on March 30, 2017
by the International Swaps and Derivatives Association, Inc.

On January 19, 2017, the Canadian Securities Administrators published National Instrument 94-101, *Mandatory Central Counterparty Clearing of Derivatives* and a related companion policy (the "***Canadian Mandatory Clearing Rule***"). This classification letter (this "letter") allows market participants to provide their counterparties with status information in order to determine if they are in scope for purposes of the Canadian Mandatory Clearing Rule. The representations in this letter are solely for the purposes of making that determination.

Capitalized terms used in this letter are defined in Appendix I.

CLASSIFICATION STATEMENTS

Question 1: Clearing Agency Participant

Instructions: Please check the applicable boxes below to indicate each OTC RCA (if any) with which you are a Clearing Agency Participant.

[Chicago Mercantile Exchange Inc. (OTC IRS)

CME Clearing Europe Limited (Cleared OTC IRS)

Eurex Clearing AG (EurexOTC Clear IRS)

LCH.Clearnet Limited (SwapClear Rates)

None of the above][5]

[5] The relevant OTC RCAs will depend on the jurisdiction(s) in which the party using this letter to request information is a Local Counterparty. Parties using this letter should list the potential in-scope OTC RCAs to assist the recipient in completing this letter. As of the date of publication of this letter, the potential in scope OTC RCAs are Chicago Mercantile Exchange Inc., CME Clearing Europe Limited, Eurex Clearing AG and LCH.Clearnet Limited. Other clearing agencies or clearing houses may be added over time if additional OTC RCAs are recognized or exempt from recognition in the future.

Question 2: Clearing Participant Affiliate[6]

Instructions: Please make one of the two representations below by checking the relevant box.

We are a Clearing Participant Affiliate

We are not a Clearing Participant Affiliate

Question 3: Large Notional Counterparty

Instructions: Please make one of the two representations below by checking the relevant box (regardless of your response to Question 1).

We are a Large Notional Counterparty

We are not a Large Notional Counterparty

Question 4: Notional Threshold Information

Instructions: If you are a Clearing Participant Affiliate or Large Notional Counterparty, please indicate whether you intend to take advantage of the 90-day transition period under paragraph 3(2) of the Canadian Mandatory Clearing Rule (this transition period is not available if you have indicated that you are a Clearing Agency Participant in Question 1).

We will use the 90-day transition period

We will not use the 90-day transition period

If you have indicated above that you intend to use the 90-day transition period, please specify the first month and year[7] in which you exceeded the month-end gross notional amount in accordance with either paragraph 3(1)(b)(ii) or 3(1)(c)(ii), as applicable, of the Canadian Mandatory Clearing Rule:

Month/Year: _____

Question 5: Clearing Agency Participants that have Clearing Participant Affiliates

[6] For purposes of determining whether you are a Clearing Participant Affiliate, you should only have regard to the OTC RCAs listed in Question 1.

[7] The earliest month specified should be April 2017.

Instructions: Only answer this question if you indicated in response to Question 1 above that you are a Clearing Agency Participant of one or more OTC RCAs identified in Question 1. Please make one of the representations below to indicate whether you have any Clearing Participant Affiliates.

We do have Clearing Participant Affiliates

We do not have any Clearing Participant Affiliates

If you do have Clearing Participant Affiliates, please list all such Clearing Participant Affiliates in the table below.[8]

Full legal name of Clearing Participant Affiliate(s)	***LEI/CICI/[Alternative Identifier] of Clearing Participant Affiliate(s)***

Question 6: Non-Canadian Local Counterparty

Instructions: If you are a Non-Canadian Local Counterparty, please indicate below whether you intend to rely on substituted compliance in accordance with paragraph 3.(5) of the Canadian Mandatory Clearing Rule.

Non-Canadian Local Counterparty that will rely on substituted compliance

Non-Canadian Local Counterparty that will not rely on substituted compliance

[8] Please use a separate sheet if additional space is needed to list all Clearing Participant Affiliates.

The undersigned agrees to notify the recipient of this letter in writing before or as soon as reasonably practicable following any of the statements made in this letter ceasing to be true. The recipient may rely on the statements made in this letter, unless and until the recipient receives written notification to the contrary from the undersigned.

Executed and delivered with effect from:

Date: _____

[*Full name of Entity Completing Letter*]: _____

LEI/CICI/[Alternative Identifier[9]]: _____

Signature: _____

Name of signatory: _____

Title of signatory: _____

[9] If you would like to include an alternative identifier, please describe the type of identifier provided.

APPENDIX I
TO CANADIAN CLEARING CLASSIFICATION LETTER

DEFINED TERMS

As used in the letter (including in this Appendix I), the words "affiliate" and "affiliated" shall be construed as provided in paragraphs 1.(2) and 1.(3) of the Canadian Mandatory Clearing Rule.

"***Canadian Mandatory Clearing Rule***" has the meaning given to it above on page 1 of this letter.

"***Clearing Agency Participant***" means any Participant of an OTC RCA, other than an Exempt Entity, that subscribes to clearing services for Mandatory Clearable Derivative(s).

"***Clearing Participant Affiliate***" means an affiliate, other than an Exempt Entity, of a Participant of an OTC RCA listed in Question 1 of this letter that subscribes to clearing services for Mandatory Clearable Derivative(s), where such affiliate has had, at any time following the date on which the Canadian Mandatory Clearing Rule comes into force[10], a month-end gross notional amount under all outstanding over-the-counter derivatives (as defined in the Canadian Mandatory Clearing Rule) exceeding CAD $1,000,000,000 (or such other amount specified in the future pursuant to an amendment, supplement or other revision to the Canadian Mandatory Clearing Rule), excluding derivatives eligible for the Intragroup Exemption.

"***Exempt Entity***" means (i) the government of Canada, the government of a jurisdiction of Canada or the government of a foreign jurisdiction; (ii) a crown corporation for which the government of the jurisdiction where the crown corporation was constituted is liable for all or substantially all the liabilities; (iii) a person or company wholly owned by one or more governments referred to in paragraph (i) of this definition of Exempt Entity if the government or governments are liable for all or substantially all the liabilities of the person or company; (iv) the Bank of Canada or a central bank of a foreign jurisdiction; (v) the Bank for International Settlements; and (vi) the International Monetary Fund.

"***Intragroup Exemption***" means the intragroup exemption from mandatory clearing provided for in section 7 of the Canadian Mandatory Clearing Rule.

"***Large Notional Counterparty***" means a Local Counterparty in any jurisdiction of Canada, other than a Clearing Participant Affiliate or an Exempt Entity, that has had, at any time following the date on which the Canadian Mandatory Clearing Rule comes into force[11], a month-end gross notional amount under all outstanding over-the-counter derivatives (as defined in the Canadian Mandatory Clearing Rule), combined with each affiliated entity that is a Local Counterparty in any jurisdiction of Canada, exceeding CAD $500,000,000,000 (or such other amount specified in the

[10] Assuming necessary approvals are obtained, the Canadian Mandatory Clearing Rule will come into force on April 4, 2017. This means April 30, 2017 will be the earliest date on which parties will be able to confirm their status as a Clearing Participant Affiliate.

[11] Assuming necessary approvals are obtained, the Canadian Mandatory Clearing Rule will come into force on April 4, 2017. This means April 30, 2017 will be the earliest date on which parties will be able to confirm their status as a Large Notional Counterparty.

future pursuant to an amendment, supplement or other revision to the Canadian Mandatory Clearing Rule), excluding derivatives eligible for the Intragroup Exemption.

"***Local Counterparty***" means a counterparty to a derivative if, at the time of execution of the transaction, either of the following applies:

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

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

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

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

or

(ii) the counterparty is an affiliated entity of a person or company referred to in paragraph (i) of this definition of Local Counterparty and the person or company is liable for all or substantially all the liabilities of the counterparty.

"***Mandatory Clearable Derivative***" means a derivative within a class of derivatives listed in Appendix A to the Canadian Mandatory Clearing Rule.

"***Non-Canadian Local Counterparty***" means an entity to which only paragraph (ii) of the definition of Local Counterparty applies.

"***OTC RCA***" means a Regulated Clearing Agency that offers clearing services in respect of Mandatory Clearable Derivatives.

"***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 Alberta, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan 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,

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

c) in Québec, a person recognized or exempted from recognition as a clearing house.