

CSA Staff Notice 93-302

Frequently Asked Questions about National Instrument 93-101 Derivatives: Business Conduct

September 12, 2024

Introduction

Staff of the Canadian Securities Administrators (CSA or we) have compiled a list of frequently asked questions (FAQs) we have received to date about National Instrument 93-101 *Derivatives: Business Conduct* (the **Business Conduct Rule** or **NI 93-101**), which comes into force on September 28, 2024 (the **Effective Date**).

The purpose of the FAQs is to provide clarity about how certain requirements under NI 93-101 should be implemented, while preserving flexibility to the extent possible for derivatives firms to operationalize these requirements in the context of their particular business frameworks.

The list of FAQs below is not exhaustive, but it includes key issues and questions that market participants have posed to us to date, along with our current views regarding the issues raised in those questions. CSA staff may update these FAQs from time to time as necessary. The FAQs will be posted on the CSA website, as well as the websites of the local securities regulators.

The responses to the FAQs represent the views of staff in the CSA jurisdictions and do not constitute legal advice.

Frequently Asked Questions

Question	Response
General Questions	
1. Please explain why the Business Conduct Rule is referred to as a “national instrument” instead of a “multilateral instrument.”	As of the date of this Notice, the Business Conduct Rule is Multilateral Instrument 93-101 <i>Derivatives: Business Conduct</i> . On July 11, 2024, the British Columbia Securities Commission (the BCSC) published advanced notice of its adoption of the Business Conduct Rule, and, subject to approval by British Columbia’s Minister of Finance, the Business Conduct Rule will be National Instrument 93-101 <i>Derivatives: Business Conduct</i> on the Effective Date. Therefore, this Notice refers to the document as a National Instrument. British Columbia’s version of the Business Conduct Rule includes certain provisions that are specific to

Question		Response
		<p>British Columbia.</p> <p>The BCSC advance notice can be found at the following link: https://www.bcsc.bc.ca/-/media/PWS/New-Resources/Securities-Law/Instruments-and-Policies/BCN/BCN-202402-July-11-2024.pdf?dt=20240711150751.</p>
2.	How does a derivatives firm determine what types of derivatives products are subject to NI 93-101?	<p>A derivatives firm is expected to consider the derivatives product determination rules that apply across the CSA jurisdictions in order to determine which types of derivatives products are subject to NI 93-101.</p> <p>The derivatives product determination rules are:</p> <ul style="list-style-type: none"> • In British Columbia, Alberta, Saskatchewan, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon, Nunavut and Northwest Territories – Multilateral Instrument 91-101 <i>Derivatives: Product Determination</i> • In Manitoba – Manitoba Securities Commission Rule 91-506 <i>Derivatives: Product Determination</i> • In Ontario – Ontario Securities Commission (OSC) Rule 91-506 <i>Derivatives: Product Determination</i> • In Québec – Regulation 91-506 respecting Derivatives Determination
Forms Filing		
3.	Where do derivatives firms submit Form 93-101F1 when relying on the exemptions found in section 39 [<i>Foreign derivatives dealers</i>] and section 46 [<i>Foreign derivatives advisers</i>]?	<p>In certain CSA jurisdictions, a fillable Form 93-101F1 can be found on the website of such CSA jurisdiction.</p> <p>Similar to the form submission process for firms relying on the exemptions for international dealers and international advisers in the context of National Instrument 31-103 <i>Registration Requirements, Exemptions and Ongoing Registrant Obligations (NI 31-103)</i>, Form 93-101F1 can be submitted in the applicable CSA jurisdiction(s) as follows:</p> <ul style="list-style-type: none"> • British Columbia – derivativesinbox@bcsc.bc.ca • Alberta – internationalfilings@asc.ca • Saskatchewan – exemptions@gov.sk.ca

Question	Response
	<ul style="list-style-type: none"> • Manitoba – registrationmsc@gov.mb.ca • Ontario – See the forms on the OSC website found here [under the heading “Derivatives”] and also here [under the heading “Required forms”] • Québec – See the form on the website found here and send to encadrementderives@lautorite.qc.ca • New Brunswick – registration-inscription@fcnb.ca • Nova Scotia – Send form to: NSSC-capital-markets@novascotia.ca • Prince Edward Island – ccis@gov.pe.ca • Newfoundland and Labrador – SecuritiesExemptions@gov.nl.ca • Yukon – See the forms on the website found here and send to securities@yukon.ca • Nunavut – Visit the website here • Northwest Territories – SecuritiesRegistry@gov.nt.ca
<p>4. In circumstances where a derivatives dealer is reporting instances of material non-compliance under section 33 [<i>Responsibility of a derivatives dealer to report to the regulator or the securities regulatory authority</i>], where should such forms be submitted?</p>	<p>In certain CSA jurisdictions, a fillable PDF of the suggested form of report under section 33 can be found on the website of such CSA jurisdiction.</p> <p>Under section 33, a derivatives dealer is required to make a report to the applicable CSA jurisdiction(s) of instances of non-compliance where such non-compliance would reasonably be considered by the derivatives dealer to be non-compliance with NI 93-101 or applicable securities legislation, and either creates a risk of material harm to a derivatives party or to capital markets, or otherwise reflects a pattern of material non-compliance. Such report can be submitted in the applicable CSA jurisdiction(s) at the following links:</p> <ul style="list-style-type: none"> • British Columbia – derivativesinbox@bcsc.bc.ca • Alberta – registration@asc.ca • Saskatchewan – exemptions@gov.sk.ca • Manitoba – registrationmsc@gov.mb.ca • Ontario – See the forms on the OSC website found here [under the heading “Derivatives”] and also here [under the heading “Required forms”] • Québec – encadrementderives@lautorite.qc.ca • New Brunswick – registration-inscription@fcnb.ca • Nova Scotia – Send form to: NSSC-capital-markets@novascotia.ca

Question	Response
	<ul style="list-style-type: none"> • Prince Edward Island – ccis@gov.pe.ca • Newfoundland and Labrador – SecuritiesExemptions@gov.nl.ca • Yukon – securities@yukon.ca • Nunavut – Visit the website here • Northwest Territories – SecuritiesRegistry@gov.nt.ca
<p>5. In the event that a derivatives dealer needs to file a report under section 33 [<i>Responsibility of a derivatives dealer to report to the regulator or the securities regulatory authority</i>], is it the expectation that the derivatives dealer files the relevant form only with the regulator or securities regulatory authority where its principal place of business is located?</p>	<p>The expectation is that a derivatives dealer reporting material non-compliance would generally file the relevant form taking into consideration the following:</p> <ul style="list-style-type: none"> • Location of the derivatives dealer: a derivatives dealer should file a report with the regulator or securities regulatory authority where its head office and principal place of business are located (however, for derivatives dealers with more than one principal place of business, or whose head office and principal place of business are located in different jurisdictions, the expectation is they will file in each jurisdiction where they have a principal place of business or head office); • Location of the derivatives party: a derivatives dealer should file a report with the regulator or securities regulatory authority where the derivatives party or derivatives parties impacted by the breach are located. For example, if the report covers activity that impacted a derivatives party in one or more jurisdictions, then the expectation is that the report will be filed in each of the relevant jurisdictions.
<p>6. For derivatives firms relying on the exemptions found in section 39 [<i>Foreign derivatives dealers</i>] and section 46 [<i>Foreign derivatives advisers</i>], do such derivatives firms need to file a Form 93-101F1 in each jurisdiction where they are trading with or advising a derivatives party?</p>	<p>A derivatives firm should file a Form 93-101F1 in each jurisdiction where the derivatives firm is transacting with or advising a derivatives party.</p>

Question		Response
7.	Does the agent for service of process identified in Form 93-101F1 need to be located in each local jurisdiction in which the foreign derivatives dealer conducts business, or can the dealer appoint a single Canadian agent for service of process?	A separate agent for service of process should be appointed in each local jurisdiction.
Definitions and Interpretations – Eligible Derivatives Party (s. 1(1))		
8.	How would investment funds managed or advised by foreign registered derivatives firms qualify as “eligible derivatives parties” (EDPs), noting that paragraph (l) of the EDP definition does not include the foreign equivalency concept that is found in paragraph (k) of the EDP definition? Without the foreign equivalency concept in paragraph (l) of the EDP definition, would there be inconsistent treatment between an investment fund seeking EDP status, depending on whether it is advised by domestic or foreign regulated advisers?	<p>In response to concerns that were expressed by certain derivatives firms, we published on July 25, 2024, CSA Coordinated Blanket Order 93-930 <i>Re Temporary exemptions for derivatives firms from certain obligations when transacting with certain investment funds and for senior derivatives managers from certain reporting obligations</i> (the Blanket Order).</p> <p>The effect of the Blanket Order is to exempt derivatives firms from the requirements under NI 93-101, other than the specified core obligations, when transacting with an investment fund managed or being advised by a foreign equivalent to a Canadian registered investment fund manager, adviser or a derivatives adviser, according to the securities or commodities futures legislation of that foreign jurisdiction. This is intended to ensure a level-playing field for certain domestic and foreign-advised investment funds seeking EDP status.</p> <p>The CSA anticipates that as part of future amendments to NI 93-101, the foreign equivalency concept found in paragraph (k) of the EDP definition will similarly be reflected in paragraph (l) of the EDP definition.</p> <p>In the meantime, CSA staff are aware that certain industry standard documentation reflects the EDP definition found in the September 2023 final publication version of (what was then known as) MI 93-101. The intention of the Blanket Order is to ensure a level-playing field for certain domestic and foreign-advised investment funds seeking EDP status; accordingly, in appropriate circumstances, derivatives firms may rely on the Blanket Order to evidence compliance with the requirement to identify their counterparties as EDPs,</p>

Question		Response
		including in industry standard documentation, on the basis of paragraph (l) of the EDP definition.
9.	Do foreign entities that are wholly-owned by a foreign government qualify as EDPs under paragraph (h) of the EDP definition, similar to the treatment of entities that are wholly-owned by the Government of Canada or the government of a jurisdiction of Canada as EDPs under paragraph (g) of the EDP definition?	<p>Paragraph (h) of the EDP definition is intended to cover, in an analogous manner, the same types of derivatives parties in a foreign jurisdiction that are covered under paragraph (g) of the EDP definition with regard to entities wholly-owned by the Government of Canada or the government of a jurisdiction of Canada.</p> <p>Please also note paragraph (f) of the EDP definition, which specifies as an EDP any “entity organized under the laws of a foreign jurisdiction that is analogous to any of the entities in paragraph (a) to (e)” of the EDP definition.</p>
10.	Do foreign municipalities qualify as EDPs under paragraph (h) of the EDP definition?	<p>Paragraph (h) of the EDP definition is intended to include any national, federal, state, provincial, territorial or municipal government of or in any foreign jurisdiction, or any agency of that government.</p> <p>National Instrument 14-101: <i>Definitions (NI 14-101)</i> provides definitions and interpretations for terms used in Canadian securities legislation. In NI 14-101, the term “foreign jurisdiction” is broadly construed and is defined as “a country other than Canada or a political subdivision of a country other than Canada”.</p>
11.	Please explain how the EDP definition applies to derivatives parties that are hospitals and universities (in situations where they are direct counterparties or where the counterparty is a separate fund managed on their behalf).	<p>CSA staff’s view is that there are different paragraphs of the EDP definition that could apply in the context of a derivatives party that is a hospital or a university (or a related fund managed on their behalf). We expect consideration be given to the following paragraphs of the EDP definition:</p> <ul style="list-style-type: none"> • paragraph (g) referring to various government agencies; • paragraphs (j), (k) or (l) referring to managed accounts and investment funds; • paragraph (p) referring to an entity that is fully guaranteed by another EDP; • paragraph (m) referring to the \$25MM net asset test. <p>We note that public sector financial reporting that is used by hospitals and universities also use the concept of “net assets” in their statement of financial position.</p>

Question		Response
		<p>Prior to the implementation of NI 93-101, these types of derivatives parties would already have qualified as a “qualified party” or “accredited counterparty” in respect of their OTC derivatives activity with a derivatives dealer. Accordingly, all the transition provisions found in part 8 of the Business Conduct Rule would apply.</p> <p>Generally, if a derivatives party does not qualify as an EDP, then the additional (retail-level) protections in NI 93-101 apply.</p>
12.	<p>For the purposes of paragraph (m) of the EDP definition, what are the CSA’s expectations regarding reliance on interim (in addition to annual) financial statements of a derivatives party?</p>	<p>The concept of “recently prepared financial statements” exists in the following core definitions in CSA rules:</p> <ul style="list-style-type: none"> • the “accredited investor” definition in National Instrument 45-106 <i>Prospectus Exemptions</i>; and • the “qualified party” definition in the jurisdictions that have blanket orders in place regarding OTC derivatives. <p>This means that many derivatives firms are familiar with this language and have in place compliance systems that address this for the purposes of complying with existing CSA rules. We note that derivatives firms engaging in OTC derivatives transactions in several CSA jurisdictions that refer to these core definitions in applicable blanket orders will continue to rely on these representations in order to remain exempt from registration in those jurisdictions.</p> <p>Accordingly, consistent with the application of those CSA rules to the same activity, we expect derivatives firms to adopt reasonable policies and procedures under NI 93-101 that would allow them to fulfill their obligations in obtaining EDP representations in relation to all paragraphs (including paragraph (m)) of that definition from their derivatives parties.</p>
<p>Part 4 – Segregating Derivatives Party Assets (s. 25)</p>		
13.	<p>Is a Covered FRFI (as defined in OSFI Guideline E-22 <i>Margin Requirements for Non-Centrally Cleared Derivatives</i> (“OSFI Guideline E-22”)) exempt from the application of</p>	<p>NI 93-101 sets out exemptions (at the entity-level) from Division 2 of Part 4 (including the general requirement in section 25) in circumstances where a derivatives firm, such as a Canadian Financial Institution, is subject to and complies with one of the regulatory regimes contemplated in the Business Conduct Rule, including OSFI Guideline E-22.</p>

Question		Response
	<p>section 25 [<i>Segregating derivatives party assets</i>] when dealing with Covered Entities (as defined in OSFI Guideline E-22) and non-Covered Entities?</p>	<p>Additionally, for derivatives firms that are Canadian Financial Institutions, there is an express exemption (at the entity-level) in section 42 [<i>Canadian Financial Institutions</i>] from, among others, the following provisions (subject to the conditions for relying on that exemption): section 25 [<i>Segregating derivatives party assets</i>], section 26 [<i>Holding initial margin</i>], and section 27 [<i>Investment or use of initial margin</i>].</p> <p>In circumstances where derivatives firms are relying on an exemption in NI 93-101, we remind derivatives firms that they remain subject to Part 5 of NI 93-101 [<i>Compliance and Recordkeeping</i>], and thus we expect their written policies and procedures to outline and describe the process they have designed in respect of reliance on an applicable exemption.</p>
<p>Part 4 – Content and Delivery of Transaction Information (s. 28)</p>		
14.	<p>Subsection 28(1) [<i>Content and delivery of transaction information</i>] requires a derivatives dealer to deliver a written confirmation of the transaction to the derivatives party. The companion policy to the Business Conduct Rule (the Companion Policy) gives examples of circumstances where the CSA does not intend to alter existing market practices. Can the CSA confirm that the same policy extends to circumstances where dealers agree among themselves which party will generate and deliver the written confirmation for purposes of satisfying the subsection 28(1) obligation?</p>	<p>The Companion Policy provides examples of different approaches that derivatives firms can take to satisfy the requirement of subsection 28(1). This reflects the intention to accommodate certain existing market practices flexibly. If derivatives dealers have mutually agreed on which party will generate and deliver the confirmation of the transaction, CSA staff expect those derivatives dealers to maintain records of such confirmations that were delivered and are relied on by derivatives parties. We remind derivatives firms of their obligations under Part 5 [<i>Compliance and Recordkeeping</i>] of NI 93-101.</p>

Question	Response
Part 5 – Designation and Responsibilities of a Senior Derivatives Manager (s. 32)	
<p>15. What constitutes a “derivatives business unit” for the purposes of paragraph 32(1)(a)? Does a “derivatives business unit” include activities conducted by a non-Canadian affiliate acting as agent for the Canadian derivatives dealer?</p>	<p>A derivatives business unit broadly includes functional areas, business lines, trading desks, or other forms of organizational structures that a senior derivatives manager may be responsible for. A derivatives business unit does not have to be a particular organizational structure, but rather can relate to a class of derivatives, an asset class, a business line or a division of a firm. CSA staff expects a dealer to consider its unique business model and risks when determining what constitutes a derivatives business unit, depending on, for example, its size, level of derivatives activity and organizational structure.</p> <p>Where the foreign affiliate of a Canadian derivatives dealer is conducting activity as an agent of that Canadian derivatives dealer (and that local derivatives dealer is the counterparty to the transaction), we expect that activity would be within the scope of oversight by a senior derivatives manager of the Canadian derivatives dealer. CSA staff would not accept that all or some trading could be run through an affiliate, booked on behalf of the local Canadian derivatives dealer, and that the conduct of staff of the affiliate acting on behalf of the Canadian derivatives dealer would be outside the supervision of the senior derivatives manager.</p>
<p>16. Is it possible to postpone to the 2025 calendar year the deadline for senior derivatives managers to submit to their board the 2024 report required under paragraph 32(3)(b) (the “SDM Compliance Report”), given the short timeframe from the Effective Date to year-end 2024?</p>	<p>In response to the concerns that were expressed by certain derivatives dealers in relation to submitting the SDM Compliance Reports for 2024, we granted an exemption from the obligation to provide a SDM Compliance Report for 2024 in the Blanket Order.</p> <p>If a derivatives dealer is relying on this exemption, its SDM Compliance Report for 2025 must also cover the period between the Effective Date of NI 93-101 and December 31, 2024.</p> <p>For avoidance of doubt, please note that all other applicable obligations under NI 93-101 continue to apply for derivatives dealers relying on this exemption, including upon the Effective Date, the obligation in section 33 [<i>Responsibility of a derivatives dealer to report to the regulator or the securities regulatory authority</i>] to promptly report any significant material non-compliance issues.</p>

Question	Response
<p>17. Under subparagraph 32(3)(a)(ii), senior derivatives managers must attest in their SDM Compliance Report that their derivatives business unit complies with NI 93-101, relevant securities laws relating to trading and advising in derivatives, and the policies and procedures required under section 31 [<i>Policies and procedures</i>].</p> <p>Can the CSA clarify the scope of this attestation and the interpretation of the phrase "securities legislation relating to trading and advising in derivatives" in subparagraph 32(3)(a)(ii)?</p>	<p>The scope of the SDM Compliance Report includes conduct carried out in accordance with the NI 93-101 requirements that apply to derivatives dealers. CSA staff also expect that the policies and procedures interacting with this attestation (i.e., section 31 [<i>Policies and procedures</i>]) align with broader securities law requirements/prohibitions that apply to a derivatives dealer's market conduct, including the provisions under securities legislation related to fraud and market manipulation, as well as misleading or untrue statements.</p> <p>For example, if a Canadian derivatives dealer is being investigated by a foreign regulator and has self-reported instances to a foreign regulator of employees engaging in frontrunning of client orders or engaging in market manipulation, such activity should be included in the attestation to the board under paragraph 32(3)(a). This attestation would be an internal report to the board noting breaches of NI 93-101 and other potential market conduct provisions of securities laws. The derivatives firm's policies and procedures should reflect the requirements found in NI 93-101 and other conduct-related provisions in securities legislation. For example, sections 126.1, 126.2, and 126.3 of the OSA (and similar provisions in the securities acts of other CSA jurisdictions) cover misleading statements and market manipulations.</p>
<p>Part 6 – Exemption for Foreign Derivatives Dealers (s. 39)</p>	
<p>18. How is section 42 [<i>Derivatives transacted on a derivatives trading facility where the identity of the derivatives party is unknown</i>] intended to interact with the exemption in section 39 [<i>Foreign Derivatives Dealer</i>]? In other words, if a foreign derivatives dealer transacts on a derivatives trading facility where the identity of its counterparty is unknown, does this mean that it can no longer rely on the</p>	<p>Section 39 is intended to exempt foreign derivatives dealers from NI 93-101 if they are regulated under laws of a foreign jurisdiction with similar regulatory outcomes. It functions as an entity-level exemption, meaning the dealer does not need to compare its home jurisdiction rules with NI 93-101 to rely on this exemption.</p> <p>As long as a foreign derivatives dealer is adhering to the legal requirements of its home jurisdiction, the entity-level exemption under section 39 is intended to be available, regardless of whether the identity of the derivatives party is known or not.</p> <p>In circumstances where a derivatives party is known to a foreign derivatives dealer, CSA staff expect the derivatives</p>

Question		Response
	exemption in section 39 [<i>Foreign Derivatives Dealer</i>] in respect of its derivatives activity and is subject to section 42 as well?	dealer relying on the section 39 exemption to exercise their professional judgement when determining how it can fulfill its notice obligations. NI 93-101 does not prescribe the form of notice.
Part 6 – Exemptions from Certain Requirements in this Instrument for Certain Notional Amounts of Certain Commodity Derivatives and other Derivatives Activity (s. 44)		
19.	The notional exemptions available under the Business Conduct Rule are listed in respect of CAD. If transactions are denominated in another currency besides CAD, is there a specific exchange rate that market participants are required to use when determining eligibility for the notional exemptions?	The expectation is that the methodology for determining eligibility for the notional exemptions, including in a scenario where market participants are required to use an exchange rate when determining denominations for currencies besides CAD, is both consistent and reasonable.
Part 8 – Transition Provisions (s. 50 and s. 51)		
20.	If a derivatives firm has obtained a transition representation from a derivatives party under section 50 [<i>Transition representations for existing derivatives parties</i>] or section 51 [<i>Transition for existing transactions that remain in place in accordance with their original terms</i>], where that derivatives party is identified as a hedger or with similar status under the “accredited counterparty”, “qualified party”, or “eligible contract participant” definitions, can the derivatives firm rely on the transition representation subject to its terms and conditions, or is the	<p>For the purposes of the transition provisions in NI 93-101, to the extent a derivatives firm has obtained a transition representation under section 50 [<i>Transition representations for existing derivatives parties</i>] or section 51 [<i>Transition for existing transactions that remain in place in accordance with their original terms</i>], including a transition representation that refers to the derivatives party’s status as a hedger, it is able to rely on such representation for the purposes of the transition period.</p> <p>As stated in the Companion Policy: <i>The transition provision is intended to provide derivatives firms with a substantial period of time, following the effective date of the Instrument, to re-paper a derivatives party as an “eligible derivatives party” as defined in the Instrument in their respective contracts and relationship documentation. Accordingly, in circumstances where the derivatives firm has received any one of the representations contemplated in this section prior to the date the Instrument takes effect in the applicable local</i></p>

Question	Response
<p>derivatives firm required to do additional due diligence to obtain the waiver contemplated for certain individuals and eligible commercial hedgers in subparagraph 8(2)(a)(iii)?</p>	<p><i>jurisdiction, such as</i></p> <ul style="list-style-type: none"> • <i>permitted client,</i> • <i>non-individual accredited investor (in Ontario),</i> • <i>accredited counterparty (in Québec),</i> • <i>a qualified party (in a number of jurisdictions),</i> • <i>an eligible contract participant (in the United States),</i> • <i>a financial counterparty (in the European Union and the United Kingdom) or a non-financial counterparty above certain clearing thresholds (in the European Union and the United Kingdom, which is generally referred to by the acronym NFC+),</i> <p><i>the derivatives firm can treat obtaining such representation as having obtained the required eligible derivatives party representation for purposes of the transition period.</i></p> <p>If a derivatives firm is not able to rely on any of the transition representations, the derivatives firm is required to confirm a derivatives party's status as an EDP according to subsection 1(1) of the Business Conduct Rule. Accordingly, the derivatives firm would need to obtain the waiver contemplated in section 8 [<i>Exemptions from certain requirements in this Instrument when dealing with or advising an eligible derivatives party</i>] for certain EDPs that are individuals and eligible commercial hedgers. As stated in the CP:</p> <p><i>For the purposes of transitioning to the new regulatory framework, CSA Staff expect that it may take some time for a derivatives firm to obtain the necessary waivers from the population of clients that this provision may otherwise apply to. Accordingly, derivatives firms are given a period of one year following the Effective Date to obtain the waiver.</i></p>

Question	Response
<p>21. For the purposes of relying on the transition representations in section 50 [<i>Transition representations for existing derivatives parties</i>] and, in particular, paragraph 50(3)(a), can derivatives firms rely on transition representations based on the firm’s own assessment of the derivatives party’s status using available information?</p>	<p>The policy intention behind the transition provisions is to provide derivatives firms with flexibility to facilitate transition to NI 93-101 and over time to the new EDP definition for the population of derivatives parties that a derivatives firm has already identified under existing status representations that are currently in use (e.g., “qualified party”, “accredited counterparty”, “permitted client”, “accredited investor”, “eligible contract participant”).</p> <p>We expect derivatives firms to use their professional judgement when deciding if they have sufficient information to establish a reasonable basis for determining if they can rely on the transition representations. This may include, for example, having an internal system that confirms and identifies a derivatives party’s status, as a result of a derivatives firm’s credit assessment or onboarding process, or having a status representation included in a derivatives contract between the parties.</p>
<p>Questions regarding the application of the Business Conduct Rule to a derivatives dealer’s overall business</p>	
<p>22. Do derivatives dealers need to include transactions between affiliates within a corporate group (or the division of a derivatives dealer performing a treasury function) in their compliance systems under NI 93-101 (including the Part 5 [<i>Compliance and Recordkeeping</i>] requirements relating to senior derivatives managers), even if the transactions are solely for risk management (hedging) purposes and are not intended for profit or any other commercial purpose?</p>	<p>NI 93-101 is designed to promote responsible business conduct on the part of derivatives firms in the course of their transactions with any derivatives party, subject to available exemptions or circumstances where the rule does not apply (please refer to the non-application provisions).</p> <p>In relation to derivatives transactions between ‘treasury affiliates’ of a derivatives dealer, or inter-affiliate transactions more generally, refer to, section 5 of NI 93-101 [<i>Non-application – Affiliated Entities</i>]:</p> <p style="text-align: center;"><i>Non-application – affiliated entities</i></p> <p style="text-align: center;">5. <i>This Instrument does not apply to a person or company in respect of dealing with or advising an affiliated entity of the person or company unless the affiliated entity is an investment fund.</i></p> <p>In designing the compliance framework, we expect a derivatives firm’s policies and procedures, supervision and compliance functions to cover the aspects of their business that are covered by NI 93-101. NI 93-101 does not use the</p>

Question	Response
	<p>concept of ‘hedging’ in determining which persons or companies are subject to its provisions, nor to determine the aspects of a derivatives firm’s business covered by NI 93-101.</p> <p>We also refer you to section 1 [<i>Factors in determining a business purpose – derivatives dealer</i>] of the Companion Policy.</p>
<p>23. The treasury function of a derivatives dealer may enter into ‘hedging’ trades with internal/affiliate counterparties or external counterparties. Please confirm if NI 93-101 covers this activity.</p>	<p>NI 93-101 has requirements that apply at the transaction-level, as well as the entity level to a derivatives dealer. The senior managers regime, for example, applies at the entity-level. If a local Canadian Financial Institution is a derivatives dealer, then with respect to its transactions with all its externally facing counterparties (including external dealer counterparties), those transactions will be considered part of its business subject to NI 93-101, including the senior derivatives manager requirements.</p> <p>With respect to transactions with ‘internal/affiliate counterparties’ we refer you to section 5 of NI 93-101 [<i>Non-application – Affiliated Entities</i>].</p> <p>Note that NI 93-101 does not use the concept of ‘hedging’ as a factor in determining if a person or company is a derivatives dealer for the purposes of the Business Conduct Rule.</p> <ul style="list-style-type: none"> • The test for determining whether a person or company is considered “in the business” of trading or advising others in relation to securities or derivatives is commonly referred to as the “business trigger”. The CSA provided guidance on the interpretation of the business trigger as it relates to securities market participants in section 1.3 [<i>Fundamental concepts</i>] of the companion policy to NI 31-103. This guidance reflects prior case law and regulatory decisions that have interpreted the business trigger test for securities matters. <ul style="list-style-type: none"> ○ The CSA have also provided guidance on the interpretation of the business trigger as it relates to derivatives market participants in section 1 [<i>Factors in determining a business purpose –</i>

Question	Response
	<p><i>derivatives dealer</i>] of the Companion Policy. The criteria set out in the Companion Policy are based on the similar criteria set out in the companion policy to NI 31-103 but have been modified to reflect the different nature of derivatives markets and derivatives market participants. In particular, the criteria have been modified to place greater emphasis on the factor of “acting as a market maker” while retaining the flexibility to consider the other criteria, as appropriate.</p> <ul style="list-style-type: none">○ As explained in the Companion Policy, in determining whether a person or company should be considered in the business of trading derivatives, the person or company should consider its activities holistically. We do not consider that all of the factors discussed above necessarily carry the same weight or that any one factor will be determinative.○ In determining whether a person or company is subject to business conduct requirements under NI 93-101, a person or company should also consider the availability of exemptions in NI 93-101, such as the end-user exemption in section 38 [<i>Exemption for certain derivatives end-users</i>], for entities that may transact in derivatives with regularity but that do not otherwise engage in specified “dealer-like” activities. This exemption is intended to provide market participants with regulatory certainty as to whether the requirements of the rules apply to their activities.● The CSA recognizes that many businesses may transact in derivatives as part of their regular business and may not deal with non-EDPs or otherwise engage in specified “dealer-like” activities. That is why it is not necessary for end-users that satisfy the criteria described in the end-user exemption to comply with the requirements of the Business Conduct Rule – because they may not be considered “in the business of trading” or because they can rely on the exemption for end-users that do not engage in specified dealer activities.

Questions

If you have questions about this CSA Notice, please contact any of the following:

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

Alison Beer
Senior Legal Counsel
Derivatives, Trading & Markets Division
Ontario Securities Commission
abeer@osc.gov.on.ca

Michael Brady
Deputy Director, Capital Markets Regulation
British Columbia Securities Commission
604-899-6561
mbrady@bcsc.bc.ca

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

Leigh-Anne Mercier
General Counsel
Manitoba Securities Commission
204-945-0362
leigh-Anne.Mercier@gov.mb.ca

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

Abel Lazarus
Director, Corporate Finance
Nova Scotia Securities Commission
902-424-6859
abel.lazarus@novascotia.ca

Securities Division
Financial and Consumer Services Commission,
New Brunswick
1-866-933-2222
info@fcnb.ca

Brian Murphy
Manager, Registration
Nova Scotia Securities Commission
902-424-4592
brian.murphy@novascotia.ca
