***POLICY STATEMENT TO REGULATION 91-506 RESPECTING DERIVATIVES DETERMINATION***

## PART 1
## GENERAL COMMENTS

### Introduction

This Policy Statement sets out the views of the *Autorité des marchés financiers* ("Authority" or "we") on various matters relating to *Regulation 91-506 respecting Derivatives Determination* (chapter I-14.01, r. 0.1) (the "Regulation").

Except for Part 1, the numbering and headings in this Policy Statement correspond to the numbering and headings in the Regulation.

Unless defined in the Regulation or this Policy Statement, terms used in the Regulation and in this Policy Statement have the meaning given to them in the *Derivatives Act* (chapter I-14.01) (the "Act"), *Regulation 14-101 respecting Definitions* (chapter V-1.1, r. 3) and *Regulation 14-501Q respecting Definitions* (chapter V-1.1, r. 4).

In this Policy Statement, the term "contract" is interpreted to mean "contract or instrument".

The Regulation excludes certain contracts from the application of *Regulation 91-507 respecting Trade Repositories and Derivatives Data Reporting* (chapter I-14.01, r. 1.1) ("Regulation 91-507") and *Regulation 94-101 respecting Mandatory Central Counterparty Clearing of Derivatives* (*indicate here the reference*) ("Regulation 94-101"). The following exclusions are in addition to those already provided in section 6 of the Act, including an investment contract as defined in the second paragraph of section 1 of the *Securities Act* (chapter V-1.1) or an option or other non-traded derivative whose value is derived from, referenced to or based on the value or market price of a security, granted as compensation or as payment for a good or service.

Section 4 of the Act remains applicable to a hybrid product, i.e. a product with features of both a derivative and a security, in order to determine if the Act applies to that product.

## PART 2
## GUIDANCE

### Covered derivatives

**1.2.** The term "derivative" is defined in section 3 of the Act to include both "standardized" and "over-the-counter" derivatives. Standardized derivatives are derivatives traded on a published market, as provided by section 3 of the Act. Thus, a published market is defined to include an exchange, an alternative trading system or any other derivatives market that constitutes or maintains a system for bringing together buyers and sellers of standardized derivatives. As such, section 1.2 of the Regulation limits the application of Regulation 91-507 and Regulation 94-101, as per section 1.1 of the Regulation, to derivatives that are not traded on an exchange; however an exception is made for derivatives trading facilities.

Section 1.2 of the Regulation provides that Regulation 91-507 and Regulation 94-101 apply to derivatives that are traded on a derivatives trading facility. A derivatives trading facility includes any trading system, facility or platform in which multiple participants have the ability to execute or trade derivative instruments by accepting bids and offers made by multiple participants in the facility or system, and in which multiple third-party buying and selling interests in over-the-counter derivatives have the ability to interact in the system, facility or platform in a way that results in a contract.

For example, derivatives traded on the following facilities would otherwise be considered derivatives required to be reported under *Regulation 91-507 respecting Trade Repositories and*

*Derivatives Data Reporting*: "swap execution facility" as defined in the *Commodity Exchange Act* 7 U.S.C. (1a) (50); a "security-based swap execution facility" as defined in the *Securities Exchange Act of 1934* 15 U.S.C. 78c(a)(77); and a "Multilateral trading facility" as defined in Directive 2004\39\EC Article 4(1)(15) of the European Parliament.

**Excluded derivatives**

**Paragraph 2(a) – Gaming contracts**

Paragraph 2(a) of the Regulation excludes certain domestic and foreign gaming contracts from the application of Regulation 91-507 and Regulation 94-101. While a gaming contract may come within the definition of "derivative", it is generally not recognized as being a financial derivative and typically does not pose the same potential risk to the financial system as other derivatives products. In addition, the Authority does not believe that the derivatives regulatory regime will be appropriate for this type of contract. Further, gaming control legislation of Canada (or a jurisdiction of Canada), or equivalent gaming control legislation of a foreign jurisdiction, generally has consumer protection as an objective and is therefore aligned with the objective of securities legislation to provide protection to investors from unfair, improper or fraudulent practices.

With respect to subparagraph 2(a)(ii), a contract that is regulated by gaming control legislation of a foreign jurisdiction would only qualify for this exclusion if: (1) its execution does not violate legislation of Canada or Québec, and (2) it would be considered a gaming contract under domestic legislation. If a contract would be treated as a derivative if entered into in Québec, but would be considered a gaming contract in a foreign jurisdiction, the contract does not qualify for this exclusion, irrespective of its characterization in the foreign jurisdiction.

**Paragraph 2(b) – Insurance and annuity contracts**

Paragraph 6(3) of the Act and paragraph 2(b) of the Regulation exclude qualifying insurance or annuity contracts from the application of Regulation 91-507 and Regulation 94-101. A reinsurance contract would be considered to be an insurance or annuity contract.

While an insurance contract may come within the definition of "derivative", it is generally not recognized as a financial derivative and typically does not pose the same potential risk to the financial system as other derivatives products. The Authority does not believe that the derivatives regulatory regime will be appropriate for this type of contract. Further, a comprehensive regime is already in place that regulates the insurance industry in Canada and the insurance legislation of Canada (or a jurisdiction of Canada), or equivalent insurance legislation of a foreign jurisdiction, has consumer protection as an objective and is therefore aligned with the objective of securities legislation to provide protection to investors from unfair, improper or fraudulent practices.

Certain derivatives that have characteristics similar to insurance contracts, including credit derivatives and climate-based derivatives, will be treated as derivatives and not insurance or annuity contracts.

Paragraph 6(3) of the Act requires an insurance or annuity contract to be entered into with a domestically licenced insurer and that the contract be regulated as an insurance or annuity contract under the *Act respecting insurance* (chapter A-32) or Canadian insurance legislation in order to be excluded from the Act. Therefore, for example, an interest rate derivative entered into by a licensed insurance company would not be excluded from the application of the Act.

With respect to subparagraph 2(b) of the Regulation, an insurance or annuity contract that is made outside of Canada would only qualify for this exclusion if it would be regulated under insurance legislation of Canada or Québec if made in Québec. Where a contract would otherwise be treated as a derivative if entered into in Canada, but is considered an insurance contract in a foreign jurisdiction, the contract does not qualify for this exclusion, irrespective of its characterization in the foreign jurisdiction. Paragraph 2(b) is included to address the

situation where a local counterparty purchases insurance for an interest that is located outside of Canada and the insurer is not required to be licenced in Canada.

**Paragraph 2(c) – Currency exchange contracts**

Paragraph 2(c) of the Regulation excludes a short-term contract for the purchase and sale of a currency from the application of Regulation 91-507 and Regulation 94-101 if it is settled within the time limits set out in subparagraph 2(c)(i). This provision is intended to apply exclusively to contracts that facilitate the conversion of one currency into another currency specified in the contract. These currency exchange services are often provided by financial institutions or other businesses that exchange one currency for another for clients' personal or business use (e.g., for purposes of travel or to make payment of an obligation denominated in a foreign currency).

Timing of delivery (subparagraph 2(c)(i))

To qualify for this exclusion the contract must require physical delivery of the currency referenced in the contract within the time periods prescribed in subparagraph 2(c)(i). If a contract does not have a fixed settlement date or otherwise allows for settlement beyond the prescribed periods or permits settlement by delivery of a currency other than the currency referenced in the contract, it will not qualify for this exclusion.

Clause 2(c)(i)(A) applies to a transaction that settles by delivery of the referenced currency within 2 business days – being the industry standard maximum settlement period for a spot foreign exchange transaction.

Clause 2(c)(i)(B) allows for a longer settlement period if the foreign exchange transaction is entered into contemporaneously with a related securities trade. This exclusion reflects the fact that the settlement period for certain securities trades can be 3 or more days. In order for the provision to apply, the securities trade and foreign exchange transaction must be related, meaning that the currency to which the foreign exchange transaction pertains was used to facilitate the settlement of the related security purchase.

Where a contract for the purchase or sale of a currency provides for multiple exchanges of cash flows, all such exchanges must occur within the timelines prescribed in subparagraph 2(c)(i) in order for the exclusion in paragraph 2(c) to apply.

Settlement by delivery except where impossible or commercially unreasonable (subparagraph 2(c)( i))

Subparagraph 2(c)(i) requires that a contract must not permit settlement in a currency other than what is referenced in the contract unless delivery is rendered impossible or commercially unreasonable as a result of events not reasonably within the control of the counterparties.

Settlement by delivery of the currency referenced in the contract requires the currency contracted for to be delivered and not an equivalent amount in a different currency. For example, where a contract references Japanese Yen, such currency must be delivered in order for this exclusion to apply. We consider delivery to mean actual delivery of the original currency contracted for either in cash or through electronic funds transfer. In situations where settlement takes place through the delivery of an alternate currency or account notation without actual currency transfer, there is no settlement by delivery and therefore the exclusion in paragraph 2(c) would not apply.

We consider events that are not reasonably within the control of the counterparties to include events that cannot be reasonably anticipated, avoided or remedied. An example of an intervening event that would render delivery to be commercially unreasonable would include a situation where a government in a foreign jurisdiction imposes capital controls that restrict the flow of the currency required to be delivered. A change in the market value of the currency itself will not render delivery commercially unreasonable.

Intention requirement (subparagraph 2(c)(ii))

Subparagraph 2(c)(ii) excludes a contract for the purchase and sale of a currency that is intended to be settled through the delivery of the currency referenced in such contract. The intention to settle a contract by delivery may be inferred from the terms of the relevant contract as well as from the surrounding facts and circumstances.

When examining the specific terms of a contract for evidence of intention to deliver, we take the position that the contract must create an obligation on the counterparties to make or take delivery of the currency and not merely an option to make or take delivery. Any agreement, arrangement or understanding between the parties, including a side agreement, standard account terms or operational procedures that allow for the settlement in a currency other than the referenced currency or on a date after the time period specified in subparagraph 2(c)(i) is an indication that the parties do not intend to settle the transaction by delivery of the prescribed currency within the specified time periods.

We are generally of the view that certain provisions, including standard industry provisions, the effect of which may result in a transaction not being physically settled, will not necessarily negate the intention to deliver. The contract as a whole needs to be reviewed in order to determine whether the counterparties' intention was to actually deliver the contracted currency. Examples of provisions that may be consistent with the intention requirement under subparagraph 2(c)(ii) include:

- a netting provision that allows 2 counterparties who are party to multiple contracts that require delivery of a currency to net offsetting obligations, provided that the counterparties intended to settle through delivery at the time the contract was created and the netted settlement is physically settled in the currency prescribed by the contract, and

- a provision where cash settlement is triggered by a termination right that arises as a result of a breach of the terms of the contract.

Although these types of provisions permit settlement by means other than the delivery of the relevant currency, they are included in the contract for practical and efficiency reasons.

In addition to the contract itself, intention may also be inferred from the conduct of the counterparties. Where a counterparty's conduct indicates an intention not to settle by delivery, the contract will not qualify for the exclusion in paragraph 2(c). For example, where it could be inferred from the conduct that counterparties intend to rely on breach or frustration provisions in the contract in order to achieve an economic outcome that is, or is akin to, settlement by means other than delivery of the relevant currency, the contract will not qualify for this exclusion. Similarly, a contract would not qualify for this exclusion where it can be inferred from their conduct that the counterparties intend to enter into collateral or amending agreements which, together with the original contract, achieve an economic outcome that is, or is akin to, settlement by means other than delivery of the relevant currency.

Rolling over (subparagraph 2(c)(iii))

Subparagraph 2(c)(iii) provides that, in order to qualify for the exclusion in paragraph 2(c), a currency exchange contract must not permit a rollover of the contract. Therefore, physical delivery of the relevant currencies must occur in the time periods prescribed in subparagraph 2(c)(i). To the extent that a contract does not have a fixed settlement date or otherwise allows for the settlement date to be extended beyond the periods prescribed in subparagraph 2(c)(i), the Authority would consider it to permit a rollover of the contract. Similarly, any terms or practice that permits the settlement date of the contract to be extended by simultaneously closing the contract and entering into a new contract without delivery of the relevant currencies would also not qualify for the exclusion in paragraph 2(c).

The Authority does not intend that the exclusion in paragraph 2(c) will apply to contracts entered into through platforms that facilitate investment or speculation based on the relative value of currencies. These platforms typically do not provide for physical delivery of the currency referenced in the contract, but instead close out the positions by crediting client

accounts held by the person operating the platform, often applying the credit using a standard currency.

**Paragraph 2(d) – Commodities**

Paragraph 2(d) of the Regulation excludes a contract for the delivery of a commodity from the application of Regulation 91-507 and Regulation 94-101 if it meets the criteria in subparagraphs 2(d)(i) and (ii).

Commodity

The exclusion available under paragraph 2(d) is limited to commercial transactions in goods that can be delivered either in a physical form or by delivery of the instrument evidencing ownership of the commodity. We take the position that commodities include goods such as agricultural products, forest products, products of the sea, minerals, metals, hydrocarbon fuel, precious stones or other gems, electricity, oil and natural gas (and by-products, and associated refined products, thereof), and water. We also consider certain intangible commodities, such as carbon credits and emission allowances, to be commodities. In contrast, this exclusion will not apply to financial commodities such as currencies, interest rates, securities and indexes.

Intention requirement (subparagraph 2(d)(i))

Subparagraph 2(d)(i) of the Regulation requires that counterparties *intend* to settle the contract by delivering the commodity. Intention can be inferred from the terms of the relevant contract as well as from the surrounding facts and circumstances.

When examining the specific terms of a contract for evidence of an intention to deliver, we take the position that the contract must create an obligation on the counterparties to make or take delivery of the commodity and not merely an option to make or take delivery. Subject to the comments below on subparagraph 2(d)(ii), we are of the view that a contract containing a provision that permits the contract to be settled by means other than delivery of the commodity, or that includes an option or has the effect of creating an option to settle the contract by a method other than through the delivery of the commodity, would not satisfy the intention requirement and therefore does not qualify for this exclusion.

We are generally of the view that certain provisions, including standard industry provisions, the effect of which may result in a transaction not being physically settled, may not necessarily negate the intention to deliver. The contract as a whole needs to be reviewed in order to determine whether the counterparties' intention was to actually deliver the commodity. Examples of provisions that may be consistent with the intention requirement under subparagraph 2(d)(i) include:

- an option to change the volume or quantity, or the timing or manner of delivery, of the commodity to be delivered;

- a netting provision that allows 2 counterparties who are party to multiple contracts that require delivery of a commodity to net offsetting obligations provided that the counterparties intended to settle each contract through delivery at the time the contract was created,

- an option that allows the counterparty that is to accept delivery of a commodity to assign the obligation to accept delivery of the commodity to a third-party; and

- a provision where cash settlement is triggered by a termination right arising as a result of the breach of the terms of the contract or an event of default thereunder.

Although these types of provisions permit some form of cash settlement, they are included in the contract for practical and efficiency reasons.

In addition to the contract itself, intention may also be inferred from the conduct of the counterparties. For example, where it could be inferred from the conduct that counterparties intend to rely on breach or frustration provisions in the contract in order to achieve an economic

outcome that is, or is akin to, cash settlement, the contract will not qualify for this exclusion. Similarly, a contract will not qualify for this exclusion where it can be inferred from their conduct that the counterparties intend to enter into collateral or amending agreements which, together with the original contract, achieve an economic outcome that is, or is akin to, cash settlement of the original contract.

When determining the intention of the counterparties, we will examine their conduct at execution and throughout the duration of the contract. Factors that we will consider include whether a counterparty is in the business of producing, delivering or using the commodity in question and whether the counterparties regularly make or take delivery of the commodity relative to the frequency with which they enter into such contracts in relation to the commodity.

Situations may exist where, after entering into the contract for delivery of the commodity, the counterparties enter into an agreement that terminates their obligation to deliver or accept delivery of the commodity (often referred to as a "book-out" agreement). Book-out agreements are typically separately negotiated, new agreements where the counterparties have no obligation to enter into such agreements and such book-out agreements are not provided for by the terms of the contract as initially entered into. We will generally not consider a book-out to be a "derivative" provided that, at the time of execution of the original contract, the counterparties intended that the commodity would be delivered.

Settlement by delivery except where impossible or commercially unreasonable (subparagraph 2(d)(ii))

Subparagraph 2(d)(ii) requires that a contract not permit cash settlement in place of delivery unless physical settlement is rendered impossible or commercially unreasonable as a result of an intervening event or occurrence not reasonably within the control of the counterparties, their affiliates or their agents. A change in the market value of the commodity itself will not render delivery commercially unreasonable. In general, we consider examples of events not reasonably within the control of the counterparties would include:

- events to which typical *force majeure* clauses would apply,

- problems in delivery systems such as the unavailability of transmission lines for electricity or a pipeline for oil or gas where an alternative method of delivery is not reasonably available, and

- problems incurred by a counterparty in producing the commodity that they are obliged to deliver such as a fire at an oil refinery or a drought preventing crops from growing where an alternative source for the commodity is not reasonably available.

In our view, cash settlement in these circumstances would not preclude the requisite intention under subparagraph 2(d)(i) from being satisfied.

**Additional contracts not considered to be derivatives**

Apart from the contracts expressly excluded from the application of the Act in section 6 of the Act and section 2 of the Regulation, there are other contracts that we do not consider to be "derivatives" for the purposes of securities or derivatives legislation. A feature common to these contracts is that they are entered into for consumer, business or non-profit purposes that do not involve investment, speculation or hedging. Typically, they provide for the transfer of ownership of a good or the provision of a service. In most cases, they are not traded on a market.

These contracts include, but are not limited to:

- a consumer or commercial contract to acquire, or lease real or personal property, to provide personal services, to sell or assign rights, equipment, receivables or inventory, or to obtain a loan or mortgage, including a loan or mortgage with a variable rate of interest, interest rate cap, interest rate lock or embedded interest rate option;

- a consumer contract to purchase non-financial products or services at a fixed, capped or collared price;
- an employment contract or retirement benefit arrangement;
- a guarantee;
- a performance bond;
- a commercial sale, servicing, or distribution arrangement;
- a contract for the purpose of effecting a business purchase and sale or combination transaction;
- a contract representing a lending arrangement in connection with building an inventory of assets in anticipation of a securitization of such assets; and
- a commercial contract containing mechanisms indexing the purchase price or payment terms for inflation such as via reference to an interest rate or consumer price index.