CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

CSA Notice of second consultation

Draft *Regulation 93-101 respecting Derivatives: Business Conduct*

Draft *Policy Statement to Regulation 93-101 respecting Derivatives: Business Conduct*

June 14, 2018

Introduction

We, the Canadian Securities Administrators (the **CSA** or **we**), are publishing the following for a second comment period of 95 days, expiring on September 17, 2018:

- Draft *Regulation 93-101 respecting Derivatives: Business Conduct* (the **Regulation**);
- Draft *Policy Statement to Regulation 93-101 respecting Derivatives: Business Conduct* (the **Policy Statement**).

Collectively, the Regulation and the Policy Statement are referred to as the **Proposed Regulation** in this Notice.

We are issuing this Notice to solicit comments on the Proposed Regulation. We welcome all comments on this publication and have also included specific questions in the Comments section.

In developing the Proposed Regulation, the CSA has consulted with the Bank of Canada, the Office of the Superintendent of Financial Institutions (**OSFI**) and the Department of Finance (Canada). We intend to continue to consult with these entities throughout the development of the Proposed Regulation.

On April 19, 2018, we published for comment Draft *Regulation 93-102 respecting Derivatives: Registration* and Draft *Policy Statement to Regulation 93-102 respecting Derivatives: Registration* (collectively, the **Proposed Registration Regulation**). The Proposed Regulation, together with the Proposed Registration Regulation, are intended to implement a comprehensive regime for the regulation of persons or companies that are in the business of trading or advising on derivatives. Accordingly, we are overlapping the comment period for the Proposed Regulation with that of the Proposed Registration Regulation, which will also close on September 17, 2018. This will allow commenters to consider the Proposed Regulation and the Proposed Registration Regulation together when making their comments.

Background

In April 2013, the CSA published for comment CSA Consultation Paper 91-407 *Derivatives: Registration* which outlined a proposed registration and business conduct regime for derivatives markets participants.

On April 4, 2017, we published for comment Draft *Regulation 93-101 respecting Derivatives: Business Conduct* and Draft *Policy Statement to Regulation 93-101 respecting Derivatives: Business Conduct* (the **first consultation)**. The comment period for the first consultation closed on September 1, 2017. During the comment period, we received submissions from 21 commenters. We thank all commenters for their input. We have carefully reviewed the comments received and have revised the Proposed Regulation. The names of the commenters and a summary of their comments, together with our responses, are contained in Annex A of this Notice. Copies of the submissions on the Proposed Regulation can be found on the websites of the Alberta Securities Commission,[1] Ontario Securities Commission[2] and Autorité des marchés financiers.[3]

As we indicated in the CSA Notice that accompanied the first consultation, we have chosen to split the proposed derivatives registration and business conduct regime into two separate rules. This approach simplifies each rule and is intended to ensure that all derivatives firms (i.e., all derivatives advisers and all derivatives dealers) remain subject to certain minimum standards in all Canadian jurisdictions.

The Proposed Regulation applies to a person that meets the definition of "derivatives adviser" or "derivatives dealer" regardless of whether it is registered or exempted from the requirement to be registered in a jurisdiction.

Substance and Purpose of the Proposed Regulation

The CSA have developed the Proposed Regulation to help protect investors, reduce risk, improve transparency, increase accountability and promote responsible business conduct in the over-the-counter (**OTC**) derivatives[4] markets.

During the financial crisis of 2008, the inappropriate sale of financial investments led to major losses for retail and institutional investors. The International Organization of

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[1] Available at http://www.albertasecurities.com/Regulatory%20Instruments/5341884-v1-CSA_Notice_and_Request_for_Comment_NI_93-101.PDF

[2] Available at http://www.osc.gov.on.ca/en/55181.htm

[3] Available at https://lautorite.qc.ca/en/professionals/regulations-and-obligations/public-consultations/topic/derivatives/finished/

[4] The Proposed Regulation applies to derivatives as determined in accordance with the product determination rule applicable in the relevant jurisdiction. Each jurisdiction has adopted a product determination rule that excludes certain types of contracts and instruments from being derivatives for the purpose of the Regulation. Only those OTC derivatives set out in the applicable product determination rule are relevant.

Securities Commissions (**IOSCO**) noted in 2012 that "until recently, OTC derivatives markets have not been subject to the same level of regulation as securities markets. Insufficient regulation allowed certain participants to operate in a manner that created risks to the global economy that manifested during the financial crisis of 2008."[5] Moreover, since the financial crisis, there have been numerous cases of serious market misconduct in the global derivatives market, including, for example, misconduct relating to the manipulation of benchmarks and front-running of customer orders.

To address these issues, the Proposed Regulation, together with the Proposed Registration Regulation, establishes a robust investor protection regime that meets IOSCO's international standards and takes into account CSA jurisdictions' commitments to create a derivatives dealer regime that is also consistent with the regulatory approach taken by most IOSCO jurisdictions with active derivatives markets.[6] As a result, the Proposed Regulation will help protect participants in the OTC derivatives markets from unfair, improper or fraudulent practices and foster confidence in the Canadian derivatives markets.

The Proposed Regulation is intended to create a uniform approach to derivatives markets conduct regulation in Canada and promote consistent protections for market participants regardless of the type of firms they deal with, while also providing that derivatives dealers and advisers operating in Canada are subject to consistent regulation that does not result in any competitive disadvantage.

A person is subject to the Proposed Regulation only if it is a "derivatives adviser" or a "derivatives dealer". As described below in the Summary of the Regulation, a test is used to determine if the person is in the business of trading or advising in OTC derivatives. Nevertheless, a person that may be in the business of trading in OTC derivatives may be exempt from the requirements of the Proposed Regulation if they qualify for the end-user exemption. Finally, even if a person is subject to the requirements of the Proposed Regulation, those requirements are tailored depending on the nature of the derivatives dealer's or derivatives adviser's derivatives party.

The Proposed Regulation sets out a comprehensive approach regulating the conduct of derivatives markets participants, including requirements relating to the following:

- Fair dealing
- Conflicts of interest
- Know your client (KYC)
- Suitability
- Pre-trade disclosure
- Reporting
- Compliance
- Senior management duties
- Recordkeeping
- Treatment of derivatives party assets

Many of the requirements in the Proposed Regulation are similar to existing market conduct requirements applicable to registered dealers and advisers under *Regulation*

[5] https://www.iosco.org/library/pubdocs/pdf/IOSCOPD381.pdf (DMI Report) at p 1.
[6] https://www.iosco.org/library/pubdocs/pdf/IOSCOPD497.pdf (DMI Implementation Review) at p. 13.

31-103 respecting *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**Regulation 31-103**) but have been modified to reflect the different nature of derivatives markets.

Much like Regulation 31-103, the Proposed Regulation takes a two-tiered approach to investor/customer protection, as follows:

- certain obligations apply in all cases when a derivatives firm is dealing with or advising a derivatives party, regardless of the level of sophistication or financial resources of the derivatives party; and

- certain obligations:

    - do not apply if the derivatives firm is dealing with or advising a derivatives party that is an "eligible derivatives party" and is neither an individual nor a specified commercial hedger, and

    - apply but may be waived if the derivatives firm is dealing with or advising a derivatives party who is an "eligible derivatives party" that is an individual or a specified commercial hedger.

The definition of "eligible derivatives party" and the extent to which obligations do not apply, or apply unless waived, when dealing with or advising an eligible derivatives party are explained below in Part 1 of the Summary of the Regulation.

As explained in CSA Staff Notice 33-319 *Status Report on CSA Consultation Paper 33-404 Proposals to Enhance the Obligations of Advisers, Dealers, and Representatives Toward Their Clients*, the CSA are presently considering a number of proposals aimed at strengthening the obligations that securities advisers, dealers and representatives owe to their clients. CSA staff responsible for this initiative continue to develop these proposals. We will monitor the work on this project, and may recommend amendments to the Proposed Regulation at a later date based on this work.

Summary of the Regulation

Part 1 – Definitions

Part 1 of the Regulation sets out relevant definitions and principles of interpretation.

Some of the most important definitions in the Regulation are provided below.

Derivatives adviser and derivatives dealer

The definitions of "derivatives adviser" and "derivatives dealer" include a "business trigger" similar to the business trigger for registration in Canadian securities legislation.

It is important to note that the Regulation applies to a person that meets the definition of "derivatives adviser" or "derivatives dealer", regardless of whether they are registered or exempted from the requirement to be registered in a jurisdiction. This is intended to ensure that certain derivatives markets participants that may benefit from an exemption from registration in certain jurisdictions nevertheless remain subject to certain minimum standards in relation to their business conduct towards their customers.

Paragraph (b) in the definitions of each of "derivatives adviser" and "derivatives dealer" has been included since the Proposed Registration Regulation may designate as or prescribe additional entities to be derivatives advisers or derivatives dealers based on specified activities (e.g., trading with non-eligible derivatives parties or engaging in certain market-making activities).

Derivatives party

In the Regulation, the term "derivatives party" refers to a derivatives firm's counterparties, customers, and other persons or companies that the derivatives firm may deal with or advise. It is not necessary that the parties consider a client relationship to exist in order for one party to be a derivatives party to the other.

Eligible derivatives party

The term "eligible derivatives party" is intended to refer to those sophisticated derivatives parties that do not require the full set of protections afforded to "retail" customers or investors, either because they may reasonably be considered to have sufficient knowledge and experience to assess the risks of transacting in derivatives or because they have sufficient financial resources to obtain professional advice in order to protect themselves through contractual negotiation with the derivatives firm.

As currently drafted, the definition of "eligible derivatives party" is generally consistent with the current regulatory regimes in the U.S. and Canada in relation to OTC derivatives.[7] In addition, the definition is similar to the definition of "permitted client" in Regulation 31-103, with a few modifications intended to reflect differences between derivatives and securities markets.

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[7] See, for example, the definition of "eligible contract participant" under the U.S. *Commodity Exchange Act* and the *Securities Exchange Act of 1934* applicable to CFTC and SEC swap dealers and major swap participants, the definition of "qualified party" in British Columbia Blanket Order 91-501 *Over-the-Counter Derivatives*, the definition of "qualified party" in Alberta Blanket Order 91-507 *Over-the-Counter Derivatives*, the definition of "qualified party" in Saskatchewan General Order 91-908 *Over-the-Counter Derivatives*, the definition of "qualified party" in Manitoba Blanket Order 91-501 *Over-the-Counter Trades in Derivatives*, the definition of "accredited counterparty" in section 3 of the Quebec *Derivatives Act*, the definition of "qualified party" in New Brunswick Local Rule 91-501 *Derivatives* and the definition of "qualified party" in Nova Scotia Blanket Order 91-501 *Over The Counter Trades in Derivatives*.

Specified commercial hedger

The term "specified commercial hedger" refers to a commercial hedger that meets the conditions under either paragraph (n) or (q) of the definition of eligible derivatives party.

Part 2 – Application

Part 2 of the Regulation sets out a number of provisions relating to the application and scope of the Regulation.

Section 3 is a scope provision intended to allow the Regulation to apply in respect of the same contracts and instruments in all jurisdictions of Canada. Each jurisdiction has adopted a Product Determination Rule that excludes certain types of contracts and instruments from being derivatives for the purpose of the Regulation.

Section 7 provides that the requirements of the Regulation, other than the specific requirements listed in subsection 7(1), do not apply to a derivatives firm if it is dealing with or advising an eligible derivatives party that:

- is not an individual or a specified commercial hedger, or

- is an individual or specified commercial hedger that has waived in writing the protections provided by the requirements.

An eligible derivatives party that is neither an individual nor a specified commercial hedger, or is an individual or specified commercial hedger that has waived these protections in writing, is referred to as a **specified eligible derivatives party** in this Notice.

When a derivatives firm is dealing with or advising a specified eligible derivatives party, the derivatives firm will only be subject to the following requirements of the Regulation:

(a) Division 1 [*General obligations towards all derivatives parties*] of Part 3 [*Dealing with or advising derivatives parties*];

(b) sections 23 [*Interaction with other regulations*] and 24 [*Segregating derivatives party assets*] of Part 4 [*Derivatives party accounts*];

(c) subsection 27(1) [*Content and delivery of transaction information*] of Part 4 [*Derivatives party accounts*]; and

(d) Part 5 [*Compliance and recordkeeping*].

A derivatives firm and an eligible derivatives party may choose to incorporate additional protections in the contracts that govern their relationship and their derivatives trading activities. However, the CSA are of the view that, in the case of a derivatives firm dealing

with or advising an eligible derivatives party, these protections should not be required but rather should be a matter of contract for the parties.

We have included a table that compares the approach in the Regulation with the approach under Regulation 31-103 in Appendix A.

Part 3 – Dealing with or advising derivatives parties

DIVISION 1 – GENERAL OBLIGATIONS TOWARDS ALL DERIVATIVES PARTIES

Division 1 of Part 3 sets out the fundamental business conduct obligations that the CSA have recommended should apply to all derivatives firms when dealing with or advising derivatives parties, including eligible derivatives parties, namely:

- fair dealing,
- responding to conflicts of interest, and
- general (or "gatekeeper") know-your-derivatives party obligations.

Fair dealing

The fair dealing obligation proposed in section 8 of the Regulation is consistent with international practice and is in line with the standards set by Regulation 31-103 while keeping in mind the differences between derivatives and securities markets. The CSA believe that the fair dealing obligation in section 8, as a principles-based obligation, should be interpreted flexibly and in a manner that is sensitive to context and to derivatives markets participants' reasonable expectations. We expect that the fair dealing obligation will be applied differently depending on the sophistication of the market participant.

Identifying and responding to conflicts of interest

Section 9 of the Regulation contains obligations to identify and respond to conflicts of interest. This obligation applies when dealing with or advising market participants of all levels of sophistication. It is a principles-based obligation which should be interpreted flexibly and in a manner that is sensitive to context and to derivatives markets participants' reasonable expectations. Furthermore, it is expected that in responding to any conflict of interest, the derivatives party will consider the fair dealing obligation as well as any other standard of care that may apply when dealing with or advising a derivatives party.

General (or "gatekeeper") know-your-derivatives party obligations

Section 10 of the Regulation sets out the general "gatekeeper" know-your-derivatives party (**KYDP**) obligations. These obligations include requirements to verify the identity

of a derivatives party, verify that the derivatives party is an eligible derivatives party, determine if the derivatives party is an insider of a reporting issuer, and comply with anti-money-laundering and terrorist financing obligations.

We would anticipate that many derivatives firms, including Canadian financial institutions, will already have policies and procedures in place to address these obligations and that section 10 should not result in any significant new obligations for these entities.

DIVISION 2 – ADDITIONAL OBLIGATIONS WHEN DEALING WITH OR ADVISING CERTAIN DERIVATIVES PARTIES

The obligations in Division 2 of Part 3 are intended to protect non-eligible derivatives parties. They do not apply to the extent that a derivatives firm is dealing with or advising a specified eligible derivatives party.

A description of a number of these obligations is provided below.

Derivatives-party-specific needs and objectives

Section 11 sets out the obligation on a derivatives firm to obtain information about a derivatives party's specific investment needs and objectives in order for the derivatives firm to meet its suitability obligations under section 12 and to provide the appropriate pre-transaction disclosure under subsection 19(1).

Information on a derivatives party's specific needs and objectives (sometimes referred to as "client-specific KYC information") forms the basis for determining whether transactions in derivatives are suitable for a derivatives party. The obligations in section 11 require a derivatives firm to take reasonable steps to obtain and periodically update information about its derivatives parties.

Suitability

Section 12 requires a derivatives firm to take reasonable steps to ensure that a proposed transaction is suitable for a derivatives party before making a recommendation or accepting instructions from the derivatives party to transact in a derivative.

DIVISION 3 – RESTRICTIONS ON CERTAIN BUSINESS PRACTICES WHEN DEALING WITH CERTAIN DERIVATIVES PARTIES

The obligations in Division 3 focus on restricting certain business activities when dealing with less sophisticated derivatives parties. These obligations relate to tied selling. The obligations in this Division do not apply if a derivatives firm is dealing with or advising a specified eligible derivatives party.

Tied selling

Section 17 prohibits a derivatives firm from engaging in certain sales practices that would pressure or require a derivatives party to obtain a product or service as a condition of obtaining other products or services from the derivatives firm. An example of tied selling would be offering a loan on the condition that the derivatives party purchase another product or service, such as a swap to hedge the loan, from the derivatives firm or one of its affiliates.

As explained in the Policy Statement, section 17 is not intended to prohibit relationship pricing or other beneficial selling arrangements similar to relationship pricing. Relationship pricing refers to the practice of industry participants offering financial incentives or advantages to certain derivatives parties.

Part 4 – Derivatives Party Accounts

DIVISION 1 – DISCLOSURE TO DERIVATIVES PARTIES

The CSA believe that less sophisticated derivatives parties, or those individuals who may require a higher level of protection, need more detailed information concerning their transactions and their accounts. Below are some of the requirements designed to keep derivatives parties informed. The obligations in this Division do not apply if a derivatives firm is dealing with or advising a specified eligible derivatives party.

Section 18 requires a derivatives firm to provide a derivatives party with all information that the derivatives party needs in order to understand not only their relationship with the derivatives firm, but also the products and services that the derivatives firm will or may provide and the fees or other charges that the derivatives party may be required to pay.

Subsection 18(1) sets out the obligation for a derivatives firm to provide a derivatives party with disclosure that is reasonably designed to allow the derivatives party to assess the material risks of transacting in the derivative. This includes the derivatives party's potential exposure and the material characteristics of the derivative, which include the material economic terms and the rights and obligations of the counterparties to the type of derivative.

This section also requires a derivatives firm to provide a risk disclosure to a derivatives party before a transaction takes place, which explains that the leverage inherent in derivatives may require the derivatives party to deposit additional funds if the value of the derivative declines. The risk disclosure requires an explanation that borrowing money or using leverage to fund a derivatives transaction carries additional risk.

In addition, subsection 19(2) establishes obligations, before transacting a specific derivative,

- to advise the derivatives party about material risks in relation to the specific derivative that are materially different than the risks disclosed under subsection 19(1), and

- if applicable, to set out the price of the derivative to be transacted and the most recent valuation.

Further to these obligations, section 20 requires a derivatives firm to provide a derivatives party with a daily valuation of the derivatives that it has transacted with or on behalf of that derivatives party.

DIVISION 2 – DERIVATIVES PARTY ASSETS

Division 2 sets out certain requirements related to segregation and holding of collateral delivered to a derivatives firm as initial margin, and imposes a requirement on the derivatives firm to obtain the written consent of its derivatives party if the derivatives firm intends to use or invest the collateral that is delivered to it by or for a derivatives party.

The Regulation exempts a derivatives firm from this Division in respect of derivatives party assets if, in respect of those derivatives party assets, any of the following apply:

- the derivatives firm is subject to and complies with or is exempt from sections 3 through 8 of *Regulation 94-102 respecting Derivatives: Customer Clearing and Protection of Customer Collateral and Positions*,

- the derivatives firm is subject to and complies with securities legislation relating to margin and collateral requirements or *Regulation 81-102 respecting Investment Funds* (**Regulation 81-102**).

We expect that later this year, securities legislation relating to margin and collateral requirements will be published for comment in Draft *Regulation 95-101 respecting Margin and Collateral Requirements for Non-Centrally Cleared Derivatives.*

The obligations in this Division, other than section 23 and section 24, do not apply if a derivatives firm is dealing with or advising a specified eligible derivatives party.

DIVISION 3 – REPORTING TO DERIVATIVES PARTIES

Division 3 sets out obligations of derivatives firms to provide certain reports to derivatives parties.

Section 27 provides that a derivatives firm must provide its derivatives party with a confirmation of the key elements of a derivatives transaction. If the derivatives party is not a specified eligible derivatives party, the required contents of this confirmation are set out in subsection 27(2).

Section 28 sets out the obligations of a derivatives firm to provide quarterly statements to derivatives parties. Subsection 28(2) describes the information that must be provided in the quarterly statement.

The obligations in this Division, other than the fundamental transaction confirmation requirement in subsection 27(1), do not apply if a derivatives firm is dealing with or advising a specified eligible derivatives party.

Part 5 – Compliance and recordkeeping

DIVISION 1 – COMPLIANCE

Section 30 provides that a derivatives firm must have policies, procedures and controls to assure that, with respect to transacting or advising on derivatives, the firms and individuals acting on its behalf comply with applicable laws, to manage risk and to ensure that individuals have the necessary training and expertise.

The CSA are monitoring international regulatory initiatives designed to ensure that senior managers bear responsibility for the effective and efficient management of their business units. Section 31 imposes certain supervisory, management, and reporting obligations on "senior derivatives managers". These requirements are intended to create accountability at the senior management level. A senior derivatives manager is an individual designated by the derivatives firm as responsible for the derivatives business unit of the derivatives firm. Senior derivatives managers must supervise compliance activities and respond, in a timely manner, to any material non-compliance by an individual working in the derivatives business unit. Furthermore, a senior derivatives manager or a chief compliance officer who has been delegated the responsibility must also report at least annually to the firm's board of directors, either to specify each incidence of material non-compliance with, or to specify that each derivatives business unit is in material compliance with, the Regulation, applicable securities legislation and the policies and procedures required under section 30.

Section 32 sets out the requirement of a derivatives firm to respond to material non-compliance, and in certain circumstances to report material non-compliance to the regulator, except in Québec, or securities regulatory authority.

Part 6 – Exemptions

DIVISION 1 – EXEMPTION FROM THE REGULATION

End users

Section 37(1) provides that certain derivatives end-users (e.g., entities that trade derivatives for their own account for commercial purposes) are exempt from the Regulation provided they do not do any of the following:

- solicit or otherwise transact in a derivative with, for or on behalf of a person that is not an eligible derivatives party;

- advise persons or companies in respect of transactions in derivatives, if the person is not an eligible derivatives party, other than general advice that is provided in accordance with the conditions of section 42;

- regularly make or offer to make a market in a derivative with a derivatives party;

- regularly facilitate or otherwise intermediate transactions in derivatives for another person other than an affiliated entity that is not an investment fund;

- facilitate the clearing of a transaction in a derivative through the facilities of a qualifying clearing agency for another person or company.

DIVISION 2 AND DIVISION 3 – EXEMPTIONS FROM SPECIFIC REQUIREMENTS OF THE REGULATION

Foreign derivatives dealers and foreign derivatives advisers

Divisions 2 and 3 provide, under certain conditions, an exemption from requirements in the Regulation for foreign derivatives dealers and foreign derivatives advisers that are regulated under the laws of a foreign jurisdiction that achieve substantially the same objectives, on an outcomes basis, as the Regulation.

These exemptions apply to the provisions of the Regulation where the derivatives dealer or derivatives adviser is subject to and in compliance with the laws of a foreign jurisdiction set out in Appendix A and Appendix D of the Regulation opposite the name of the foreign jurisdiction. The jurisdictions specified in Appendices A and D will be determined on a jurisdiction-by-jurisdiction basis, and based on a review of the laws and regulatory framework of the jurisdiction.

Investment dealers

Division 2 provides an exemption from requirements in the Regulation for a derivatives dealer that is a dealer member of the Investment Industry Regulatory Organization of Canada (**IIROC**) if the derivatives dealer complies with the corresponding conduct and other regulatory requirements of IIROC as set out in Appendix B of the Regulation

Canadian financial institutions

Division 2 provides an exemption from requirements in the Regulation for a derivatives dealer that is a Canadian financial institution and is subject to and complies with corresponding conduct and other regulatory requirements of its prudential regulator as set out in Appendix C of the Regulation.

Note that, as of the time of this publication for comment, the equivalency analysis required to populate the Appendices of the Regulation has not been completed. The Appendices will be completed and published for public comment prior to the Regulation being finalized.

DIVISION 3 – EXEMPTIONS FOR DERIVATIVES ADVISERS

Advising generally

Division 3 provides an exemption for persons and companies that provide general advice in relation to derivatives, where the advice is not tailored to the needs of the person receiving the advice (e.g., analysis published in mass media), and the person discloses all financial or other interests in relation to the advice.

Part 8 – Effective Date

Section 45 provides that the requirements will not apply to unexpired derivatives that were entered into before the effective date of the Regulation other than the following ongoing requirements: fair dealing (Section 8), daily reporting (Section 20) and derivatives party statements (Section 28).

Summary of Key Changes to the Proposed Regulation from Previous Publication

(a) "eligible derivatives party" new paragraph (o) – commercial hedger

We received a number of comments relating to the net asset requirement of $25 million for a person to be considered an eligible derivatives party under paragraph (m) of that definition. Commenters expressed the view that this threshold may reduce liquidity for commercial hedgers and is not harmonized with the threshold in other major trading jurisdictions. In response to these comments, we have included a new paragraph of the eligible derivatives party definition for commercial hedgers that have at least $10 million in net assets and meet other specified conditions. Entities relying on this paragraph must waive their right to be treated as a non-eligible derivative party.

(b) "eligible derivatives party" new paragraph (p) – fully guaranteed entities

We received comments that the eligible derivatives party definition should be amended to allow an entity to qualify as an eligible derivatives party if its obligations are guaranteed by an entity that otherwise qualifies as an eligible derivatives party. In response to these comments we have included a new paragraph (p) of the eligible derivatives party definition for companies whose obligations under a derivative are fully guaranteed or otherwise fully supported under an agreement by one or more eligible derivatives parties.

(c) Managed accounts of eligible derivatives parties

We received a number of comments recommending that managed accounts for eligible derivatives parties should not be treated like those of non-eligible derivatives parties. They asserted that eligible derivatives parties are sophisticated investors and the fact that they have granted discretionary authority to an adviser to execute derivative transactions on their behalf should not change that classification. In response to these comments, we have removed subsection 7(3) which required managed accounts of eligible derivatives parties to be treated as those of non-eligible derivatives parties.

(d) Former section 19 – Fair terms and pricing

We received comments that the former section 19 fair terms and pricing provision was not appropriately tailored for the OTC derivatives market. The commenters pointed out the negotiated, bilateral and bespoke nature of OTC derivatives transactions. We received another comment that this provision would be better suited as part of the fair dealing obligation in section 8 of the Regulation. In response to these comments, we have deleted this provision and included policy statement guidance in section 8 relating to the pricing of derivatives.

(e) Part 4, Division 2 – Derivatives Party Assets

We received a number of suggestions to revise this Division, relating to the scope of its application generally and to the re-use and investment of derivatives party assets. Part 4 Division 2 now clarifies that this requirement does not apply to a derivatives firm's transactions with a derivatives party that are already subject to rules that apply to a specific type of derivatives party, such as securities legislation relating to margin and collateral requirements or Regulation 81-102. Furthermore, this Division imposes a requirement on the derivatives firm to obtain the written consent of its derivatives party if the derivatives firm intends to use or invest initial margin.

(f) Part 5, Division 1 – Compliance

We received comments that certain of the senior derivatives manager obligations, such as compliance reporting to a derivatives firm's board of directors, should be undertaken by a firm's chief compliance officer and not its senior derivatives manager. We have amended sections 31 and 32 to permit the senior derivatives manager or a chief compliance officer to fulfil the internal reporting requirements.

(g) Sections 38 and 43 – Foreign derivatives dealer exemption and foreign derivatives adviser exemption – trading on an exchange or derivatives trading facility

We received comments that the exemption for foreign derivatives dealers and foreign derivatives advisers should be available to foreign dealers and foreign advisers in the business of trading in derivatives on an exchange or a derivatives trading facility designated or recognized in a Canadian jurisdiction. In response to these comments, we

have amended subsections 38(3) and 43(3) so that these foreign derivatives dealers and foreign derivatives advisers are no longer prohibited from qualifying for the exemptions under sections 38 and 43.

(h) Section 41 – Derivatives traded on a derivatives trading facility that are cleared

We received comments that a derivatives firm may not know the identity of its derivatives party prior to execution of a transaction anonymously on a derivatives trading facility. We have included an exemption from sections 10 and 27 of the Regulation for derivatives traded on a derivatives trading facility that, as soon as technologically practicable, are submitted for clearing to a qualifying clearing agency. This exemption is only available if the derivatives firm's derivatives party is an eligible derivatives party.

(i) Section 45 – Effective date

We received a number of comments that market participants should be permitted to leverage existing disclosures and representations to determine eligible derivatives party status. In response to these comments, we have included a transition provision that permits derivatives firms to rely on a derivatives party's "permitted client" status under Regulation 31-103, "accredited counterparty" status under the *Derivatives Act* (Quebec) or "qualified party" status under the relevant blanket orders in the provinces of Alberta, British Columbia, Manitoba, New Brunswick or Nova Scotia for transactions entered into prior to the coming into force of the Regulation. However, the fair dealing obligation, daily reporting and derivatives party statement requirements will apply to these pre-existing transactions.

(j) International harmonization and miscellaneous drafting clarifications

There are a number of drafting changes throughout the Regulation to respond to comments that clarify the Regulation and further harmonize the Regulation with international regulatory regimes.

Anticipated Costs and Benefits

As mentioned above, we have developed the Proposed Regulation to help protect investors and counterparties, reduce risk, improve transparency, increase accountability and promote responsible business conduct in the OTC derivatives markets. Moreover, the business conduct requirements under the Regulation will help to protect participants in the OTC derivatives markets from unfair, improper or fraudulent practices and foster confidence in the Canadian derivatives market.

The Proposed Regulation aims to provide participants in the Canadian OTC derivatives markets with protections that are equivalent to protections offered to participants in other major international markets.

There will be compliance costs for derivatives firms that may increase the cost of trading or receiving advice for market participants. In the CSA's view, the compliance costs to market participants are proportionate to the benefits to the Canadian market of implementing the Proposed Regulation. The major benefits and costs of the Proposed Regulation are described below.

(a) Benefits

The Proposed Regulation will protect participants in the Canadian OTC derivatives markets by reducing the likelihood of suffering loss through inappropriate transactions, inappropriate sale of derivatives and market misconduct. The Proposed Regulation offers protections not only to retail market participants but also large market participants whose derivatives losses could impact their business operations and potentially the Canadian economy more broadly. The Proposed Regulation fills a regulatory gap in the Canadian OTC derivatives markets for certain derivatives firms that are not subject to business conduct regulation and oversight. It is intended to foster confidence in the Canadian derivatives markets by creating a regime that meets international standards and is, where appropriate, equivalent to the regimes in major trading jurisdictions. Currently, OTC derivatives are regulated differently across Canadian jurisdictions, and there is inconsistency in regulation of business conduct in OTC derivatives markets. The Proposed Regulation aims to reduce compliance costs for derivatives firms to the degree possible, by harmonizing the rules across Canadian jurisdictions and establishing a regime that is tailored for the derivatives market.

(b) Costs

Generally, firms will incur costs from analysing the requirements and establishing policies and procedures for compliance. Any costs associated with complying with the Proposed Regulation are expected to be borne by derivatives firms and in certain circumstances may be passed on to derivatives parties.

There is also a possibility that foreign derivatives firms may be dissuaded from entering or remaining in the Canadian market due to the costs of complying with the Proposed Regulation, which would reduce Canadian derivatives parties' options for derivatives services. However, the Regulation contemplates a number of exemptions, including an exemption for derivatives firms located in foreign jurisdictions, which are subject to and in compliance with equivalent requirements under foreign laws. These exemptions could significantly reduce compliance costs associated with the Proposed Regulation for derivatives firms located in and complying with the laws of approved foreign jurisdictions.

(c) Conclusion

The CSA are of the view that the impact of the Proposed Regulation, including anticipated compliance costs for derivatives firms, is proportional to the benefits sought.

Protection of derivatives parties and the integrity of the Canadian derivatives markets are the fundamental principles of the Proposed Regulation. The Proposed Regulation aims to provide a level of protection similar to that offered to derivatives parties in other jurisdictions with significant OTC derivatives markets, while being tailored to the nature of the Canadian market. To achieve a balance of interests, the Proposed Regulation is designed to promote a safer environment in the Canadian derivatives markets while offering exemptions to derivatives firms that only deal with eligible derivatives parties or that are already subject to and compliant with equivalent requirements.

Contents of Annexes

The following annexes form part of this CSA Notice:

- Annex I – Summary of comments and CSA responses and list of commenters
- Annex II – Alternative version of the definition of "affiliated entity"

Comments

In addition to your comments on all aspects of the Proposed Regulation, the CSA also seek specific feedback on the following questions:

1) Definition of "affiliated entity"

The Regulation defines "affiliated entity" on the basis of "control", and sets out certain tests for "control". In the context of other rules relating to OTC derivatives, we are also considering a definition of "affiliated entity" that is based on accounting concepts of "consolidation" (a proposed version of the definition is included in Annex II). Please provide any comments you may have on (i) the definition in the Regulation, (ii) the definition in Annex II, and (iii) the appropriate balance between harmonization across related rules and using different definitions to more precisely target specific entities under different rules.

2) Definition of "eligible derivatives party"

Paragraphs (m), (n) and (o) provide that certain persons and companies are eligible derivatives parties if they meet certain criteria, including meeting certain financial thresholds. Are these criteria appropriate? Please explain your response.

3) Anonymous transactions executed on a derivatives trading facility

We are considering whether the exemption in section 41 should be expanded in respect of other requirements in this Regulation. Is it appropriate to expand this exemption?

We are also considering whether a similar exemption should be available in other scenarios, including, for example:

(a) derivatives traded anonymously on a derivatives trading facility that are not cleared; and

(b) derivatives that are not traded on a derivatives trading facility but are submitted for clearing to a regulated clearing agency.

Is it appropriate to provide a similar exemption in other scenarios? Please explain your response.

4) Handling complaints

The obligations in section 16, as proposed, do not apply if a derivatives firm is dealing with (i) an eligible derivatives party that is not an individual or a specified commercial hedger, or (ii) an eligible derivatives party who is an individual or a specified commercial hedger that has waived these protections. Should the obligations in section 16 be expanded towards all derivatives parties? Please explain your response.

5) Derivatives Party Assets

We note that the requirements with respect to initial margin in sections 25 and 26 only apply to transactions with non-EDPs. Please provide any comments you may have, including whether it would be appropriate to include, for all derivatives parties, restrictions with respect to collateral delivered to a derivatives firm (as initial margin) or adopt a model of requiring informed consent with respect to its use and investment, or some combination of the two approaches.

6) Policies, procedures and controls

Subparagraph 30(1)(c)(iii) requires a derivatives firm to have policies, procedures and controls that are sufficient to assure that an individual who transacts or advises on derivatives for a derivatives firm, conducts themselves with integrity. Please provide any comments you may have relating to this requirement, specifically about any issues relating to the implementation of the requirement in its current form. We will consider these comments in assessing the impact of this requirement on derivatives firms.[8]

Please provide your comments in writing by **September 17, 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

[8] Staff in British Columbia are particularly concerned about the scope of this requirement, in its current form.

each of the Alberta Securities Commission at www.albertasecurities.com, the *Autorité des marchés financiers* at www.lautorite.qc.ca and the Ontario Securities Commission at www.osc.gov.on.ca. Therefore, you should not include personal information directly in comments to be published. It is important that you state on whose behalf you are making the submission.

Thank you in advance for your comments.

Please address your comments to each of the following:

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

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

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

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

Questions

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Appendix A

Comparison of protections that do not apply to, or may be waived by, "eligible derivatives parties" under Draft *Regulation 93-101 respecting Derivatives: Business Conduct* and "permitted clients" under *Regulation 31-103 respecting Registration Requirements, Exemptions and Ongoing Registrant Obligations*

Certain requirements in the Proposed Regulation are similar to existing market conduct requirements applicable to registered dealers and advisers under *Regulation 31-103 respecting Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**Regulation 31-103**) but have been modified to reflect the different nature of derivatives markets.

The extent to which obligations do not apply, or apply unless waived, when dealing with or advising an eligible derivatives party is set out in the following chart:

Obligation	**Approach under Regulation 31-103**	**Approach under Regulation 93-101**
Fair dealing[9]	Applies in respect of all clients	Applies in respect of all derivatives parties (s. 8)
Identifying and responding to conflicts of interest	Applies in respect of all clients (s. 13.4) However, client relationship disclosure obligations in relation to conflicts of interest do not apply in respect of a permitted client that is not an individual (s. 14.2(6))	Applies in respect of all derivatives parties (s. 9) However, relationship disclosure obligations in Part 4 in relation to conflicts of interest do not apply in respect of • an EDP that is not an individual • an EDP that is an individual that has waived this disclosure • an EDP that is a specified commercial hedger that has waived this disclosure

[9] See section 2.1 of OSC Rule 31-505 *Conditions of Registration*; section 14 of the Securities Rules, B.C. Reg. 194/97 under the *Securities Act* (British Columbia), R.S.B.C. 1996, c. 418; section 75.2 of the *Securities Act* (Alberta) R.S.A. 2000, c.S-4; section 33.1 of *The Securities Act, 1988* (Saskatchewan), S.S. 1988-89, c. S-42.2; subsection 154.2(3) of *The Securities Act* (Manitoba) C.C.S.M. c. S50; section 65 of the *Derivatives Act* (Québec), R.S.Q., c. 14.01; subsection 54(1) of the *Securities Act* (New Brunswick) S.N.B. 2004, c. S-5.5; section 90 of the *Securities Act* (Prince Edward Island), R.S.P.E.I. 1988, c. S-3.1; section 39A of the *Securities Act* (Nova Scotia), R.S.N.S. 1989, c. 418; subsection 26.2(1) of the *Securities Act* (Newfoundland and Labrador), R.S.N.L.1990, c. S-13; section 90 of the *Securities Act* (Nunavut), S.Nu. 2008, c. 12; section 90 of the *Securities Act* (Northwest Territories), S.N.W.T. 2008, c. 10; and section 90 of the *Securities Act* (Yukon), S.Y. 2007, c. 16.

Gatekeeper KYC (AML, etc.)	Applies in respect of all clients (s. 13.2) However, this does not apply if the client is a registered firm, Canadian financial institution or Schedule III bank (s. 13.2(5))	Applies in respect of all derivatives parties (s. 10) However, this does not apply if the derivatives party is a registered firm or a Canadian financial institution (including a Schedule III bank). Additionally, this does not apply to an anonymous transaction executed on a derivatives trading facility that is cleared.
Client-specific KYC (investment needs and objectives, etc.) Suitability	Applies in respect of all clients (ss. 13.2(2)(c) and 13.3) May be waived in writing by a permitted client (including an individual permitted client) if registrant does not act as an adviser in respect of a managed account for the client (ss. 13.2(6) and 13.3(4))	Applies in respect of all derivatives parties other than • an EDP that is not an individual • an EDP that is an individual that has waived in writing this obligation • an EDP that is a specified commercial hedger that has waived this obligation (ss. 7, 11 and 12)
Miscellaneous other obligations	Do not apply to a permitted client • Disclosure when recommending the use of borrowed money – s. 13.13(2) • When the firm has a relationship with a financial institution – s. 14.4(3)	Apply in respect of all derivatives parties other than • an EDP that is not an individual • an EDP that is an individual that has waived in writing this obligation • an EDP that is a specified commercial hedger that has waived this obligation (ss. 7 and 19)
Miscellaneous other obligations	Do not apply to a permitted client that is not an individual • Dispute resolution service – s. 13.16(8) • Relationship disclosure information – s. 14.2(6) • Pre-trade disclosure of charges – s. 14.2.1(2), • Restriction on self-custody and qualified custodian requirement – s. 14.5.2 • Additional statements – s. 14.14.1 • Security position cost information – s. 14.14.2 • Report on charges and other compensation – s. 14.17 • Investment performance report – s. 14.18	Apply in respect of all derivatives parties other than • an EDP that is not an individual • an EDP that is an individual that has waived in writing this obligation • an EDP that is a specified commercial hedger that has waived this obligation (See ss. 7 and Part 4)

Appendix B

Application of business conduct requirements

Regulatory Requirement	Derivatives firms dealing with EDPs	Derivatives firms dealing with non-EDPs
General obligations toward all (Part 3 Div 1) • Fair dealing • Conflict of interest management • General/gatekeeper know-your-derivatives party	●	●
Additional obligations and restrictions (Part 3 Div 2–3) • Derivatives-party-specific know-your-derivatives party • Product suitability • Permitted referral arrangements • Complaint handling • Prohibition on tied selling		●
Client and counterparty accounts (Part 4) • Relationship disclosure • Pre-trade disclosures re. leverage/borrowing, risk, product, price, and compensation • Report daily valuations • Notice by non-resident registrants • Holding of assets[10] • Use and investment of assets • Transaction confirmations[11] • Quarterly statements		●
Compliance and recordkeeping (Part 5) • Compliance and risk management systems • Senior manager report • Client/counterparty agreement • Recordkeeping	●	●

[10] A basic segregation requirement applies in all circumstances, but most of the asset requirements only apply in the non-EDP context.

[11] A basic transaction confirmation requirement applies in all circumstances, but the more detailed requirement applies only in the non-EDP context.

ANNEX I
COMMENT SUMMARY AND CSA RESPONSES

Section Reference	Summary of Issues/Comments	Response
Part 1 – Definitions and Interpretation		
s. 1— Definition of "derivatives adviser"	Two commenters noted the compliance requirements of *Regulation 31-103 respecting Registration Requirements and Exemptions* ("**Regulation 31-103**") and suggested the Regulation would be duplicative.	Many of the requirements in the Proposed Regulation are similar to existing business conduct requirements applicable to registered dealers and advisers under Regulation 31-103 but have been tailored to reflect the different nature of derivatives markets. In the case of firms that are registered under Regulation 31-103, we would expect these firms to have policies and procedures in place aimed at complying with these obligations. To the extent compliance requirements under the Regulation are similar to compliance requirements under Regulation 31-103, a registered firm will be able to satisfy the requirements through its existing policies and procedures. However, to the extent compliance requirements are dissimilar, these firms will need to adopt additional policies and procedures that reflect the different nature of derivatives markets.
	One commenter suggested that the list of factors for determining whether a party is in the business of advising in respect of derivatives should not be the same as that for trading.	Change made. The Policy Statement has been revised to include additional guidance on the business trigger for advising. See revised Policy Statement guidance on factors in determining a business purpose – derivatives advisers.
s. 1— Definition of "derivatives dealer"	One commenter requested clarification on which agency roles fall within the scope of the definition.	Change made. The revised Policy Statement provides additional guidance on when a person will be considered to be a derivatives dealer. See revised Policy Statement guidance

		on factors in determining a business purpose – derivatives dealer.
	One commenter suggested the definition of derivatives dealer be harmonized across Canada into a national instrument.	No change. The definition of derivatives dealer and the criteria used to assess if a firm is a derivatives dealer found in the Policy Statement to this Regulation will be applied consistently across Canada and in Proposed *Regulation 93-102 respecting Derivatives: Registration* ("**Proposed Regulation 93-102**"). To the extent necessary, any further consequential amendments to other rules, such as rules relating to trade reporting, will be made at a later date.
s. 1— Business trigger to "derivatives adviser" and "derivatives dealer", General	Two commenters requested clarification of the definition of "derivatives adviser" and "derivatives dealer" to enable derivatives parties to receive definitive legal advice on whether their activities bring them into scope.	Change made. The revised Policy Statement provides additional guidance on when a person will be considered to be a derivatives dealer or a derivatives adviser.
	Two commenters suggested replacing the word "trading" with "dealing" in the definition and Policy Statement guidance on "derivatives dealer".	No change. The registration requirement in Canadian securities legislation is generally based on the concept of a "business trigger" for registration, namely whether a person is in the business of "trading" securities or derivatives or advising others in relation to securities or derivatives.
	Two commenters requested clarification of the jurisdictional scope of the Regulation and Policy Statement.	Changes made. The Policy Statement has been revised to include guidance on the jurisdictional scope of the Regulation under factors in determining a business purpose – general.
	One commenter requested a specific exemption or guidance that investment-related services provided by pension plan sponsors to their sponsored plans, such as hiring third party investment managers, is not	No change. The revised Policy Statement provides additional guidance on when a person will be considered to be a derivatives dealer or a derivatives adviser. The registration requirement in

	captured. The commenter submitted that the inclusion of "directly or indirectly carrying on the activity with repetition, regularity or continuity" and "transacting with the intention of being compensated" may capture pension plans or their sponsors.	Canadian securities legislation is generally based on the concept of a "business trigger" for registration, namely whether a person is in the business of trading securities or derivatives or advising others in relation to securities or derivatives. Accordingly, the Regulation does not fundamentally alter the nature of the existing registration requirement for market participants, but merely extends the requirement to OTC derivatives. If a firm, after considering the guidance in the Policy Statement, remains uncertain as to whether or not it has tripped the business trigger for registration, the firm should consider the exemptions in Part 6 of the Regulation, including the exemption in s. 37 for certain derivatives end-users.
	One commenter requested guidance that a person acting as a manager of investment managers providing derivatives advisory services will not be considered a "derivatives adviser" solely on the basis of engaging in hiring, and providing investment guidelines to, third-party investment managers.	No change. The revised Policy Statement provides additional guidance on when a person will be considered to be a derivatives dealer or a derivatives adviser. The Regulation and Draft Regulation 93-102 do not contemplate a separate category of registration for fund managers of funds that invest in derivatives. However, the existing registration category of investment fund manager in Regulation 31-103 would likely cover these activities.
s. 1— Business trigger to "derivatives adviser" and "derivatives dealer", Routinely quotes prices	Several commenters suggested that routinely providing quotes should not be treated as indicia of dealing or advising. The commenters suggested that "derivatives dealer" be limited to market making activity, which absent other factors, should not be determined solely by quoting prices, routinely or not. The commenters requested clarification of the end-user	Partial change. Further revisions have been made to the indicia described in the Policy Statement to determine whether a derivatives dealer or derivatives advisor is in the business of trading derivatives. The Policy Statement explains that the end-user exemption may be available to a party that trades derivatives with regularity but does not engage in specified

	exemption.	dealer-like activities.
s. 1— Business trigger to "derivatives adviser" and "derivatives dealer", Derivatives clearing services	One commenter requested clarification of clearing services that would result in a clearing broker being considered a "derivatives dealer".	No change. Providing clearing services is one of the indicia of being in the business of trading derivatives.
s. 1— Business trigger to "derivatives adviser" and "derivatives dealer", *De minimis*	Several commenters submitted that a notional value-based *de minimis* exception to "derivatives dealer" requirements be provided to alleviate risk concentration and decreased liquidity.	No change. The Regulation creates a uniform approach to regulating conduct in derivatives markets and promotes consistent protections for market participants. However, a *de minimis* exemption from certain requirements imposed on derivatives dealers is contemplated in Draft Regulation 93-102. This is intended to strike a balance between addressing liquidity/market access concerns without significantly impacting protections for market participants.
s. 1— Business trigger to "derivatives adviser" and "derivatives dealer", Incidental advisory activities	Several commenters suggested express exclusions of professionals whose advisory services are solely incidental to their business or profession.	Change made. Clarifying language has been added to the Policy Statement. Appropriately licensed professionals would generally not be considered to be advising on derivatives if their activities are incidental to their *bona fide* professional activities.
	Commenters suggested express exclusion of otherwise-regulated persons including banks, trust companies and insurance companies. Pension plan sponsors and affiliates providing investment-related services to a Canadian regulated pension fund or subsidiary were requested to be expressly excluded.	No change. This Regulation will include exemptions for entities that are subject to and comply with other regulatory requirements that, on an outcomes basis, are equivalent to requirements in this Regulation. Requirements of Canadian and foreign regulators that are deemed equivalent will be published for comment prior to the finalization of this Regulation.
s. 1— Definition of "eligible	Several commenters supported the concept of an eligible derivatives party ("**EDP**") to classify sophisticated	We thank the commenters for their comments. We have specifically requested

derivatives party", General	market participants. One commenter recommended reconsideration of EDP status for advisers that only advise on an incidental basis (and accordingly do not require registration as derivatives advisers). One commenter suggested that managed account clients be subject to the same carve-outs applicable to EDPs.	comment in the CSA Notice of consultation in relation to Draft Regulation 93-102 as to whether and in what circumstances registered advisers (portfolio managers) under Regulation 31-103 should be considered derivatives advisers. We will consider these responses in determining whether registered advisers (portfolio managers) should remain included within the EDP definition. We have deleted proposed subsection 7(3) of the version of the Regulation published for comment in April 2017. Accordingly, a derivatives firm acting as an adviser in respect of a managed account of an EDP will be subject to the reduced set of obligations contemplated by s. 7 of the Regulation unless otherwise agreed by the firm and the EDP.
s. 1— Definition of "eligible derivatives party", Consistency with other regulatory definitions	Several commenters suggested that the definition of EDP be expanded to include all "permitted clients" under Regulation 31-103, including mutual fund dealers, exempt market dealers and charities. The commenters noted the compliance burdens on the derivatives industry if the "permitted client" status cannot be leveraged to determine EDP status under the Regulation.	We have amended the definition of EDP to include certain new categories; however, the definition of EDP has not been extended to expressly include mutual fund dealers, exempt market dealers and registered charities. In terms of the compliance burden, we point out that the financial asset test for companies found in the definition of "permitted client" may be higher than the threshold contemplated in this Regulation. For example, the net asset test that applies to a company that qualifies as a specified commercial hedger in this Regulation is $10,000,000. Furthermore, we are permitting a derivatives firm to leverage a pre-existing "permitted client", "accredited counterparty" or "qualified party" representation from its client as set out in s. 45 of the Regulation for pre-existing transactions. If the conditions

		in that section are satisfied, then those transactions are only subject to s. 8 [*Fair dealing*], s. 20 [*Daily reporting*] and s. 30 [*Derivatives party statements*]. The definition of EDP is built on the knowledge and experience test found in the *Derivatives Act* (*Quebec*). Unless a person qualifies as an EDP under any of the prescribed categories, we are not persuaded that they otherwise have sufficient sophistication, derivatives-related expertise, or financial resources so as to not require the additional protections afforded to non-EDP customers.
	Several commenters suggested harmonization of the definition of EDP with existing definitions, noting liquidity and equivalence concerns. These definitions included "eligible contract participant" used by the U.S. Commodity Futures Trading Commission ("**CFTC**"),[1] "qualified party" in Blanket Order 91-507 *Over-the-Counter Trades in Derivatives* ("**BO 91-507**")[2], "accredited investor" in *Regulation 45-106 respecting Prospectus Exemptions* ("**Regulation 45-106**"), and "permitted client" under Regulation 31-103.	Change made. We have amended the definition of EDP to include certain new categories, including: • (n) non-individual commercial hedger that has net assets of $10,000,000, • (p) non-individual entity whose obligations under derivatives are fully guaranteed by another EDP, other than an individual or commercial hedger, and • (q) non-individual entity that is a commercial hedger and whose obligations under derivatives are fully guaranteed by another EDP, other than an individual. We believe that, with these changes, the definition of EDP is sufficiently harmonized with the definitions cited by the commenter, recognizing that there are differences in the overall regulatory approach that warrant certain distinctions.

[1] *See* s. 1a(18)(a)(v) of the U.S. Commodity Exchange Act.
[2] In Quebec, "accredited counterparty" under the Québec *Derivatives Act*.

s. 1— Definition of "eligible derivatives party", para (m)	Several commenters requested a lower asset threshold necessary to qualify as an EDP and specifically requested harmonization with the $10 million threshold applicable to an "eligible contract participant" under the U.S. Commodity Exchange Act[3] ("**CEA**") and an "accredited counterparty" under the Quebec Derivatives Act.[4] One commenter suggested a threshold of $25 million of total assets instead of net assets. Another commenter suggested that individuals with net assets reaching an aggregate realizable value of $25 million should be treated as EDPs that are not individuals.	Change made. See new paragraph (n) of the EDP definition.
s. 1— Definition of "Eligible Derivatives Party", para (n)	Two commenters suggested that individuals with minimum net assets of $5 million should be treated as EDPs. One of these commenters suggested harmonization with the definition of "accredited counterparty" under the *Quebec Derivatives Act*.[5]	No change. Based on our analysis, the threshold aggregate realizable value before tax but net of any related liabilities of at least $5 million of *financial assets* is appropriate for the determination of eligible derivatives party status for an individual. This is consistent with the current financial threshold for individuals in the definition of "permitted client" in Regulation 31-103.
s. 1— Definition of "eligible derivatives party", Knowledge and experience requirements	Several commenters suggested a "bright line" financial resources test eliminating the knowledge and experience requirements, consistent with the approach in Regulation 31-103 and Regulation 45-106. Alternatively, the knowledge and experience requirements should apply generally with no transaction-specific	No change. Appropriate knowledge and experience is necessary for a derivatives party to transact in derivatives without the additional protections provided to non-EDPs. This is also consistent with requirements that currently apply in Quebec under the Quebec *Derivatives*

[3] The U.S. Commodity Exchange Act sets out a $10 million total assets test in the definition of "eligible contract participant" (calculated as $10 million in total assets, or, if hedging, a minimum net worth exceeding $1 million).
[4] "Accredited counterparty" under the Quebec Derivatives Act is calculated as "cash, securities, insurance contracts or deposits having an aggregate realizable value, before taxes, but after deduction of the corresponding liabilities, of more than $10,000,000" (Derivatives Regulation, c. I-14.01, r.1, s. 1).
[5] Calculated as "cash, securities, insurance contracts or deposits having an aggregate realizable value, before taxes, but after deduction of the corresponding liabilities, of more than" $5,000,000 (Derivatives Regulation, c. I-14.01, r.1, s. 1).

of paras (m)-(n)	determination. One commenter submitted that investable assets do not necessary imply financial sophistication, such that tests based on financial assets may not be indicative of better access to information and less need for protection.	*Act*.
	Several commenters suggested that the Regulation allow representations as to the knowledge and experience requirements to be given in ISDA Master Agreements or protocols amending them.	Change made. Representations are required to be made in writing and can be included as an element of a broader written agreement.
	One commenter noted that to the extent previously given representations are no longer true or reliable about a party's knowledge and experience with particular types of derivatives, the knowledge and experience requirements may potentially trigger default events, followed by transaction terminations, under derivatives trading agreements. As the OTC derivatives market is characterized by inter-related transactions, such default and subsequent termination may spread to other derivatives transactions among different parties.	No change. The Policy Statement provides guidance on when a derivatives firm may rely on a representation. See Policy Statement guidance on subsection 1(7).
	One commenter submitted that it is practically remote to receive written representations from each counterparty and requested that derivatives firm be allowed to otherwise confirm, acting reasonably, that the counterparty satisfies the requirements.	No change. Representations form part of the written agreements that document derivatives transactions.
s. 1— Definition of "eligible derivatives party", Waiver and representation	Several commenters suggested that market participants who would not otherwise qualify for EDP status be allowed to affirmatively represent their qualification to evaluate risks associated with derivatives transactions and waive the	No change. However, new paragraphs have been added under the definition of eligible derivatives party. A person, other than an individual, may qualify for EDP status under these new paragraphs.

s *See also s. 7 below.*	applicability of certain provisions.	
	One commenter submitted that allowing an investor to waive protections may result in abuse.	No change. Derivatives firms have an obligation to act in good faith. Applying undue pressure on a derivatives party to waive protections would be a breach of that obligation.
	Several commenters requested clarification that there is no affirmative duty to perform an investigation of a party's representation or warranty, unless a reasonable person would have grounds to believe that such statements are false or otherwise unreasonable to rely on.	Change made. We have further clarified that a derivatives firm may rely on written representations unless it would be unreasonable to do so. See Policy Statement guidance on subsection 1(7).
s. 1—Definition of "eligible derivatives party", Commercial hedger	Several commenters requested that the definition of EDP include an exemption for hedgers. The commenters suggested a definition similar to the existing exemptions in BO 91-507 for "qualified parties" or "eligible contract participants" in the U.S., and broad enough to include all end-users who currently transact in OTC derivatives transactions for hedging purposes. One commenter submitted that regardless of size, many commercial operations need to hedge their foreign currency or interest rate risks and no market other than the OTC derivatives market can provide an equivalent tailored risk management solution.	Change made. Please see new paragraphs (n) and (q) under the definition of EDP. A person, other than an individual, will qualify for EDP status subject to certain requirements when it meets the definition of commercial hedger.
s. 1—Definition of "eligible derivatives party", Guarantees	Several commenters suggested that the definition of EDP also include an entity whose obligations are guaranteed by an entity that otherwise qualifies as an EDP. One of these commenters suggested that the definition of EDP also include an entity that wholly, directly or indirectly, owns, is owned by, or is under common ownership with, one or more EDPs.	Change made. Please see new paragraph (p) under the definition of EDP. A person, other than an individual, whose obligations under a derivative are fully guaranteed or fully supported (under a letter of credit or credit support agreement) by one or more eligible derivatives parties will qualify for EDP status subject to certain conditions.

Part 2 – Application		
s. 3— Application - scope of Regulation	One commenter submitted that the imposition of the same requirements on derivatives advisers as those on derivatives dealers creates a duplicative and unnecessary compliance burden.	Change made. The Policy Statement has been revised to include additional guidance on the business trigger for advising. The requirements in the Regulation are generally similar to existing business conduct requirements applicable to registered advisers under Regulation 31-103 but have been tailored to reflect the different nature of derivatives markets. Accordingly, we do not believe that the proposed regulatory regime for derivatives advisers unnecessarily duplicates the regime for derivatives dealers.
	One commenter suggested that members of the Investment Industry Regulatory Organization of Canada ("**IIROC**") not be required to comply with the Regulation.	No change. This Regulation will include exemptions for entities that are subject to and comply with other regulatory requirements that, on an outcomes basis, are equivalent to requirements in this Regulation. Requirements of Canadian and foreign regulators that are deemed equivalent will be published for comment prior to the finalization of this Regulation.
	One commenter suggested exempting derivatives firms that adhere to the FX Global Code of Conduct, whether or not their counterparty is an EDP. Alternatively, that such exemption applies in respect of physically-settled FX swaps and FX forwards.	No change. The FX Global Code of Conduct does not impose legal or regulatory obligations on market participants. Many of the requirements in the Regulation are principles-based and may be satisfied in different ways. We encourage derivatives firms that trade or advise others in relation to FX-related derivatives to consider the contents of the FX Global Code of Conduct in developing their policies and procedures aimed at complying with the requirements of the Regulation.
s. 4— Application - affiliated	One commenter supported the inclusion of s. 4, which exempts a person providing derivatives advisory	We thank the commenter for their comment. A person that deals with or advises an

entities	services to an affiliated entity from the Regulation. The commenter requested an exemption for the person providing investment advisory services for no compensation to an associated or related person that does not otherwise fall within the definition of an affiliated entity. Alternatively, that guidance clarify that such person does not trip any business trigger as a "derivatives adviser".	entity that meets the definition of "affiliated entity" may qualify for the exemption. However, the exemption is not available if the affiliated entity is an investment fund. We have specifically requested comment in the CSA Notice of second consultation in relation to this Regulation and in the Notice and Request for Comment in relation to Draft Regulation 93-102 as to how we should define the concept of affiliated entity for the purposes of these rules.
s. 5— Application - qualifying clearing agencies	One commenter requested clarification on whether derivatives firms are exempt from the Regulation when facing regulated clearing agencies. The commenter also requested that EDP status be granted for clearing agencies that enter into proprietary trades that are not cleared transactions.	Change made. Qualifying clearing agencies have been added to the definition of EDP. See new paragraph (r) under the definition of EDP. A clearing agency will be an EDP for all trades, including proprietary trades.
s. 6— Application - governments, central banks and international organizations	Two commenters requested clarification on whether derivatives firms are exempt from the Regulation when facing entities listed under s. 6.	Clarifying language has been added to the Policy Statement to make it clear that derivatives firms are not exempt from their obligations when facing government entities, central banks and international organizations. However, these entities will generally be EDPs.
	One commenter suggested expanding the list of excluded entities to include (1) crown corporations, government agencies and any other entity wholly owned or controlled by, or all of whose liabilities are guaranteed by, one or more governments, central banks and international organizations, and (2) state, regional and local governments in foreign jurisdictions.	No change. To ensure a level playing field, all derivatives dealers and derivatives advisors are subject to a minimum set of standards in their dealings with derivatives parties.
s. 7— Exemptions from the requirements of this Regulation	Several commenters supported the two-tiered approach of the Regulation with the effect that a substantial portion of the Regulation will not apply to transactions with an EDP and submitted that no additional	No change. The Regulation sets out a two-tiered regime with the effect that a derivatives firm is not required to comply with certain requirements in the Regulation when dealing with eligible derivatives parties. The

when dealing with or advising an eligible derivatives party, General	requirements are necessary when a derivatives firm deals with an EDP. Two commenters suggested a three-tier approach with the effect of an outright exemption for the inter-dealer market.	obligations of a derivatives firm differ depending on the nature of the derivatives party. Please see s. 7 of the Regulation and related guidance in the Policy Statement. The inter-dealer market will typically involve transactions between two EDPs and since those parties can bargain for appropriate protections, they are subject to a limited set of provisions in this Regulation. It is inappropriate and inconsistent with the rule to provide an outright exemption for the inter-dealer market and also inconsistent with the approach taken internationally.
s. 7—Exemptions from the requirements of this Regulation when dealing with or advising an eligible derivatives party, subsection (2)	Three commenters submitted that the Regulation requires individual EDPs to waive in writing the second tier of requirements. The commenters suggested that individual EDPs be exempt from the second-tier requirements similar to other categories of EDPs. In the alternative, the commenters requested that no new waiver be required from the individual every 365 days and instead the onus for revocation be placed on the individual.	Change made. An individual eligible derivatives party may waive, in writing, any or all of the requirements of the Regulation, other than as set out in s. 7(1). Waiver may be included in account-opening documentation or other relationship disclosure, and there is no obligation to update the waiver once a derivatives party has begun trading. A derivatives party may withdraw their waiver at any time.
s. 7—Exemptions from the requirements of this Regulation when dealing with or advising an eligible derivatives party, subsection (3)	Several commenters suggested that s. 7(3) be deleted on the basis that disclosures and protections are not affected by whether the trading decision is client-directed or at the discretion of the adviser. Managed account clients benefit from both the fiduciary obligation owed to them by their adviser and the contractual terms of the investment management agreement. In the alternative, the commenters requested that managed account clients be permitted to waive sections of the Regulation that but for s. 7(3) would not apply.	Change made. The requirements of the Regulation are not dependent on whether a derivatives firm is acting as an adviser to an EDP or an adviser in respect of a managed account of an eligible derivatives party. We have deleted proposed subsection 7(3) of the version of the Regulation published for comment in April 2017. Accordingly, a derivatives firm acting as an adviser in respect of a managed account of an EDP will be subject to the reduced set of obligations contemplated by s. 7 of the Regulation unless otherwise agreed by the firm and the EDP.

Part 3 – Dealing with or Advising Derivatives Parties		
Division 1 – General Obligations Towards All Derivatives Parties		
s. 8—Fair dealing	Several commenters supported the fair dealing requirements, noting the importance of regulatory tools necessary to enforce against deceptive and manipulative trading practices or fraudulent activity. One commenter requested clarification on s. 8 as compared with s. 19.	We thank the commenters for their comments. Change made. Former stand-alone provision in s. 19 on fair terms and pricing has been removed and clarifying language in the Policy Statement has been added that fair terms and pricing may, in certain circumstances, be viewed to fall within the overall fair dealing principle in s. 8.
	Two commenters suggested higher requirements for derivatives advisers, while other commenters noted that fiduciary standards apply, Regulation 31-103 regulates derivatives advisers, and that transactions are often of a bespoke nature.	We have deleted proposed subsection 7(3) of the version of the Regulation published for comment in April 2017. Accordingly, a derivatives firm acting as an adviser/investment counsel to an EDP will be subject to the same set of obligations under the Regulation as a derivatives firm acting as an adviser/portfolio manager for an EDP. However, where a derivatives firm is acting as an adviser to a fully managed account for a derivatives party, including an EDP, the derivatives firm may be subject to a fiduciary duty under certain statutes and under common law.
	One commenter requested an exemption for derivatives firms dealing with other derivatives firms or financial institutions.	No change. However, clarifying language has been added to the Policy Statement. Fair dealing obligations will be interpreted flexibly and in a manner sensitive to context.
	One commenter submitted that the need for regulation has not been identified, as no appreciable or material examples of banks or other derivatives firms have been identified in Canada as violating existing fair dealing rules.	No change. Canadian jurisdictions are committed to implementing harmonized business conduct rules that will protect derivatives parties in the Canadian market.
	One commenter submitted that fair dealing should not change depending	No change. Fair dealing obligations will be interpreted flexibly and in a

	on the sophistication of counterparties and s. 8 should be deleted. The commenter submitted that the derivatives dealer relationship is not a fiduciary one, nor does good faith generally apply to the negotiation of transactions at common law. In the alternative, s. 8 should be harmonized with other regulatory regimes, which do not impose requirements on individuals acting on behalf of a derivatives firm.	manner sensitive to context.
s. 9— Conflicts of interest	Two commenters requested clarification of the Regulation and Policy Statement, particularly with respect to the divergent nature of two parties' interests. For conflicts of interest not prohibited by law, the only regulatory requirement should be to identify and disclose material conflicts. One of the commenters suggested limiting the requirement to conflicts of interest relating to research and clearing activities.	No change. Requirements relating to conflicts of interest are a central pillar of business conduct regulation.
	One commenter suggested eliminating specific conflict of interest requirements with respect to derivatives advisers, as they face fiduciary obligations.	The requirements in the Regulation are generally similar to existing business conduct requirements applicable to registered advisers under Regulation 31-103 but have been tailored to reflect the different nature of derivatives markets. These requirements include requirements in relation to identifying and responding to conflicts of interest. We acknowledge that, where a derivatives firm is acting as an adviser to a fully managed account for a derivatives party, including an EDP, the derivatives firm may be subject to a fiduciary duty under certain statutes and under common law. However, this may not be the case where the derivatives adviser is merely providing advice in relation to derivatives or

		strategies but does not exercise discretion over the EDP's account.
	One commenter submitted that the Regulation overlaps with conflicts of interest requirements under existing Canadian laws[6] and that overlapping requirements should be removed from the Regulation.	No change. This Regulation will include exemptions for entities that are subject to and comply with other regulatory requirements that, on an outcomes basis, are equivalent to requirements in this Regulation. Requirements of Canadian and foreign regulators that are deemed equivalent will be published for comment prior to the finalization of this Regulation.
	Two commenters submitted that disclosure must be specific and provided before a transaction takes place, recognizing that in certain situations disclosure may be more appropriate after the transaction. Another commenter requested that the use of standardized disclosures be permitted, provided that additional or particularized disclosures are made available as appropriate.	Change made. Please see revised Policy Statement guidance related to s. 9. We expect derivatives firms to provide general and specific disclosures.
s. 10—Know your derivatives party, General	Several commenters suggested harmonization of s. 10 with similar regulatory requirements in other jurisdictions.[7] Several commenters submitted that an exemption is needed for derivatives dealers that do not know the identity of their counterparties prior to execution of the transaction.	Change made. New s. 41 exempts a derivatives firm in certain circumstances where it does not know the identity of its derivatives party prior to the execution of the transaction. The exemption in s. 41 is applicable to transactions executed on a derivatives trading facility (or analogous platform) where at the time of the transaction, the derivatives party to the derivative that is submitted for clearing is an eligible derivatives party. We have specifically requested further comment in the CSA Notice of second consultation in relation to this Regulation about the availability of a similar exemption in respect of derivatives traded anonymously on a derivatives trading facility that are not

[6] The *Bank Act* requires Canadian banks to establish procedures to identify and address conflicts of interest. OSFI Guideline B-7 requires federally regulated financial institutions that are dealing in derivatives to take reasonable steps to identify and address potential material conflicts of interest.

[7] *See* CFTC's relief in No Action Letter 13-70 in respect of swaps that are intended to be cleared.

		cleared, derivatives that are not traded on a derivatives trading facility but are submitted for clearing to a regulated clearing agency, and otherwise if it is appropriate to extend the scope of the exemption to other sections of this Regulation. We understand that a trading platform would perform know-your-derivatives-party diligence prior to accepting a derivatives party for trading on the platform. We consider this to be a reasonable steps obligation and we would accept that if it is not possible to know the identity of the counterparty, that information is not required.
s. 10—Know your derivatives party, subsection (2)	Several commenters requested that s. 10(2)(c) be removed, submitting that it is disproportionately impracticable to require derivatives advisers, in connection with securities-based derivatives, to establish if the party they are advising (i) is an insider of a reporting issuer or any other issuer whose securities are publicly traded, or (ii) would be reasonably expected to have access to material non-public information relating to any interest underlying the derivative.	No change. These obligations already exist for registered firms under securities legislation. In the case of derivatives firms that are not currently registered under securities legislation but nevertheless provide products or services in relation to equity derivatives, we would expect these firms today to have policies and procedures in place aimed at preventing illegal insider trading and tipping. This information is necessary to ensure that securities law is being complied with.
s. 10—Know your derivatives party, subsection (4)	Two commenters requested that information be deemed current, unless a client informs a derivatives firm otherwise.	No change. The requirements in relation to "gatekeeper" KYDP in s. 10 of the Regulation and "derivatives-party-specific" KYDP in s. 11 of the Regulation are generally consistent with existing "know-your-client" obligations under Canadian securities legislation and comparable requirements in foreign jurisdictions. This information is necessary to ensure that securities law is being complied with.
s. 10—Know	Two commenters requested an	No change. Know-your-derivatives

your derivatives party, subsection (5)	expansion of s. 10(5) to cover EDPs, registration-exempt entities, and foreign financial institutions.	party requirements do not apply to a registered securities firm, registered derivatives firm, or a Canadian financial institution.
Division 2 – Additional Obligations when Dealing with or Advising Certain Derivatives Parties		
s. 12— Suitability	Two commenters requested clarification on what constitutes a recommendation by a derivatives dealer. The commenters suggested that suitability be limited to recommendations, and not instructions.	No change. Reasonable steps must be taken to ensure that a proposed transaction is suitable for a derivatives party before making a recommendation or accepting instructions from the derivatives party to transact in a derivative.
	One commenter requested that s. 12 clarify that a determination of suitability need not be made on a trade-by-trade basis if a discrete trade fits into a larger trading strategy or series of trades, for which suitability can be assessed.	No change. Reasonable steps must be taken to ensure that a proposed transaction is suitable for a derivatives party before making a recommendation or accepting instructions from the derivatives party to transact in a derivative. If a discrete transaction fits into a larger trading strategy or series of transactions, and the derivatives firm has determined that the larger trading strategy or series of transactions is suitable for the derivatives party, it is unclear why there should be a concern over the discrete transaction.
	One commenter submitted that specific suitability obligations are not necessary in the case of a derivatives adviser, as they have broader fiduciary obligations.	We acknowledge that, where a derivatives firm is acting as an adviser to a fully managed account for a derivatives party, including an EDP, the derivatives firm may be subject to a fiduciary duty under certain statutes and under common law. However, this may not be the case where the derivatives adviser is merely providing advice in relation to derivatives or strategies but does not exercise discretion over the EDP's account.
	Two commenters requested safe harbours from the suitability requirements, including for derivatives dealers and intended to be cleared	No change. Suitability requirements are crucial to the protection of non-EDPs. Suitability requirements do not apply

	derivatives.	when trading with or advising non-individual EDPs and apply, but may be waived, when trading with or advising individual EDPs. As explained in the CSA Notice of consultation for the Regulation published in April 2017, this is generally similar to the regime that applies to registered securities firms under Regulation 31-103.
s. 13—Permitted referral arrangements	Three commenters submitted that s. 13 imposes broad obligations. One commenter requested clarification that establishing a relationship with a dealer on behalf of an advisory client does not constitute a referral arrangement. Other commenters requested that s. 13 be removed to better align with the absence of comparable obligations in CFTC rules. Alternatively, that s. 13 apply only to referral arrangements that specifically involve derivatives and that exemptions be provided for inter-group referrals.	No change. The requirements in relation to permitted referral arrangements do not apply if the firm is trading with or advising non-individual EDPs and apply but may be waived if the firm is trading with or advising individual EDPs. In the case of firms trading with or advising non-EDPs, these requirements are generally consistent with requirements in Regulation 31-103 applicable to IIROC CfD/forex firms.
Former s. 16—Disclosure regarding the use of borrowed money or leverage	One commenter requested that to avoid duplication, the disclosure statement apply only to derivatives dealers. The commenter requested clarification that posting of the disclosure statement on a website in a readily accessible location will be sufficient.	Change made. Disclosure regarding the use of borrowed money or leverage has been incorporated into new s. 19. Disclosure must be delivered to a derivatives party.
Former s. 17—Handling complaints	One commenter suggested harmonization with CFTC rules by eliminating complaint handling obligations.	No change. The requirements in relation to complaint handling do not apply if the firm is trading with or advising non-individual EDPs and apply, but may be waived, if the firm is trading with or advising individual or specified commercial hedger EDPs. In the case of firms trading with or advising non-EDPs, these requirements are generally consistent with requirements in Regulation 31-103 applicable to IIROC CfD/forex

		firms. Please see the Regulation and related guidance in the Policy Statement.
Division 3 – Restrictions on Certain Business Practices when Dealing with Certain Derivatives Parties		
Former s. 18—Tied selling	One commenter suggested that tied selling obligations are duplicative of existing Canadian legislation and should be eliminated to better align with other regulatory regimes.	No change. This Regulation will include exemptions for entities that are subject to and comply with other regulatory requirements that, on an outcomes basis, are equivalent to requirements in this Regulation. Requirements of Canadian and foreign regulators that are deemed equivalent will be published for comment prior to the finalization of this Regulation.
Former s. 19—Fair terms and pricing	Two commenters supported the requirement. One commenter submitted that the terms are better suited to Policy Statement guidance on s. 8. Another submitted that the inclusion of an express best execution requirement would be beneficial to avoiding conflicts. Two other commenters suggested that the requirement should be deleted. The commenters suggested that given the negotiated, bilateral and bespoke nature of transactions, there is no fair price beyond what the parties agree, and that legal obligations and remedies already exist.	Change made. Former s. 19 on fair terms and pricing has been merged with s. 8. Clarifying language has been added to the Policy Statement in relation to guidance on s. 8. Both the compensation and market value or price components of a derivative are relevant to a derivatives firm's obligation to transact with derivatives parties under terms and pricing that are fair. Derivatives firms are expected to set and follow policies and procedures that are reasonably designed to achieve the most advantageous terms for the derivatives firm's derivatives parties.
Part 4 – Derivatives Party Accounts		
Division 1 – Disclosure to Derivatives Parties		
Division 1, General	Several commenters suggested harmonization of the requirements with CFTC rules. Derivatives firms should not be required to provide valuations or related inputs and assumptions and that instead "mid-market marks"[8] should be used.	Change made. Please see revised Policy Statement guidance on the definition of valuation.

[8] CFTC rules do not include amounts for profit, credit reserve, hedging, funding, liquidity or other costs or adjustments in the mid-market mark.

	Several other commenters supported the requirement to provide valuations that are accompanied by inputs and assumptions in order to make the estimates/prices more meaningful. Commenters suggested that daily marks should only be required for uncleared transactions. One commenter suggested limiting "inputs and assumptions" to "methodology and assumptions".	
Former s. 20—Relationship disclosure information	One commenter submitted that certain relationship documentation listed in former s. 20(2) is not applicable for a derivatives relationship.	No change made. The requirements in relation to client relationship disclosure do not apply if the firm is trading with or advising non-individual EDPs and apply, but may be waived, if the firm is trading with or advising individual or specified commercial hedger EDPs. In the case of firms trading with or advising non-EDPs, these requirements are generally consistent with requirements in Regulation 31-103 applicable to IIROC CfD/forex firms. The required disclosure is important for non-EDPs to understand the risks associated with derivatives.
Former s. 21—Pre-transaction disclosure	One commenter requested that the use of standardized disclosures be permitted provided additional or particularized disclosures are made available as appropriate.	No change. Where standardized disclosure meets all requirements, it is acceptable.
	Two commenters requested clarification that pre-transaction disclosures do not apply where the transaction is an intended to be cleared derivative or executed on an exchange.	No change. Pre-transaction disclosures are required for all transactions with non-EDPs.
	One commenter requested clarification on when disclosure would not be required as result of the application of subsection (2)(b) and what additional information is intended by subsection (2)(c).	Change made. The phrase "if applicable" has been removed from new s. 19(2)(b). Compensation not reflected in the price would be required to be disclosed pursuant to s. 19(2)(c).
Former s.	Only derivatives dealers should have a	Change made. See new s. 20(2).

22—Daily reporting	daily reporting obligation, and it is sufficient for derivatives advisers to provide reporting on a monthly basis, unless otherwise agreed.	
Former s. 23—Notice to derivatives parties by non-resident derivative firms	One commenter submitted that the notice requirement for non-resident derivatives firms is duplicative of former s. 20 and standard information that is provided in relationship documentation.	No change. However, clarifying language has been added to the Policy Statement. A separate statement is not required when information required is already provided to counterparties under standard form industry documentation.
Division 2 – Derivatives Party Assets		
Division 2, General	Several commenters requested a revision of Division 2 of Part 4 to recognize that re-hypothecation is a private commercial matter, unless otherwise subject to existing regulatory restrictions, such as segregation, margin, and specific types of counterparty requirements. Two commenters submitted that only former s. 24 should apply to EDPs. Two commenters requested clarification of the application of the requirements to derivatives advisers fulfilling discretionary mandates, for which they are generally given authority by their clients with respect to the use and investment of assets.	Change made. A derivatives firm is exempted from the requirements of the division if it is subject to and complies with or is otherwise exempt from *Regulation 94-102 respecting Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* ("Regulation **94-102**"), securities legislation relating to margin and collateral requirements or *Regulation 81-102 respecting Investment Funds*. We note that ss. 25 and 26 only apply to transactions with non-EDPs. We have specifically requested further comment in the CSA Notice of second consultation in relation to this Regulation about the appropriate model for protecting customer assets of derivatives parties.
Former s. 24—Interaction with Regulation 94-102	Several commenters submitted that the Regulation was more onerous than securities regulations such as Regulation 94-102. One commenter requested clarification regarding the application of provisions relating to the segregation, use, holding and investment of derivatives party assets as applied to a portfolio manager acting on behalf of a managed account client, where the adviser has been granted authority	Change made. In circumstances where initial margin has been delivered by a non-EDP to a derivatives firm, the requirement is that this collateral will be (i) segregated and held at a permitted depository and (ii) the derivatives firm has obtained written consent from its counterparty to the use or investment of the collateral. Division 2 does not apply to a derivatives firm for transactions that are subject to Regulation 94-102,

	with respect to portfolio assets that include but are not limited to derivatives. Another commenter requested clarification of the exemption from Division 2 for parties relying on the substituted compliance provisions in Regulation 94-102.	including firms relying on exemptions in that regulation.
Division 3 – Reporting to Derivatives Parties		
Former s. 29—Content and delivery of transaction information	Two commenters supported the requirement that transactions be confirmed in writing but submitted the prescriptive contents of those confirmations are not appropriate. The commenters requested harmonization with CFTC requirements. The commenters requested clarification of the application of the requirement to uncleared derivatives and that electronic confirmations satisfy the "in writing" requirement.	No change. However, clarifying language has been added to the Policy Statement. New s. 41 exempts a derivatives firm from the requirement in subsection 27(1) to deliver a written confirmation of the transaction in certain circumstances. The exemption in s. 41 is applicable to transactions executed on a derivatives trading facility (or analogous platform) where at the time of the transaction, the derivatives party to the derivative that is submitted for clearing is an eligible derivatives party. We have specifically requested further comment in the CSA Notice of second consultation in relation to this Regulation about the availability of a similar exemption in respect of derivatives traded anonymously on a derivatives trading facility that are not cleared, derivatives that are not traded on a derivatives trading facility but are submitted for clearing to a regulated clearing agency, and otherwise if it is appropriate to extend the scope of the exemption to other sections of this Regulation. The requirements in relation to client relationship disclosure do not apply if the firm is trading with or advising non-individual EDPs and apply, but may be waived, if the firm is trading

		with or advising individual or specified commercial hedger EDPs.
Former s. 30—Derivatives party statements	One commenter noted that there are no requirements to prepare monthly statements under either the CFTC rules or MiFID II.[9] As it would require derivatives dealers to implement new reporting technology, the commenter requested that the requirement to deliver monthly statements be removed.	No change. Monthly statements contain important information for non-EDPs to monitor their derivatives transactions. The requirements in relation to client relationship disclosure do not apply if the firm is trading with or advising non-individual EDPs and apply but may be waived if the firm is trading with or advising individual or specified commercial hedger EDPs.
Part 5 – Compliance and Recordkeeping		
Division 1 – Compliance		
Former s. 33—Responsibilities of senior derivatives managers	Several commenters requested that former s. 33 be eliminated or the responsibilities reassigned to a chief compliance officer to reflect current industry best practices. A derivatives manager's oversight of activities within the derivatives manager's functional business unit is a conflict of interest. Any reporting to the regulators should be the obligation of the chief compliance officer. One commenter, noting the Office of the Superintendent of Financial Institutions ("**OSFI**") Guidelines,[10] submitted that the proposed requirements are at odds with the existing compliance structure. Two commenters submitted that the context where a specific duty has been introduced for senior managers in other jurisdictions is distinguishable from that in Canada. There has not been any crisis of confidence in Canada. Where specific duty has been	Change made. Revisions have been made to the Regulation and Policy Statement to better reflect existing compliance structures at derivatives firms.

[9] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU ("**MiFID II**").
[10] *For example*, OSFI Guideline E-13 *Regulatory Compliance Management* and OSFI Guideline E-21 *Operational Risk Management.*

	imposed, it has been part of a comprehensive framework across business lines and the responsibility is shared across multiple functions. Several commenters noted that personal liability for a senior derivatives manager is unwarranted and inconsistent with best practices.	
	One commenter requested clarification of Policy Statement guidance on "serious misconduct" and "material non-compliance".	No change. The Policy Statement provides guidance on these terms. See Policy Statement guidance under new s. 31 – responsibilities of senior derivatives managers
	One commenter requested an optional carve-out for firms registered under Regulation 31-103 from the senior derivatives manager requirements to allow the senior derivatives manager to be the chief compliance officer. A separate senior derivatives manager regime should not be mandated for firms registered as portfolio managers under Regulation 31-103.	No change. This Regulation will include exemptions for entities that are subject to and comply with other regulatory requirements that, on an outcomes basis, are equivalent to requirements in this Regulation. Requirements of Canadian and foreign regulators that are deemed equivalent will be published for comment prior to the finalization of this Regulation.
	One commenter submitted that there should be flexibility to former s. 33(2) to submit reports to senior management in lieu of reporting to the board. Another commenter submitted that all instances of material non-compliance should be reported no less frequently than on an annual basis and following the review of the annual report by the board.	Change made. The Regulation has been revised in new s. 31 to permit a senior derivative manager to delegate its responsibility for submitting the report to the board to the firm's chief compliance officer.
Former s. 34— Responsibility of derivatives firm to respond to material non-compliance	One commenter submitted that former s. 34(b) places a broad and onerous self-reporting burden on derivatives firms without precedent in Canadian securities legislation and should be removed from the Regulation. One commenter requested clarification of the Policy Statement guidance related to former s. 34 to expressly provide an opportunity for derivatives	No change. Self-reporting is a key element of the Regulation. The Regulation does not prohibit issues of material non-compliance with the Regulation from being raised with a board as long as the report is submitted to the regulator in a timely manner.

	firms to raise issues with their board before being required to report to regulators.	
Division 2 – Recordkeeping		
Division 2—General	One commenter submitted that recordkeeping obligations already exist under OSC Rule 91-507 *Trade Repositories and Derivatives Data Reporting* and OSFI Guidelines for federally regulated financial institutions. One commenter submitted that federally regulated financial institutions should be exempt from compliance and in the alternative, should be granted substituted compliance.	No change. This Regulation will include exemptions for entities that are subject to and comply with other regulatory requirements that, on an outcomes basis, are equivalent to requirements in this Regulation. Requirements of Canadian and foreign regulators that are deemed equivalent will be published for comment prior to the finalization of this Regulation.
Former s. 35—Derivatives party agreement	Two commenters requested an exemption for transactions that are executed on an exchange and for transactions that are cleared.	No change. However, clarifying language has been added to the Policy Statement.
	Two commenters submitted that firms regularly enter into foreign exchange transactions prior to completing an ISDA Master Agreement and should be exempt from such requirement.	No change. A written agreement should be entered into prior to completing a transaction.
Former s. 36—Records	Several commenters note that the recordkeeping requirements are too broad and the added costs on derivatives firms will be passed on to other market participants. Commenters suggested that the recordkeeping obligations be limited to keeping records of communications related to the negotiation, execution and amendment or termination of derivatives. All records of communications should not be kept where a record of those communications otherwise exists.	No change. Please see the Regulation and related guidance in the Policy Statement.
Former s. 37—Form, accessibility and retention of records	Two commenters submitted that the length of the record retention requirement exceeds that of the CFTC.	No change. This retention period is consistent with other Canadian requirements.

Part 6 – Exemptions		
Division 1 – Exemption from this Regulation		
Former s. 39—Exemption for certain derivatives end-users, General	Two commenters requested clarification of the scope of the end-user exemption and suggested reference to particular categories of persons. Several commenters submitted that the availability of the end-user exemption should not be restricted to parties that interact solely with EDPs.	Change made. The end-user exemption in new s. 37 of the Regulation has been amended to clarify the scope of the exemption. The end-user exemption includes the following conditions: • (a) the person does not solicit or otherwise transact a derivative with, for or on behalf of, a non-eligible derivatives party; • (b) the person does not, in respect of any derivative or transaction, advise non-eligible derivatives parties, other than general advice that is provided in accordance with the conditions of s. 42 [*Advising generally*]; • (c) the person does not regularly make or offer to make a market in a derivative with a derivatives party; • (d) the person does not regularly facilitate or otherwise intermediate transactions for another person other than an affiliated entity that is not an investment fund; • (e) the person does not facilitate clearing of a derivative through the facilities of a qualifying clearing agency for another person. Although the end-user exemption includes a condition that the person does not solicit or transact with a non-EDP, we have also amended the definition of EDP to include a specified commercial hedger category. We believe this should partially address the commenter's concerns.
Former s. 39—Exemption for	Several commenters submitted that entities that are market-makers and that do not otherwise act as derivatives	No change. However, clarifying changes have been made to the Policy Statement. A person that frequently

certain derivatives end-users, para (c)	dealers or advisers, but regularly quote prices due to a need to regularly hedge positions, should not be excluded from the end-user exemption. One commenter requested clarification on whether former s. 39(c) is intended to capture commodity firms trading amongst themselves in the over the counter market.	and regularly transacts in derivatives to hedge business risk but that does not undertake any of the activities listed in new s. 37 may qualify for this exemption.
Division 2 – Exemptions from Specific Requirements in this Regulation		
Former s. 40—Foreign derivatives dealers, General	One commenter submitted that substituted compliance from substantially the entire Regulation be granted either to both foreign derivatives dealers and Canadian financial institutions or to neither of them in order to maintain a level playing field.	No change. This Regulation will include exemptions for entities that are subject to and comply with other regulatory requirements that, on an outcomes basis, are equivalent to requirements in this Regulation. Requirements of Canadian and foreign regulators that are deemed equivalent will be published for comment prior to the finalization of this Regulation.
	One commenter requested that corresponding domestic and foreign laws that can be complied with in lieu of the Regulation and the residual provisions of the Regulation be published for consultation before the Regulation is finalized.	Requirements of Canadian and foreign regulators that are deemed equivalent will be published for comment prior to the finalization of this Regulation.
Former s. 40—Foreign derivatives dealers, subsection (1)	One commenter submitted that the foreign dealer exemption should not be conditional on dealings with EDPs when the business conduct rules of a foreign jurisdiction are deemed equivalent.	No change. The foreign dealer exemption is not available to derivatives firms that transact with non-EDPs. This approach is similar to the approach taken towards foreign dealers in Regulation 31-103.
Former s. 40—Foreign derivatives dealers, subsection (3)	Two commenters submitted that the requirement to deliver a statement pursuant to former s. 40(3)(c) in order to qualify for the exemption does not provide any additional protection and the disclosures are generally addressed in the Master Agreement. This type of statement is not required by the CFTC as a condition of substituted compliance. This requirement should be removed, and disclosure in a	No change. However, clarifying language has been added to the Policy Statement. Disclosures contemplated in s. 38(3)(b) can be made by a derivatives firm in a master trading agreement with its counterparty.

	Master Agreement should be sufficient. In the alternative, the statement should only be required delivered to non-EDPs.	
	Several commenters requested clarification on the policy rationale behind former s. 40(3)(e) on which the exemption for foreign dealers based on substituted compliance is not available if the dealer is in the business of trading in derivatives on an exchange or a derivatives trading facility designated or recognized in a Canadian jurisdiction, particularly if only dealing with EDPs.	Change made. The subsection was removed. A person in the business of trading in derivatives on an exchange or a derivatives trading facility is no longer prohibited from qualifying for the exemption under new s. 38(1).
Division 3 – Exemptions for Derivatives Advisers		
Division 3, General	One commenter submitted that a corresponding exemption to former s. 41 should be added for portfolio managers, as they have limited derivatives activity.	We have specifically requested comment in the CSA Notice of consultation in relation to Proposed Regulation 93-102 as to whether and in what circumstances registered advisers (portfolio managers) under Regulation 31-103 should be considered derivatives advisers. We will consider these responses in determining whether registered advisers (portfolio managers) that provide incidental advice in relation to derivatives should be considered in the business of advising in relation to derivatives or whether an express exemption is required.

Former s. 44—Foreign derivatives advisers, General	Several commenters generally supported exempting foreign derivatives advisers but noted that the exemption is too narrow, as many jurisdictions do not subject derivatives advisers to registration. Derivatives advisers should be exempt from the Regulation when exempt or not required to be registered in their principal jurisdiction, which would better align with the international adviser exemption in Regulation 31-103.	No change. We have intentionally limited the exemption in s. 43 [*Foreign derivatives advisers*] of the Regulation to foreign derivatives advisers that are "registered, licensed or otherwise authorized under the securities, commodity futures or derivatives legislation of a foreign jurisdiction specified in Appendix D".
	One commenter requested that corresponding domestic and foreign laws that can be complied with in lieu of the Regulation and the residual provisions of the Regulation be published for consultation before the Regulation is finalized.	Requirements of Canadian and foreign regulators that are deemed equivalent will be published for comment prior to the finalization of this Regulation.
Former s. 44—Foreign derivatives advisers, subsection (1)	One commenter submitted that the foreign adviser exemption should not be conditional on dealings with EDPs when the business conduct rules of a foreign jurisdiction are deemed equivalent.	No change. The foreign adviser exemption is not available to derivatives firms that transact with non-EDPs.
Former s. 44—Foreign derivatives advisers, subsection (3)	One commenter submitted that the requirement to deliver a statement pursuant to former s. 44(3)(c) in order to qualify for the exemption does not provide any additional protection and is inconsistent with former s. 23, which requires a similar statement only be delivered to non-EDPs.	No change. However, clarifying language has been added to the Policy Statement. Disclosures contemplated in s. 43(3)(b) can be made by a derivatives firm in a master trading agreement with its counterparty.
	Several commenters requested clarification on the policy rationale behind former s. 44(3)(e) on which the exemption for foreign advisers based on substituted compliance is not available if the adviser is in the business of trading in derivatives on an exchange or a derivatives trading facility designated or recognized in a Canadian jurisdiction, particularly if only dealing with EDPs.	Change made. A person in the business of trading in derivatives on an exchange or a derivatives trading facility is no longer prohibited from qualifying for the exemption under s. 43(1).

Part 7 – Granting an Exemption		
Former s. 45—Exemption	One commenter submitted that credit unions make available products largely on demand to provide a full suite of services and do not operate platforms, are not market makers, and are not directly offering quotes. Credit unions are the intended beneficiaries of the Regulation and qualify for the end-user exemption. Credit unions should not be defined as derivatives dealers or advisers and should fall outside the scope of the Regulation.	No change. The exemption available for derivatives end-users that satisfy certain requirements is set out in s. 37. Discretionary exemptions are available on an ad-hoc basis.
	One commenter submitted that IIROC-regulated dealers are already regulated and should be exempt from the Regulation.	No change. This Regulation will include exemptions for entities that are subject to and comply with other regulatory requirements that, on an outcomes basis, are equivalent to requirements in this Regulation. Requirements of Canadian and foreign regulators that are deemed equivalent will be published for comment prior to the finalization of this Regulation.
Part 8 – Effective Date		
Former s. 46—Effective date	Two commenters suggested delaying the implementation date to harmonize the Regulation with CFTC and Securities and Exchange Commission rules.	No change. Canadian jurisdictions are committed to implementing harmonized business conduct rules.
	Several commenters suggested extending the implementation period to become compliant to 6 months for previously regulated firms and 12 months for those not previously regulated.	No change. Please see the Regulation and related guidance in the Policy Statement.
	One commenter submitted that all pre-effective date transactions regardless of their remaining term should be grandfathered and that grandfathering should apply even if pre-effective date transactions are subsequently amended after the date the Regulation is finalized.	We are permitting a derivatives firm to leverage a pre-existing "permitted client", "accredited counterparty" or "qualified party" representation from its client as set out in s. 45 of the Regulation for pre-existing transactions. If the conditions in that section are satisfied, then those transactions are only subject to s. 8 [*Fair dealing*], s. 20 [*Daily reporting*]

		and s. 28 [*Derivatives party statements*].

List of Commenters

1. Associated Foreign Exchange, ULC
2. Bruce Power L.P.
3. Canadian Bankers Association
4. Canadian Credit Union Association
5. Capital Power Corporation
6. Enbridge Inc.
7. Franklin Templeton Investments Corp.
8. International Energy Credit Association
9. International Swaps and Derivatives Association, Inc.
10. Investment Industry Association of Canada
11. Investor Advisory Panel
12. Just Energy Corp.
13. NorthPoint Energy Solutions, Inc.
14. Osler, Hoskin & Harcourt LLP
15. Pension Investment Association of Canada
16. Portfolio Management Association of Canada
17. SIFMA Asset Management Group
18. The Canadian Advocacy Council for Canadian CFA Institute Societies
19. The Canadian Commercial Energy Working Group
20. The Canadian Market Infrastructure Committee
21. Western Union Business Solutions

ANNEX II

Alternative version of the definition of "affiliated entity"

In this Regulation, a person (the first party) is an affiliated entity of another person (the second party) if any of the following apply:

(a) the first party and the second party are consolidated in consolidated financial statements prepared in accordance with

(i) IFRS, or

(ii) generally accepted accounting principles in the United States of America;

(b) all of the following apply:

(i) neither the first party's nor the second party's financial statements, nor the financial statements of another person or company, were prepared in accordance with the principles or standards specified in subparagraphs (a)(i) or (ii);

(ii) the first party and the second party would have been, at the relevant time, required to be consolidated in consolidated financial statements prepared by the first party, the second party or the other person or company, if the consolidated financial statements were prepared in accordance with the principles or standards specified in subparagraphs (a)(i) or (ii);

(c) both parties are prudentially regulated entities that are supervised on a consolidated basis.