POLICY STATEMENT TO REGULATION 93-101 RESPECTING DERIVATIVES: BUSINESS CONDUCT

PART 1
GENERAL COMMENTS

Introduction

This policy statement (the "Policy Statement") sets out the views of the Canadian Securities Administrators (the "CSA" or "we") on various matters relating to *Regulation 93-101 respecting Derivatives: Business Conduct* (the "Regulation") and related securities legislation.

Numbering system

Except for Part 1, the numbering and headings of Parts, sections and subsections in this Policy Statement correspond to the numbering and headings in the Regulation. Any general guidance for a Part or section appears immediately after the Part or section name. Any specific guidance on a section or subsection follows any general guidance. If there is no guidance for a Part or section, the numbering in this Policy Statement will skip to the next provision that does have guidance.

Unless otherwise stated, any reference to a Part, section, subsection, paragraph, subparagraph or definition in this Policy Statement is a reference to the corresponding Part, section, subsection, paragraph, subparagraph or definition in the Regulation.

Definitions and interpretation

Unless defined in the Regulation or this Policy Statement, terms used in the Regulation and in this Policy Statement have the meaning given to them in securities legislation, including in *Regulation 14-101 respecting Definitions* (chapter V-1.1, r. 3) ("Regulation 14-101"). "Securities legislation" is defined in Regulation 14-101 and includes statutes and other instruments related to both securities and derivatives.

In this Policy Statement,

"Product Determination Rule" means,

- in Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan and Yukon, Multilateral Instrument 91-101 *Derivatives: Product Determination*,
- Manitoba, Manitoba Securities Commission Rule 91-506 *Derivatives: Product Determination*,
- in Ontario, Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination*, and
- in Québec, *Regulation 91-506 respecting Derivatives Determination* (chapter I-14.01, r. 0.1);

"regulator" means the regulator or securities regulatory authority in a jurisdiction.

Interpretation of terms defined in the Regulation

Section 1 – Definition of Canadian financial institution

The definition of "Canadian financial institution" in the Regulation is consistent with the definition of this term in Regulation 14-101.[1] The definition of this term in Regulation 14-101 does not include a Schedule III bank. Schedule III banks are distinct legal entities that are organized in

[1] Final publication expected to reference the definition of "Canadian financial institution" in Regulation 14-101. See CSA Notice of Consultation, Draft *Regulation to amend Regulation 14-101 respecting Definitions*, Draft Consequential Amendments.

foreign jurisdictions and maintain a branch in Canada. To the extent a Schedule III bank enters into a derivatives transaction with a derivatives party in the local jurisdiction, we would consider that entity to be a foreign derivatives dealer for the purposes of the Regulation.

With respect to the Canadian financial institutions that are Schedule I or Schedule II banks, the definition of Canadian financial institution encompasses both domestic and foreign branches (if the bank in fact operates a foreign branch) – a branch does not have a legal identity apart from its principal entity. However, the definition of Canadian financial institutions does not include an affiliate of a bank that is established, incorporated or organized as a separate legal entity in a foreign jurisdiction.

Section 1 – Definition of commercial hedger

The concept of "commercial hedger" is meant to apply to a business entering into a transaction for the purpose of managing risks inherent in its business. For example, this could include, a commodity producer managing risks associated with fluctuations in the price of the commodity it produces or a company entering into an interest rate swap to hedge its interest rate risks associated with a loan obligation. It could also include derivatives that are intended to eliminate or reduce currency risk associated with international commercial transactions (for example, when a company's functional currency or currency of index prices referenced in its transactions and the currency of settlement are not the same currency). It is not, however, intended to include a circumstance where the commercial enterprise enters into a transaction for speculative purposes; there has to be a significant link between the transaction and the business risks that are being hedged.

The definition of "commercial hedger" is used in paragraph (n) of the definition of "eligible derivatives party". If a person, other than an individual, is a commercial hedger for the purposes of a derivatives transaction and the person has the requisite knowledge and experience as described in clause (i) of that paragraph, the person is an "eligible derivatives party" for the purposes of that transaction. We refer to this type of eligible derivatives party as a "eligible commercial hedger". Pursuant to subsection 7(2) of the Regulation, the eligible commercial hedger may "waive" certain protections under the Regulation. In addition, as an eligible derivatives party, the eligible commercial hedger comes within the class of derivatives parties a foreign derivatives dealer or adviser may deal with under an available exemption.

The Regulation does not provide a definition of hedge; generally, we would expect that the hedge relating to a derivative would qualify for hedge accounting under applicable accounting standards.

Section 1 – Definition of derivatives adviser and derivatives dealer

A person that meets the definition of "derivatives adviser" or "derivatives dealer" in a local jurisdiction is subject to the Regulation in that jurisdiction, whether or not it is registered or exempted from the requirement to be registered in that jurisdiction.

A person will be subject to the requirements of the Regulation if it is either of the following:

- in the business of trading derivatives or in the business of advising others in respect of derivatives;

- otherwise required to register as a derivatives dealer or a derivatives adviser under securities legislation.

Factors in determining a business purpose – derivatives dealer

In determining whether a person is in the business of trading or in the business of advising in derivatives, a number of factors should be considered. Several factors that we consider relevant are described below. This is not a complete list and other factors may also be considered.

- *Acting as a market maker* – Market making is generally understood as the practice of routinely standing ready to transact derivatives by

    - responding to requests for quotes on derivatives, or

    - making quotes available to other persons that seek to transact derivatives, whether to hedge a risk or to speculate on changes in the market value of the derivative.

Market makers are typically compensated for providing liquidity through spreads, fees or other compensation, including fees or compensation paid by an exchange or a trading facility that do not relate to the change in the market value of the derivative transacted. A person that contacts another person about a transaction to accommodate its own risk management needs or to speculate on the market value of a derivative will not, typically, be considered to be acting as a market maker.

A person will be considered to be "routinely standing ready" to transact derivatives if it is responding to requests for quotes or it is making quotes available with some frequency, even if it is not on a continuous basis. Persons that respond to requests or make quotes available occasionally are not "routinely standing ready".

A person would also typically be considered to be a market maker when it holds itself out as undertaking the activities of a market maker.

Engaging in bilateral discussions relating to the terms of a transaction will not, on its own, constitute market making activity.

- *Directly or indirectly carrying on the activity with repetition, regularity or continuity* – Frequent or regular transactions are a common indicator that a person may be engaged in trading or advising for a business purpose. The activity does not have to be its sole or even primary endeavour for it to be in the business. We consider regularly trading or advising in any way that produces, or is intended to produce, profits to be for a business purpose.

- *Facilitating or intermediating transactions* – The person provides services relating to the facilitation of trading or intermediation of transactions between third-party counterparties to derivatives contracts.

- *Transacting with the intention of being compensated* – The person receives, or expects to receive, any form of compensation for carrying on transaction activity. This would include any compensation that is transaction or value-based including compensation from spreads or built-in fees. It does not matter if the person actually receives compensation or what form the compensation takes. However, a person would not be considered to be a derivatives dealer solely by reason that it realizes a profit from changes in the market price for the derivative (or its underlying reference asset), regardless of whether the derivative is intended for the purpose of hedging or speculating.

- *Directly or indirectly soliciting in relation to transactions* – The person directly solicits transactions. Solicitation includes contacting someone by any means, including communication that offers (i) transactions, (ii) participation in transactions or (iii) services relating to transactions. This would include providing quotes to derivatives parties or potential derivatives parties that are not provided in response to a request. This also includes advertising on the internet with the intention of encouraging transacting in derivatives by local persons. A person might not be considered to be soliciting solely because it contacts a potential counterparty, or a potential counterparty contacts them to enquire about a transaction, unless it is the person's intention or expectation to be compensated as a result of the contact. For example, a person that wishes to hedge a specific risk is not necessarily soliciting for the purpose of the Regulation if it contacts multiple potential counterparties to enquire about potential transactions to hedge the risk.

- *Engaging in activities similar to a derivatives adviser or derivatives dealer* – The person carries out any activities related to transactions involving derivatives that would reasonably appear, to a third party, to be similar to the activities discussed above. This would not include the operator of an exchange or a clearing agency.

- *Providing derivatives clearing services* – The person provides services to allow third parties, including counterparties to transactions involving the person, to clear derivatives through a clearing agency. These services are actions in furtherance of a trade conducted by a person that would typically play the role of an intermediary in the derivatives market.

In determining whether or not it is, for the purposes of the Regulation, a derivatives dealer, a person should consider its activities holistically. We do not consider that all of the factors discussed above necessarily carry the same weight or that any one factor will be determinative.

Factors in determining a business purpose – derivatives adviser

Under securities legislation, a person engaging in or holding itself out as engaging in the business of advising others in relation to derivatives is generally required to register as a derivatives adviser unless an exemption is available.

As with the definition of "derivatives dealer", the definition of "derivatives adviser" (and the definition of "adviser" in securities legislation generally) requires an assessment of whether the person is "in the business" of conducting an activity. In the case of derivatives advisers, it is necessary to determine whether a person is "advising others" in relation to derivatives.

As with derivatives dealers, a person that is determining whether or not it is a derivatives adviser should consider its activities holistically. We do not consider that all of the factors discussed above necessarily carry the same weight or that any one factor will be determinative.

The definition of "derivatives adviser" also contains an additional element that the derivatives adviser should be in the business of "advising others" in relation to derivatives. Examples of persons that may be considered to be in the business of advising others in relation to derivatives include the following:

- a registered adviser under securities or commodity futures legislation that provides advice to an investment fund or another person in relation to derivatives or derivatives trading strategies;

- a registered adviser under securities or commodity futures legislation that manages an account for a client and makes trading decisions for the client in relation to derivatives or derivatives trading strategies;

- an investment dealer that provides advice to clients in relation to derivatives or derivatives trading strategies;

- a person that recommends a derivative or derivatives trading strategy to investors as part of a general solicitation by an online derivatives trading platform.

A person that discusses the merits of a particular derivative or derivatives trading strategy in a newsletter or on a website may be considered to be advising others in relation to derivatives but would be exempt if it meets the conditions in section 42.

Similarly, a derivatives dealer that recommends a particular derivative or derivatives trading strategy to a customer in connection with a proposed transaction may be considered to be advising the customer in relation to derivatives. However, so long as the derivatives dealer is appropriately registered and has the necessary proficiency to provide the advice (or is otherwise exempt from registration), the derivatives dealer does not need to also register as a derivatives adviser.

If the derivatives firm's trading or advising activity is incidental to the firm's primary business, we may not consider it to be for a business purpose. For example, appropriately licensed professionals, such as lawyers, accountants, engineers, geologists and teachers, may provide advice in relation to derivatives in the normal course of their professional activities. We would generally not consider them to be advising on derivatives for a business purpose if such activities are incidental to their *bona fide* professional activities.

Factors in determining a business purpose – general

Generally, we would consider a person that engages in the activities discussed above in an organized and repetitive manner to be a derivatives dealer or, depending on the context, a derivatives adviser. Ad hoc or isolated instances of the activities discussed above may not necessarily result in a person being a derivatives dealer or, depending on the context, a derivatives adviser. Similarly, organized and repetitive proprietary trading, in and of itself, absent other factors described above, may not result in a person being considered to be a derivatives dealer for the purposes of the Regulation.

A person does not need to have a physical location, staff or other presence in the local jurisdiction to be a derivatives dealer or derivatives adviser in that jurisdiction. A derivatives dealer or a derivatives adviser in a local jurisdiction is a person that conducts the described activities in that

jurisdiction. For example, this would include a person that is located in a local jurisdiction and that conducts dealing or advising activities in that local jurisdiction or in a foreign jurisdiction. This would also include a person located in a foreign jurisdiction that conducts dealing or advising activities with a derivatives party located in the local jurisdiction.

Where dealing or advising activities are provided to derivatives parties in a local jurisdiction or where dealing or advising activities are otherwise conducted within a local jurisdiction, regardless of the location of the derivatives party, we would generally consider a person to be a derivatives dealer or derivatives adviser (unless an exemption is otherwise available). However, where the person that is a derivatives dealer or adviser is not located in the local jurisdiction (e.g., is a foreign derivatives dealer or a foreign derivatives adviser), the obligations in the Regulation only apply to its dealing or advising activities with a derivatives party that is located in the local jurisdiction.

Note that a person that may be in the business of transacting derivatives may nevertheless be exempt from requirements of the Regulation; see the following Part 6:

- *Foreign derivatives dealers that trade with derivatives dealers* (s. 36)
- *Certain derivatives end-users* (s. 37)
- *Foreign derivatives dealers* (s. 38)
- *Investment dealers* (s. 39)
- *Canadian financial institutions* (s. 40)
- *Derivatives traded on a derivatives trading facility where the identity of the derivatives party unknown* (s. 41)
- *Advising generally* (s. 42)
- *Foreign derivatives advisers* (s. 43)
- *Foreign derivatives sub-advisers* (s. 44)
- *Registered advisers under securities or commodity futures legislation* (s. 45)

Section 1 – Definition of derivatives party assets

"Derivatives party assets" includes all assets of a derivatives party that are received or held by a derivatives firm for or on behalf of the derivatives party for any purpose relating to derivatives transactions.

Section 1 – Definition of derivatives party

The term "derivatives party" is similar to the concept of a "client" in *Regulation 31-103 respecting Registration Requirements, Exemptions and Ongoing Registration Obligations* (chapter V-1.1, r. 10) ("Regulation 31-103"). We have used the term "derivatives party" instead of "client" to reflect the circumstance where the derivatives firm may not regard its counterparty as its "client."

Section 1 – Definition of eligible derivatives party

The term "eligible derivatives party" is intended to refer to those derivatives parties that have the requisite knowledge and experience to evaluate the information about derivatives that has been provided to the derivatives party by the derivatives firm. These persons generally may not require the full set of protections that are provided to other derivatives parties that are not eligible derivatives parties. As a result, only the following requirements in the Regulation apply to transactions with an eligible derivatives party (subject to the limitation discussed below for transactions with an eligible derivatives party that is an individual or eligible commercial hedger):

- Division 1 of Part 3 (fair dealing, conflicts of interest, know your derivatives party, handling complaints, tied selling);

- Sections 23 and 24 relating to derivatives party assets;

- Subsection 27(1) requirement to deliver a transaction confirmation; and

- Part 5 relating to compliance and recordkeeping requirements.

When a derivatives firm is dealing with or advising a derivatives party that is either an individual or a commercial hedger, all applicable additional protections in the Regulation are presumed to apply unless that derivatives party has provided the derivatives firm with the necessary representations and waived, in writing, some or all of the additional protections in the Regulation. Section 7 of this Policy Statement provides additional guidance relating to this waiver.

A derivatives firm should take reasonable steps to determine if a derivatives party is an eligible derivatives party. In determining whether the person that it transacts with, solicits or advises is an eligible derivatives party, the derivatives firm may rely on factual representations made in writing by the derivatives party, unless a reasonable person would have grounds to believe that such statements are false, or it is otherwise unreasonable to rely on the representations. For example, such grounds may include

- a situation where a derivatives dealer has information in its possession (e.g. financial statements) that raise material questions with respect to a derivatives party's status as an eligible derivatives party; or

- a situation where a company represents that it is an eligible derivatives party on the basis of the commercial hedger category, however, the derivatives dealer is aware that the derivative in question is not being used to hedge risks of that company or is aware that the derivative is not linked to the business of the company).

Section 1 – Definition of eligible derivatives party – paragraphs (m) to (p)

Under paragraphs (m) to (p) of the definition of "eligible derivatives party", a person will only be considered to be an eligible derivatives party if it has made certain representations to the derivatives firm in writing.

If the derivatives firm has not received a written statement from a derivatives party, the derivatives firm should not consider the derivatives party to be an eligible derivatives party.

We expect that a derivatives firm would maintain a copy of each derivatives party's written representations that is relevant to its status as an eligible derivatives party and would have policies and procedures reasonably designed to ensure that the information relating to each derivatives party is up to date.

For the purposes of paragraph (m), net assets must have an aggregate realizable value, before taxes, but after deduction of the corresponding liabilities, that are more than $25 000 000 in Canadian dollars or an equivalent amount in another currency. Unlike in paragraph (o), assets considered for the purposes of paragraphs (m) are not limited to "financial assets".

A person is only an eligible derivative party under paragraph (n) if the person has, at the time the transaction occurs, represented that it is a commercial hedger. The derivatives firm may rely on a written representation from the derivatives party that it is a commercial hedger for the derivatives it transacts with the derivatives firm unless a reasonable person would have grounds to believe that the statement is false, or it is otherwise unreasonable to believe that the representation is accurate. This representation may be tailored by the eligible derivatives party and the derivatives firm to provide for specific derivatives or types of derivatives.

In the case of paragraph (o), the individual must beneficially own financial assets, as that term is defined in section 1.1 of *Regulation 45-106 respecting Prospectus Exemptions* (chapter V.1-1, r. 21), that have an aggregate realizable value before tax but net of any related liabilities of at least $5 000 000 in Canadian dollars (or an equivalent amount in another currency). "Financial assets" is defined to include cash, securities or a deposit, or an evidence of a deposit that is not a security for the purposes of securities legislation.

Paragraph (p) of the definition of "eligible derivatives party" provides that a derivatives firm may treat a derivatives party as an eligible derivatives party if the derivatives party represents to the derivatives firm that all of its obligations under a derivative are guaranteed or otherwise fully and unconditionally supported (under a letter of credit or credit support agreement) by one or more eligible derivatives parties, other than an eligible derivatives party qualifying as such under paragraphs (n) (an individual) or (o) (an eligible commercial hedger).

Whether it is reasonable for a derivatives firm to rely on a derivatives party's written representation will depend on the particular facts and circumstances of the derivatives party and its relationship with the derivatives firm. For example, in determining whether it is reasonable to rely on a derivatives party's representation that it has the requisite knowledge and experience, a derivatives firm may consider factors such as

- whether the derivatives party enters into transactions with frequency and regularity,
- whether the derivatives party has staff who have experience and/or training in derivatives and risk management, or
- whether the derivatives party has retained independent advice in relation to its derivatives, and
- publicly available financial information.

A derivatives party's representation, if applicable, can relate to a specific derivative, a class of derivatives or all derivatives.

Section 1 – Definition of permitted depository

In recognition of the international nature of the derivatives market, paragraph (e) of the definition of "permitted depository" permits a foreign bank or trust company with a minimum amount of reported shareholders' equity to act as a permitted depository and hold derivatives party assets, provided its head office or principal place of business is located in a permitted jurisdiction and it is regulated as a bank or trust company in the permitted jurisdiction.

Section 1 – Definition of permitted jurisdiction

Paragraph (a) of the definition of "permitted jurisdiction" captures jurisdictions where foreign banks authorized under the *Bank Act* (S.C. 1991, c. 46) to carry on business in Canada, subject to supervision by the Office of the Superintendent of Financial Institutions ("OSFI"), are located.[2] As of the time of the publication of the Regulation, the following countries and their political subdivisions are permitted jurisdictions: Belgium, France, Germany, Ireland, Japan, Netherlands, Singapore, Switzerland, United Kingdom, and the United States of America.

For paragraph (b) of the definition of "permitted jurisdiction," in the case of the euro, where the currency does not have a single "country of origin", the provision will be read to include all countries in the euro area and countries using the euro under a monetary agreement with the European Union. [3]

Section 1 – Definition of segregate

While the term "segregate" means to separately hold or separately account for derivatives party assets or positions, consistent with the PFMI Report and *Regulation 94-102 respecting Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* (chapter I-14.01, r. 0.001) ("Regulation 94-102"), accounting segregation is acceptable (i.e., customer collateral is segregated by maintaining records that allow the positions and the value of collateral delivered by each customer to be identified).

The PFMI Report is the April 2012 final report entitled *Principles for financial market infrastructures* published by the Bank for International Settlements' Committee on Payments and

[2] For a list of authorized foreign banks regulated under the *Bank Act* and subject to OSFI supervision, see: Office of the Superintended of Financial Institutions, *Who We Regulate* (available: http://www.osfi-bsif.gc.ca/Eng/wt-ow/Pages/wwr-er.aspx?sc=1&gc=1#WWRLink11).

[3] European Union, Economic and Financial Affairs, *What is the euro area?*, February 12, 2020, online: European Union (http://ec.europa.eu/economy_finance/euro/adoption/euro_area/index_en.htm).

Market Infrastructure (formerly the Committee on Payment and Settlement Systems) and the Technical Committee of the International Organization of Securities Commissions, as amended from time to time.

Section 1 – Definition of valuation

The term "valuation" is defined to mean the value of a derivative determined in accordance with accounting principles for fair value measurement that are consistent with accepted methodologies within the derivatives firm's industry. Where market quotes or market-based valuations are unavailable, we expect the value to represent the current mid-market level derived from market-based metrics incorporating a fair value hierarchy. The mid-market level does not have to include adjustments incorporated into the value of a derivative to account for the characteristics of an individual counterparty.

PART 2
APPLICATION

Section 2 – Application to registered and unregistered derivatives firms

The Regulation applies to "derivatives advisers" and "derivatives dealers" as defined in subsection 1(1) of the Regulation. These definitions include a person that, under securities legislation is

- registered as a "derivatives dealer" or "derivatives adviser",
- exempt from the requirement to register as a "derivatives dealer" or "derivatives adviser", and
- excluded from registration as a "derivatives dealer" or "derivatives adviser".

Accordingly, derivatives firms that may be exempt from the requirement to register in a jurisdiction, such as Canadian financial institutions and individuals acting on their behalf in relation to transacting in, or providing advice in relation to, a derivative, will nevertheless be subject to the same standard of conduct towards their derivatives parties that apply to registered derivatives firms and their registered representatives.

Section 3 – Scope of Regulation

Section 3 ensures that the Regulation applies to 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 purposes of the Regulation.

Section 3 – Application – scope of Regulation

General principle

Section 3.1(1) provides that the Regulation applies to short-term foreign exchange contracts or instruments in the wholesale foreign exchange market, which are typically settled within 2 business days or less ("short-term FX") and, which include, for greater certainty, transactions in this market that are commonly referred to as spot FX.

Inclusion of certain short-term FX transactions in the institutional foreign exchange market

The wholesale foreign exchange market is a global over-the-counter market made up of a broad sub-set of market participants, including, derivatives parties referred to in paragraphs (a) to (m) and (q) of the definition of eligible derivatives party. Specifically, this includes banks, central banks, supranational and quasi-government organizations, investment funds, pension funds, insurance companies, investment dealers, payment remittance and money services businesses, proprietary trading firms, benchmark and trading execution providers, as well as large multinational corporates with global treasury operations ("wholesale FX market participants"). These wholesale FX market participants transact short-term FX with other wholesale FX market participants. As wholesale FX

market participants, Canadian financial institutions typically transact short-term FX as market maker, as well as for hedging, speculation and operational purposes.

The obligations in the Regulation relating to fair dealing, conflicts of interest, complaints handling, as well as compliance and recordkeeping obligations (including the obligations related to senior managers) will apply to a derivatives dealer that is also a Canadian financial institution with respect to short-term FX transactions it enters into with its counterparties that are also wholesale FX market participants. These obligations, however, will only apply to a derivatives dealer that is a Canadian financial institution if its notional exposure under all outstanding derivatives – calculated on the basis of outstanding derivatives that are reportable derivatives under the trade reporting rules – exceeds $500 billion (i.e., short-term FX transactions are excluded from this calculation).

Applying these obligations to cover the short-term FX transactions of this population of derivatives dealers in the wholesale foreign exchange market is generally consistent with expectations already laid out in a voluntary code of conduct that certain wholesale FX market participants, including derivatives dealers that are Canadian financial institutions, already adhere to. In addition to currency-linked derivatives that are covered by the Regulation, our intention is that this provision covers the same short-term FX activity that is covered by these voluntary codes of conduct. Therefore, we expect these derivatives dealers will already have in place an existing compliance framework (i.e., policies, procedures, and controls) to address this activity and would generally expect that existing framework will meet section 30 compliance obligations and the other limited sub-set of obligations of the Regulation that apply to short-term FX transactions.

If a derivatives party qualifies under paragraph (m) as an eligible derivatives party (e.g. a corporation) and would not typically be considered a wholesale FX market participant that transacts in the wholesale FX market with a Canadian financial institution, including under a voluntary code of conduct that covers short-term FX activity, we would not interpret such transaction as a short-term FX transaction that was included for the purposes of section 3.1.

The wholesale foreign exchange market does not include retail foreign currency exchange transactions, including retail foreign currency exchange transactions conducted at the branch level.

Section 6 – Governments, central banks and international organizations

Section 6 provides that the Regulation does not apply to certain governments, central banks and international organizations specified in the section. Section 6 does not, however, exclude derivatives firms that deal with or advise these entities from the application of the Regulation.

Section 7 – Exemptions from the requirements of the Regulation when dealing with or advising an eligible derivatives party

We are of the view that, because of their nature, regulatory oversight, financial resources or experience, eligible derivatives parties do not require the full set of protections afforded to other derivatives parties. Other derivatives parties are referred to in this Policy Statement as “non-eligible derivatives parties”.

The obligations of a derivatives firm and the individuals acting on its behalf towards a derivatives party differ depending on whether the derivatives party is an eligible derivatives party and on the nature of the eligible derivatives party.

Dealing with or advising a derivatives party that is a non-eligible derivatives party

If a derivatives firm is dealing with or advising a non-eligible derivatives party, no exemption is available from the requirements in Parts 3, 4 and 5.

Dealing with or advising an eligible derivatives party that is not an individual or an eligible commercial hedger

A derivatives firm is exempt from the requirements of the Regulation if it is dealing with or advising a derivatives party that is an eligible derivatives party that is not an individual or an eligible commercial hedger, other than the following requirements (the “core requirements”):

- in Part 3, all of the requirements in Division 1:

    - section 8,
    - section 9,
    - section 10, and
    - section 11,
    - section 12,
- in Part 4, Division 2:
    - section 23, and
    - section 24,
- in Part 4, Division 3:
    - section 27(1),
- in Part 5:
    - all of Division 1, and
    - all of Division 2.

Dealing with or advising an eligible derivatives party that is an individual or an eligible commercial hedger

Under subsection 7(2), when a derivatives firm is dealing with or advising a derivative party that is an individual or eligible commercial hedger, all applicable additional protections in the Regulation are presumed to apply unless that derivatives party has provided the derivatives firm with the requisite representations indicating that they qualify as an eligible derivatives party and the eligible derivatives party waives, in writing, some or all of the additional protections in the Regulation. As specified in subsection 7(3), the core requirements cannot be waived by the eligible derivatives party.

An eligible derivatives party that is an individual or eligible commercial hedger can waive specific requirements for a derivative, a type of derivatives or for all derivatives. For example, a producer of a certain commodity may choose to waive certain requirements in relation to derivatives where the underlying asset is a commodity that they produce but may not want to waive protections in relation to other types of derivatives.

We do not consider there to be an obligation under the Regulation to update the "waiver" after it is made. However, it is always open to an eligible derivatives party that is an individual or an eligible commercial hedger to withdraw, in whole or in part, any waiver it has made to a derivatives firm. A "waiver" can apply to a specific derivative, a class of derivatives or all derivatives involving the derivatives party.

There is no prescribed form for the waiver provided by subsection 7(2). For example, it may be appropriate for the waiver to be given by an eligible derivatives party that is an individual or an eligible commercial hedger as part of account-opening documentation, in master trading agreements or protocols amending master trading agreements. A derivatives firm may also wish to use a form of waiver that is similar to the typical forms of waivers used by securities market participants when certain permitted clients provide a waiver from certain suitability/disclosure obligations under Regulation 31-103.

However, consistent with the derivatives firm's obligation to deal fairly, honestly and in good faith with derivatives parties, we expect the waiver to be presented to the derivatives party in a clear and meaningful manner in order to ensure the derivatives party understands the information presented and the significance of the protections being waived. We would consider it to be a breach of section 8 to put unreasonable pressure on any derivatives party to waive any requirements. We also expect

the derivatives firm to remind the derivatives party that it has the option to obtain independent advice before signing the waiver.

PART 3
DEALING WITH OR ADVISING DERIVATIVES PARTIES

DIVISION 1 – General obligations towards all derivatives parties

Section 8 – Fair dealing

General Principle

The obligation in section 8 (the "fair dealing obligation") is a principles-based obligation and is intended to be similar to the duty to act fairly, honestly and in good faith applicable to registered firms and registered individuals under securities legislation (the "registrant fair dealing obligation").[4]

The fair dealing obligation should be interpreted flexibly and in a manner sensitive to context

We recognize that there are important differences between derivatives markets and securities markets. The fair dealing obligation under the Regulation may not always apply to derivatives market participants in the same manner as the registrant fair dealing obligation would apply to securities market participants. Accordingly, we 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 market participants' reasonable expectations. For this reason, prior CSA guidance and case law on the registrant fair dealing obligation may not necessarily be relevant in interpreting the fair dealing obligation under the Regulation. Similarly, the guidance in this Policy Statement is not necessarily applicable to registrants in their conduct with securities market participants.

We take the view that the concept of fairness when applied to derivatives market participants is context-specific. Conduct that may be considered unfair when dealing with a derivatives party that is not an eligible derivatives party may be considered fair and part of ordinary commercial practice when dealing with an eligible derivatives party. For example, the fair dealing obligation may be interpreted differently if the derivatives party is an individual or small business than from how it would be interpreted if the derivatives party is a sophisticated market participant, such as a global financial institution. Similarly, conduct that may be considered to be unfair when acting as an agent to facilitate a derivatives transaction with a third-party may be considered fair when entering into a derivative as principal, where it would be expected that each party negotiating the derivative is seeking to ensure favourable financial terms.

When a derivatives firm is dealing with or advising an eligible derivatives party, we generally interpret the fair dealing obligation in section 8 in a similar manner to the "fair and balanced communications" obligation as it is conceived in the context of similar rules in the United States.

We take the view that abusive practices, including fraud, price fixing, spoofing and layering, manipulation of benchmark rates, and front-running of trades would be a severe breach of the fair dealing obligation.

Derivatives firms have an obligation to transact with a derivatives party under terms that are fair. What constitutes "fair" will vary depending on the particular circumstances. Misrepresenting the nature of the product and related risks, or deliberately selling a derivative that is not appropriate for a derivatives party, would not be considered to be "fair" and, in our view, would be a breach of the fair dealing obligation.

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[4] See 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 2.1 of OSC Rule 31-505 *Conditions of Registration* ; section 65 of the *Derivatives Act* (Québec), R.S.Q., c. 14.01; section 39A of the *Securities Act* (Nova Scotia), R.S.N.S. 1989, c. 418; 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; 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.

We expect a derivatives firm to ensure a derivatives party is reasonably made aware of the implications of terminating a transaction prior to maturity, including potential exit costs. However, depending on the level of sophistication of the derivatives party, as well as the nature of the derivatives party, we recognize that this may not be necessary and therefore, the obligation to be "fair" is this context is minimal. For example, it would be appropriate for this information to be provided to an eligible commercial hedger; whereas, we would generally not expect this information to be disclosed between 2 banks. We recognize that implications of termination, including costs, are wholly dependent on market conditions at the time of termination and therefore, the more specific details relating to such costs would only be disclosed when actual termination of the transaction is being discussed or negotiated.

As part of the policies and procedures required under section 30, a derivatives firm is expected to be able to demonstrate that it has established and follows policies and procedures that are reasonably designed to achieve fair terms, in the context, for the derivatives firm's derivatives parties and that these policies and procedures are reviewed regularly and amended as required.

We interpret the fair dealing obligation to include determining prices for derivatives transacted with derivatives parties in a fair and equitable manner. We expect there to be a rational basis for a discrepancy in price where essentially the same derivative is transacted with different derivatives parties. Factors that indicate a rational basis could include the level of counterparty risk of a derivatives party, the derivatives party's trading activity, or relationship pricing. Lack of sophistication, knowledge or understanding of a derivatives product should never be a factor in providing less advantageous pricing. Both the compensation component and the market value or price component of the derivative are relevant in determining whether the price for a derivatives party is fair. A derivatives firm's policies and procedures under section 30 must address pricing practices, as well as how the reasonableness of compensation is determined. A derivatives party should be given an opportunity, at their option, to obtain independent advice before transacting in a derivative.

Derivatives firms are expected to obtain information from each derivatives party to allow them to meet their fair dealing obligation.

Section 9 – Conflicts of interest

We consider a conflict of interest to be any circumstance where the interests of a derivatives party and those of a derivatives firm or its representatives are inconsistent or divergent.

We believe that the conflict of interest provisions in section 9 should be interpreted flexibly and in a manner that is sensitive to context and to derivatives market participants' reasonable expectations. For example, a derivatives firm and the derivatives party with which it transacts bilaterally hold opposing positions under the same derivative and this may represent an inherent conflict of interest in the narrow context of that specific derivative. We recognize, therefore, that it may not necessarily be appropriate to apply the conflict of interest provisions under the Regulation to derivatives market participants in the same manner as the relevant conflict of interest provisions would apply to securities market participants.

We take the view that a conflict of interest, when applied to derivatives market participants, is context-specific. Circumstances that may be considered to give rise to a conflict of interest when dealing with a derivatives party that is not an eligible derivatives party may be considered fair and part of ordinary commercial practice when dealing with an eligible derivatives party. For example, conflicts of interests may be viewed differently when dealing with a non-eligible derivative party that is an individual or a small business than they would be viewed if the derivatives party were an eligible derivatives party, which may be different again from how conflicts of interest would be viewed if the derivatives party were a sophisticated market participant such as a global financial institution.

In addition, the circumstances that may give rise to a conflict of interest when acting as an intermediary on behalf of an eligible derivatives party, may not represent a conflict of interest when entering into a derivative as principal, provided the eligible derivatives party is reasonably aware that the derivatives firm is seeking terms favourable to its own interests. One way to generally address this conflict would be to provide a representation to that effect in a master trading agreement; however, such standard representation may not necessarily address all of the circumstances that would give rise to a conflict of interest that ought to be disclosed to a derivatives party.

Subsection 9(2) – Responding to conflicts of interest

We expect that a derivatives firm's policies and procedures for managing conflicts to allow the firm and its staff to

- identify conflicts of interest,
- determine the level of risk, to both the derivatives firm and a derivatives party, that a conflict of interest raises, and
- respond appropriately to conflicts of interest.

When responding to any conflict of interest, we expect the derivatives firm to consider the fair dealing obligation in section 8 as well as any other standard of care that may apply when dealing with or advising a derivatives party.

We are of the view that there are 3 methods that are generally reasonable to respond to a conflict of interest, depending on the circumstances: avoidance, control and disclosure.

We expect that if there is a risk of material harm to a derivatives party or the integrity of the markets, the derivatives firm will take all reasonable steps to avoid the conflict of interest. If there is not a risk of material harm and the derivatives firm does not avoid the conflict of interest, we expect that it will take steps to either control or disclose the conflict, or both. We also expect the derivatives firm to consider what internal structures or policies and procedures it should implement to reasonably respond to such a conflict of interest.

Avoiding conflicts of interest

A derivatives firm must avoid all conflicts of interest that are prohibited by law. If a conflict of interest is not prohibited by law, we expect the derivatives firm to avoid the conflict if it is sufficiently contrary to the interests of a derivatives party that there can be no other reasonable response. We are generally of the view that conflicts that have a lesser impact on the interests of a derivatives party can be managed through controls or disclosure.

Where conflicts of interest between a derivatives party and a derivatives firm cannot be managed using controls or disclosure, we expect the derivatives firm to avoid the conflict. This may require the derivatives firm to stop providing the service or stop transacting derivatives with, or providing advice in relation to derivatives to, the derivatives party.

Controlling conflicts of interest

We expect that a derivatives firm would design its organizational structures, lines of reporting and physical locations to, where appropriate, control conflicts of interest effectively. For example, the following situations would likely raise a potential conflict of interest that could be controlled in this manner:

- advisory staff reporting to marketing staff,
- compliance or internal audit staff reporting to a business unit, and
- individuals acting on behalf of a derivatives firm and investment banking staff in the same physical location.

Depending on the conflict of interest, a derivatives firm may be able to reasonably respond to the conflict of interest by controlling the conflict in an appropriate way. This may include

- assigning a different individual to provide a service to the derivatives party,
- creating a group or committee to review, develop or approve responses to a type of conflict of interest,
- monitoring trading activity, or

- using information barriers for certain internal communication.

Where a conflict of interest is such that no control is effective, we expect the conflict to be avoided or disclosed.

Subsection 9(3) – Disclosing conflicts of interest

When disclosure is appropriate

We expect a derivatives firm to inform each derivatives party it transacts derivatives with, or provides advice in relation to derivatives to, about any conflicts of interest that could affect the services the firm provides to the derivatives party.

Timing of disclosure

Under subsection 9(3), a derivatives firm and individuals acting on its behalf must disclose a conflict of interest in a timely manner. We expect a derivatives firm and its representatives to disclose the conflict to a derivatives party before or at the time they recommend the transaction or provide the service that gives rise to the conflict to enable the derivatives party to decide beforehand whether or not they wish to proceed with the transaction or service.

Where this disclosure is provided to a derivatives party before the transaction takes place, we expect the disclosure to be provided shortly before the transaction takes place. For example, if it was initially provided with the derivative party's account-opening documentation months or years previously, we expect that an individual acting on behalf of a derivatives firm to also disclose this conflict to the derivatives party shortly before the transaction or at the time the transaction is recommended.

When disclosure is not appropriate

Disclosure may not be appropriate if a conflict of interest involves confidential or commercially-sensitive information, or the information amounts to "inside information" under insider trading provisions in securities legislation. In these situations, a derivatives firm will need to assess whether there are other methods to adequately respond to the conflict of interest. If not, the firm may have to decline to provide the service to avoid the conflict of interest. We also expect a derivatives firm to have specific procedures for responding to conflicts of interest that involve inside information and for complying with insider trading provisions.

How to disclose a conflict of interest

Subsection 9(3) provides that a derivatives firm must provide disclosure about a material conflict of interest to a derivatives party. When a derivatives firm provides this disclosure, we expect that the disclosure would

- be prominent, specific, clear and meaningful to the derivatives party, and
- explain the conflict of interest and how it could affect the service the derivatives party is being offered.

We expect that a derivatives firm would not

- provide only generic disclosure,
- provide only partial disclosure that could mislead the derivatives party, or
- obscure conflicts of interest in overly detailed disclosure.

More specifically, we generally expect that disclosures are separated into 2 categories:

(i) general conflicts of interest disclosures applicable to all counterparties (those which affect all counterparties and transaction types, addressed in a written general disclosure) that could be disclosed to counterparties on an annual basis, and

(ii) disclosures specific to a counterparty or a specific contemplated transaction (i.e., disclosure regarding specific conflicts of interest that are material and specific to a counterparty or a particular transaction prior to entering into a transaction) by providing written notice of or disclosing the conflict to a trader of their derivatives party over a taped line prior to trading.

We recognize that it may be appropriate in some circumstances for a derivatives firm to disclose a conflict where it arises after the original transaction has taken place. This might arise, for example, in the case of an equity total return swap where subsequent to entering into a transaction with a derivatives party, the derivatives dealer becomes a mergers and acquisitions adviser in respect of the equity underlier (where the proposed merger and acquisitions activity has been announced).

Examples of conflicts of interest

Specific situations where a derivatives firm could be in a conflict of interest and how to manage the conflict are described below.

Acting as both dealer and counterparty

When a derivatives firm enters into a transaction with or recommends a transaction to a derivatives party, and the derivatives firm or an affiliated entity of the derivatives firm is the counterparty to the derivatives party in the transaction, we expect that the derivatives firm would respond to the resulting conflict of interest by disclosing it to the derivatives party.

Competing interests of derivatives parties

If a derivatives firm deals with or provides advice to multiple derivatives parties, we expect the derivatives firm to make reasonable efforts to be fair to all such derivatives parties. We expect that a derivatives firm will have internal policies and procedures to evaluate the balance of these interests.

Acting on behalf of derivatives parties

When a derivatives firm, or the individuals acting on its behalf, exercise discretionary authority over the accounts of its derivatives parties to enter into transactions on their behalf, we expect the derivatives firm to have policies and procedures to address the potential conflicts of interest ensuing from the contractual relationship governing the exercise of discretionary authority.

Compensation practices

We expect that a derivatives firm would consider whether any benefits, compensation or remuneration practices are inconsistent with their obligations to derivatives parties, especially if the firm relies heavily on commission-based remuneration. For example, if there is a complex product that carries a high commission but may not be appropriate for the derivatives firm's derivatives parties, the derivatives firm may decide that it is not appropriate to offer that product.

Section 10 – Know your derivatives party

Derivatives firms act as gatekeepers of the integrity of the derivatives markets. They should not, by act or omission, facilitate conduct that brings the market into disrepute. As part of their gatekeeper role, derivatives firms are required to establish the identity of, and conduct due diligence on, their clients or counterparties under the know-your-derivatives party obligation in section 10 (the "KYDP obligation"). Complying with this obligation can help ensure that derivatives transactions are completed in accordance with securities laws.

The KYDP obligation requires derivatives firms to take reasonable steps to obtain and periodically update information about their derivatives parties. In the ordinary course, an annual request to a derivatives party from a derivatives dealer to confirm that nothing has changed in relation to the gatekeeper KYDP information in section 10 would satisfy this obligation.

Section 41 provides an exemption for derivatives firms from the obligations under this section for transactions that are executed on a derivatives trading facility where the identity of the counterparty is unknown prior to and at the time the transaction is executed.

Section 11 – Handling Complaints

General duty to document and respond to complaints

Section 11 requires a derivatives firm to document complaints in respect of its derivatives business and to effectively, fairly and promptly respond to them. We expect that a derivatives firm would document and respond to all complaints received from a derivatives party who has dealt with the derivatives firm in respect of the derivatives activity at issue (in this section, a "complainant").

Complaint handling

We are of the view that an effective complaint system would deal with all formal and informal complaints or disputes in a timely and fair manner. To achieve the objective of handling complaints fairly, we expect the derivatives firm's compliance system to include standards allowing for objective factual investigation and analysis of the matters specific to the complaint.

We expect a derivatives firm to take a balanced approach to the gathering of facts that objectively considers the interests of

- the complainant,
- the individual or individuals acting on behalf of the derivatives firm, and
- the derivatives firm.

We also expect a derivatives firm to limit its consideration and handling of complaints for the purposes of the Regulation to those relating to possible violations of securities legislation.

Complaint monitoring

We expect a derivatives firm's complaint system to provide for specific procedures for reporting the complaints to superiors, in order to allow the detection of frequent and repetitive complaints made with respect to the same matter which may, on a cumulative basis, indicate a serious problem. We also expect the derivatives firm to take appropriate measures to promptly address the cause of a problem that is the subject of a complaint, particularly a serious problem.

Responding to complaints

Types of complaints

We expect a derivatives firm to provide an appropriate response to all complaints, including complaints relating to one of the following matters, by providing an initial and substantive response, promptly in writing:

- a trading or advising activity,
- a breach of the derivatives party's confidentiality,
- theft, fraud, misappropriation or forgery,
- misrepresentation,
- the fair dealing obligation,
- an undisclosed or prohibited conflict of interest, or
- personal financial dealings with a derivatives party.

A derivatives firm may determine that a complaint relating to matters other than the matters listed above is nevertheless of a sufficiently serious nature to be responded to in the manner described below. This determination should be made, in all cases, by considering if a derivatives party, acting reasonably, would expect a written response to its complaint.

Timeline for responding to complaints

We expect that a derivatives firm would

- promptly send an initial written response to a complainant within 5 business days of receipt of the complaint, and

- provide a substantive response to all complaints relating to the matters listed under "Types of complaints" above, indicating the derivatives firm's decision on the complaint.

A derivatives firm may also wish to use its initial response to seek clarification or additional information from the derivatives party.

We encourage derivatives firms to respond to and resolve complaints relating to the matters listed above within a reasonable timeframe depending on the nature of the dispute (in the ordinary course, within 90 days would be considered reasonable).

Section 12 – Tied selling

Section 12 prohibits a derivatives firm from imposing undue pressure on or coercing a person to obtain a product or service from a particular person, including the derivatives firm or any of its affiliates, as a condition of obtaining another product or service from the derivatives firm. These types of practices are known as "tied selling". In our view, this section would be contravened if, for example, a financial institution agreed to lend money to a derivatives party on the condition that the derivatives party hedged their loan through the same financial institution. In this example, we would take the view that a derivatives firm would not contravene section 12 if it required the derivatives party to enter into an interest rate derivative in connection with a loan agreement as long as the derivatives party were permitted to transact in this derivative with the counterparty of their choice.

Section 12 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.

DIVISION 2 – Additional obligations when dealing with or advising certain derivatives parties

The obligations in Division 2 of Part 3 do not apply if a derivatives firm is dealing with or advising an eligible derivatives party that is not an individual or an eligible commercial hedger or an eligible derivatives party that is an individual or eligible commercial hedger that has waived these obligations.

Section 13 – Derivatives-party-specific needs and objectives

Information on a derivatives party's specific needs and objectives (referred to below as "derivatives-party-specific KYC information") forms the basis for determining whether transactions are suitable for a derivatives party. The obligations in section 13 require a derivatives firm to take reasonable steps to obtain and periodically update information about their derivatives parties.

The derivatives-party-specific KYC information may also be relevant in complying with policies and procedures that are aimed at ensuring fair terms of a derivative for a derivatives party under subsection 8(1).

Derivatives parties may have a variety of execution priorities. For example, a derivatives party may have as their primary objective executing the transaction as quickly as possible rather than trying to obtain the best available price. Factors to consider when evaluating execution include price, certainty, timeliness, and minimizing the impact of making a trading interest public.

Before transacting with a derivatives party, we expect a derivatives firm to have the appropriate information to assess the derivatives party's knowledge, experience and level of understanding of the relevant type of derivative, the derivative's party's objective in entering into the derivative and the risks involved, in order to assess whether the derivative is suitable for the derivatives party. The derivatives-party-specific KYC information is obtained with this goal in mind.

If the derivatives party chooses not to provide the necessary information that would enable the derivatives firm to assess suitability, or if the derivatives party provides insufficient information, we expect the derivatives party to be notified. The derivatives firm would be expected to advise the derivatives party that

- this information is required to determine whether the derivative is suitable for the derivatives party, and

- without this information there is a strong risk that it will not be able to determine whether the derivatives party has the ability to understand the derivative and the risks involved with transacting the derivative.

Derivatives-party-specific KYC information for suitability depends on circumstances

The extent of derivatives-party-specific KYC information that a derivatives firm needs in order to determine the suitability of a transaction or a derivatives party's priorities when transacting in the derivative will depend on factors that include

- the derivatives party's circumstances and objectives,

- the type of derivative,

- the derivatives party's relationship to the derivatives firm, and

- the derivatives firm's business model.

In some cases, a derivatives firm will need extensive derivatives-party-specific KYC information, for example, where the derivatives party would like to enter into a derivatives strategy to hedge a commercial activity in a range of asset classes. In these cases, we expect the derivatives firm to have a comprehensive understanding of the derivatives party's

- needs and objectives when entering into a derivative, including the derivatives party's time horizon for their hedging or speculative strategy,

- overall financial circumstances, and

- risk tolerance for various types of derivatives, taking into account the derivative party's knowledge of derivatives.

In other cases, a derivatives firm may need to obtain less derivatives-party-specific KYC information, for example, if the derivatives firm enters into a single derivative with a derivatives party who needs to hedge a loan that the derivatives firm extended to the derivatives party.

Subsection 13(2) corresponds to subsection 10(4) of the Regulation and subsection 13.2(4) of Regulation 31-103. In the context of Regulation 31-103, CSA Staff have generally interpreted this to mean the firms has to refresh the client specific KYC information at least once a year. Pursuant to subsection 13(1) of the Regulation, any time that a derivatives firm makes a recommendation or accepts an order, it is required to make a suitability determination unless the derivatives party is an eligible derivatives party (that is not an individual) or the derivatives party is an eligible derivatives party that is an individual or an eligible commercial hedger that has waived this requirement. Consequently, any time a firm makes a recommendation or accepts an order, the firm needs to know whether the client is an eligible derivatives party or a retail counterparty in order to know whether it has to satisfy the suitability obligation. As long as the firm complies with its obligation in section 10(2) to keep its client specific KYDP information current, and as long as the firm does not know otherwise, the firm can rely on existing representations.

Section 14 – Suitability

Subsection 14(1) 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.

Suitability obligation

To meet the suitability obligation, a derivatives firm should have in-depth knowledge of all derivatives that it transacts with or for, or recommends to, its derivatives party. This is often referred to as the "know your product" or KYP obligation.

We expect a derivatives firm to know each derivative well enough to understand and explain to the derivatives party the derivative's risks, key features, and initial and ongoing obligations. The decision by a derivatives firm to include a type of derivative on its product shelf or approved list of products does not necessarily mean that the derivative will be suitable for each derivatives party. Individuals acting on behalf of a derivatives firm must still determine the suitability of each transaction for every derivatives party.

When assessing suitability, we expect a derivatives firm to take all reasonable steps to determine whether the derivatives party has the capability to understand the particular type of derivative and the risks involved.

In all cases, we expect a derivatives firm to be able to demonstrate a process for making suitability determinations that are appropriate under the circumstances.

Any direction from a derivatives party to override a suitability determination made by a derivatives firm should be made in writing or otherwise documented by the firm/individual acting on its behalf.

Suitability obligations cannot be delegated

A derivatives firm should not

- delegate its suitability obligations to anyone other than an officer or employee of the derivatives firm, or

- satisfy the suitability obligation by simply disclosing the risks involved with a transaction.

Section 13 and 14 - Use of online services to determine derivatives party specific needs and objectives and suitability

The conduct obligations set out in the Regulation, including the derivatives-party-specific KYC and suitability obligations in sections 13 and 14, are intended to be "technology neutral". This means that these obligations are the same for derivatives firms that interact with derivatives parties on a face-to-face basis or through an online platform.

Where the information necessary to fulfill a derivatives firm's obligations pursuant to sections 13 and 14 is solicited through an online service or questionnaire, we expect that this process would amount to a meaningful discussion with the derivatives party.

An online service or questionnaire is expected to achieve this objective if it

- uses a series of behavioural questions to establish risk tolerance and elicit other derivatives-party-specific KYC information,

- prevents a derivatives party from progressing further until all questions have been answered,

- tests for inconsistencies or conflicts in the answers and will not let the derivatives party complete the questionnaire until the inconsistencies or conflicts are resolved,

- offers information about the terms and concepts involved, and

- reminds the derivatives party that an individual from the derivatives firm is available to help them throughout the process.

Section 15 – Permitted referral arrangements

Subsection 1(1) defines a "referral arrangement" in broad terms. Referral arrangement means an arrangement in which a derivatives firm agrees to pay or receive a referral fee. The definition is not limited to referrals for providing derivatives, financial services or services requiring registration. It also includes receiving a referral fee for providing a derivatives party's name and contact information to an individual or a firm. "Referral fee" is also broadly defined. It includes any benefits received from referring a derivatives party, including sharing or splitting any commission resulting from a transaction.

Under section 15, parties to a referral arrangement are required to set out the terms of the arrangement in a written agreement. This is intended to ensure that each party's roles and responsibilities are made clear. This includes obligations for a derivatives firm involved in referral arrangements to keep records of referral fees (this includes records of all fees relating to referrals that were either paid by the derivatives firm to another person or received by the derivatives firm from another person). Payments do not necessarily have to go through a derivatives firm, but a record of all payments related to a referral arrangement must be kept.

We expect referral agreements to include

- the roles and responsibilities of each party,
- limitations on any party that is not a derivatives firm,
- the specific contents of the disclosure to be provided to referred derivatives parties, and
- who provides the disclosure to referred derivatives parties.

If the person receiving the referral is a derivatives firm or an individual acting on behalf of that derivatives firm, they would be responsible for carrying out all obligations of a derivatives firm towards the referred derivatives party in respect of the derivatives-related activities for which the derivatives party is referred and communicating with the referred derivatives party. However, if the referring person is a derivatives firm, the referring derivatives firm is still required to comply with sections 15, 16 and 17.

If a derivatives party is referred by or to an individual acting on behalf of a derivatives firm, we expect the derivatives firm to be a party to the referral agreement. This ensures that the derivatives firm is aware of these arrangements so it can adequately supervise the individuals acting on its behalf and monitor compliance with the agreements. It does not preclude the individual acting on behalf of the derivatives firm from also being a party to the agreement.

A party to a referral arrangement may need to be registered depending on the activities that the party carries out. A derivatives firm cannot use a referral arrangement to assign, contract out of or otherwise avoid its regulatory obligations.

In making referrals, a derivatives firm should ensure that the referral itself does not constitute an activity that the derivatives firm is not authorized to engage in.

We generally are of the view that the compliance practices of investment dealers with respect to referral arrangements under Regulation 31-103 could similarly be employed to meet the requirements under the Regulation with respect to referral arrangements.

Section 16 – Verifying the qualifications of the person receiving the referral

Section 16 requires the derivatives firm, or individual acting on its behalf, making a referral to satisfy itself that the party receiving the referral is appropriately qualified to perform the services, and, if applicable, is appropriately registered. The derivatives firm, or individual acting on its behalf, is responsible for determining the steps that are reasonable in the circumstances. For example, this may include an assessment of the types of derivatives parties that the referred services would be appropriate for.

Section 17 – Disclosing referral arrangements to a derivatives party

The disclosure of information to a derivatives party required under section 17 is intended to help the derivatives party make an informed decision about the referral arrangement and to assess any conflicts of interest. We expect the disclosure to be provided to a derivatives party before or at the time the referred services are provided. We also expect a derivatives firm, and any individuals acting on behalf of the derivatives firm who is directly participating in the referral arrangement, to take reasonable steps so that a derivatives party understands

- which entity it is dealing with,
- what it can expect that entity to provide to it,
- the derivatives firm's key responsibilities to it,
- if applicable, the limitations of the derivatives firm's registration category or exemptive relief,
- if applicable, any relevant terms and conditions imposed on the derivatives firm's registration or exemptive relief,
- the extent of the referrer's financial interest in the referral arrangement, and
- the nature of any potential or actual conflict of interest that may arise from the referral arrangement.

PART 4
DERIVATIVES PARTY ACCOUNTS

DIVISION 1 – Disclosure to derivatives parties

The obligations in this Division do not apply if a derivatives firm is dealing with or advising an eligible derivatives party that is not an individual or an eligible commercial hedger or an eligible derivatives party that is an individual or an eligible commercial hedger that has waived these obligations.

Section 18 – Relationship disclosure information

Content of relationship disclosure information

The Regulation does not prescribe a form for the relationship disclosure information required under section 18. A derivatives firm may provide this information in a single document, or in separate documents, which together give the derivatives party the prescribed information.

We expect that relationship disclosure information would contain accurate, complete, and up-to-date information. We suggest that derivatives firms review their disclosures annually or more frequently, as necessary. A derivatives firm must take reasonable steps to notify a derivatives party, in a timely manner, of significant changes in respect of the relationship disclosure information that has been provided.

To satisfy their obligations under subsection 18(1), an individual acting on behalf of a derivatives firm must spend sufficient time with a derivatives party in a manner consistent with their operations to adequately explain the relationship disclosure information that is delivered to the derivatives party. We expect a derivatives firm to have policies and procedures that reflect the derivatives firm's practices when preparing, reviewing, delivering and revising relationship disclosure documents.

Disclosure should occur before entering into an initial transaction, prior to advising a derivatives party in respect of a derivative and when there is a significant change in respect of the information delivered to a derivatives party. We expect that the derivatives firm will maintain evidence of compliance with their disclosure requirements.

Paragraphs 18(2)(a) to (k) – Required relationship disclosure information

Description of the nature or type of the derivative party's account

Under paragraph 18(2)(a), a derivatives firm must provide derivatives parties with a description of the nature or type of account that the derivatives party holds with the derivatives firm. In particular, we expect that a derivatives firm would provide sufficient information to enable the derivatives party to understand the manner in which transactions will be executed and any applicable contractual obligations. We also expect a derivatives firm to provide information regarding margin and collateral requirements, if applicable. Under paragraph 18(2)(k) the derivatives firm must disclose how the derivatives party assets will be held, used and invested.

We expect that the relationship disclosure information would also describe any related services that may be provided by the derivatives firm. If the firm is advising in derivatives, and the adviser has discretion over the derivatives party's account, we also expect this to be disclosed.

Describe the conflicts of interest

Under paragraph 18(2)(b) a derivatives firm must provide a description of the conflicts of interest that the derivatives firm is required to disclose under securities legislation. One such requirement is in section 9, which provides that a firm must take reasonable steps to identify and then respond to existing and potential material conflicts of interest between the derivatives firm and the derivatives party. This includes disclosing the conflict, where appropriate.

Disclosure of charges, fees and other compensation

Paragraphs 18(2)(c), (d) and (e) require a derivatives firm to provide a derivatives party information on fees and costs they might be charged when entering into a transaction. These requirements ensure that a derivatives party receives all relevant information to evaluate the costs associated with the products and services they receive from the derivatives firm. We expect this disclosure to include information related to compensation or other incentives that the derivatives party may pay relating to a transaction.

We also expect a derivatives firm to provide the derivatives party with general information on any transaction and other charges that a derivatives party may be required to pay, including general information about potential break costs if a derivative is terminated prior to maturity, as well as other compensation the derivatives firms may receive from a third party as a result of their business relationship.

We recognize that a derivatives firm may not be able to provide all information about the costs associated with a particular derivative or transaction until the terms of the derivative have been agreed upon. However, before entering into an initial transaction, a derivatives firm must meet the applicable pre-transaction disclosure requirements in section 19.

Description of content and frequency of reporting

Under paragraph 18(2)(f) a derivatives firm is required to provide a description of the content and frequency of reporting to the derivatives party. Reporting to derivatives parties includes, as applicable

- daily reporting under section 20,
- transaction confirmations under section 27, and
- derivatives party statements under section 28.

Further guidance about a derivatives firm's reporting obligations to a derivatives party is provided in Division 3 of this Part.

Know your derivatives party information

Paragraph 18(2)(i) requires a derivatives firm to disclose the type of information that it must collect from the derivatives party. We expect this disclosure will also indicate how this information will be used in assessing and determining the suitability of a derivatives party transaction.

Section 19 – Pre-transaction disclosure

The Regulation does not prescribe a form for the pre-transaction disclosure that must be provided to a derivatives party under section 19. The derivatives firm may provide this information in a single document, or in separate documents, which together give the derivatives party the prescribed information.

The disclosure document required under subsection 19(1) must be delivered to the derivatives party at a reasonably sufficient time prior to entering into the first transaction with the derivatives firm to allow the derivatives party to assess the material risks and material characteristics of the type of derivative transacted. This disclosure document may be communicated by email or other electronic means.

Identify the derivatives-related products or services the derivatives firm offers

Under paragraph 19(1)(a), a derivatives firm must provide a general description of the derivatives products and services related to derivatives that the derivatives firm offers to a derivatives party. We expect the relationship disclosure information to explain which asset classes the derivatives firm deals in and explain the different types of derivative products that the derivatives firm can transact with the derivatives party. The information required to be delivered under paragraph 19(1)(a) may be provided orally or in writing.

Describe the types of risks that a derivatives party should consider

Subparagraph 19(1)(b)(i) requires a derivatives firm to provide an explanation of the risks associated with the derivatives products being transacted, including any specific risks relevant to the derivatives offered and strategies recommended to the derivatives party. The risks disclosed may include market, credit, liquidity, operational, legal and currency risks, as applicable.

The information required to be delivered under paragraph 19(1)(b) may be provided orally or in writing.

Describe the risks of using leverage to finance a derivative to a derivatives party

Paragraph 19(1)(c) contemplates that a derivatives firm will disclose the risk of leverage to all derivatives parties, regardless of whether or not the derivatives party uses leverage or the derivatives firm recommends the use of borrowed money to finance any part of a transaction. Using leverage means that derivatives parties are only required to deposit a percentage of the total value of the derivative when entering into a transaction. This effectively amounts to a loan by the derivatives firm to the derivatives party. However, the derivatives party’s profits or losses are based on changes in the total value of the derivative. Leverage magnifies a derivatives party’s profit or loss on a transaction, and losses can exceed the amount of funds deposited.

Posting of the disclosure on a derivative firm’s website in a readily accessible location will be sufficient for purposes of ensuring the relevant disclosure has been provided (and refreshed as appropriate) provided the derivatives firm directs the relevant derivatives party to the website before executing a transaction with or on behalf of a derivatives party.

Subsection 19(2) – Disclosure before transacting in a derivative

We understand that the use of the term “price” is not always appropriate in relation to a derivative or transaction in a derivative. Therefore, under paragraph 19(2)(b), disclosure with respect to spreads, premiums, costs, etc., could be more appropriate than the price.

Section 20 – Daily reporting

In respect of a transaction involving a managed account, we expect the derivatives dealer to make the information required under subsection 20(1) available to the derivatives adviser that is acting on behalf of the managed account. Whereas in respect of the same transaction, the derivatives adviser that is acting for a managed account is only required to make the information required under subsection 20(2) available to the derivatives party on a monthly basis.

We do not expect a derivatives dealer under subsection 20(1) to make the daily mid-market mark (or valuation) available to a derivatives party for a derivative that is cleared through a regulated clearing agency because we expect that derivatives parties will already be able to access valuation information from the clearing agency. However, we do expect the derivatives dealer to notify the derivatives party of its right to request and receive the clearing agency's daily mid-market mark.

We expect this information to be available to a derivatives party in an electronic form (such as through an online platform that allows the derivatives party to see the value of its derivatives position). The derivatives firm should provide its derivatives parties with guidance on how to access this information before executing a transaction with or on behalf of a derivatives party and whenever the derivatives firm makes a change to the way the information is provided to a derivatives party.

Section 21 – Notice to derivatives parties by non-resident derivatives firms

The notice required under section 21 may be provided by a derivatives firm to a derivatives party in standard form industry documentation; a separate statement is not required to be provided to satisfy the obligations of this section.

DIVISION 2 – Derivatives party assets

The obligations in this Division, other than sections 23 and 24, do not apply if a derivatives firm is dealing with or advising an eligible derivatives party that is not an individual or an eligible commercial hedger, or an eligible derivatives party that is an individual or an eligible commercial hedger that has waived these obligations.

Section 23 – Interaction with other regulations

A derivatives firm is exempt from the requirements of this Division in respect of derivatives party assets if the derivatives firm is subject to and complies with or is exempt from sections 3 to 8 of Regulation 94-102 in respect of the derivatives party assets. The exemption from the requirements of this Division set out in paragraph (a) also extends to derivatives firms that rely on substituted compliance under Regulation 94-102.

A derivatives firm is exempt from the requirements of this Division in respect of derivatives party assets if the derivatives firm is subject to and complies with securities legislation relating to margin and collateral requirements or *Regulation 81-102 respecting Investment Funds* (chapter V-1.1, r. 39) in respect of derivatives party assets. The exemption from the requirements of this Division on this basis extends to derivatives firms that rely on exemptions from the requirements under securities legislation relating to margin and collateral requirements.

Section 24 – Segregating derivatives party assets

A derivatives firm is required to segregate derivatives party assets from its own property and from the property of the firm's other derivatives parties either by separately holding or accounting for derivatives party assets.

Section 25 – Holding initial margin

We expect a derivatives firm to take reasonable efforts to confirm that the permitted depository holding initial margin

- qualifies as a permitted depository under the Regulation,

- has appropriate rules, policies and procedures, including robust accounting practices, to help ensure the integrity of the derivatives party assets and minimize and manage the risks associated with the safekeeping and transfer of the derivatives party assets,

- maintains securities in an immobilized or dematerialized form for their transfer by book entry,

- protects derivatives party assets against custody risk through appropriate rules and procedures consistent with its legal framework,

- employs a robust system that ensures segregation between the permitted depository's own property and the property of its participants and segregation among the property of participants and ,where supported by the legal framework, supports operationally the segregation of property belonging to a derivative party on the participant's books and facilitates the transfer of derivatives party assets,

- identifies, measures, monitors, and manages its risks from other activities that it may perform, and

- facilitates prompt access to initial margin, when required.

If a derivatives firm is a permitted depository, as defined in the Regulation, it may hold derivatives party assets itself and is not required to hold derivatives party assets at a third-party depository. For example, a Canadian financial institution that acts as a derivatives firm would be permitted to hold derivatives party assets provided it did so in accordance with the requirements of the Regulation. Where a derivatives firm deposits derivatives party assets with a permitted depository, the derivatives firm is responsible for ensuring the permitted depository maintains appropriate books and records to ensure the derivatives party assets can be attributed to the derivatives party.

Section 26 – Investment or use of initial margin

Section 26 requires that a derivatives firm receive written consent from a derivatives party before investing or otherwise using collateral provided as initial margin. In order to provide consent a derivatives party needs to be made aware of and agree to any potential investment or use. If applicable, we expect such disclosure to take the form of the disclosures provided by paragraph 18(2)(k), which requires the derivatives firm to disclose the manner in which the assets are used or invested and to provide a description of the risks and benefits to the derivatives party that arises from the derivatives firm having access to use or invest derivatives party assets.

DIVISION 3 – Reporting to derivatives parties

The obligations in this Division, other than subsection 27(1), do not apply if a derivatives firm is dealing with or advising an eligible derivatives party that is not an individual or an eligible commercial hedger, or an eligible derivatives party that is an individual or an eligible commercial hedger that has waived these obligations.

Section 27– Content and delivery of transaction information

Requirement to deliver a confirmation to all derivatives parties

The requirement to provide a written confirmation under subsection 27(1) can be satisfied by electronic confirmations (including SWIFT confirmations) as well as confirmations (or certain provisions within a confirmation) that are otherwise capable of being represented in computer code in accordance with standards developed by relevant industry associations from time to time.

Paragraph 27(1)(b) allows for a confirmation to be delivered to a derivatives adviser on behalf of a derivatives party, provided the derivative party has consented to this in writing. A client typically authorizes or gives consent to its derivatives adviser to receive the transaction confirmation on its behalf in an investment management agreement. In our view, this practice is consistent with the requirement in paragraph 27(1)(b). We do not intend to alter the market practice for a derivatives dealer to deliver the confirmation to the derivatives adviser as agent for the derivatives party and we do not expect a derivatives adviser to obtain an entirely new and separate written direction from a derivatives party.

Where a transaction is executed on a derivatives trading facility (or analogous trading venue), we understand the trade confirmation will be provided by the derivatives trading facility pursuant to the terms in its rulebook to each of the counterparties to the transaction and therefore, we would not expect a derivatives firm in this scenario to provide a separate and additional trade confirmation to a derivatives party.

Additional requirements, where applicable, for confirmations delivered to non-eligible derivatives parties

Subsection 27(2) applies only to transactions with a non-eligible derivatives party. This subsection is intentionally flexible – it requires information to be disclosed only to the extent that information applies to the transaction in question. We are of the view that the written description of the derivative transacted required by paragraph 27(2)(a) for transactions would be fulfilled by providing a plain language description of the asset class of the derivative and the features of the derivative (e.g., fixed for floating interest rate swap with CDOR as the reference rate).

Section 28 – Derivatives party statements

We interpret "delivery" of a statement referred to in subsection 28(1) to include a statement that is made available to a derivatives party through the derivatives firm website or that is posted to a derivative's party's online account with the derivatives firm.

We are of the view that the description of the derivative transacted required by paragraphs 28(2)(b) and (3)(a) would be fulfilled by providing a plain language description of the asset class of the derivative and the features of the derivative (e.g., fixed for floating interest rate swap with CDOR as reference rate).

PART 5
COMPLIANCE AND RECORDKEEPING

DIVISION 1 – Compliance

The objective of this Division is to further a culture of compliance and personal accountability within a derivatives firm. Section 31 imposes certain obligations on a senior derivatives manager of a derivatives dealer, further discussed below, with respect to ensuring compliance by individuals performing activities relating to transacting in, or advising in relation to, derivatives within the area of the business the senior derivatives manager is responsible for, which is referred to in the Regulation and below as a "derivatives business unit".

Sections 30 and 32 set out certain obligations on the derivatives dealer regarding policies and procedures relating to compliance and responding to material non-compliance. We are of the view that a derivatives dealer should be afforded flexibility with respect to who fulfills these obligations of the derivatives dealer. The obligations on the derivatives dealer under these sections may be carried out by, for example, one or more senior derivatives managers designated by the derivatives dealer.

Section 30 also sets out certain obligations on the derivatives adviser regarding policies and procedures relating to compliance; however, the "senior derivatives manager" requirements in this Division (sections 31 and 32) are not applicable to derivatives advisers.

Section 29 – Definitions

Derivatives business unit

The definition of "derivatives business unit" is not intended to dictate that a derivatives dealer must organize its derivatives activity in any particular organizational structure. Depending on the size of the derivatives dealer, a derivatives business unit could relate to, for example, a class of derivatives, an asset class or sub-asset class, a business line or a division of the derivatives department of the derivatives dealer.

Senior derivatives manager

The definition of "senior derivatives manager" refers to the individual designated as primarily responsible for a particular derivatives business unit and who manages or has significant influence over its activity on a day-to-day basis. This definition is intended to lead to the designation of the individual responsible for

- the management or conduct of a derivatives business unit, including implementing, within the derivatives business unit, management of business priorities, risk management and operational efficiency and streamlining processes with respect to a class of derivatives, an asset class or sub-asset class, a business line or a division of the derivatives department, and,

- operationalizing, within the derivatives business unit, policies and procedures relating to compliance established by the department that is responsible for compliance of the derivatives dealer.

In a large financial institution, a "senior derivatives manager" may refer to a business manager.

Section 30 – Policies and procedures

General principle

A strong culture of compliance, which focuses not only on compliance with applicable rules and regulations but also emphasizes the importance of personal integrity and the need to deal with a derivatives party fairly, honestly and in good faith, is the responsibility of each individual acting on behalf of a derivatives firm in its derivatives operations with respect to derivatives activity.

Establishing a compliance system

Toward that end, section 30 requires a derivatives firm to establish, maintain and apply policies and procedures and a system (i.e., a "compliance system") of controls and supervision sufficient to provide reasonable assurance that

- the derivatives firm and those acting for it, as applicable, comply with applicable securities legislation,

- the derivatives firm and each individual acting on its behalf manage derivatives-related risks prudently,

- individuals performing a derivatives-related activity on behalf of the firm, prior to commencing the activity and on an ongoing basis,

    - possess the experience, education and training that a reasonable person would consider necessary to perform these activities in a competent manner, and

    - conduct themselves with integrity.

We expect that the policies, procedures and controls referred to in section 30 include internal controls and monitoring that are reasonably likely to identify non-compliance at an early stage and would allow the derivatives firm to correct non-compliance in a timely manner.

We do not expect that the policies, procedures and controls referred to in section 30 be applicable to derivatives firm's activities other than its activities relating to transacting in, or advising in relation to, derivatives. For example, a derivatives dealer may also be a reporting issuer. The policies, procedures and controls established to monitor compliance with the Regulation would not necessarily reference matters related only to the derivatives firm's status as a reporting issuer. Nevertheless, a derivatives firm would not be precluded from establishing a single set of policies, procedures and controls (i.e., a firm-wide policy) related to the derivatives firm's compliance with all applicable securities laws.

We expect a derivatives firm, from time to time, to review, assess and update its policies, procedures and controls to adapt to or reflect changes in applicable securities laws, as well as industry practices/norms (including, the adoption of voluntary codes of conduct).

We interpret “risks relating to its derivatives activities” in paragraph 30(1)(b) to include the risks inherent in derivatives trading (including credit risk, counterparty risk, and market risk) that relate to a derivatives firm’s overall financial viability.

Paragraph 30(c) – Policies and procedures relating to individuals

Paragraph 30(c) establishes a reasonable person standard with respect to proficiency, rather than prescribing specific courses or other training requirements. However, we note that a derivatives firm and an individual transacting in, or providing advice in relation to, a derivative on behalf of the derivatives firm may be subject to more specific education, training and experience requirements, including under other securities legislation, if applicable.

Subparagraph 30(c)(i) contemplates that industry experience can be a substitute for formal education and training. We are of the view that this is particularly relevant in respect of formal education and training prior to commencing an activity on behalf of the derivatives firm relating to transacting in, or providing advice in relation to, a derivative. However, we expect that all individuals who perform such activity receive appropriate training on an ongoing basis. We expect training program to include compliance training, periodic training sessions on fundamentals and other relevant developments to the derivatives market, as well as training on new derivatives products and services.

Subparagraph 30(c)(iii) relates to integrity of the individuals who perform an activity on behalf of the derivatives firm relating to transacting in, or providing advice in relation to, a derivative. We expect individuals performing such activities to conduct themselves with integrity, which includes honesty and good faith, particularly in dealing with clients.

Prior to employing an individual in a derivatives business unit, we expect that a derivatives firm will assess the integrity of the individual by having regard to the following:

- references provided by previous employers, including any relevant complaint of fraud or misconduct against the individual;

- if the individual has been subject to disciplinary action by its previous employer or to any adverse finding or settlement in civil proceedings;

- whether the individual has been refused the right to carry on a trade, business or profession requiring a licence, registration or other professional designation;

- in light of the individual’s responsibility, whether the individual’s reputation may have an adverse impact on the firm for which the activity is to be performed.

On an ongoing basis, a firm-wide code of conduct/ethics policies can be relied on as part of satisfying the obligation under subparagraph 30(c)(iii). We also expect derivatives firms to require the employees in its derivatives business unit to read the code of conduct and for each employee to provide some form of an acknowledgement (typically updated annually) to the derivatives firm that they are complying with such code of conduct.

Section 31 – Designation and Responsibilities of a senior derivatives manager

Paragraph 31(1)(a) imposes an obligation on a derivative dealer to designate a senior derivatives manager in respect of a derivatives business unit (unless the derivatives dealer is exempt from this obligation under section 31.1 - Exemptions from the designation and responsibilities of a senior derivatives managers).

Depending on its size, level of derivatives activity and organizational structure, a derivatives dealer may have a number of different derivatives business units and therefore, it would be appropriate to designate a senior derivatives manager for each business unit. For example, a large dealer with multiple trading desks covering different products may have a number of different senior managers. The specific title or job description of the individual designated as “senior derivatives manager” for a derivatives business unit could vary between derivatives dealers, depending once again on their size, level of derivatives activity and organizational structures. In general, we would not expect that the same individual would be designated as the senior derivatives manager for more than one derivatives business unit.

Except in a small derivatives dealer operating a single derivatives business unit, a senior derivatives manager should not be the same individual as the chief executive officer of the derivatives dealer, or another individual registered under securities legislation.

It is the responsibility of the derivatives dealer to identify within the organizational structure of their business the individual that should be designated as the senior derivatives manager of a derivatives business unit.

Following implementation of the Regulation, we expect to monitor the process derivatives dealers use to identify the individual or individuals that are designated as senior derivatives managers.

Paragraph 31(1)(b) – responsibilities of senior derivatives manager

Under paragraph 31(1)(b), an appropriate response to non-compliance is a contextual determination, depending on the harm or potential harm, of the non-compliance. We are of the view that an appropriate response could include one or more of the following, depending on the circumstances:

- rectifying the non-compliance;

- disciplining one or more individuals who perform an activity on behalf of the derivatives firm relating to transacting in, or providing advice in relation to, a derivative;

- working with a chief compliance officer or other person responsible for the policies, to improve (or recommending improvements to) processes, policies and procedures aimed at ensuring compliance with the Regulation, applicable securities legislation and the policies and procedures required under section 30.

An appropriate response could include directing a subordinate to respond to the non-compliance.

A senior derivatives manager's responsibilities under this Division apply to the senior derivatives manager even in situations where that individual has delegated his or her responsibilities.

Subsection 31(3) – Senior derivatives manager's report to the board

Whether non-compliance with the Regulation or applicable securities legislation is "material" will depend on the specific circumstances. For example, material non-compliance with respect to a small, unsophisticated derivatives party may differ from the material non-compliance with respect to a large, more sophisticated derivatives party. Further, if the non-compliance is part of a continual pattern or practice of activities constituting non-compliance within the derivatives business unit or by an individual employee within the derivatives business unit, even if a single incident of non-compliance would not be material, the pattern of non-compliance itself may be "material". Any single incident of fraud, price fixing, manipulation of benchmark rates, or front-running of trades would be considered material.

We expect that in complying with the requirement to submit a report under paragraph 31(3)(b) to the board of directors, that reasonable care will be exercised in determining when and how often material non-compliance should be reported to the board. For example, in a case of serious misconduct, we expect the board to be made aware promptly of the misconduct. In the ordinary course, it may otherwise be appropriate to consolidate the senior derivatives manager's report into an annual report; however, the senior derivatives manager should be involved in preparing the report on behalf of the derivatives business unit, even in the circumstances where the senior derivatives manager's obligation to submit the report to the board of directors is being fulfilled by the derivatives dealer's chief compliance officer.

Section 31.1 – Exemptions from the designation and responsibilities of a senior derivatives manager

The exemptions from the designation and responsibilities of a senior derivatives manager in section 31 are available to a derivatives dealer that satisfies the requirements necessary to rely on either,

- the exemption in section 31.1(1) for derivatives dealers whose aggregate month-end gross notional amount of derivatives outstanding in any of the previous 24 months does not exceed $250 million, or

- the exemption in section 31.1.(2) for derivatives dealers that deal solely in commodity derivatives and whose aggregate month-end gross notional amount of commodity derivatives outstanding in any of the previous 24 months does not exceed $3 billion.

The term "notional amount" used in sections 31.1(1) and 31.1(2) should be calculated by determining the aggregate month-end gross notional amount under all outstanding derivatives below the threshold specified in each section.

While in most cases, the notional amount for a specific derivative will be the monetary amount specified in the derivative, in some cases, the derivative may reference a non-monetary amount, such as a notional quantity (or volume) of an underlying asset. In these latter cases, calculating the monetary notional amount outstanding will require converting the notional quantity of the underlying asset into a monetary value. We expect the method that derivatives dealers use for determining how the monetary notional amount should be calculated is taken from the Technical Guidance - *Harmonisation of critical OTC derivatives data elements (other than UTI and UPI)* published in April of 2018 by the Committee on Payments and Market Infrastructures and the Board of the International Organization of Securities Commissions. It is commonly referred to as the CDE methodology.

Section 32 – Responsibility of a derivatives dealer to report material non-compliance to the regulator or securities regulatory authority

The requirement on a derivatives dealer to make a report to the regulator under section 32 will depend on whether the particular non-compliance would reasonably be considered by the derivatives dealer to be non-compliance with the Regulation or applicable securities legislation and create a risk of material harm to a derivatives party or to capital markets, or otherwise reflect a significant pattern of non-compliance.

The derivatives dealer should establish a standard for determining when there is a risk of material harm to a derivatives party of the firm or to the capital markets. Whether the harm is "material" is dependent on the specific circumstances. Material harm to a small, unsophisticated derivatives party may differ from the material harm to a large, more sophisticated derivatives party.

We expect that the report to the regulator could be provided by any one of the following individuals:

(a) the chief executive officer of the derivatives dealer, or if the derivatives dealer does not have a chief executive officer, an individual acting in a capacity similar to that of a chief executive officer;

(b) a partner or the sole proprietor of the registered derivatives dealer;

(c) if the derivatives dealer has other significant business activities, the officer in charge of the division of the derivatives firm that acts as a derivatives dealer; or

(d) the chief compliance officer of the derivatives dealer.

See Appendix A of this Policy Statement for the suggested form that a derivatives dealer may use to report the type of non-compliance contemplated in section 32 to the regulator.

This section does not apply to derivatives advisers.

DIVISION 2 – Recordkeeping

Section 33 – Derivatives party agreement must establish all material terms

The Regulation does not prescribe a form of agreement. Appropriate subject matter for the derivatives party agreement typically includes terms addressing payment obligations, netting of payments, events of default or other termination events, calculation and netting of obligations upon termination, transfer of rights and obligations, governing law, valuation, and dispute resolution. In

determining whether the requirements of section 33 are met, we would generally take into consideration harmonized disclosure, reporting and other documentary practices that may be developed from time to time by global trade associations in standard form industry documentation based on requirements applicable in the major global markets.

The process of reaching an agreement with a new counterparty may involve setting out the essential terms before the transaction, followed by more general terms (such as events of default) in the trade confirmation, prior to executing a master agreement. We would accept in some circumstances that this process could satisfy the obligations in section 33. We expect that the agreement would also cover other areas as appropriate in the context of the transactions into which the parties will enter. For example, where transactions will be subject to margin, we expect the agreement to include terms that cover margin requirements, assets that are acceptable as collateral, collateral valuation methods, investment and rehypothecation of collateral, and custodial arrangements for initial margin, if applicable.

We understand that it is not market practice by Canadian market participants for certain types of foreign exchange transactions to be documented in standard form industry documentation. Rather, firms will typically rely on a trade confirmation (including a SWIFT confirmation) to evidence the agreement between the parties. In this circumstance, we would generally accept that the requirements in section 33 can also be satisfied through a trade confirmation (including a SWIFT confirmation) required to be delivered under subsection 27(1), which may not include all the terms that are otherwise typically included in standard form industry documentation.

Section 34 – Records

Section 34 imposes a general obligation on a derivatives firm to keep full and complete records relating to the derivatives firm's derivatives, transactions in derivatives, and all of its business activities relating to derivatives, trading in derivatives or advising in derivatives. These records must be kept in a form that is readily accessible and searchable. This list of records is not intended to be exhaustive but rather sets out the minimum records that must be kept. We expect a derivatives firm to consider the nature of its derivatives-related activity when determining the records that it must keep and the form of those records.

The principle underlying section 34 is that a derivatives firm should document, through its records,

- compliance with all applicable securities legislation (including the Regulation) for its derivatives-related activities,

- the details and evidence of each derivative which it has been a party or in respect of which it has been an agent,

- the circumstances surrounding the entry into and termination of those derivatives, and

- related post-transaction matters.

We expect, for example, a derivatives firm to be able to demonstrate, for each derivatives party, the details of compliance with the obligations in section 10 and, if applicable, the obligations in section 13 and section 14 (and if sections 13 and 14 are not applicable, the reason as to why they are not).

If a derivatives firm wishes to rely on any exemption or exclusion in the Regulation or other related securities laws, it should be able to demonstrate that the conditions of the exemption or exclusion are met.

With respect to records required under paragraph 34(b), demonstrating the existence and nature of the derivatives firm's derivatives, and records required under paragraph 34(c) documenting the transactions relating to the derivatives, we expect

- a derivatives firm to accurately and fully document every transaction it enters into, and

- to keep records to the extent that they demonstrate the existence and nature of the derivative (this includes documentation capable of being represented in computer code, if the records meet the requirements in the Regulation).

We also expect a derivatives firm to maintain notes of communications that could have an impact on a derivatives party's account or its relationship with the derivatives firm. These records of communications kept by a derivatives firm may include notes of oral and written communications, including all communications by e-mail, regular mail, fax, instant messaging, chat rooms, mobile device, or other digital or electronic media performed across a technology platform.

While a derivatives firm may not need to save every voicemail or e-mail, or record all telephone conversations with every derivatives party, we expect a derivatives firm to maintain reasonable records of all communications with a derivatives party relating to derivatives transacted with, for or on behalf of the derivatives party. What is "reasonable" for larger derivatives firm may be different from what is "reasonable" for a smaller derivatives firm.

Section 35 – Form, accessibility and retention of records

Paragraph 35(1)(a) requires derivatives firms to keep their records in a safe location. This includes ensuring that no one has unauthorized access to information, particularly confidential derivatives party and counterparty information. We expect a derivatives firm to be particularly vigilant if it maintains books and records in a location that may be accessible by a third party. In this case, we expect the derivatives firm to have a confidentiality agreement with the third party.

PART 6
EXEMPTIONS

The Regulation provides several exemptions from the requirements in the Regulation. If a firm is exempt from a requirement in the Regulation, the individuals acting on its behalf are likewise exempt.

DIVISION 1 – Exemption from the Regulation

Section 36 – Exemption for foreign liquidity providers

General principle

This exemption allows foreign liquidity providers (i.e., foreign derivatives dealers) to transact with derivatives dealers that are located in Canada without being subject to the conduct requirements in the Regulation in order to facilitate access and liquidity in the inter-dealer market.

Availability of the exemption

There are no notice or filing requirements (or any additional conditions) imposed on foreign derivatives dealers relying on this exemption when they transact with local derivatives dealers. Foreign dealers that seek wider access to Canadian derivatives markets on an exempt basis would need to rely on the foreign derivatives dealer exemption in section 38.

A derivatives dealer that is a Schedule I or Schedule II bank under the *Bank Act* (Canada) is not permitted to rely on this exemption; however, we intend for this exemption to be available to derivatives dealers that are Schedule III banks (foreign bank branches of foreign derivatives dealers authorized under the *Bank Act* to do business in Canada), since the exemption is intended to be available to a foreign bank (i.e., the foreign legal entity that is counterparty to a transaction with a local derivatives dealer).

For example, a derivatives dealer located in the U.S., regardless of whether it is a registered swaps dealer or otherwise operates under an exemption from having to be registered (because they fall below certain financial thresholds that would require them to register as a U.S. swaps dealer), is exempt from the conduct requirements in the Regulation when transacting with a Canadian financial institution that is a derivatives dealer. Similarly, the conduct requirements in the Regulation would not apply to a derivatives dealer solely in commodities that is located in the U.S., regardless of whether it is a registered swaps dealer or otherwise operates under an exemption from having to be

registered (because they fall below certain financial thresholds that would require them to register as a U.S. swaps dealer), when they are transacting with a person referenced in paragraph 36(a).

For the purposes of this exemption, we consider "securities, commodity futures or derivatives legislation in a foreign jurisdiction" to include banking legislation of a foreign jurisdiction.

Section 37 – Exemption for certain derivatives end-users

Section 37 provides an exemption from the provisions of the Regulation for a person that does engage in the activities described in section 37 and not have the status described in section 36.

For example, a person that frequently and regularly transacts in derivatives to hedge business risk but that does not undertake any of the activities referred to in paragraphs 37(1)(a) to (e) may qualify for this exemption. Typically, such a person would transact with a derivatives dealer who itself may be subject to some or all of the requirements of the Regulation.

Section 38 – Foreign derivatives dealers

General principle

Section 38 provides an exemption from the provisions of the Regulation for foreign derivatives dealers that are regulated under the laws of a foreign jurisdiction to conduct the activities it proposes to conduct with an eligible derivatives party in Canada that achieve comparable regulatory outcomes to the requirements in the Regulation.

Availability of the exemption

The exemption is available to foreign derivatives dealers whose head office or principal place of business is in a jurisdiction listed in Appendix A, if the transaction is with persons that are eligible derivatives parties. The regulator may designate additional jurisdictions for the purposes of Appendix A. For other jurisdictions to be designated, either the foreign regulator, market participants or relevant industry associations would need to apply to the regulator for consideration.

With respect to foreign derivatives dealers that are foreign banks whose home jurisdiction is listed on Appendix A and that operate a foreign bank branch in Canada (i.e., a Schedule III bank under the *Bank Act* (Canada)), this exemption will extend to its Canadian branches.

This exemption is only available where a foreign derivatives dealer complies with the laws of the foreign jurisdiction specified in Appendix A that are applicable to the dealer with respect to its derivatives activities with a derivatives party located in Canada. If a foreign derivatives dealer is not subject to regulations in its 'home' jurisdiction with respect to its derivatives activities, including where it relies on an exclusion or an exemption (including discretionary relief) from those regulations in the foreign jurisdiction, the exemption in section 38 will not be available. If the foreign derivatives dealer relies on an exclusion or exemption in the foreign jurisdiction (or there is otherwise no regulatory regime that applies to its derivatives activities with a derivatives party), it would need to apply to the relevant securities regulatory authorities for consideration of similar exemptive or discretionary relief from the Regulation.

Report to regulator

The requirement to report to the regulator provided in paragraph 38(1)(d) will depend on whether the instance or instances of non-compliance would reasonably be considered by the derivatives dealer to be material non-compliance with the laws of the foreign jurisdiction relating to trading in derivatives and create a risk of material harm to a derivatives party or to capital markets, or otherwise reflect a significant pattern of non-compliance. Whether the harm is "material" will depend on the specific circumstances. What constitutes "material harm" to a small derivatives party that is a commercial hedger may differ from what constitutes "material harm" to a large, more sophisticated derivatives party.

If the report provided in paragraph 38(1)(d) first requires notification to the regulator in its home jurisdiction, we expect the report to be provided to the Canadian regulator within a reasonable period of time after the derivatives dealer has provided the notification. The report can be made to the regulator by a chief compliance officer, chief executive officer (or if the derivatives dealer does not

have a chief executive officer, an individual acting in a capacity like that of a chief executive officer) or the officer in charge of the division of the derivatives firm that acts as a derivatives dealer.

See Appendix A of this Policy Statement for a suggested form a derivatives dealer may use to report material non-compliance to the regulator in accordance with paragraph 38(1)(d). We recognize that depending on the facts and circumstances that it may be appropriate for a foreign derivatives dealer to provide a report to the Canadian regulator using the form of report that was filed by the foreign derivatives dealer in its home jurisdiction.

Additional conditions

This exemption in section 38 is available if the foreign derivative dealer is dealing only with persons that are eligible derivatives parties. The foreign derivatives dealer must comply with the conditions set out in subsection 38(2).

Foreign derivatives dealers are only expected to file one submission to jurisdiction form to the regulator. In other words, if a foreign derivative dealer files a Form 93-101F1 *Submission to Jurisdiction and Appointment of Agent for Service* with the regulator, this satisfies the filling requirement.

DIVISION 2 – Exemptions from specific provisions in the Regulation

Section 39 – Investment dealers

Section 39 of the Regulation includes an exemption from certain provisions in the Regulation that are listed in Appendix B for a derivatives dealer that is a dealer member of IIROC provided the derivatives dealer complies with the corresponding IIROC provisions relating to a transaction with a derivatives party. We regard compliance with applicable IIROC procedures, interpretations, notices, bulletins and practices as relevant to compliance with the applicable IIROC provisions.

A derivatives dealer cannot rely on this exemption unless (i) they are complying with the IIROC requirements that correspond to the provisions specified in Appendix B and (ii) notify the regulator of material non-compliance with the IIROC requirements that correspond to the provisions specified in Appendix B.

Section 40 – Canadian financial institutions

Section 40 of the Regulation includes an exemption from certain provisions in the Regulation that are listed in Appendix C for a derivatives dealer that is a Canadian financial institution that is prudentially regulated by OSFI provided the derivative dealer complies with the corresponding OSFI requirements or *Bank Act* provisions relating to a transaction with a derivatives party. We regard compliance with applicable OSFI guidelines, rules, regulations, interpretations, advisory and practices of OSFI as relevant to compliance with the applicable OSFI requirements.

A derivatives dealer cannot rely on this exemption unless (i) they are complying with the OSFI requirement or *Bank Act* requirements that correspond to the provisions specified in Appendix C and (ii) notify the regulator of material non-compliance with the OSFI requirements or *Bank Act* requirement that correspond to the provisions specified in Appendix C.

Section 41 – Derivatives traded on a derivatives trading facility where the identity of the derivatives party is unknown

Where a derivatives dealer enters into a transaction with a derivatives party on an derivatives trading facility or an analogous platform or trading venue (e.g., a trading facility referred to as a swap execution facility under CFTC rules or a multilateral trading facility under E.U. rules), it may not be possible for the derivatives dealer to establish the identity of the derivatives party prior to entering into the transaction. We understand that a trading facility would perform know-your-derivatives party diligence prior to accepting a derivatives party for trading on the platform, as well as provide trade confirmation to each counterparty to a transaction; accordingly, this section of the Regulation includes an exemption for the derivatives dealer in these circumstances, as well as other pre-transaction level requirements that cannot be fulfilled due to the fact that the identity of the derivatives party is unknown at the time the transaction is executed.

We do not expect that derivatives trading facilities rules will permit non-eligible derivatives parties to transact on a derivatives trading facility.

DIVISION 3 – Exemptions for derivatives advisers

Section 42 – Advising generally

Section 42 contains an exemption from the requirements applicable to a derivatives adviser if advice does not purport to be tailored to the needs of the recipient.

In general, we would not consider advice to be tailored to the needs of the recipient if it

- is a general discussion of the merits and risks of a derivative or class of derivatives,

- is delivered through newsletters, articles in general circulation newspapers or magazines, websites, e-mail, internet chat rooms, bulletin boards, television or radio, and

- does not claim to be tailored to the needs and circumstances of any recipient.

This type of general advice can also be given at conferences. However, if a purpose of the conference is to solicit the audience and generate specific transactions in specific derivatives or class of derivatives, we may consider the advice to be tailored or we may consider the individual or firm giving the advice to be engaged in trading activity.

Under subsection 42(3), if an individual or a firm relying on the exemption has a financial or other interest in the derivative or class of derivatives it recommends, or in an underlying interest of the derivative, it must disclose the interest to the recipient when it makes the recommendation.

Section 43 – Foreign derivatives adviser

General principle

Section 43 provides, in respect of advice provided to a derivatives party, an exemption from the provisions in the Regulation for foreign derivatives advisers that are regulated under the laws of a foreign jurisdiction to conduct the activities it proposes to conduct with an eligible derivatives party in Canada that achieve comparable regulatory outcomes to the requirements in the Regulation.

There is a separate exemption in section 45 for derivatives advisers that are registered as an adviser under securities or commodity futures legislation.

Availability of the exemption

The exemption is available to foreign derivatives advisers whose head office or principal place of business is in a jurisdiction listed in Appendix D in respect of derivatives-related advice given to persons that are eligible derivatives parties. The regulator may designate additional jurisdictions for the purposes of Appendix D. For other jurisdictions to be designated, either the foreign regulator, market participants or relevant industry associations would need to apply to the regulator for consideration.

This exemption is only available where a foreign derivatives adviser complies the laws of the foreign jurisdiction specified in Appendix D that are applicable to the adviser with respect to its derivatives activities with a derivatives party located in Canada. If a foreign derivatives adviser is not subject to regulations in its ‘home’ jurisdiction with respect to its derivatives activities, including where it relies on an exclusion or an exemption (including discretionary relief) from those regulations in the foreign jurisdiction, the exemption in section 43 will not be available. If the foreign derivatives adviser relies on an exclusion or exemption in the foreign jurisdiction, it would need to apply to the relevant securities regulatory authorities for consideration of similar exemptive or discretionary relief from the Regulation.

Additional conditions

The foreign derivatives adviser must comply with each of the conditions set out in subsection 43(2). The disclosures provided in paragraph 43(2)(b) can be made by a derivatives adviser in account opening documentation.

Section 44 – Foreign derivatives sub-adviser

The exemption is available to foreign derivatives sub-advisers whose head office or principal place of business is in a jurisdiction listed in Appendix E.

This exemption permits a foreign derivatives sub-adviser to provide advice to certain derivatives advisers (and derivatives dealers), without having to register as an adviser in Canada. In these arrangements, the derivatives adviser or derivatives dealer is the foreign derivatives sub-adviser's client, and it receives the advice, either for its own benefit or for the benefit of its clients. One of the conditions of this exemption is that the derivatives adviser or derivatives dealer has entered into an agreement with its client that it is responsible for losses that arise out of certain failures by the sub-adviser. We expect that a derivatives firm taking on this liability will conduct appropriate initial and ongoing due diligence on the sub-adviser and ensure the investments are suitable for their client. We also expect that the derivatives firm will maintain records of the due diligence conducted.

Section 45 – Registered advisers under securities or commodity futures legislation

Registered advisers under securities or commodities futures legislation are exempt from the provisions listed in Appendix E. This exemption is available to registered advisers provided they comply with the corresponding requirements in Regulation 31-103 in respect of their derivatives activity.

This exemption is intended to allow registered advisers to extend their existing compliance systems to cover their derivatives activities with their clients for requirements related to for example, among other things, the suitability requirement and referral arrangements (section 14 and section 15) provided they comply with the corresponding provisions found in Regulation 31-103 with respect to their derivatives activities with a client. The remaining provisions that apply to registered advisers in respect of their derivatives activity are principles based and therefore, we similarly expect for their existing compliance systems to accommodate the application of the core principles such as the fair dealing obligations.

PART 8
TRANSITION AND EFFECTIVE DATE

Section 47 – Transition for existing non-individual derivatives parties

Under the Regulation, a derivatives firm may qualify for specific exemptions where each of its derivatives parties is an eligible derivatives party. The transition provision will allow the derivatives firm to rely on existing representations it has received that a derivatives party is a permitted client, accredited counterparty (in Québec), a qualified party (in a number of jurisdictions) or an eligible contract participant.

This transition provision is only available for use by a derivatives firm with respect to non-individual clients. It expires 5 years after the effective date of the Regulation.

A derivatives firm that has previously obtained a representation from a derivatives party as to its status as a permitted client**,** qualified party, accredited counterparty, or as an eligible contract participant in the context of similar rules in the United States, prior to the effective date of the Regulation – for example, in documentation such as an ISDA master agreement, account opening documentation or an investment management agreement – is able to treat the derivatives party as having represented to the derivatives firm that it qualifies as an "eligible derivatives party" for the purposes of the Regulation. As long the derivatives firm obtained the status representation and could rely on that representation before the Regulation came into force, then the derivatives firm may rely on that representation until the transition period expires.

Following the effective date of the Regulation, the expectation is that documentation, for example an ISDA master agreement, account opening documentation or an investment management

agreement, used by a derivatives firm to confirm the derivatives party's status under the Regulation, will refer exclusively to the definition and categories of eligible derivatives party. This expectation applies to any transaction entered into with a derivatives party where the derivatives firm has not confirmed a derivatives party's status or in circumstances where the derivatives firm establishes an entirely new relationship with a derivatives party.

If a sophisticated derivatives party (such as a pension fund) enters into a derivative transaction with a derivatives firm following the effective date of the Regulation and the derivatives firm has already confirmed the derivatives party's status as an existing sophisticated derivatives party in writing – for example, in documentation such as an ISDA master agreement, account opening documentation or an investment management agreement where a derivatives party has represented that it is a "permitted client" – the derivatives firm is able to treat the derivatives party as having represented to the derivatives firm that the derivatives party is an eligible derivatives party. If a derivatives firm enters into a derivatives transaction following the effective date of the Regulation with a sophisticated derivatives party and the derivatives firm has not previously obtained a "permitted client" representation from the derivatives party, the derivatives firm is required to confirm a derivatives party's status on the basis of the definition and the categories of eligible derivatives party in subsection 1(1) of the Regulation. We would generally expect that derivatives firms that are updating information relating to derivatives parties after the effective date of the Regulation and prior to the expiry of the transition period would begin to collect information about the status of the derivatives party as an eligible derivatives party.

The definition of "permitted client" does not include a "eligible commercial hedger". In any circumstance where a derivatives party is relying on the "eligible commercial hedger" category to qualify as an eligible derivatives party, the derivatives firm is required to confirm a derivatives party's status as an eligible derivatives party by using the definition and the categories of eligible derivatives party in subsection 1(1) of the Regulation.

Section 48 – Transition for existing transactions

For any transaction that a derivatives firm enters into with a derivatives party prior to the effective date of the Regulation, if the derivatives firm has already determined that the derivatives party qualifies as a permitted client, accredited counterparty, qualified party, or an eligible contract participant under applicable U.S. legislation., only the fair dealing obligation (section 8) applies with respect to such transaction.

Section 49 – Effective Date

The Regulation comes into force on (*indicate here the date of coming into force*) (the "in-force date"). Any transaction entered into by a derivatives firm from this date forward is subject to the terms of the Regulation.

In Saskatchewan, if the Regulation is filed with the Registrar of Regulations after the in-force date, the Regulation comes into force on the day on which they are filed with the Registrar of Regulations.

With respect to transactions that pre-date the in-force date, only section 8 will apply if the following conditions are met:

- the transaction was entered into before the in-force date; and

- the derivatives firm has taken reasonable steps to determine that its derivatives party is either (i) a "permitted client" under Regulation 31-103, (ii) an "accredited counterparty" under the *Derivatives Act* (chapter I-14.01), (iii) a "qualified party" as that term is defined the relevant blanket orders in the provinces of Alberta, British Columbia, Manitoba, New Brunswick or Nova Scotia, or (iv) an "eligible contract participant" as that term is defined under Section 1(a)(18) of the United States *Commodity Exchange Act*.

In our view, taking "reasonable steps" would include having received a written representation, provided the derivatives firm has no information or reason to question the accuracy of that representation.

APPENDIX A
SUGGESTED FORM OF REPORT FOR REPORTABLE MATERIAL NON-COMPLIANCE UNDER SECTION (32) AND SUBSECTION 38(1)

1. Identify any entities, business units, and/or individuals involved.

2. Provide details of the non-compliance, including its context (describe how and by whom the issue was identified (derivatives party complaints, internal testing or audit, other surveillance) setting out whether it relates to (a) a risk of material harm to a derivatives party, (b) a risk of material harm to capital markets, and/or (c) is part of a pattern of non-compliance.

3. Provide a timeline setting out when in relation to question 2 above, (i) the non-compliance occurred, (ii) the non-compliance was discovered, (iii) the non-compliance was remedied, and (iv) the non-compliance was reported.

4. What steps, if any, have been taken to address/remedy the non-compliance?