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

PART 1
GENERAL COMMENTS

Introduction

This 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, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan and Yukon, *Multilateral Instrument 91-101 Derivatives: Product Determination*,

- in Manitoba, Manitoba Securities Commission *Rule 91-506 Derivatives: Product Determination*,

- in Ontario, Ontario Securities Commission *Rule 91-506 Derivatives: Product Determination*, and

- in Québec, *Regulation 91-506 respecting Derivatives Determination* (chapter I-14.01, r. 0.1);

"regulator" means the regulator or securities regulatory authority in a jurisdiction as defined in Regulation 14-101.

Interpretation of terms defined in the Regulation

Section 1 – Definition of Canadian financial institution

The term "Canadian financial institution" is defined in Regulation 14-101. 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 institution" does not include an affiliate of a bank that is established, incorporated or organized as a separate legal entity in a foreign jurisdiction.

The definition of "Canadian financial institution" does not include a Schedule III bank. Schedule III banks are distinct legal entities that are organized in 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.

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. Assessment of the factors discussed above may depend on a person's particular facts and circumstances. 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 45.

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 will not also be treated as a derivatives adviser with respect to the same activity.

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 liquidity providers – transactions with derivatives dealers* (s. 37)
- *Certain derivatives end-users* (s. 38)
- *Foreign derivatives dealers* (s. 39)
- *Investment dealers* (s. 41)
- *Canadian financial institutions* (s. 42)
- *Derivatives transacted on a derivatives trading facility where the identity of the derivatives party is unknown* (s. 43)
- *Certain notional amounts of certain commodity derivatives and other derivatives activity* (s. 44)
- *Advising generally* (s. 45)
- *Foreign derivatives advisers* (s. 46)
- *Foreign derivatives sub-advisers* (s. 47)
- *Registered advisers under securities or commodity futures legislation* (s. 48)

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 commercial hedger

The definition of "commercial hedger" is used in paragraph (n) of the definition of "eligible derivatives party".

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.

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 provisions 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 24 and 25 relating to derivatives party assets;
- Subsection 28(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 8 of this Policy Statement provides additional guidance relating to this waiver and the conditions that must be fulfilled by the derivatives firm in order for the derivatives firm to rely on the exemption set out in section 8 of the Regulation.

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. Examples of such grounds may include the following:

- 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 (n) and (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 are 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.

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.

Commercial hedgers in paragraph (n)

A person is an eligible derivative party under paragraph (n) only 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. A derivatives firm may not rely on a representation if a reasonable person would have grounds to believe there may not be a reasonable link between the commercial risks the derivatives party is hedging and the transaction entered into. This representation may be tailored by the eligible derivatives party and the derivatives firm to provide that the derivatives party is only treated as an eligible derivatives party for specific derivatives or types of derivatives.

The concept of "commercial hedger" under paragraph (n) is meant to apply to a business (including a sole proprietorship) 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, in circumstances where 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 could also include an agribusiness (e.g., farmer, grain operator) that operates as a sole proprietorship hedging risks associated with the production and operation of their commercial business. 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 reasonable link between the transaction and the business risks that are being hedged.

For greater certainty, the "commercial hedger" concept under paragraph (n) is available for use by individuals operating sole proprietorships. We understand that there are specific scenarios where sole proprietorships (which are legally treated as individuals) also enter into derivatives to hedge risks associated with their commercial activities. A "sole proprietorship" is an unincorporated business that is owned by one individual. The owner of a sole proprietorship has sole responsibility for making decisions, receives all the profits, claims all the losses, and does not have a separate legal status from the business. Accordingly, individual sole proprietors operating a commercial business are able to qualify as commercial hedgers if they satisfy the conditions for qualifying as a commercial hedger and are entering into a transaction solely for the purposes of managing risks inherent to the commercial enterprise. For greater certainty, the "commercial hedger" concept is not intended to include a circumstance where an individual is entering into over-the-counter derivatives to hedge

risks associated with their personal investment activities. To ensure this prong of the eligible derivatives party definition is used for its intended purpose, CSA Staff intend to carefully monitor and review the use of this prong of the definition by clients of derivatives firms to qualify as an eligible derivatives party.

The Regulation does not provide a definition of hedge. While, generally, we would expect that the hedge relating to a derivative would qualify for hedge accounting under applicable accounting standards, we understand that certain persons may choose to account for the fair value of the contract in their financial statements. The key is that the hedging transaction be objectively connected to, and measurably reduce, a risk related to the commercial activity carried on by the person.

The additional obligations in the Regulation presumptively apply to transactions with a derivatives party that is an eligible commercial hedger; however, pursuant to subsection 8(2) of the Regulation, an eligible commercial hedger may "waive" the application of the additional protections under the Regulation.

In addition, as an eligible derivatives party, the eligible commercial hedger comes within the class of derivatives parties that a foreign derivatives dealer or adviser may deal with under an available exemption.

Obligations guaranteed by another eligible derivatives party under paragraph (p)

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 fully guaranteed or otherwise 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 eligible commercial hedger) or (o) (an individual).

Determining assets – paragraphs (m) and (o)

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 as shown on its last financial statements. "Net assets" under this paragraph is calculated as total assets minus total liabilities. Unlike in paragraph (o), assets considered for the purposes of paragraphs (m) are not limited to "financial assets".

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. Realizable value is typically the amount that would be received by selling an asset.

In general, determining whether financial assets are beneficially owned by an individual should be straightforward. However, this determination may be more difficult if financial assets are held in a trust or in other types of investment vehicles for the benefit of an individual.

Factors indicating beneficial ownership of financial assets include:

- possession of evidence of ownership of the financial asset;
- entitlement to receive any income generated by the financial asset;
- risk of loss of the value of the financial asset;

- the ability to dispose of the financial asset or otherwise deal with it as the individual sees fit.

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.[1] 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.[2]

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 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.

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[1] For a list of authorized foreign banks regulated under the *Bank Act* and subject to OSFI supervision, see: Office of the Superintendent 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).

[2] 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).

PART 2
APPLICATION AND EXEMPTION

Section 2 – Application to derivatives firms and individuals acting on their behalf

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 – Application to certain derivatives

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 regulation under the Regulation.

Section 4 – Application – short-term foreign exchange contract or instrument

General principle

Subsection 4(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 two 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 subset of market participants, including, the types of 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[3] – 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 31 compliance obligations and the other limited subset of obligations of the Regulation that apply to short-term FX transactions.

For greater certainty, a Canadian financial institution that is subject to this provision is not required or expected to obtain any status certifications or representations from its counterparties. The limited subset of three provisions in the Regulation (fair dealing, conflicts of interest, complaints handling) that apply to short-term FX contracts in the wholesale FX market is intended to overlay the existing policies and procedures that have already been adopted by the population of derivatives dealers subject to these provisions, including the existing policies and procedures that have been incorporated into their internal compliance frameworks through their adherence to a voluntary code of conduct that covers short-term FX activity and other FX derivatives (e.g., the FX Global Code, as it is amended and restated from time to time).[4]

If a derivatives party would not be considered a wholesale FX market participant that transacts in the wholesale FX market with a Canadian financial institution under the FX Global Code, we would not interpret any FX transaction by such derivatives party as a short-term FX transaction that needs to be included for the purposes of section 4.

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 7 – Non-application – governments, central banks and international organizations

Section 7 provides that the Regulation does not apply to certain governments, central banks and international organizations specified in the section. Section 7 does not, however, exclude derivatives firms that deal with or advise these entities from the application of the Regulation.

Section 8 – Exemptions from certain requirements in this 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.

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[3] In the Regulation reference to "trade reporting rules" refers to the following instruments, as applicable: Ontario Securities Commission Rule 91-507 *Trade Repositories and Derivatives Data Reporting;* Manitoba Securities Commission Rule 91-507 *Trade Repositories and Derivatives Data Reporting*; *Regulation 91-507 respecting Trade Repositories and Derivatives Data Reporting* in Québec; and, Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* in Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan, and Yukon

[4] See https://www.globalfxc.org/fx_global_code.htm, which was facilitated by the Foreign Exchange Working Group operating under the auspices of the Bank of International Settlements Markets Committee.

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 9;
    - section 10;
    - section 11;
    - section 12; and
    - section 13;
- in Part 4, Division 2:
    - section 24; and
    - section 25;
- in Part 4, Division 3:
    - subsection 28(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 8(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 Regulation. As specified in subsection 8(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 specific derivative, a class 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.

There is no prescribed form for the waiver provided by subparagraph 8(2)(a)(iii). 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 in 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 9 to put unreasonable pressure on a 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.

In the limited circumstances where a sole proprietorship (which is legally treated as an individual) uses derivatives to hedge against commercial risk and thus qualify as an eligible derivatives party, the derivatives firm transacting with such party must identify and document the nature of the sole proprietorship's business and the commercial risks it needs to manage for purposes of the transaction (paragraph 8(2)(b)). This is in addition to the expectation that a derivatives firm will take reasonable steps to determine if a derivatives party is an eligible derivatives party (described more fully in Section 1 of this Policy Statement).

PART 3
DEALING WITH OR ADVISING DERIVATIVES PARTIES

DIVISION 1 – General obligations towards all derivatives parties

Section 9 – Fair dealing

General Principle

The obligation in section 9 (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").[5]

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

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[5] 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.

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 9, 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 9 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.

Abusive practices, including fraud, price fixing, spoofing and layering, manipulation of benchmark rates, and front-running of trades would be considered 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.

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" in 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 two 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 31, 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 and capital risk of a particular 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 31 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 10 – 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.

The conflict of interest provisions in section 10 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 further recognize that transacting in certain commodity derivatives markets, such as energy derivatives markets, may also necessarily involve counterparties that have competing interests. 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 10(2) – Responding to conflicts of interest

We expect that a derivatives firm's policies and procedures for managing conflicts should 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 9 as well as any other standard of care that may apply when dealing with or advising a derivatives party.

There are three 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 10(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 10(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 derivatives 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 10(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 two 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 acquisition 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 11 – 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 11 (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 11 would satisfy this obligation.

Section 43 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 12 – Handling Complaints

General duty to document and respond to complaints

Section 12 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 five 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 13 – Tied selling

Section 13 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 13 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 13 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 14 – 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 14 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 9(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 financial and business 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 using a range of asset classes to hedge a commercial activity and related risks. 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 14(2) corresponds to subsection 11(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 firm has to refresh the client specific KYC information at least once a year. Pursuant to subsection 14(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 (i) the derivatives party is an eligible derivatives party, provided that it is not an eligible derivatives party that is an individual or eligible commercial hedger; or (ii) 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 subsection 11(4) to keep its derivatives-party-specific KYDP information current, and as long as the firm does not know otherwise, the firm can rely on existing representations.

Section 15 – Suitability

Subsection 15(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 is 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 obligation cannot be delegated

A derivatives firm should not

- delegate its suitability obligation 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.

Sections 14 and 15 - 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 14 and 15, 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 14 and 15 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 16 – 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 16, 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 16, 17 and 18.

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 17 – Verifying the qualifications of the person receiving the referral

Section 17 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 18 – Disclosing referral arrangements to a derivatives party

The disclosure of information to a derivatives party required under section 18 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 19 – Relationship disclosure information

Content of relationship disclosure information

The Regulation does not prescribe a form for the relationship disclosure information required under section 19. 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 19(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 19(2)(a) to (k) – Required relationship disclosure information

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

Under paragraph 19(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 19(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 19(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 10, 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 19(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 20.

Description of content and frequency of reporting

Under paragraph 19(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

- valuation reporting under section 21,
- transaction confirmations under section 28, and
- derivatives party statements under section 29.

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 19(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 20 – 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 20. 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 20(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 20(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 20(1)(a) may be provided orally or in writing.

Describe the types of risks that a derivatives party should consider

Subparagraph 20(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 20(1)(b) may be provided orally or in writing.

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

Paragraph 20(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 derivatives 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) as long as the derivatives firm directs the relevant derivatives party to the website before executing a transaction with or on behalf of a derivatives party.

Subsection 20(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 20(2)(b), disclosure with respect to spreads, premiums, costs, etc., could be more appropriate than the price.

Section 21 – Valuation reporting

A derivatives dealer under subsection 21(1) does not have to make the daily mid-market mark (or valuation) available to a derivatives party for a derivative that is cleared through a qualifying clearing agency because we expect that derivatives parties will already be able to access valuation information from the clearing agency. However, the derivatives dealer should notify the derivatives party of its right to request and receive the clearing agency's daily mid-market mark.

This information should 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.

In respect of a transaction involving a managed account, we expect the derivatives dealer to make the information required under subsection 21(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 for its client is only required to make the information required under subsection 21(2) available to the derivatives party (i.e., its client) at least once every three months, unless their client requests to receive that information monthly, in which case the derivatives advisor must make that information available for each one-month period. We expect that a derivatives adviser would typically make this information available to its client in a statement that also includes information with respect to its client's overall portfolio and may include the type of information contemplated in section 14.14 of Regulation 31-103.

Section 22 – Notice to derivatives parties by non-resident derivatives dealers

The notice required under section 22 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 provisions in this Division, other than sections 24 and 25, do not apply if a derivatives firm is dealing with or advising (i) an eligible derivatives party that is not an individual or an eligible commercial hedger, or (ii) an eligible derivatives party that is an individual or an eligible commercial hedger that has waived these obligations.

Section 24 – Application and 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,

- is subject to and complies with Guideline E-22 *Margin Requirements for Non-Centrally Cleared Derivatives* issued by the federal Office of the Superintendent of Financial Institutions ("OSFI"), including derivatives firms that rely on an exemption from such rules because they are complying with the equivalent rules of a foreign jurisdiction;

- 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);

- is subject to and complies with the Autorité des marchés financiers' *Guideline on margins for over-the-counter derivatives not cleared by a central counterparty*.

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 25 – 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 separately accounting for derivatives party assets.

Section 26 – 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 27 – Investment or use of initial margin

Section 27 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 19(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 28(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 28 – Content and delivery of transaction information

Requirement to deliver a confirmation to all derivatives parties

The requirement to provide a written confirmation under subsection 28(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 28(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 28(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 regulated trading venue), we understand the trade confirmation will be provided by the derivatives trading facility (i.e., a U.S. Commodity Futures Trading Commission ("CFTC") regulated swap execution facility that is regulated as an exempt exchange in Canada) 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 28(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 28(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 29 – Derivatives party statements

We interpret "delivery" of a statement referred to in subsection 29(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 29(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 32 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 31 and 33 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 31 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 32 and 33) are not applicable to derivatives advisers.

Section 30 – 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 31 – 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 31 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 31 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 31 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 legislation.

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 legislation, as well as industry practices/norms (including, the adoption of voluntary codes of conduct).

We interpret "risks relating to its derivatives activities" in paragraph 31(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 31(c) – Policies and procedures relating to individuals

Paragraph 31(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 31(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 31(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 any 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 31(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 32 – Designation and responsibilities of a senior derivatives manager

Paragraph 32(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 44.

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 32(2)(b) – Responsibilities of a senior derivatives manager

Under paragraph 32(2)(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 31.

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 32(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 32(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 33 – Responsibility of a derivatives dealer to report to the regulator or securities regulatory authority

The requirement on a derivatives dealer to make a report to the regulator under section 33 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 33 to the regulator.

This section does not apply to derivatives advisers.

DIVISION 2 – Recordkeeping

Section 34 – Derivatives party agreement

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 34 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 34. 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 34 can also be satisfied through a trade confirmation (including a SWIFT confirmation) required to be delivered under subsection 28(1), which may not include all the terms that are otherwise typically included in standard form industry documentation.

Section 35 – Records

Section 35 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 35 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 11 and, if applicable, the obligations in section 14 and section 15 (and if sections 14 and 15 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 legislation, it should be able to demonstrate that the conditions of the exemption or exclusion are met.

With respect to records required under paragraph 35(b), demonstrating the existence and nature of the derivatives firm's derivatives, and records required under paragraph 35(a) 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 firms may be different from what is "reasonable" for a smaller derivatives firm.

Section 36 – Form, accessibility and retention of records

Derivatives firms are required 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.

The Regulation requires records to be kept for seven years (or eight years in Manitoba) from the date such record is created. For greater certainty, this principle does not override the record retention requirements found in other CSA derivatives instruments that applicable firms are subject to, such as derivatives trade reporting rules.

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 37 – Exemption for foreign liquidity providers – transactions with derivatives dealers

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 39.

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 37(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 38 – Exemption for certain derivatives end-users

Section 38 provides an exemption from the provisions of the Regulation for a person that (i) does not engage in the activities described in section 38 and (ii) does not have the status described in paragraph 38(2)(a) or 38(2)(b).

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 38(1)(a) to (e) may qualify for this exemption. It is also possible for a person to frequently engage in derivatives transactions for speculative purposes (i.e., for the purpose of gaining market returns) and qualify for the end-user exemption. Typically, in these cases, 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 39 – Exemption for foreign derivatives dealers

General principle

Section 39 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 and the foreign derivatives dealer otherwise satisfies the conditions in that section for relying on the exemption.

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*), 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 laws 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 39 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) and is unable to rely on another exemption in the Regulation, it would need to apply to the relevant securities regulatory authorities for consideration of similar exemptive or discretionary relief to exempt the foreign derivatives dealer from the requirements of the Regulation.

For example, if a foreign derivatives dealer is licensed or registered in a foreign jurisdiction (e.g., is a CFTC registered swaps dealer), then we would expect that derivatives dealer to make use of this exemption for its derivatives activity with its counterparties that qualify as eligible derivatives parties and are located in a jurisdiction of Canada, unless the foreign derivatives dealer is relying on the exemption in section 37), which is an outright exemption for transactions that take place with a local Canadian derivatives dealer. For greater certainty, because the U.S. is listed as a jurisdiction in Appendix A, then the expectation is that this exemption functions as an entity-level exemption – that is, the foreign derivatives dealer is not expected to compare the rules of its home jurisdiction to the obligations found in the Regulation in order to rely on this exemption.

If, however, a foreign derivatives dealer is not registered, licensed or otherwise authorized in respect of its derivatives activity in its home jurisdiction, even if its home jurisdiction is listed in Appendix A, it will not be able to rely on the exemption provided in section 39 of the Regulation. Instead, the foreign derivatives dealer will have to rely on the other exemptions available to foreign derivatives dealers in the Regulation, if applicable, such as the exemption provided in section 37 of the Regulation for foreign liquidity providers or the exemption provided in section 44 of the Regulation for certain notional levels of derivatives activity. If the foreign derivatives dealer is unable to satisfy the requirements in the other available exemptions, then foreign derivatives dealer will have to either comply with the full requirements of the Regulation or apply to the relevant securities regulatory authorities for consideration of exemptive or discretionary relief.

Appendix A may be updated from time to time to include additional foreign jurisdictions once CSA Staff have had a chance to consider the regulatory regimes in these additional foreign jurisdictions. Industry associations, market participants, or foreign regulators with an interest in a particular jurisdiction that is not listed may make applications for exemptive relief or otherwise make submissions to CSA Staff in support of comparability assessments for jurisdictions that are not found in Appendix A for the purposes of future amendments to the Regulation.

Additional conditions

This exemption in section 39 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 39(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 41 – Investment dealers

Section 41 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 CIRO provided the derivatives dealer complies with the corresponding CIRO rules relating to a transaction with a derivatives party. We regard compliance with applicable CIRO procedures, interpretations, notices, bulletins and practices as relevant to compliance with the applicable CIRO rules.

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

Section 42 – Canadian financial institutions

Section 42 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 *Bank Act*, 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 requirements 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 43 – Derivatives transacted 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 a derivatives trading facility or an analogous regulated platform or trading venue (i.e., a trading facility referred to and regulated as a swap execution facility under CFTC rules or a multilateral trading facility under E.U. rules and regulated in Canada as an exempt exchange), in certain limited circumstances, it may not be possible for the derivatives dealer to establish the identity of the derivatives party prior to entering into the transaction because of rules or

regulations that prohibit such regulated marketplace from disclosing the identity of a counterparty prior to entering into the derivative. This exemption is intended to address this practical limitation that results from those regulations - it is not intended to have broad use by any derivatives dealer outside this narrow context. We understand that such 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.

The types of rules that give rise to the context necessitating this exemption (e.g., the CFTC swap execution facility rules) do not permit non-eligible derivatives parties to transact on a derivatives trading facility. This exemption is not intended to be available if the transaction involves a non-eligible derivatives party.

Section 44 – Exemptions from certain requirements in this Regulation for certain notional amounts of certain commodity derivatives and other derivatives activity

Section 44 provides for exemptions (the "notional amount exemptions") from the requirements in this Regulation, other than section 9, section 10 and section 28 if its aggregate notional amount of derivatives activity falls below certain financial thresholds. To rely on the notional amount exemptions, a derivatives dealer must either,

- have an aggregate month-end gross notional amount of derivatives outstanding in any of the previous 24 months that does not exceed CAD$250 million (subsection 44(1)) (the "general notional amount exemption"); or

- for derivatives dealers that deal solely in commodity derivatives, have an aggregate month-end gross notional amount of commodity derivatives outstanding in any of the previous 24 months that does not exceed CAD$10 billion (subsection 44(2)) (the "commodity derivatives dealer notional amount exemption").

The calculation of the notional amount exemption threshold

For a local derivatives dealer, the "notional amount" referred to in subparagraphs 44(1)(c)(i) (i.e., the general notional amount exemption for local derivatives dealers) and 44(2)(d)(i) (i.e., the notional amount exemption for local physical commodity derivatives dealers) should be calculated by:

- determining the notional amount of all its transactions, minus inter-affiliate transactions; and

- adding the notional amount of all transactions of its affiliates that are a Canadian local counterparty, minus their inter-affiliate transactions.

For a foreign derivatives dealer, the "notional amount" in subparagraphs 44(1)(c)(ii) (i.e., the general notional amount exemption for foreign derivatives dealers) and 44(2)(d)(ii) (i.e., the commodity derivatives dealer notional amount exemption for foreign physical commodity derivatives dealers) should be calculated by:

- determining the notional amount of all its transactions with local counterparties, minus inter-affiliate transactions; and

- adding the notional amount of all transactions of its affiliates that are a local counterparty, minus their inter-affiliate transactions.

For greater certainty, local and foreign derivatives dealers exclude from their calculations all transactions of a foreign affiliate (provided the foreign affiliate is not a local

counterparty, such as a guaranteed affiliate), regardless of who that affiliate is transacting with.

While in most cases, the notional amount for a particular 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 methodology specified in 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.

The local counterparty nexus

The purpose of including the reference to "local counterparty" in this section of the Regulation is to clarify the scope of the derivatives activity that is included for the purposes of calculating the notional amount exemption thresholds.

While the "local counterparty" concept is based on the harmonized definition of "local counterparty" under *Regulation 94-101 respecting Mandatory Central Counterparty Clearing of Derivatives* (chapter I-14-01, r. 0.01), as a practical matter, the term "local counterparty" as it is used in this section of the Regulation is essentially aligned with the "local counterparty" concept in the trade reporting rules (we note that the CSA's respective derivatives trade reporting rule contains a definition of "local counterparty" for the purposes of those rules; however, the definition in the trade reporting rules is not harmonized across jurisdictions).

Accordingly, the calculation of the "notional amount" is intended to capture transactions involving local counterparties under the trade reporting rules to be consistent with the derivatives data reported to a designated or recognized trade repository and collected by the CSA. Therefore, derivatives dealers that are reporting counterparties under the trade reporting rules can rely on the information they use to report transactions under those rules, for the purpose of calculating whether they are able to rely on a notional amount exemption. Similarly, we also expect that inter-affiliate transactions that are excluded from the calculation would generally be consistent with transactions that are reported as inter-affiliate transactions under the trade reporting rules.

Use of this exemption by certain foreign dealers

We expect most foreign derivatives dealers to rely on the exemptions in section 37 and section 39 of the Regulation in respect of their derivatives business in Canada in lieu of relying on the notional amount exemptions. However, there are certain circumstances where it may not be possible for a foreign dealer to rely on such exemptions. For example:

- if a U.S. derivatives dealer dealing solely in commodity derivatives is transacting with non-dealers in Canada that qualify as eligible derivatives parties, and the U.S. derivatives dealer is not registered with the CFTC, then the derivatives dealer is not able to rely on the exemption under section 39. Accordingly, it could potentially rely on a notional amount exemption (i.e., the commodity derivatives dealer notional amount exemption) provided the conditions for relying on the exemption are met.

The only requirements a derivatives dealer that relies on a notional amount exemption is subject to when they transact with eligible derivatives parties, are the following:

- section 9;
- section 10; and

- section 28.

There are no other notice, filing or additional obligations imposed on derivatives dealers relying on a notional amount exemption.

Exemption not available to affiliates of derivatives dealers

As set out in paragraph 44(2)(c), the commodity derivatives dealer notional amount exemption is not an exemption that is available for a commodity derivatives dealer that is an affiliate of a derivatives dealer that is not itself solely a commodity derivatives dealer (e.g., is an affiliate of a bank). Rather, the commodity derivatives dealer notional amount exemption is intended to be exclusively available to derivatives dealers in commodities markets whose derivatives activity is ancillary to its physical commodities business.

The CSA will monitor the use and application of the notional amount exemptions, both generally and in commodity derivatives markets.

DIVISION 3 – Exemptions for derivatives advisers

Section 45 – Advising generally

Section 45 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 45(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 46 – Foreign derivatives advisers

General principle

Section 46 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 48 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. Appendix D may be updated from time to time to include additional foreign jurisdictions once CSA Staff have had a chance to consider the regulatory regimes in these additional foreign jurisdictions. Industry associations, market participants, or foreign regulators with an interest in a particular jurisdiction that is not listed may make applications for exemptive relief or otherwise make submissions to CSA Staff in support of comparability assessments for jurisdictions that are not found in Appendix D for the purposes of future amendments to the Regulation.

This exemption is only available where a foreign derivatives adviser complies with 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 46 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 46(2). The disclosures provided in paragraph 46(2)(b) can be made by a derivatives adviser in account opening documentation.

Section 47 – Foreign derivatives sub-advisers

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 48 – Registered advisers under securities or commodity futures legislation

Registered advisers under securities or commodities futures legislation are exempt from the provisions listed in Appendix F of the Regulation. 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 15 and section 16). 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.

See Appendix B of this Policy Statement for an overview of the parts, divisions and sections in the Regulation that still apply to registered advisers relying on this exemption, as well as a summary of the parts, divisions and sections in the Regulation that do not apply to registered advisers that comply with the corresponding requirements in Regulation 31-103 in respect of their derivatives activity. Appendix B of this Policy Statement also lists the provisions under Regulation 31-103 that are generally applicable in respect of a registered adviser's derivatives activity if such registered adviser is relying on this section 48 exemption.

With respect to risk disclosure found in section 14.2 of Regulation 31-103, we expect registered advisers to review their risk disclosure statement to be certain that it adequately discloses the risks associated with derivatives. For example, registered advisers can consider whether a statement similar to the statement in paragraph 20(1)(c) of the Regulation is appropriate given the use of derivatives by that registered adviser in relation to its client's account or client's portfolio.

PART 8
TRANSITION AND EFFECTIVE DATE

Section 50 – Transition representations for existing 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 is intended to provide derivatives firms with a substantial period of time, following the effective date of the Regulation, to re-paper a derivatives party as an "eligible derivatives party" as defined in the Regulation in their respective contracts and relationship documentation. Accordingly, in circumstances where the derivatives firm has received any one of the representations contemplated in this section prior to the date the Regulation takes effect in the applicable local jurisdiction, such as

- permitted client,
- non-individual accredited investor (in Ontario),
- accredited counterparty (in Québec),
- a qualified party (in a number of jurisdictions),
- an eligible contract participant (in the United States),
- a financial counterparty (in the European Union and the United Kingdom) or a non-financial counterparty above certain clearing thresholds (in the European Union and the United Kingdom, which is generally referred to by the acronym "NFC+"),

the derivatives firm can treat obtaining such representation as having obtained the required eligible derivatives party representation for purposes of the transition period (the "Transition Representations").

For greater certainty, for the purposes of the Transition Representations, the concept of financial counterparty and the concept of non-financial counterparty above certain clearing thresholds (i.e., NFC+) is also intended to include counterparties that are located in the United Kingdom that qualify as a financial counterparty, or as an NFC+ counterparty, as a result of United Kingdom legislation that onshores the *European Market Infrastructure Regulation*.

The transition period begins on the date the Regulation comes into force (the "Effective Date") and expires five years thereafter.

If prior to the Effective Date, a derivatives firm has already obtained a Transition Representation from a derivatives party, including in documentation such as an ISDA agreement, account opening documentation, or an investment management agreement, the

derivatives firm may treat the derivatives party as an eligible derivatives party for the purposes of the Regulation until the transition period expires. For example, if a derivatives firm enters into a derivatives transaction with a sophisticated derivatives party (such as a pension fund) following the Effective Date and the derivatives firm has already confirmed the derivatives party's status under an applicable Transition Representation in any of its documentation, the derivatives firm is able to treat the derivatives party as having represented to the derivatives firm in writing that the derivatives party is an eligible derivatives party for the purposes of the transition period.

For greater certainty, a deemed repetition of a Transition Representation with respect to a transaction entered into after the Effective Date still allows a derivatives firm to benefit from the transition provision under section 50 even if on a technical interpretation, such representation is made after the Effective Date.

After the Effective Date, if a derivatives firm is not able to rely on a Transition Representations in respect of a derivatives party, then the expectation is that a derivatives firm will confirm the derivatives party's status on the basis of the "eligible derivatives party" definition found in subsection 1(1) of the Regulation. Practically, this means that unless the derivatives firm can rely on a Transition Representation, the derivatives firm has one year between when the Regulation is published in its final form and the Effective Date to obtain the necessary status representations from its counterparty or client in order to comply with the Regulation.

We understand that because of the registration exemption in subsection 35.1 (1) of the Ontario *Securities Act* (R.S.O. 1990, chapter S.5), certain Canadian banks may not have obtained "permitted client" status representations from their institutional counterparties; however, they may have obtained an "accredited investor" representation for the population of counterparties that would have otherwise qualified as "permitted clients" in relation to their over-the-counter derivatives activity. Accordingly, solely for the purposes of the transition period, the non-individual "accredited investor" status representation has been included as a Transition Representation since this population of counterparties would otherwise each qualify as a "permitted client" and "permitted client" is one of the Transition Representations.

The definitions of "permitted client" and "accredited investor" do not include an "eligible commercial hedger" concept. In any circumstance where a derivatives party is relying on the "eligible commercial hedger" category to qualify as an eligible derivatives party and is not able to rely on any of the Transition Representations in the local jurisdiction (e.g., "qualified party" or an "accredited counterparty" representation), the derivatives firm is required to confirm a derivatives party's status as an eligible derivatives party according to subsection 1(1) of the Regulation.

CSA Staff strongly encourage derivatives firms to update their internal compliance programs in anticipation of the Effective Date and as soon as practicable to begin the process of updating their documentation, as well as establishing a plan to conduct the necessary outreach to ensure the appropriate representations have been updated following the expiry of the transition period.

Section 51 – Transition for existing transactions that remain in place in accordance with their original terms

The fair dealing obligation (section 9) applies to transactions executed prior to the Effective Date that remain in place in accordance with their original terms after the Effective Date (e.g., no material amendment or modification which would result in a significant change in the value of a derivative, differing cash flows, change to the method of settlement or creation of upfront payments). Derivatives are not point-in-time specific transactions. There are ongoing relationships and obligations between the parties following implementation of the Regulation.

With respect to pre-existing transactions with non-eligible derivatives parties (i.e., retail clients), following the Effective Date, all applicable provisions in the Regulation apply to the extent that it is reasonably practicable. We note that for the population of firms that are registered with CIRO and offer over-the-counter derivatives to retail clients, they are already subject to business conduct obligations under CIRO's regulatory regime. The Regulation will now overlay those obligations and we expect those firms will be relying on the exemption available to CIRO registered firms for complying with the relevant CIRO provisions.

Section 52 - Transition for obtaining waivers for certain individuals and eligible commercial hedgers

Paragraph 8(2)(a) of the Regulation means that the additional protections in the Regulation are presumed to apply to eligible derivatives parties that are individuals or eligible commercial hedgers, unless they waive some or all of the additional protections in the Regulation. For the purposes of transitioning to the new regulatory framework, CSA Staff expect that it may take some time for a derivatives firm to obtain the necessary waivers from the population of clients that this provision may otherwise apply to. Accordingly, derivatives firms are given a period of one year following the Effective Date to obtain the waiver. During this period, the core obligations in the Regulation still apply. This transition period is intended to assist derivatives firms in circumstances where their client is an individual (and the waiver is still required to be obtained due to the application of paragraph 8(2)(a)), or where a client can only qualify as an eligible derivatives party on the basis of the eligible commercial hedger prong of the eligible derivatives party definition.

Section 53 – Effective Date

The Regulation comes into force on September 28, 2024 (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.

APPENDIX A
SUGGESTED FORM OF REPORT FOR REPORTABLE MATERIAL NON-COMPLIANCE UNDER SECTION 33 [*RESPONSIBILITY OF A DERIVATIVES DEALER TO REPORT TO THE REGULATOR OR THE SECURITIES REGULATORY AUTHORITY*]

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

2. Provide details of the non-compliance, including:

    a. describe the context (how and by whom the issue was identified, derivatives party complaints, internal testing or audit, other surveillance);

    b. set 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 the following:

    a. when the non-compliance occurred,

    b. when the non-compliance was discovered,

    c. when the non-compliance was remedied, and

    d. when the non-compliance was reported.

4. Provide details of what steps, if any, have been taken to address/remedy the non-compliance.

APPENDIX B
SUMMARY OF PARTS, DIVISIONS AND SECTIONS UNDER THE REGULATION THAT APPLY TO REGISTERED ADVISERS RELYING ON SECTION 48 [*REGISTERED ADVISERS UNDER SECURITIES OR COMMODITY FUTURES LEGISLATION*]

Relevant parts and divisions	**Sections that apply to registered advisers under the Regulation**	**Sections registered advisers are exempt from under the Regulation if they are in compliance with the corresponding provisions of Regulation 31-103 with respect to their derivatives activities with a client**	**Corresponding provisions of Regulation 31-103 that apply, as applicable, in respect of a registered adviser's derivatives activity for the purposes of relying on the exemption under section 48**
Part 1, Definitions and interpretation	All sections, if applicable to derivatives advisers		
Part 2, Application and exemption	All sections, if applicable to derivatives advisers		
Part 3, Dealing with or advising derivatives parties **Division 1 – General obligations towards all derivatives parties**	Section 9, Fair dealing Section 10, Conflicts of interest Section 11, Know your derivatives party	Section 12, Handling complaints	Section 13.15, Handling complaints
		Section 13, Tied selling	Section 11.8, Tied selling
Part 3, Dealing with or advising derivatives parties **Division 2 – Additional obligations when dealing with or advising certain derivatives parties**	None	Section 14, Derivatives-party-specific needs and objectives	Paragraph 13.2(2)(c) and Subsection 13.2(4), Know your client
		Section 15, Suitability	Section 13.3, Suitability determination
		Section 16, Permitted referral arrangements	Section 13.8, Permitted referral arrangements
		Section 17, Verifying the qualifications of the person receiving the referral	Section 13.9, Verifying the qualifications of the person receiving the referral
		Section 18, Disclosing referral arrangements to a derivatives party	Section 13.10, Disclosing referral arrangements to clients
Part 4 – Derivatives party accounts **Division 1 – Disclosure to derivatives parties**	None	Section 19, Relationship disclosure information	Section 14.2, Relationship disclosure information
		Section 20, Pre-transaction disclosure	Section 14.2, Relationship disclosure information
		Subsection 21(2), Valuation Reporting	Subsection 14.14(3) Account statements
		Section 22, Notice to derivatives parties by non-resident derivatives dealers	Section 14.5, Notice to clients by non-resident registrants

Part 4 – Derivatives party accounts **Division 2 – Derivatives party assets**	None	Division 2, Derivatives party assets of Part 4, Derivatives party accounts	Division 3, Client assets and investment fund assets of Part 14, Handling client accounts – firms
Part 4 – Derivatives party accounts **Division 3 – Reporting to derivatives parties**	None	Section 29, Derivatives party statements	Section 14.14 Account statements, Section 14.14.1 Additional statements
Part 5 – Compliance and recordkeeping **Division 1 – Compliance**	Section 31, Policies and procedures	None	None
Part 5 – Compliance and recordkeeping **Division 2 – Recordkeeping**	None	Section 34, Derivatives party agreement	Section 11.5, General requirements for records
		Section 35, Records	Section 11.5, General requirements for records
		Section 36, Form, accessibility and retention of records	Section 11.6, Form, accessibility and retention of records