CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

CSA Notice of Publication
Regulation 94-102 respecting Derivatives: Customer Clearing and Protection of Customer Collateral and Positions

and Related Policy Statement

January 19, 2017

Introduction

The Canadian Securities Administrators (the **CSA** or **we**), are adopting:

- *Regulation 94-102 respecting Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* including:
  - Form 94-102F1 Customer Collateral Report: Direct Intermediary
  - Form 94-102F2 Customer Collateral Report: Indirect Intermediary
  - Form 94-102F3 Customer Collateral Report: Regulated Clearing Agency

  (the **Regulation**), and

- *Policy Statement to Regulation 94-102 respecting Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* (the **Policy Statement**)

(together, **Regulation 94-102**).

In some jurisdictions, government ministerial approvals are required for the implementation of the Regulation. Provided all necessary approvals are obtained, Regulation 94-102 will come into force on July 3, 2017.

The CSA Derivatives Committee (the **Committee**) has consulted and collaborated with the Bank of Canada, the Office of the Superintendent of Financial Institutions (Canada), the Department of Finance Canada and market participants on Regulation 94-102. The Committee also continues to contribute to and follow international regulatory developments. In particular, members of the Committee work with international regulators and bodies such as the International Organization of Securities Commissions and the OTC Derivatives Regulators' Group in the development of international standards and regulatory practices.

Although a significant market in Canada, the Canadian over-the-counter (**OTC**) derivatives market comprises a relatively small share of the global market, and a substantial portion of derivatives entered into by Canadian market participants involve foreign counterparties. The CSA endeavours to develop rules for the Canadian market that are aligned with international practices to ensure that Canadian market participants have access to the international market and are regulated in accordance with international principles.

We would like to draw your attention to another publication: CSA Notice of *Regulation 94-101 respecting Mandatory Central Counterparty Clearing of Derivatives* which is being published concurrently with this Notice. This publication, and Regulation 94-102, relate to central counterparty clearing.

Substance and Purpose

The purpose of the Regulation is to ensure that the clearing of a local customer's OTC derivatives is carried out in a manner that protects the customer's positions and collateral and improves derivatives clearing agencies' resilience to default by a clearing intermediary. For a more detailed explanation of customer clearing please see CSA Consultation Paper 91-404 *Derivatives: Segregation and Portability in OTC Derivatives Clearing.*[1]

The Regulation contains requirements for the treatment of customer collateral by clearing intermediaries providing clearing services to local customers and derivatives clearing agencies located in Canada or providing clearing services to local customers. The Regulation includes requirements relating to the segregation and use of customer collateral that are designed to protect customer collateral, particularly in the case of financial difficulties of a clearing intermediary. The Regulation also includes detailed recordkeeping, reporting and disclosure requirements intended to make customer collateral and positions readily identifiable. Finally, the Regulation contains requirements relating to the transfer or porting of customer collateral and positions intended to result, in the event of default or insolvency of a clearing intermediary, that customer collateral and positions can be transferred to one or more non-defaulting clearing intermediaries.

Background and Summary of Written Comments Received by the CSA

On January 16, 2014, the CSA published for comment CSA Notice 91-304 *Proposed Model Provincial Rule on Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* (the **Model Rule**). The Committee modified the Model Rule in response to public comments and on January 21, 2016, Draft *Regulation 94-102 respecting Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* (the **Draft Regulation**) was published by CSA Notice for a 90-day comment period.

During the last comment period, we received submissions from six commenters on the Draft Regulation. We thank all of the commenters for their input. We have carefully reviewed the comments received and revised the Draft Regulation. The names of the commenters and a summary of their comments, together with our responses, are contained in Annex A of this Notice. Copies of the submissions on the Draft Regulation can be found on the websites of the Alberta Securities Commission, Ontario Securities Commission and Autorité des marchés financiers.[2]

[1] Available at http://www.lautorite.qc.ca/en/previous-consultations-derivatives-pro.html.
[2] Available at http://www.lautorite.qc.ca/en/previous-consultations-derivatives-pro.html.

Summary of the Regulation

The Regulation is divided into 11 Parts.

Part 1 of the Regulation sets out relevant definitions and specifies that the Regulation applies only to cleared OTC derivatives where a customer, regulated clearing agency or clearing intermediary has a specified nexus to a local jurisdiction.

Part 2 to Part 4 of the Regulation set out requirements applicable to clearing intermediaries with respect to treatment of customer collateral, recordkeeping and disclosure.

Part 2 of the Regulation sets out the manner in which a customer's collateral is to be treated by clearing intermediaries, including requirements in respect of the collection, holding and maintenance of customer collateral, the identification of excess margin as well as the segregation, use and investment of customer collateral. Part 2 also sets out requirements that a clearing intermediary must meet to provide clearing services to a local customer including appropriate risk management in respect of those services.

Under Part 3 of the Regulation, clearing intermediaries are required to keep and retain certain records and supporting documentation as well as keep adequate and appropriately updated books and records that facilitate the identification and protection of a customer's positions and collateral.

Part 4 of the Regulation sets out reporting and disclosure requirements for clearing intermediaries, including reporting required to be submitted to the regulator or the securities regulatory authority.

Part 5 to Part 7 of the Regulation are parallel to Part 2 to Part 4 of the Regulation and set out similar requirements as they apply to regulated clearing agencies.

Part 5 of the Regulation sets out how a customer's collateral is to be treated by regulated clearing agencies, including requirements in respect of the collection, holding and maintenance of customer collateral, the identification of excess margin as well as the segregation, use and investment of customer collateral.

Under Part 6 of the Regulation, regulated clearing agencies are required to keep certain records and supporting documentation as well as keep adequate and appropriately updated books and records that facilitate the identification and protection of a customer's positions and collateral.

Part 7 of the Regulation sets out reporting and disclosure requirements for regulated clearing agencies, including reporting required to be submitted to the regulator or the securities regulatory authority.

Part 8 of the Regulation sets out the requirements for a regulated clearing agency to facilitate the transfer of a customer's positions and collateral in the context of a clearing intermediary's default or at the request of a customer. Part 8 also requires a clearing intermediary that provides

clearing services to an indirect intermediary to have policies and procedures for transferring the positions and collateral of a customer of the indirect intermediary.

Under Part 9 of the Regulation, clearing intermediaries and regulated clearing agencies located outside Canada may be exempt from the Regulation if they comply with the requirements of comparable legislation of a foreign jurisdiction specified in Appendix A to the Regulation. Despite the exemption from the Regulation provided for in Part 9, clearing intermediaries and regulated clearing agencies that offer clearing services to local customers will remain subject to certain provisions under the Regulation, as specified in Appendix A to the Regulation.

Part 10 of the Regulation contains provisions authorizing the regulator or the securities regulatory authority, as the case may be, to grant an exemption from any provision of the Regulation.

Part 11 of the Regulation sets out the effective date for the Regulation.

Summary of Changes to the Draft Regulation

(a) Non-application to OTC options on securities

We received comments noting that the Regulation would extend the application of segregation and portability requirements to options on securities in a manner that is inconsistent with other regulatory regimes internationally. In response to these comments, we determined that the Regulation will not apply to OTC options on securities. Under securities legislation in Canada, options on securities are subject to regulation as securities, or in Québec as derivatives.[3] Options on securities will continue to be regulated as securities, or in Québec as derivatives, under the existing securities legislation in Canada and remain subject to the investor protections included in these regimes. This is consistent with approaches employed in the United States and the European Union.

(b) Record retention

Changes have been made to the record retention provisions for clearing intermediaries and regulated clearing agencies to avoid duplicative retention of records. These changes were made in response to several comments received that pointed out how recordkeeping efficiencies could be incorporated into the Regulation.

For clearing intermediaries, different retention requirements apply to (i) records and documentation related to individual cleared derivatives and (ii) all other records and information collected for a customer. Records related to a cleared derivative are required to be retained for at least seven years after the expiration of the cleared derivative while customer profiles, account agreements or other general information collected from a customer at any time by a clearing intermediary providing clearing services for the customer must be kept for at least seven years

[3] See *Regulation 14-101 respecting Definitions* for a list of statues and other instruments comprising "securities legislation" across Canada. Available at http://www.lautorite.qc.ca/files/pdf/reglementation/valeurs-mobilieres/14-101/2011-01-01/2011jan01-14-101-vadmin-en.pdf.

after the date upon which the customer's last derivative that is cleared with the clearing intermediary expires or is terminated.

Regulated clearing agencies are now required to keep records only until the expiry or termination of the cleared derivative to which the record relates. Since clearing intermediaries are required to maintain records relating to a particular cleared derivative for at least seven years after the termination of the cleared derivative, this change to the Regulation avoids duplication of the records already maintained by clearing intermediaries.

(c) Transfer of collateral and positions upon default vs. business-as-usual

We received comments discussing the challenges associated with transferring a customer's positions and collateral in both non-default, or "business-as-usual", transfer scenarios and during the default of a direct intermediary. In particular, the commenters noted that in a default scenario, it is sometimes necessary to rely on negative consent from a customer (i.e., the customer's silence), where a customer has not provided instructions or it is not possible to transfer a customer's collateral and positions in accordance with its instructions. We acknowledge there are differences between a transfer of a customer's positions and collateral upon default by a direct intermediary and a business-as-usual transfer upon request from the customer, and separate provisions for these scenarios have been included in the Regulation. The provision relating to the transfer of a customer's positions and collateral upon default by a direct intermediary provides additional flexibility to facilitate a transfer while taking into account any instructions that a customer may have provided in contemplation of a clearing intermediary's default.

(d) Substituted compliance

Currently, OTC derivatives clearing infrastructure and clearing service providers are largely concentrated outside of Canada. Therefore, it is likely that many local customers' cleared derivatives will involve foreign clearing infrastructure or clearing service providers. We received comments requesting exemptions from the Regulation where a clearing intermediary or regulated clearing agency complies with comparable laws of a foreign jurisdiction. As a result, we carefully considered the interaction of the Regulation with foreign customer clearing regimes that may also apply to a cleared derivative involving local customers. The Regulation provides for an exemption from the Regulation based on the concept of substituted compliance where a foreign clearing intermediary or regulated clearing agency in compliance with the comparable laws of the United States or the European Union is involved in clearing a local customer's cleared derivatives. However, despite a clearing intermediary or regulated clearing agency qualifying for the exemption from the Regulation by substituted compliance, certain provisions in the Regulation will still apply to foreign entities providing clearing services to local customers. These "residual provisions" include the retention of records, reporting on customer collateral to the customer and the regulator and the segregation of customer collateral from other property of the customer. The residual provisions that apply to a clearing intermediary or regulated clearing agency depend on the comparability of the applicable foreign laws, and therefore on whether the foreign entity complies with the laws of the United States or the European Union.

(e) Customer collateral reports – regulatory

We received comments regarding the information about customer collateral required to be reported to the regulator or securities regulatory authority. Commenters asked that the information reported by clearing intermediaries and regulated clearing agencies in Form 94-102F1, Form 94-102F2 and Form 94-102F3 pursuant to section 25 and section 43 of the Regulation be more closely harmonized with similar reporting requirements under the U.S. Commodity Futures Trading Commission's rules. In response to these comments, among other changes, information on customer collateral is now required on an aggregate basis, rather than on an individual customer basis.

Commenters also requested that reporting on customer collateral to the regulator or securities regulatory authority be included in the provisions for which an exemption based on substituted compliance is available. However, the information reported on Form 94-102F1, Form 94-102F2 and Form 94-102F3 is of importance to securities regulatory authorities. Consequently, section 25 and section 43 of the Regulation are not included in the exemption based on substituted compliance.

(f) International harmonization and miscellaneous drafting clarifications

There are a number of drafting changes throughout the Regulation to respond to comments from clearing agencies and clearing intermediaries that work to harmonize the Regulation with international regulatory regimes and more accurately reflect customer collateral and position segregation, recordkeeping and reporting practices.

Local Matters

The scope of derivatives subject to the Regulation in each local jurisdiction is set out in Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination*,[4] Manitoba Securities Commission Rule 91-506 *Derivatives: Product Determination*,[5] Québec *Regulation 91-506 respecting Derivatives Determination*[6] (**Québec Regulation 91-506**) and Multilateral Instrument 91-101 *Derivatives: Product Determination.*[7]

Concurrently with the publication of this Notice, the Autorité des marchés financiers is publishing consequential amendments in respect of Regulation 94-102 to Regulation 91-506.

Anticipated Costs and Benefits

The Regulation is intended to facilitate development of the Canadian market for clearing customer OTC derivatives in a safe and efficient manner. It is intended to provide investor

[4] Available at https://www.osc.gov.on.ca/en/SecuritiesLaw_91-506.htm
[5] Available at http://docs.mbsecurities.ca/msc/irp/en/item/101711/index.doc
[6] Available at http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=3&file=/I_14_01/I14_01R0_1_A.HTM
[7] Available at http://www.albertasecurities.com, http://www.bcsc.bc.ca, http://www.nbsc-cvmnb.ca, http://nssc.novascotia.ca and http://www.fcaa.gov.sk.ca/Securities%20Division

protection for local customers using clearing services that are equivalent to the protections offered in major foreign markets and provide systemic benefits to the Canadian market. There will be compliance costs for clearing service providers that may increase the cost of clearing for market participants. The benefits to the Canadian market and to local customers from implementing the Regulation significantly outweigh the compliance costs to market participants. The major benefits and costs of the Regulation are described below.

(a) Benefits

The two major benefits of the Regulation are the reduction of systemic risk and the protection of customers and their assets when they clear OTC derivatives through clearing agencies.

(i) Mitigation of Systemic Risk

The Group of Twenty has agreed that requiring standardized and sufficiently liquid OTC derivatives to be cleared through central counterparties will result in more effective management of counterparty credit risk. The clearing of OTC derivatives may also contribute to greater stability of our financial markets and to a reduction in systemic risk. Along with mandatory central counterparty clearing, minimum capital requirements and margin requirements for non-centrally cleared derivatives may create additional incentives for central counterparty clearing.

The Regulation is designed to create a framework for customer clearing that promotes stability of the OTC derivatives market by facilitating, to the greatest extent possible, the porting of customers' positions and collateral. Portability of customers' positions and collateral is a key mechanism to ensure that in the event of a clearing intermediary default or insolvency, customers' positions are not terminated and their positions and collateral can be transferred to one or more non-defaulting clearing intermediaries. Portability can mitigate difficulties associated with stressed market conditions such as a market-wide reduction in liquidity and price dislocation, allow customers to maintain continuous clearing access and generally promotes efficient financial markets.

(ii) Customer Protection

The Regulation is aimed at significantly reducing the likelihood that customers will suffer major financial losses in the event of a clearing service provider's insolvency. In general, customer clearing offers risk mitigation benefits to customers. However, if a robust customer protection regime is not in effect, there can be risks in the clearing process, particularly if a clearing intermediary becomes insolvent. The Regulation provides customer protections that should significantly reduce the likelihood of a range of negative potential consequences, that could occur in the event of a clearing intermediary's insolvency, including:

- forced liquidation of positions;
- loss or inaccessibility of collateral;

- loss of hedge positions necessitating re-entry into the market at time of stress to re-establish positions; and

- market uncertainty.

The Regulation mitigates many of these risks to customers by establishing robust collateral and recordkeeping requirements. It requires a customer's positions to be collateralized at the regulated clearing agency and obligates the regulated clearing agency and clearing intermediaries to keep records that identify customers and their positions in order to facilitate porting.[8]

(b) Costs

Generally, any increased costs resulting from compliance with the Regulation stem from enhanced collateral protection and recordkeeping and reporting requirements for customer collateral and positions. Any costs associated with complying with the Regulation will be borne by clearing intermediaries and regulated clearing agencies and may be passed on to customers through higher initial margin or higher fees for cleared derivatives. There is also a possibility that clearing service providers may be dissuaded from entering or remaining in the Canadian market due to the costs of complying with the Regulation, which would reduce local customers' options for clearing service providers.

(i) Establishing Systems

Clearing intermediaries and regulated clearing agencies may incur up-front costs to develop or modify their recordkeeping and account structure systems in order to comply with the Regulation. However, once the systems are established, the incremental cost of on-going compliance should be less significant.

(ii) Loss of Potential Revenue for Clearing Intermediaries and Clearing Agencies

The Regulation places restrictions on the use and investment of customer collateral held by clearing intermediaries and clearing agencies. Customer collateral may only be invested in liquid and low-risk instruments. The Regulation also requires a regulated clearing agency to collect initial margin from clearing intermediaries for each customer on a gross basis. Collecting gross margin promotes more effective porting of positions which benefits customers. However, this requirement means that less customer collateral will be held at and available for use by clearing intermediaries. These requirements limit the potential revenue that clearing intermediaries and clearing agencies may earn through the use and investment of their customers' collateral.

(iii) Market Access Issues

Currently, OTC derivatives clearing infrastructure and service providers are largely concentrated outside of Canada with the main clearing agencies and clearing intermediaries located in the

[8] The level of protection afforded by the Regulation is dependent on the Regulation's interaction with other foreign and domestic laws such as bankruptcy and insolvency laws and the *Payment Clearing and Settlement Act* (Canada) as well as provincial and territorial personal property security laws including as they apply to cash collateral.

United States and the European Union. Given the small size of the Canadian market, there is a risk that the costs of analyzing and complying with the Regulation may result in some market participants choosing not to offer customer clearing services in Canada which may limit local customers' access to OTC derivatives clearing services. However, as described above, the Regulation provides for an exemption for clearing intermediaries and regulated clearing agencies located in foreign jurisdictions based on substituted compliance with certain foreign laws. This exemption based on substituted compliance could significantly reduce compliance costs associated with the Regulation for providers of clearing services located in and complying with the laws of the foreign jurisdictions set out in Appendix A to the Regulation.

(c) Conclusion

Protection of customers' positions and collateral is the fundamental principle of the Regulation. It is the Committee's view that the impact of the Regulation, including anticipated compliance costs for market participants, is proportional to the benefits sought. The Regulation aims to provide a level of protection similar to that offered to customers in other jurisdictions with significant OTC derivatives markets. To achieve a balance of interests, the Regulation is designed to deliver a high level of protection to customers transacting in OTC derivatives and create a safer environment in the Canadian market for customers to clear OTC derivatives, while allowing clearing service providers a flexible and competitive market to operate in.

Contents of Annex

The following annex forms part of this CSA Notice:

- Annex A – Summary of comments and CSA responses and list of commenters.

Questions

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ANNEX A

Summary of comments and CSA responses on Draft *Regulation 94-102 respecting Derivatives: Customer Clearing and Protection of Customer Collateral and Positions*

1. Section Reference	2. Summary of Issues/Comments	3. Response
GENERAL COMMENTS		
General Comments	Overall, commenters supported creating a domestic regime for the protection of customer positions and collateral to ensure that Canada's derivatives market functions efficiently and continues to maintain the confidence of market participants.	The Regulation addresses the need for a harmonized regime across Canada for the protection of customer positions and collateral. The Regulation furthers the aims of OTC derivatives reform set out by the Group of Twenty and supports the safe, effective and efficient function of Canada's OTC derivatives market.
	Support was expressed for substituted compliance in the Regulation. In particular, support was expressed for the revisions that facilitate the operation of different customer clearing models and including the laws of the United States and European Union for substituted compliance. Other commenters cautioned that without an effective substituted compliance regime, the Regulation may result in overlapping, duplicative and burdensome requirements.	Exemptions based on substituted compliance are available where market participants are subject to foreign laws that are substantially the same, on an outcomes basis, as the Regulation, based on a review of the foreign laws. The Regulation permits substituted compliance in specified circumstances and subject to certain conditions where a foreign clearing intermediary or regulated clearing agency clears a derivative and is in compliance with the foreign laws listed in Appendix A to the Regulation.
	Two commenters requested that orders exempting certain actions issued by foreign regulatory agencies be included in the substituted compliance approach used in the Regulation.	No change. To include exemptions made by foreign regulatory authorities in the substituted compliance approach under the Regulation would be an impermissible sub-delegation of a securities regulatory authority's legislative powers, as a foreign regulatory authority granting exemptions would be able to bypass the effect of the Regulation without the approval of the securities regulatory authority.

	One commenter requested that customer disclosure rules under the U.S. Commodity Futures Trading Commission (**CFTC**) regulations be deemed equivalent to the disclosure rules in the Regulation. Additionally, the commenter suggested that the Regulation be aligned with the customer disclosure rules and market practice evidenced by CFTC Rule 1.55(k) Disclosure and Default Disclosure, in particular with respect to sections 21, 22, 23, 26 and 27.	Change made. An exemption based on substituted compliance is available to clearing intermediaries that provide disclosure in accordance with CFTC and European Market Infrastructure Regulation (**EMIR**) disclosure requirements. Additionally, the examples of information to be included in the disclosure provided as guidance in the Policy Statement have been clarified.
	Two commenters requested clarification regarding whether equity options would be within the scope of the Regulation. It was noted that equity options have a specific margining process where initial margin is collected on a gross basis and there is no netting of opposite positions or resulting margin. The commenters suggest that the level of segregation required under the Proposed Regulation would adversely limit the margin efficiency investors are looking for when using OTC options in parallel with exchange-traded options and will impose a significant burden on equity options market participants that is not imposed in other foreign jurisdictions.	Change made. OTC options on securities are excluded from the scope of application of the Regulation.
	One commenter noted that requirements in the Regulation should be applied consistently across all jurisdictions of Canada and harmonized with international regulations.	No change. The Regulation will be consistently applied across Canadian jurisdictions and is largely harmonized with international regulations.
	One commenter noted that implementation of the Regulation will require significant technological, operational and rule changes for regulated clearing agencies and requested that appropriate timelines for compliance be provided in the Regulation.	Change made. The Regulation includes an implementation period to provide time for market participants to comply with the Regulation.
	Two commenters requested that reporting obligations in the Regulation be revised to minimize duplicative reporting requirements for foreign clearing agencies, such as by accepting the same reports provided to the CFTC or National Futures Association (with information regarding non-Canadian customers removed). One commenter requested that the reporting obligations of clearing agencies be limited to information related to collateral held by Canadian intermediaries.	Change made. An exemption based on substituted compliance is available to regulated clearing agencies that act in accordance with CFTC and EMIR recordkeeping and reporting requirements.

PART 1: DEFINITIONS, INTERPRETATION AND APPLICATION		
s. 1 – Definitions and interpretation		
General comments	One commenter requested that the definition of "cleared derivative" be modified to clarify the exclusion of exchange-traded derivatives from the scope of the definition of "cleared derivative" and from the scope of the Regulation as it applies to clearing agencies.	No change. Subsection 1(4) together with the application provisions in subsection 2(2) of the Regulation provide that the Regulation is limited only to the scope of derivatives set out in each local jurisdiction's derivatives product determination rule or regulation (the **Product Determination Rules**),[1] which exclude exchange-traded derivatives. Subsection 1(4) and Subsection 2(2) apply to the entirety of the Regulation, including the definitions of direct intermediary and indirect intermediary and the other application provisions in section 2. To provide a specific reference to the Product Determination Rules in the definition of "cleared derivative" would be redundant.
"clearing services"	One commenter suggested that the definition may be overly broad and capture activities which should not be regulated as clearing services, such as services provided by introducing brokers that do not hold customer collateral.	No change. The term "clearing services" is not defined in the Regulation. However, guidance applicable to that term is provided in the Policy Statement. With respect to intermediaries that provide clearing services, the Regulation applies only to clearing intermediaries that, according to the definitions in the Regulation, require, receive or hold customer collateral.
"customer"	One commenter noted that a clearing agency may have difficulty porting a customer's position and associated collateral where there are several intermediaries between the clearing agency and the customer that is the beneficial owner of the position. The commenter suggested that the definition of customer should be limited in scope to include only direct customers of a direct intermediary (i.e., a customer of a participant of the clearing agency).	No change. Customers that clear indirectly should benefit from the same protections as those that clear directly through a direct intermediary.

[1] Manitoba Securities Commission Rule 91-506 *Derivatives: Product Determination*; Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination*; Québec *Regulation 91-506 respecting Derivatives Determination*; and Multilateral Instrument 91-101 *Derivatives: Product Determination*.

"customer collateral"	One commenter requested that the definition of customer collateral distinguish between collateral that is deposited to satisfy margin requirements (i.e., initial margin) and cash or other assets that are paid or deposited to settle the change in price of an open transaction over its settlement cycle (i.e., variation margin). The commenter requested clarification on whether customer initial margin and variation margin must be segregated from the initial margin and variation margin belonging to other customers as well as from house owned initial margin and variation margin.	No change. Initial margin and variation margin must be segregated from a clearing intermediary's house account. Customer collateral is permitted to be held in an omnibus account, provided that the customer collateral for each customer is accounted for separately.
PART 2: TREATMENT OF CUSTOMER COLLATERAL BY A CLEARING INTERMEDIARY		
s. 3 – Segregation of customer collateral – clearing intermediary		
General Comments	One commenter expressed concern regarding the risk associated with perfecting a secured interest in cash collateral posted by a customer to a clearing intermediary. While the commenter supported the changes made to the Regulation, which no longer requires customer collateral to be held in a segregated account linked to the customer's name, the commenter noted the importance of amending the personal property security legislation in Canada to permit perfection by control of a security interest in cash collateral held outside a securities account.	Amendments to the personal property securities legislation are outside the jurisdiction of the CSA. However, amendments were made to the Quebec Civil Code to address this issue and the Committee supports the amendments suggested by the commenter and harmonization of personal property securities legislation across Canada.
s. 5 – Excess margin – clearing intermediary		
General Comments	One commenter requested that the requirement for clearing service providers to identify and record each business day the value of excess margin under section 5 and section 31 be harmonized with the CFTC's regulations which only require Futures Commission Merchants (FCMs) to calculate excess margin across all customers rather than at the individual customer level.	No change. However, an exemption based on substituted compliance with CFTC and EMIR provisions is available for sections 5 and 31 of the Regulation.

s. 7 – Investment of customer collateral – clearing intermediary		
General Comments	One commenter noted that United States laws do not require that a repurchase or reverse repurchase agreement in respect of customer collateral invested by a clearing intermediary or regulated clearing agency be confirmed in writing to the customer, contrary to section 7 or section 33, and that such a requirement may be onerous, considering that a customer bears no risk of loss on such agreement.	Change made. To harmonize with similar CFTC requirements, delivery of a written confirmation to the clearing intermediary, rather than to the customer, of the terms of a repurchase or resale transaction involving customer collateral is required in the Regulation. Additionally, the clearing intermediary must disclose to the customer in writing that its customer collateral may be invested or used by the clearing intermediary in accordance with section 7, including disclosure that any losses on the investment or use of the customer collateral will not be allocated to the customer.
PART 3: RECORDKEEPING BY A CLEARING INTERMEDIARY		
s. 12 – Retention of records – clearing intermediary		
General Comments	Commenters requested that the record time for record retention under section 12 and section 36 be reduced to five years.	No change. A seven-year retention period is common practice in Canada and is in line with timing requirements under the *Limitations Act, 2002* (Ontario).
	Commenters requested that record retention be measured in relation to each individual transaction to harmonize with similar requirements under United States laws. Alternatively, the commenters suggested that recordkeeping requirements be considered for substituted compliance. Clarification of what was meant by keeping records in a readily accessible location was also requested.	Change made. Record retention has been revised to operate on an individual transaction basis. However, general account information must be maintained for at least seven years after the last date upon which a customer's last derivative that is cleared by the clearing intermediary expires or terminates.

s. 13 – Books and records – clearing intermediary		
General Comments	Commenters suggested that the information required to be recorded about customer collateral held by clearing intermediaries and regulated clearing agencies under section 13 and section 37 is too detailed for the customer segregation regime permitted by the Regulation. A concern was raised that requiring clearing intermediaries and regulated clearing agencies to identify specific items of collateral attributable to each customer may lead customers to believe specific items of collateral are individually segregated for their benefit. Commenters requested that the guidance be revised to only require recording of collateral value.	Change made. The Regulation requires a clearing intermediary or regulated clearing agency to record the value of the customer collateral received from or attributable to a customer.
PART 4: REPORTING AND DISCLOSURE BY A CLEARING INTERMEDIARY		
s. 25 – Customer collateral report – regulatory		
General Comments	Two commenters suggested that the requirement for clearing intermediaries to report posted customer collateral on Forms 94-102F1 and 94-102F2 on an individual customer basis was more burdensome than similar requirements under the CFTC's rules, where reporting on posted customer collateral is only required on an aggregate basis. One commenter expressed its support for section 25 to be one of the sections listed in Appendix A for which substituted compliance is available for clearing intermediaries that are in compliance with analogous rules and regulations under the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (United States).	Change made. Forms 94-102F1 and 94-102F2 have been revised. A clearing intermediary is now required to report customer collateral on an aggregate basis for all customers, rather than on an individual customer basis. Additionally, a clearing intermediary is now required to report which permitted depositories hold customer collateral on its behalf but is not required to report on the value of customer collateral held at each permitted depository location. The reporting required under this section is of importance to Canadian securities regulatory authorities. Consequently, this section remains a residual requirement that is applicable even when substituted compliance is available.
s. 26 – Customer collateral report – customer		
s.26(1)(b)	Two commenters requested that paragraph 26(1)(b) and paragraph 44(b) be modified to remove references to asset type and quantity of customer collateral to address the concern raised about the level of detail required to be recorded about customer collateral held by clearing intermediaries and regulated clearing agencies under section 13 and section 37.	Change made. Consistent with the changes to sections 13 and 37, the Regulation requires a clearing intermediary or regulated clearing agency to record the value of the customer collateral received from or attributable to a customer.

PART 5: TREATMENT OF CUSTOMER COLLATERAL BY A REGULATED CLEARING AGENCY		
General Comments	Commenters suggested that portfolio margining and cross-margining of OTC derivatives with other products such as futures should be permitted under the Regulation because these practices confer commercial benefits for market participants without meaningfully increasing the risk of customer shortfalls in the event of a clearing intermediary's default.	No change. The Regulation prohibits the cross-margining of a customer's OTC cleared derivatives and futures positions. However, in some jurisdictions, customer protection requirements applicable to futures are equivalent to those applicable to OTC cleared derivatives; under such regimes, cross-margining may not represent a material risk to porting a customer's OTC cleared derivatives positions. Therefore, these factors will be taken into account when considering an application for discretionary relief from the prohibition on cross-margining or when making an equivalence determination of a foreign jurisdiction's regulatory requirements for the purpose of substituted compliance.
s. 28 – Collection of initial margin		
General Comments	One commenter noted that a clearing agency's rules do not prescribe the level of margin that its participants must request from its customers. Accordingly, it will not be possible for the clearing agency to monitor whether or not direct intermediaries are offsetting initial margin positions of its customers against one another.	No change. A regulated clearing agency is responsible for ensuring it receives initial margin on a gross basis from each customer.
s. 30 – Holding of customer collateral – regulated clearing agency		
General Comments	One commenter requested the Regulation explicitly permit commingling and the use of omnibus accounts directly in section 30.	No change. We refer to the guidance in section 30 of the Policy Statement, which states that the customer collateral of multiple customers held by a regulated clearing agency may be commingled in an omnibus customer account if the customer collateral is segregated by each customer on a recordkeeping basis. Additionally, the recordkeeping obligations in the Regulation require the regulated clearing agency to identify the value of customer collateral held for each customer within an omnibus account.

s.30(2)	One commenter requested clarification on whether separate accounts are required for each type of customer collateral (e.g., initial margin, variation margin) as well as for any property of the customer held by the regulated clearing agency related to transactions outside of the scope of the Regulation (e.g., exchange-traded derivatives).	Change made. All types of customer collateral can be commingled in an omnibus account with the customer collateral of other customers. Additionally, guidance has been added to the Policy Statement clarifying that a regulated clearing agency is required to hold customer collateral relating to cleared derivatives separately from any other type of property that is not customer collateral, including any other property posted by a customer as collateral relating to another investment or financial instrument that is not a cleared derivative. For example, the customer collateral of a customer may be commingled in an omnibus account with the customer collateral of other customers but may not be commingled with collateral relating to a futures contract that belongs to the customer or another customer.
s. 32 – Use of customer collateral – regulated clearing agency		
General Comments	Commenters noted that section 32 prevents cross-margining of futures and OTC swaps and requested that cross-margining be permitted where a Canadian counterparty is interacting with a clearing agency in foreign jurisdictions where cross-margining is permitted. It was requested the Committee consider that clearing agencies would need to implement manual controls to prevent Canadian counterparties from accessing cross-margined offerings and that Canadian counterparties would be subject to significantly higher margin requirements if their futures and OTC swaps could not be commingled and cross-margined.	No change. The Regulation prohibits the cross-margining of a customer's OTC cleared derivatives and futures positions. However, in some jurisdictions, customer protection requirements applicable to futures are equivalent to those applicable to OTC cleared derivatives; under such regimes, cross-margining may not represent a material risk to porting a customer's OTC cleared derivatives positions. Therefore, these factors will be taken into account when considering an application for discretionary relief from the prohibition on cross-margining or when making an equivalence determination of a foreign jurisdiction's regulatory requirements for the purpose of substituted compliance.
s. 33 – Investment of customer collateral – regulated clearing agency		
General Comments	One commenter requested that investment losses be borne solely by the clearing agency. The commenter noted that equivalent provisions in the CFTC regulations do not permit mutualisation of investment losses among clearing agency members and requested clarification on the risk management and policy reasons for permitting mutualisation of investment losses among clearing members.	No change. There is no requirement in section 7 or section 33 that losses be shared among clearing intermediaries.

PART 6: RECORDKEEPING BY A REGULATED CLEARING AGENCY		
s. 36 – Retention of records – regulated clearing agency		
General Comments	Clarification of the scope of records required to be retained by regulated clearing agencies was requested. The commenter suggested that the customer information collected by a clearing intermediary and shared with a regulated clearing agency under section 24 should be retained only by the clearing intermediary in accordance with section 12.	Change made. The Regulation does not require a regulated clearing agency to retain records related to a cleared derivative after the cleared derivative is terminated. Clearing intermediaries are required to maintain records related to customers and individual cleared derivatives for at least 7 years after termination; thus, it would be redundant for both clearing intermediaries and regulated clearing agencies to keep these records for an extended period after termination.
s. 37 – Books and records – regulated clearing agency		
General Comments	A concern was raised that requiring clearing intermediaries and regulated clearing agencies to identify specific items of collateral attributable to each customer may cause customers to believe specific items of collateral are individually segregated for their benefit.	Change made. The Regulation requires a regulated clearing agency to record the value of the customer collateral received from or attributable to a customer.
s. 38 – Separate records – regulated clearing agency		
s. 38(b)	One commenter noted that under United States laws, a derivatives clearing organization (**DCO**) must only record the value of customer collateral held by the DCO in satisfaction of its margin requirements and is not required to record the value of excess margin. The commenter requested that paragraph 38(b) not apply to non-Canadian clearing agencies subject to different regulatory requirements and which have built operation systems accordingly.	Change made. Section 31 of the Regulation has been revised and requires a regulated clearing agency to record the value of excess margin it holds for a clearing intermediary on behalf of its customers. Additionally, an exemption based on substituted compliance is available to regulated clearing agencies that act in accordance with CFTC or EMIR requirements.
s. 38(b)	One commenter requested that paragraph 38(b) be revised to clarify that clearing agencies are not required to distinguish the value of customer collateral on an individually segregated basis (i.e., it can be recorded within an omnibus customer account).	No change. Customer collateral can be held within an omnibus account but the value of customer collateral attributable to each customer must be recorded.

s. 38(b) and (c)	One commenter requested that to align with the CFTC's approach to the treatment of non-US indirect intermediary's accounts, the Regulation should provide for substituted compliance for paragraphs 38(b) and (c) and clarify that paragraphs 38(b) and (c) apply only to a clearing intermediary in respect of local counterparties (not all of their customers).	Change made. An exemption based on substituted compliance is available to regulated clearing agencies that act in accordance with CFTC or EMIR requirements. Otherwise, section 2 of the Regulation provides that the requirements under the Regulation are applicable to a regulated clearing agency that has its head office or principal place of business in a foreign jurisdiction only in respect of clearing services provided for local customers (i.e., customers located or organized in Canada). Section 2 also provides that the requirements under the Regulation applicable to clearing intermediaries apply only in respect of clearing services provided to local customers.
PART 7: REPORTING AND DISCLOSURE BY A REGULATED CLEARING AGENCY		
s. 41 – Disclosure to direct intermediaries by regulated clearing agency		
General Comments	One commenter requested that for clearing agencies subject to United States laws, substituted compliance be available to permit reliance on the existing disclosures by clearing agencies under Part 39.37 of the CFTC's rules. Additionally, where a clearing agency has already made the disclosures required under the Regulation to a customer, the clearing agency should not be required to make the disclosures again after the Regulation comes into force.	Change made. Substituted compliance applies to clearing intermediaries that provide disclosure in accordance with CFTC and EMIR disclosure requirements. Additionally, the guidance in the Policy Statement providing examples of information to be included in the disclosure has been clarified. As stated in the Notice and in the Policy Statement, where a regulated clearing agency or clearing intermediary has previously delivered disclosure to its customers that meets the requirements of the Regulation prior to the entry into force of the Regulation, new disclosure will not need to be provided to those customers.

S. 43 – Customer collateral report – regulatory		
General Comments	One commenter suggested that the reporting requirements regarding customer collateral for regulated clearing agencies on Form 94-102F3 was more burdensome than similar requirements under the CFTC's rules.	Change made. Form 94-102F3 has been revised and a regulated clearing agency is now required to report customer collateral on an aggregate basis for all customers, rather than on an individual customer basis. Additionally, a regulated clearing agency is now required to report which permitted depositories hold customer collateral on its behalf but is not required to report on the value of customer collateral held at each permitted depository location. The reporting required under this section is of importance to Canadian securities regulatory authorities. Consequently, this section remains a residual requirement that is applicable even when substituted compliance is available.
PART 8: TRANSFER OF POSITIONS		
s. 46 – Transfer of customer collateral and positions		
General Comments	One commenter noted that the contractual obligation between a clearing agency and its direct participant to comply with the rules of the clearing agency does not extend to a customer of the direct participant. Consequently, the clearing agency is not in a position to assess if the direct participant's customer has defaulted on its obligation.	Change made. The Policy Statement has been revised at section 24 to explain that the clearing intermediary would be responsible for providing information on customer default.
s. 46(1)	Two commenters requested that subsection 46(1) be modified to include "to the extent practicable" to address explicitly the challenges associated with discharging the obligations created by this provision.	Change made. Section 46 has been revised in the Regulation to address the challenges associated with the obligations created by the provision. These changes include specifying different requirements for transfers of a customer's positions and customer collateral in a default scenario or by request of the customer in a business-as-usual scenario.
s. 46(3)(a)	Two commenters suggested that paragraph 46(3)(a) be revised to reflect the fact that customer consent to transfer collateral and positions will not always be obtained in certain default scenarios which rely on negative consent.	Change made. Regulated clearing agencies are obligated to make reasonable efforts to ensure the transfer of a customer's collateral and positions is facilitated in accordance with the customer's instructions. Guidance on this point has been added to the Policy Statement.

PART 9: SUBSTITUTED COMPLIANCE		
General Comments	In making its conclusions regarding which provisions in the Regulation will benefit from substituted compliance, one commenter encouraged assessing foreign customer protection rules using an outcomes-based approach, such that foreign rules would qualify for substituted compliance where the same level of overall protection is achieved even if the foreign rules are not exactly the same as the requirements under the Regulation.	Change made. An outcomes-based approach was used to make the substituted compliance determinations included in the Regulation.
	Commenters requested that the Regulation permit substituted compliance on a holistic basis whereby the OTC derivatives customer clearing regimes of foreign jurisdictions would be recognized in their entirety. Where certain parts of a foreign jurisdiction's customer clearing regime are insufficient, it was suggested that additional conditions be imposed such that compliance with the Regulation is required for those particular provisions.	Change made. An outcomes-based approach was used to make the substituted compliance determinations included in the Regulation. On an outcomes basis, it was determined that certain provisions in the Regulation did not have equivalent provisions in the customer clearing regimes used in the foreign jurisdictions that we have reviewed. Accordingly, such "residual" provisions must be complied with by foreign clearing intermediaries and regulated clearing agencies providing clearing services for local customers even when benefitting from the exemption based on substituted compliance.

List of Commenters:

1. BMO Nesbitt Burns Inc.
2. The Canadian Advocacy Council for Canadian CFA Institute Societies
3. Canadian Market Infrastructure Committee
4. Chicago Mercantile Exchange Inc.
5. Futures Industry Association, Inc.
6. TMX Group Limited