

## CSA Notice of consultation

### Draft Regulation to amend Regulation 24-102 respecting Clearing Agency Requirements

### Draft amendments to Policy Statement to Regulation 24-102 respecting Clearing Agency Requirements

October 18, 2018

#### Introduction

The Canadian Securities Administrators (the **CSA** or **we**) are publishing for a 90 day comment period draft *Regulation to amend Regulation 24-102 respecting Clearing Agency Requirements* (**Regulation**) and draft amendments to *Policy Statement to Regulation 24-102 respecting Clearing Agency Requirements* (**Policy Statement**), altogether referred as the **Draft Amendments**. The Regulation and the Policy Statement are collectively referred to as **Regulation 24-102**.

The purposes of the Draft Amendments are described in the “Substance and Purpose” section below.

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The 90-day comment period will expire on January 16, 2019. For further details, see the “Request for Comments” section below.

#### Background

The Regulation sets out ongoing requirements for recognized clearing agencies, including requirements that are based on international standards applicable to financial market infrastructures (**FMI**s) operating as a central counterparty (**CCP**), central securities depository (**CSD**) or securities settlement system (**SSS**). These international standards are described in the April 2012 report (**PFMI Report**) *Principles for financial market infrastructures* (the **PFMI Principles**) published by the Committee on Payments and Market Infrastructures (**CPMI**)<sup>1</sup> and the International Organization of Securities Commissions (**IOSCO**).<sup>2</sup> The Policy Statement presently includes an annex (**Annex I**) that sets forth supplementary guidance (**Joint Supplementary Guidance**) that was developed jointly by the Bank of Canada and CSA regulators. The Joint Supplementary Guidance is intended to provide additional clarity on the PFMI Principles for domestic recognized clearing agencies that are also overseen by the Bank of Canada. The Regulation also sets forth certain requirements for clearing agencies intending to apply for recognition as a clearing agency under securities legislation, or for an exemption from the recognition requirement. Regulation 24-102, including the Joint Supplementary Guidance, came into force February 17, 2016.<sup>3</sup>

Since the development of the PFMI and their adoption by CPMI and IOSCO members, CPMI-IOSCO has undertaken to monitor global implementation of the PFMI. On August 2, 2018, a report was published by CPMI-IOSCO which provides an assessment of Canada’s implementation of the PFMI within its legislative and regulatory structure.<sup>4</sup> The report presents the

<sup>1</sup> Prior to September 2014, CPMI was known as the Committee on Payment and Settlement Systems (**CPSS**).

<sup>2</sup> The PFMI Report is available on the Bank for International Settlements’ website ([www.bis.org](http://www.bis.org)) and the IOSCO website ([www.iosco.org](http://www.iosco.org)).

<sup>3</sup> In Saskatchewan, the effective date was February 19, 2016.

<sup>4</sup> The assessment report on Canada’s adoption of the PFMI is available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD608.pdf>.

conclusions of CPMI-IOSCO as to whether, and to what degree, the Canadian legal, regulatory and oversight frameworks, including rules and regulations and any relevant policy statements, implement the PFMI with regards to systemically important CCPs, CSDs and SSSs (as well as trade repositories and payment systems). The report generally found that the PFMI were implemented in a complete and consistent manner through the implementation measures of the Canadian authorities. These findings are discussed further below.

## Substance and Purpose

### 1. Purposes of Draft Amendments

The Draft Amendments seek to enhance operational system requirements, align aspects of Regulation 24-102 more closely with similar provisions in *Regulation 21-101 respecting Marketplace Operation (Regulation 21-101)*, and reflect latest developments and findings of CPMI-IOSCO with relevance for the Canadian market.

In particular, the purposes of the Draft Amendments are the following:

- enhance the systems-related requirements in Part 4, Division 3, of the Regulation and related provisions in the Policy Statement, by aligning them more closely with similar provisions in Regulation 21-101, emphasizing the importance of cyber resilience, and clarifying testing and reporting expectations;
- update Regulation 24-102 to include a general reference in the Policy Statement to CPMI-IOSCO guidance reports that have been published on various aspects of the PFMI Principles since the publication of the PFMI Report;
- adopt findings made by the CPMI-IOSCO PFMI implementation monitoring assessment, including substantially simplifying the Joint Supplementary Guidance; and
- make other non-substantive amendments, corrections and clarifications to Regulation 24-102.

### 2. Summary of Draft Amendments

We discuss briefly the amendments and policy rationales for the key Draft Amendments below.

#### a. Systems requirements

(i) The concept of ‘cyber resilience’ has been added to subparagraph 4.6(1)(a)(ii) as one of the information technology general controls that a recognized clearing agency must develop and maintain. While cyber resilience should already be covered by an entity’s controls, the explicit addition of the concept in the Regulation is intended to be reflective of the increasing importance of ensuring that an entity has taken adequate steps to address cyber resilience, as discussed in the June 2016 CPMI-IOSCO *Guidance on cyber resilience for financial market infrastructures*.<sup>5</sup>

(ii) The concept of “security breach” in relation to the notifications that must be provided by a recognized clearing agency pursuant to subsection 4.6(c) has been broadened to “security incident”. The amendment extends the concept beyond actual breaches, as we are of the view that a material event may include one where a breach has not necessarily occurred. We describe “security incidents” in the Policy Statement with reference to general definition of the concept used by the National Institute of Standards and Technology (U.S. Department of Commerce) (NIST)<sup>6</sup>, a recognized standard also followed by CPMI-IOSCO.

(iii) In line with the reporting requirements in existing recognized clearing agencies’ recognition orders, for clarity and consistency we have added requirements in the Regulation under section 4.6 and draft section 4.6.1 that recognized clearing agencies keep records of any systems failures, malfunctions, delays or security incidents and if applicable document reasons with respect to the materiality of the event, and provide a report to us on a quarterly basis.

(iv) To better align the systems requirements in the Regulation with those for marketplaces in Regulation 21-101, we propose two amendments. Firstly, a new section 4.6.1 regarding auxiliary systems has been added. An auxiliary system is one that shares network resources with one or more systems, operated by or on behalf of a recognized clearing agency, that supports its clearing, settlement and depository functions and that, if breached, would pose a security threat to one or more of the previously mentioned systems. We note that the new section is not intended to introduce any new substantive requirement, but to clarify what is already implicit in PFMI Principle 17: *Operational risk*; namely, that recognized clearing agencies are expected to identify and manage all plausible sources of operational risks internally and externally including those that may result from auxiliary systems.

Secondly, under section 4.7, we make clear that we expect a recognized clearing agency to engage a “qualified external auditor” to conduct and report on its independent systems reviews. A qualified external auditor is considered to be a person, or a group of persons, with relevant experience in both information technology and in the evaluation of related internal systems or controls in a complex information technology environment. As contemplated by section 6.1 of the Regulation, we may consider

<sup>5</sup> The guidance is available at <https://www.bis.org/cpmi/publ/d146.pdf>.

<sup>6</sup> The NIST definition of “security incident” is available at <https://csrc.nist.gov/Glossary>.

applications for exemption from the requirement to engage a qualified external auditor in certain circumstances, subject to such conditions or restrictions as may be imposed in the exemption. Before engaging a qualified external auditor, we would also expect the clearing agency to discuss with us its choice for qualified external auditor and the scope of the systems review mandate.

b. Additional CPMI-IOSCO guidance reports

The Policy Statement currently states that, in interpreting and implementing the PFMI Principles, regard is to be given to the explanatory notes in the PFMI Report unless otherwise indicated in section 3.1 or Part 3 of the Policy Statement. Since the publication of the PFMI Report, CPMI-IOSCO have published related documents and additional guidance on certain specific aspects of the PFMI Principles, including the following:<sup>7</sup>

- December 2012 – *Principles for financial market infrastructures: disclosure framework and assessment methodology*
- October 2014 – *Recovery of financial market infrastructures*
- December 2014 – *Principles for financial market infrastructures: Assessment methodology for the oversight expectations applicable to critical service providers*
- February 2015 – *Public quantitative disclosure standards for central counterparties*
- August 2015 – *Application of the “Principles for financial market infrastructures” to central bank FMI*
- February 2016 – *Clearing of deliverable FX instruments*
- June 2016 – *Guidance on cyber resilience for financial market infrastructures*
- July 2017 – *Resilience of central counterparties: further guidance on the PFMI*
- April 2018 – *Framework for supervisory stress testing of central counterparties (CCPs)*

We are proposing to amend the Policy Statement to include the general reference that these and other future additional CPMI-IOSCO reports should be used as guidance in interpreting and implementing the PFMI Principles.

c. CPMI-IOSCO implementation monitoring assessment

Following from the CPMI-IOSCO implementation monitoring assessment, which found that Canada has generally implemented the PFMI in a complete and consistent way, the report does recommend making some clarifications within the Canadian regime applicable to clearing agencies. As a result, we propose to make two main amendments to the Regulation 24-102 to address these findings.

Firstly, we propose to amend subsection 4.3(1) by removing the permissive ability of a recognized clearing agency's chief risk officer and chief compliance officer to report directly to the chief executive officer, if its board of directors so determines. This amendment will address the CPMI-IOSCO finding that a reporting line to the chief executive officer may result in insufficient independence of the risk and audit functions unless there are adequate safeguards in place that address potential conflicts of interest.

Secondly, as the CPMI-IOSCO implementation monitoring assessment found that certain limited aspects of the Joint Supplementary Guidance may introduce confusion in relation to the implementation of two PFMI Principles, we propose to substantially simplify such guidance, and in the process, remove any lack of clarity with respect to the application of the PFMI Principles to domestic recognized clearing agencies that are also overseen by the Bank of Canada. Beyond removal of all guidance that is duplicative of the text of the PFMI Report, including all guidance presently included for PFMI Principle 2: *Governance* and PFMI Principle 23: *Disclosure of rules, key procedures, and market data*, these amendments will address the CPMI-IOSCO finding in respect of PFMI Principle 7: *Liquidity risk* that confusion may follow by allowing the use of “other liquid resources” which are not “qualifying liquid resources” to meet a certain portion of minimum liquid resource requirements. The amendments will also address the finding related to the Joint Supplementary Guidance for PFMI Principle 15: *General business risk* that “any extraordinary expenses” (i.e. unessential, infrequent or one-off costs) should not be excluded from the calculation of current operating expenses. Joint Supplementary Guidance presently included for PFMI Principle 3: *Framework for the comprehensive management of risks* related to ‘Recovery Plans’ is not removed or simplified, however. Such guidance is unchanged but moved to a new Annex II to the Policy Statement.

d. Non-substantive amendments

Lastly, a number of non-substantive amendments, corrections and clarifications are proposed, including modernizing the drafting of Regulation 24-102 in accordance with recent revised CSA rule-making drafting guidelines. By their nature, none of the non-substantive amendments should have any impact on the application of Regulation 24-102 to market participants.

### **Request for Comments**

We welcome your comments on the Draft Amendments. Please submit your comments in writing on or before January 16, 2019. If you are not sending your comments by email, please send a CD containing the submissions (in Microsoft Word format).

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<sup>7</sup> Links to all of the documents are presently available at [https://www.bis.org/cpmi/info\\_pfmi.htm](https://www.bis.org/cpmi/info_pfmi.htm).

Address your submission to the following CSA member commissions:

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Autorité des marchés financiers  
British Columbia Securities Commission  
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Office of the Superintendent of Securities, Newfoundland and Labrador  
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Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

Please deliver your comments only to the addresses that follow. Your comments will be forwarded to the remaining CSA member jurisdictions.

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

The Secretary  
Ontario Securities Commission  
20 Queen Street West, 22nd Floor  
Toronto, Ontario M5H 3S8  
Fax: 416-595-2318  
E-mail: [comments@osc.gov.on.ca](mailto:comments@osc.gov.on.ca)

Please note that comments received will be made publicly available and posted on the Websites of certain CSA jurisdictions. We cannot keep submissions confidential because securities legislation in certain provinces requires publication of the written comments received during the comment period. Therefore, you should not include personal information directly in comments to be published. It is important that you state on whose behalf you are making the submission.

Questions with respect to this Notice or the Draft Amendments may be referred to:

Claude Gatién  
Director, Clearing houses  
Autorité des marchés financiers  
Tel: 514 395-0337, ext. 4341  
Toll free: 1 877 525-0337  
Email: [claudio.gatien@lautorite.qc.ca](mailto:claudio.gatien@lautorite.qc.ca)

Martin Picard  
Senior Policy Advisor, Clearing houses  
Autorité des marchés financiers  
Tel: 514 395-0337, ext. 4347  
Toll free: 1 877 525-0337  
Email: [martin.picard@lautorite.qc.ca](mailto:martin.picard@lautorite.qc.ca)

Aaron Ferguson  
Manager, Market Regulation  
Ontario Securities Commission  
Tel: 416 593-3676  
Email: [aferguson@osc.gov.on.ca](mailto:aferguson@osc.gov.on.ca)

Oren Winer  
Legal Counsel, Market Regulation  
Ontario Securities Commission  
Tel: 416 593-8250  
Email: owiner@osc.gov.on.ca

Michael Brady  
Senior Legal Counsel  
British Columbia Securities Commission  
Tel: 604 899-6561  
Email: mbrady@bcsc.bc.ca

April Hughes  
Legal Counsel  
Alberta Securities Commission  
Tel: 403 297-2634  
Email: april.hughes@asc.ca

Martin McGregor  
Legal Counsel  
Alberta Securities Commission  
Tel: 403 355-2804  
Email: martin.mcgregor@asc.ca

Paula White  
Deputy Director, Compliance and Oversight  
Manitoba Securities Commission  
Tel: 204 945-5195  
Email: paula.white@gov.mb.ca

Liz Kutarna  
Deputy Director, Capital Markets, Securities Division  
Financial and Consumer Affairs Authority of Saskatchewan  
Tel: 306 787-5871  
Email: liz.kutarna@gov.sk.ca