Chapter 6

Request for Comments

6.1.1 CSA Notice and Second Request for Comment – Proposed Amendments to National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives and Proposed Changes to Companion Policy 94-101 Mandatory Central Counterparty Clearing of Derivatives

CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

CSA Notice and Second Request for Comment
Proposed Amendments to
National Instrument 94-101
Mandatory Central Counterparty Clearing of Derivatives
and
Proposed Changes to Companion Policy 94-101 *Mandatory Central Counterparty Clearing of Derivatives*

September 3, 2020

Introduction

The Canadian Securities Administrators (the **CSA** or we) are publishing the following for a second comment period of 90 days, expiring on December 2, 2020:

- proposed amendments to National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (the **National Instrument)**, and
- proposed changes to Companion Policy 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (the **CP**).

Collectively, the proposed amendments to the National Instrument (the **Proposed Rule Amendments**) and the proposed changes to the CP are referred to as the **Proposed Amendments**.

The CSA is of the view that Proposed Rule Amendments are necessary to address issues raised by market participants following the CSA's publication for comment of proposed amendments and changes to the National Instrument and the CP on October 12, 2017 (the **2017 Proposed Amendments**). The issues relate largely to the scope of market participants that are required to clear an over-the-counter (**OTC**) derivative prescribed in Appendix A to the National Instrument through a central clearing counterparty (the **Clearing Requirement**).

We are issuing this CSA Notice to solicit comments on the Proposed Amendments.

Background

The Proposed Amendments are a response to feedback received from various market participants, and are intended to more effectively and efficiently promote the underlying policy aims of the National Instrument.

The National Instrument was published on January 19, 2017 and came into force on April 4, 2017 (except in Saskatchewan where it came into force on April 5, 2017). The purpose of the National Instrument is to reduce counterparty risk in the OTC derivatives market by requiring certain counterparties to clear certain prescribed derivatives through a central clearing counterparty.

The Clearing Requirement became effective for certain counterparties specified in paragraph 3(1)(a) of the National Instrument (*i.e.*, a local counterparty that is a participant of a regulated clearing agency that subscribes for clearing services for the applicable class of derivatives) on the coming-into-force date of the National Instrument, and was initially scheduled to become effective for certain other counterparties specified in paragraphs 3(1)(b) and 3(1)(c) on October 4, 2017.

On October 12, 2017 the CSA published for comment proposed amendments and changes to the National Instrument and CP. However, in order to facilitate the rule-making process for these amendments and to refine the scope of market participants that

are subject to the Clearing Requirement, the CSA jurisdictions (except Ontario) exempted counterparties specified in paragraphs 3(1)(b) and (c) of the National Instrument from the Clearing Requirement.[1]

The Ontario Securities Commission (the **OSC**) similarly amended the National Instrument to extend the effective date of the Clearing Requirement for those counterparties until August 20, 2018.[2]

While the Clearing Requirement took effect in Ontario on August 20, 2018 for all categories of counterparties specified in subsection 3(1) of the National Instrument, OSC staff expressed the view that only counterparties specified under paragraph 3(1)(a) are expected to comply with the Clearing Requirement until the CSA finalizes the amendments to the National Instrument to narrow the scope of market participants that would be subject to the Clearing Requirement[3].

Substance and Purpose of the Proposed Amendments

Following the comments received on the 2017 Proposed Amendments, the CSA is proposing further amendments to the National Instrument. These include amendments that reflect issues raised by commenters relating to the scope of the counterparties that are subject to the National Instrument, and amendments to refine the scope of products that are mandated to be cleared. Minor non-material changes are also being proposed.

The Proposed Amendments reflect our consideration of the comments received from market participants on the 2017 Proposed Amendments, as well as our ongoing review of the National Instrument's impact on market participants.

Summary of the Proposed Amendments

(a) Subsection 1(2): interpretation of "affiliated entity"

The proposed amendments to the interpretation of "affiliated entity" are based on the concept of consolidated financial statements under IFRS or U.S. generally accepted accounting principles[4]. Proposed subsection 1(2), in conjunction with the proposed repeal of subsection 1(3) and the introduction of subsections 3(0.1) and (0.2), would affect the circumstances in which an entity is considered an affiliated entity.

The proposed amendments reflect a CSA policy decision in 2016, in response to our evaluation of the size and nature of the Canadian OTC derivatives market, to design the Clearing Requirement so that it applied to specific types of transactions and to the market participants that had access to clearing agencies that offered clearing services for the mandated derivatives, or because certain market participants' derivatives exposure represented a potential systemic risk. Considering the scope of the application of the National Instrument and review of the comments received following the publication of the 2017 Proposed Amendments, the previous interpretation of "affiliated entity" could subject certain entities to the Clearing Requirement unintentionally while other market participants could unintentionally be excluded from the National Instrument.

(b) De minimis exclusion

Consistent with the CSA's intention to apply the Clearing Requirement only to market participants that, together with affiliated entities, might present systemic risk, the CSA is still proposing to exclude from the scope of the National Instrument entities that have a month-end gross notional amount under all outstanding derivatives of less than $1 billion and are part of a large derivative participant group from the Clearing Requirement.

Paragraph 3(1)(c) was originally designed to capture certain large local counterparties and all their local affiliated entities. In substance, adding the notional amount of all outstanding derivatives of affiliated entities to the calculation of the threshold stated in paragraph 3(1)(c) was intended to prevent market participants from creating multiple sub-entities to avoid being subject to the Clearing Requirement. However, the CSA is of the view that entities with less than $1 billion of notional derivatives exposure should not be required to clear.

In response to comments we received following the publication of the 2017 Proposed Amendments to reduce the monitoring frequency of the $1 billion threshold under paragraphs 3(1)(b) and (c), the CSA is proposing to establish an annual three-month monitoring period during which counterparties will need to determine if they are subject to the Clearing Requirement for the subsequent one-year period.

1 Blanket Order 94-501, available on the website of the securities regulatory authority in the local jurisdiction.
2 See, in Ontario, Amendment to National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives*, published July 6, 2017.
3 As explained further in CSA Staff Notice 94-303, on May 31st 2018 the CSA jurisdictions (except Ontario) extended the blanket order relief under Blanket Order 94-501 until the earlier of its revocation or the coming into force of amendments to the National Instrument with respect to the scope of counterparties subject to the Clearing Requirement. Since blanket orders were not authorized under Ontario securities law, the OSC was unable to follow the approach of the other CSA jurisdictions.
4 Refer to IFRS 10 Consolidated Financial Statements and US FASB Accounting Standards Codification Topic 810.

(c) Investment funds and special purpose entities

The CSA has come to the view that a further subset of market participants should be excluded. With the introduction of subsections 3(0.1) and (0.2), it is proposed to exclude investment funds and certain types of consolidated entities (commonly referred to as special purpose entities) from being treated as affiliated entities for the purpose of paragraphs 3(1)(b) and (c), with the effect that such entities would only be potentially subject to the Clearing Requirement in circumstances where paragraph 3(1)(c) applies, i.e. when these entities exceed on their own the $500 billion threshold in that paragraph.

(d) Determination of mandatory clearable derivatives

As previously published in the 2017 Proposed Amendments, Appendix A of the National Instrument will remove overnight index swaps with variable notional type and forward rate agreements with variable notional type from the list of mandatory clearable derivatives as those are not currently offered for clearing by regulated clearing agencies.

(e) Appendix B Laws, Regulations or Instruments of foreign jurisdiction applicable for substituted compliance

The CSA continues to follow developments regarding Brexit and other international actions being taken in that regard to ensure the substituted compliance provision reflect any changes that are necessary to address these developments.

(f) Removal of the requirement to deliver Form 94-101F1 Intragroup Exemption and Form 94-101F2 Derivatives Clearing Services

The CSA is proposing to remove the requirement to deliver Form 94-101F1 *Intragroup Exemption* and Form 94-101F2 *Derivatives Clearing Services* from the National Instrument because we have found alternative sources for obtaining the information included in these forms that does not result in additional regulatory burden for participants.

Contents of Annexes

The following annexes form part of this CSA Notice:

Annex A	Proposed amendments to National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives*
Annex B	Blackline of National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* showing the proposed amendments
Annex C	Proposed Changes to Companion Policy 94-101 *Mandatory Central Counterparty Clearing of Derivatives*
Annex D	Blackline of Companion Policy 94-101 *Mandatory Central Counterparty Clearing of Derivatives* showing the proposed changes
Annex E	Summary of comments and CSA responses and list of commenters
Annex F	Local Matters, where applicable

Request for Comments

Please provide your comments in writing by December 2, 2020. We cannot keep submissions confidential because securities legislation in certain provinces requires publication of a summary of the written comments received during the comment period.

In addition, all comments received will be posted on the websites of the Alberta Securities Commission (www.albertasecurities.com), the Autorité des marchés financiers (www.lautorite.qc.ca) and the Ontario Securities Commission (www.osc.gov.on.ca).

Therefore, you should not include personal information directly in comments to be published.

It is important that you state on whose behalf you are making the submission.

Thank you in advance for your comments.

Please address your comments to each of the following:

British Columbia Securities Commission;
Alberta Securities Commission;
Financial and Consumer Affairs Authority of Saskatchewan;

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

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

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2640, boulevard Laurier, bureau 400Québec (Québec)
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Questions

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ANNEX A

PROPOSED AMENDMENTS TO
NATIONAL INSTRUMENT 94-101 *MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES*

1. National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives is amended by this Instrument.

2. Section 1 is amended

(a) in subsection (1), by adding the following definitions:

"investment fund" has the meaning ascribed to it in National Instrument 81-106 *Investment Fund Continuous Disclosure*;

"prudentially regulated entity" means a person or company that is subject to and in compliance with the laws of Canada, a jurisdiction of Canada or a foreign jurisdiction where the head office or principal place of business of a Schedule III bank is located, and a political subdivision of that foreign jurisdiction, relating to minimum capital requirements, financial soundness and risk management, or the guidelines of a regulatory authority of Canada or a jurisdiction of Canada relating to minimum capital requirements, financial soundness and risk management;

"reference period" means, for a given year after 2019, the period beginning on September 1 in a year and ending on August 31 of the following year***,***

(b) by replacing subsection (2) with the following:

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

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

(i) IFRS;

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

(b) all of the following apply:

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

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

(c) the first party and second party are both prudentially regulated entities supervised together on a consolidated basis.

(c) by repealing subsection (3).

3. Section 3 is amended

(a) by adding the following subsections:

(0.1) Despite subsection 1(2), an investment fund is not an affiliated entity of another person or company for the purposes of paragraphs 3(1)(b) and (c);

(0.2) Despite subsection 1(2), a person or company is not an affiliated entity of another person or company for the purposes of paragraphs 3(1)(b) and (c) if the following apply:

(a) the person or company has, as its primary purpose, one of the following:

(i) financing a specific pool or pools of assets;

(ii) providing investors with exposure to a specific set of risks;

(iii) acquiring or investing in real estate or other physical assets;

(b) all the incurred indebtedness by the person or company whose primary purpose is one set out in subparagraphs (a)(i) or (ii), including obligations owing to its counterparty to a derivative, are solely secured by the assets of that person or company.

(b) by replacing paragraphs (1)(b) and (c) with the following:

(b) the counterparty

(i) is an affiliated entity of a participant referred to in paragraph (a), and

(ii) had, for the months of March, April and May preceding the reference period in which the transaction was executed, an average month-end gross notional amount under all outstanding derivatives exceeding $1 000 000 000 excluding derivatives to which paragraph 7(1)(a) applies;

(c) the counterparty

(i) is a local counterparty in any jurisdiction of Canada,

(ii) had, during the previous 12-month period, a month-end gross notional amount under all outstanding derivatives, combined with each affiliated entity that is a local counterparty in any jurisdiction of Canada, exceeding $500 000 000 000 excluding derivatives to which paragraph 7(1)(a) applies, and

(iii) had, for the months of March, April and May preceding the reference period in which the transaction was executed, an average month-end gross notional amount under all outstanding derivatives exceeding $1 000 000 000 excluding derivatives to which paragraph 7(1)(a) applies.***, and***

(c) in subsection (2), by deleting "(1)(b) or***", "***(1)(b)(ii) or***" and "***, as applicable***".***

4. Section 6 is amended by replacing "the following counterparties***" with "***a counterparty in respect of a mandatory clearable derivative if any counterparty to the mandatory clearable derivative is one of the following**".***

5. Section 7 is amended

(a) by deleting "the application of***",***

(b) in paragraph (1)(a), by deleting "if each of the counterparty and the affiliated entity are consolidated as part of the same audited consolidated financial statements prepared in accordance with "accounting principles" as defined in National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards****", and***

(c) by repealing subsections (2) and (3).

6. Section 8 is amended

(a) by deleting "the application of***",***

(b) by replacing paragraph (d) with the following:

(d) the multilateral portfolio compression exercise involved both counterparties to the mandatory clearable derivative;***, and***

(c) in paragraph (e), by replacing "is***" with "***was***".***

7. Part 4 is repealed.

8. Appendix A is replaced with the following:

APPENDIX A
TO
NATIONAL INSTRUMENT 94-101 *MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES*
MANDATORY CLEARABLE DERIVATIVES (Subsection 1(1))

Interest Rate Swaps

Type	Floating index	Settlement currency	Maturity	Settlement currency type	Optionality	Notional type
Fixed-to-float	CDOR	CAD	28 days to 30 years	Single currency	No	Constant or variable
Fixed-to-float	LIBOR	USD	28 days to 50 years	Single currency	No	Constant or variable
Fixed-to-float	EURIBOR	EUR	28 days to 50 years	Single currency	No	Constant or variable
Fixed-to-float	LIBOR	GBP	28 days to 50 years	Single currency	No	Constant or variable
Basis	LIBOR	USD	28 days to 50 years	Single currency	No	Constant or variable
Basis	EURIBOR	EUR	28 days to 50 years	Single currency	No	Constant or variable
Basis	LIBOR	GBP	28 days to 50 years	Single currency	No	Constant or variable
Overnight index swap	CORRA	CAD	7 days to 2 years	Single currency	No	Constant
Overnight index swap	FedFunds	USD	7 days to 3 years	Single currency	No	Constant
Overnight index swap	EONIA	EUR	7 days to 3 years	Single currency	No	Constant
Overnight index swap	SONIA	GBP	7 days to 3 years	Single currency	No	Constant

Forward Rate Agreements

Type	Floating index	Settlement currency	Maturity	Settlement currency type	Optionality	Notional type
Forward rate agreement	LIBOR	USD	3 days to 3 years	Single currency	No	Constant
Forward rate agreement	EURIBOR	EUR	3 days to 3 years	Single currency	No	Constant
Forward rate agreement	LIBOR	GBP	3 days to 3 years	Single currency	No	Constant

9. Form 94-101F1 Intragroup Exemption and Form 94-101F2 Derivatives Clearing Services are repealed.

10. This Instrument comes into force on [*insert date here*].

ANNEX B

This Annex sets out a blackline showing the proposed amendments to National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives*, as set out in Annex A.

NATIONAL INSTRUMENT 94-101
MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES

PART 1
DEFINITIONS AND INTERPRETATION

Definitions and interpretation

1. (1) In this Instrument

"investment fund" has the meaning ascribed to it in National Instrument 81-106 *Investment Fund Continuous Disclosure*;

"local counterparty" means a counterparty to a derivative if, at the time of execution of the transaction, either of the following applies:

(a) the counterparty is a person or company, other than an individual, to which one or more of the following apply:

(i) the person or company is organized under the laws of the local jurisdiction;

(ii) the head office of the person or company is in the local jurisdiction;

(iii) the principal place of business of the person or company is in the local jurisdiction;

(b) the counterparty is an affiliated entity of a person or company referred to in paragraph (a) and the person or company is liable for all or substantially all the liabilities of the counterparty;

"mandatory clearable derivative" means a derivative within a class of derivatives listed in Appendix A;

"participant" means a person or company that has entered into an agreement with a regulated clearing agency to access the services of the regulated clearing agency and is bound by the regulated clearing agency's rules and procedures;

"prudentially regulated entity" means a person or company that is subject to and in compliance with the laws of Canada, a jurisdiction of Canada or a foreign jurisdiction where the head office or principal place of business of a Schedule III bank is located, and a political subdivision of that foreign jurisdiction, relating to minimum capital requirements, financial soundness and risk management, or the guidelines of a regulatory authority of Canada or a jurisdiction of Canada relating to minimum capital requirements, financial soundness and risk management;

"reference period" means, for a given year after 2019, the period beginning on September 1 in a year and ending on August 31 of the following year;

"regulated clearing agency" means,

(a) in Alberta, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan and Yukon, a person or company recognized or exempted from recognition as a clearing agency or clearing house pursuant to the securities legislation of any jurisdiction of Canada,

(b) in British Columbia, Manitoba and Ontario, a person or company recognized or exempted from recognition as a clearing agency in the local jurisdiction, and

(c) in Québec, a person recognized or exempted from recognition as a clearing house;

"transaction" means any of the following:

(a) entering into a derivative or making a material amendment to, assigning, selling or otherwise acquiring or disposing of a derivative;

(b) the novation of a derivative, other than a novation with a clearing agency or clearing house.

(2) In this Instrument, a person or company (the first party) is an affiliated entity of another person or company ~~if one of them controls the other or each of them is controlled by the same person or company.(3) In this Instrument, a person or company (the first party) is considered to control another person or company~~ (the second party) if any of the following apply:

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

(i) IFRS;

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

(b) all of the following apply:

(i) the first party ~~beneficially owns or directly or indirectly exercises control or direction over securities of the second party carrying votes which, if exercised, would entitle the first party to elect a majority of the directors of the second party unless the first party holds the voting securities only to secure an obligation;~~and the second party would have been, at the relevant time, required to be consolidated in consolidated financial statements prepared by the first party, the second party or another person or company, if the consolidated financial statements were prepared in accordance with the principles or standards referred to in subparagraphs (a)(i) or (ii);

~~(b) the second party is a partnership, other than a limited partnership, and the first party holds more than 50% of the interests of the partnership;~~

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

(c) the ~~second party is a trust and a trustee of the trust is the first party.~~first party and second party are both prudentially regulated entities supervised together on a consolidated basis.

(3) (*Repealed*).

(4) In this Instrument, in Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan and Yukon, "derivative" means a "specified derivative" as defined in Multilateral Instrument 91-101 *Derivatives: Product Determination*.

Application

2. This Instrument applies to,

(a) in Manitoba,

(i) a derivative other than a contract or instrument that, for any purpose, is prescribed by any of sections 2, 4 and 5 of Manitoba Securities Commission Rule 91-506 *Derivatives: Product Determination* not to be a derivative, and

(ii) a derivative that is otherwise a security and that, for any purpose, is prescribed by section 3 of Manitoba Securities Commission Rule 91-506 *Derivatives: Product Determination* not to be a security,

(b) in Ontario,

(i) a derivative other than a contract or instrument that, for any purpose, is prescribed by any of sections 2, 4 and 5 of Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination* not to be a derivative, and

(ii) a derivative that is otherwise a security and that, for any purpose, is prescribed by section 3 of Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination* not to be a security, and

(c) in Québec, a derivative specified in section 1.2 of Regulation 91-506 respecting derivatives determination, other than a contract or instrument specified in section 2 of that regulation.

In each other local jurisdiction, this Instrument applies to a derivative as defined in subsection 1(4) of this Instrument. This text box does not form part of this Instrument and has no official status.

PART 2
MANDATORY CENTRAL COUNTERPARTY CLEARING

Duty to submit for clearing

3. (0.1) Despite subsection 1(2), an investment fund is not an affiliated entity of another person or company for the purposes of paragraphs 3(1)(b) and (c);

(0.2) Despite subsection 1(2), a person or company is not an affiliated entity of another person or company for the purposes of paragraphs 3(1)(b) and (c) if the following apply:

(a) the person or company has, as its primary purpose, one of the following:

(i) financing a specific pool or pools of assets;

(ii) providing investors with exposure to a specific set of risks;

(iii) acquiring or investing in real estate or other physical assets;

(b) all the incurred indebtedness by the person or company whose primary purpose is one set out in subparagraphs (a)(i) or (ii), including obligations owing to its counterparty to a derivative, are solely secured by the assets of that person or company.

(1) A local counterparty to a transaction in a mandatory clearable derivative must submit, or cause to be submitted, the mandatory clearable derivative for clearing to a regulated clearing agency that offers clearing services in respect of the mandatory clearable derivative, if one or more of the following applies to each counterparty:

(a) the counterparty

(i) is a participant of a regulated clearing agency that offers clearing services in respect of the mandatory clearable derivative, and

(ii) subscribes to clearing services for the class of derivatives to which the mandatory clearable derivative belongs;

(b) the counterparty

(i) is an affiliated entity of a participant referred to in paragraph (a), and~~(ii) has~~

(ii) had, ~~at any time after the date on which this Instrument comes into force, a~~for the months of March, April and May preceding the reference period in which the transaction was executed, an average month-end gross notional amount under all outstanding derivatives exceeding $1 000 000 000 excluding derivatives to which paragraph 7(1)(a) applies;

(c) the counterparty

(i) is a local counterparty in any jurisdiction of Canada, ~~other than a counterparty to which paragraph (b) applies, and~~

(ii) ~~has had, at any time after the date on which this Instrument comes into force~~had, during the previous 12-month period, a month-end gross notional amount under all outstanding derivatives, combined with each affiliated entity that is a local counterparty in any jurisdiction of Canada, exceeding $500 000 000 000 excluding derivatives to which paragraph 7(1)(a) applies, and

(iii) had, for the months of March, April and May preceding the reference period in which the transaction was executed, an average month-end gross notional amount under all outstanding derivatives

exceeding $1 000 000 000 excluding derivatives to which paragraph 7(1)(a) applies.

(2) Unless paragraph (1)(a) applies, a local counterparty to which paragraph ~~(1)(b) or~~ (1)(c) applies is not required to submit a mandatory clearable derivative for clearing to a regulated clearing agency if the transaction in the mandatory clearable derivative was executed before the 90th day after the end of the month in which the month-end gross notional amount first exceeded the amount specified in subparagraph (1)(~~b)(ii) or (1)(~~c)(ii)~~, as applicable~~.

(3) Unless subsection (2) applies, a local counterparty to which subsection (1) applies must submit a mandatory clearable derivative for clearing no later than

(a) the end of the day of execution if the transaction is executed during the business hours of the regulated clearing agency, or

(b) the end of the next business day if the transaction is executed after the business hours of the regulated clearing agency.

(4) A local counterparty to which subsection (1) applies must submit the mandatory clearable derivative for clearing in accordance with the rules of the regulated clearing agency, as amended from time to time.

(5) A counterparty that is a local counterparty solely pursuant to paragraph (b) of the definition of "local counterparty" in section 1 is exempt from this section if the mandatory clearable derivative is submitted for clearing in accordance with the law of a foreign jurisdiction to which the counterparty is subject, set out in Appendix B.

Notice of rejection

4. If a regulated clearing agency rejects a mandatory clearable derivative submitted for clearing, the regulated clearing agency must immediately notify each local counterparty to the mandatory clearable derivative.

Public disclosure of clearable and mandatory clearable derivatives

5. A regulated clearing agency must do all of the following:

(a) publish a list of each derivative or class of derivatives for which the regulated clearing agency offers clearing services and state whether each derivative or class of derivatives is a mandatory clearable derivative;

(b) make the list accessible to the public at no cost on its website.

PART 3
EXEMPTIONS FROM MANDATORY CENTRAL COUNTERPARTY CLEARING

Non-application

6. This Instrument does not apply to a counterparty in respect of a mandatory clearable derivative if any counterparty to the mandatory clearable derivative is one of the following~~counterparties:~~:

(a) the government of Canada, the government of a jurisdiction of Canada or the government of a foreign jurisdiction;

(b) a crown corporation for which the government of the jurisdiction where the crown corporation was constituted is liable for all or substantially all the liabilities;

(c) a person or company wholly owned by one or more governments referred to in paragraph (a) if the government or governments are liable for all or substantially all the liabilities of the person or company;

(d) the Bank of Canada or a central bank of a foreign jurisdiction;

(e) the Bank for International Settlements;

(f) the International Monetary Fund.

Intragroup exemption

7. (1) A local counterparty is exempt from ~~the application of~~ section 3, with respect to a mandatory clearable derivative, if all of the following apply:

(a) the mandatory clearable derivative is between a counterparty and an affiliated entity of the counterparty ~~if each of the counterparty and the affiliated entity are consolidated as part of the same audited consolidated financial statements prepared in accordance with "accounting principles" as defined in National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards*~~;

(b) both counterparties to the mandatory clearable derivative agree to rely on this exemption;

(c) the mandatory clearable derivative is subject to a centralized risk management program reasonably designed to assist in monitoring and managing the risks associated with the derivative between the counterparties through evaluation, measurement and control procedures;

(d) there is a written agreement between the counterparties setting out the terms of the mandatory clearable derivative between the counterparties.

~~(2) No later than the 30th day after a local counterparty first relies on subsection (1) in respect of a mandatory clearable derivative with a counterparty, the local counterparty must deliver electronically to the regulator or securities regulatory authority a completed Form 94-101F1 *Intragroup Exemption*.~~

~~(3) No later than the 10th day after a local counterparty becomes aware that the information in a previously delivered Form 94-101F1 *Intragroup Exemption* is no longer accurate, the local counterparty must deliver or cause to be delivered electronically to the regulator or securities regulatory authority an amended Form 94-101F1 *Intragroup Exemption*.~~

(2) (*Repealed*).

(3) (*Repealed*).

Multilateral portfolio compression exemption

8. A local counterparty is exempt from ~~the application of~~ section 3, with respect to a mandatory clearable derivative resulting from a multilateral portfolio compression exercise, if all of the following apply:

(a) the mandatory clearable derivative is entered into as a result of more than 2 counterparties changing or terminating and replacing existing derivatives;

(b) the existing derivatives do not include a mandatory clearable derivative entered into after the effective date on which the class of derivatives became a mandatory clearable derivative;

(c) the existing derivatives were not cleared by a clearing agency or clearing house;

(d) the multilateral portfolio compression exercise involved both counterparties to the mandatory clearable derivative ~~is entered into by the same counterparties as the existing derivatives~~;

(e) the multilateral portfolio compression exercise ~~is~~was conducted by an independent third-party.

Recordkeeping

9. (1) A local counterparty to a mandatory clearable derivative that relied on section 7 or 8 with respect to a mandatory clearable derivative must keep records demonstrating that the conditions referred to in those sections, as applicable, were satisfied.

(2) The records required to be maintained under subsection (1) must be kept in a safe location and in a durable form for a period of

(a) except in Manitoba, 7 years following the date on which the mandatory clearable derivative expires or is terminated, and

(b) in Manitoba, 8 years following the date on which the mandatory clearable derivative expires or is terminated.

PART 4
MANDATORY CLEARABLE DERIVATIVES

~~**Submission of information on derivatives clearing services provided by a regulated clearing agency**~~

~~10. No later than the 10th day after a regulated clearing agency first offers clearing services for a derivative or class of derivatives, the regulated clearing agency must deliver electronically to the regulator or securities regulatory authority a completed Form 94-101F2 *Derivatives Clearing Services*, identifying the derivative or class of derivatives.~~

(*Repealed*)

PART 5
EXEMPTION

Exemption

11. (1) The regulator or the securities regulatory authority may grant an exemption to this Instrument, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.

(2) Despite subsection (1), in Ontario, only the regulator may grant an exemption.

(3) Except in Alberta and Ontario, an exemption referred to in subsection (1) is granted under the statute referred to in Appendix B of National Instrument 14-101 *Definitions* opposite the name of the local jurisdiction.

PART 6
TRANSITION AND EFFECTIVE DATE

Transition – regulated clearing agency filing requirement

12. No later than May 4, 2017, a regulated clearing agency must deliver electronically to the regulator or securities regulatory authority a completed Form 94-101F2 *Derivatives Clearing Services*, identifying all derivatives or classes of derivatives for which it offers clearing services on April 4, 2017.

Transition – certain counterparties' submission for clearing

13. A counterparty specified in paragraphs 3(1)(b) or (c) to which paragraph (3)(1)(a) does not apply is not required to submit a mandatory clearable derivative for clearing to a regulated clearing agency until October 4, 2017.

Effective date

14. (1) This Instrument comes into force on April 4, 2017.

(2) In Saskatchewan, despite subsection (1), if these regulations are filed with the Registrar of Regulations after April 4, 2017, these regulations come into force on the day on which they are filed with the Registrar of Regulations.

APPENDIX A
TO
NATIONAL INSTRUMENT 94-101 *MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES*

MANDATORY CLEARABLE DERIVATIVES
(Section 1(1))

Interest Rate Swaps

Type	Floating index	Settlement currency	Maturity	Settlement currency type	Optionality	Notional type
Fixed-to-float	CDOR	CAD	28 days to 30 years	Single currency	No	Constant or variable
Fixed-to-float	LIBOR	USD	28 days to 50 years	Single currency	No	Constant or variable
Fixed-to-float	EURIBOR	EUR	28 days to 50 years	Single currency	No	Constant or variable
Fixed-to-float	LIBOR	GBP	28 days to 50 years	Single currency	No	Constant or variable
Basis	LIBOR	USD	28 days to 50 years	Single currency	No	Constant or variable
Basis	EURIBOR	EUR	28 days to 50 years	Single currency	No	Constant or variable
Basis	LIBOR	GBP	28 days to 50 years	Single currency	No	Constant or variable
Overnight index swap	CORRA	CAD	7 days to 2 years	Single currency	No	Constant ~~or variable~~
Overnight index swap	FedFunds	USD	7 days to 3 years	Single currency	No	Constant ~~or variable~~
Overnight index swap	EONIA	EUR	7 days to 3 years	Single currency	No	Constant ~~or variable~~
Overnight index swap	SONIA	GBP	7 days to 3 years	Single currency	No	Constant ~~or variable~~

Forward Rate Agreements

Type	Floating index	Settlement currency	Maturity	Settlement currency type	Optionality	Notional type
Forward rate agreement	LIBOR	USD	3 days to 3 years	Single currency	No	Constant ~~or variable~~
Forward rate agreement	EURIBOR	EUR	3 days to 3 years	Single currency	No	Constant ~~or variable~~
Forward rate agreement	LIBOR	GBP	3 days to 3 years	Single currency	No	Constant ~~or variable~~

APPENDIX B
TO
NATIONAL INSTRUMENT 94-101
MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES

LAWS, REGULATIONS OR INSTRUMENTS OF FOREIGN JURISDICTIONS APPLICABLE FOR SUBSTITUTED COMPLIANCE
(Subsection 3(5))

Foreign jurisdiction	Laws, regulations or instruments
European Union	Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories
United States of America	Clearing Requirement and Related Rules, 17 C.F.R. pt. 50

ANNEX C

PROPOSED CHANGES TO
COMPANION POLICY 94-101 MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES

1. Companion Policy 94-101 Mandatory Central Counterparty Clearing of Derivatives is changed by this Document.

2. Part 1 is changed by adding the following subsection:

Subsection 1(2) – Interpretation of "affiliated entity"

To determine whether two entities are affiliates, the Instrument uses an approach based on the concept of consolidated financial statements under IFRS or U.S. Generally Accepted Accounting Principles (U.S. GAAP). Consequently, two entities whose financial statements are consolidated, or would be consolidated if any financial statements were required, would be considered affiliated entities under the Instrument. We expect corporate groups that do not prepare financial statements in accordance with IFRS or U.S. GAAP to apply the consolidation test under either IFRS or U.S. GAAP to determine whether entities within the corporate group meet the "affiliated entity" interpretation.

3. Part 2 is replaced with the following:

PART 2 MANDATORY CENTRAL COUNTERPARTY CLEARING

Subsections 3(0.1) and (0.2) – Exclusion of investment funds and certain entities

An investment fund whose financial statements are consolidated with those of another entity should not be considered an affiliated entity of the other entity for the application of paragraphs 3(1)(b) and (c). In addition, the month-end exposure should not be considered when calculating the month-end gross notional amount in accordance with those paragraphs.

However, an investment fund will be subject to the clearing requirements if it, on its own, exceeds the $500 000 000 000 month-end gross notional amount for all outstanding derivatives.

Similarly, certain consolidated structured entities (commonly known as special purpose entities) should not be considered as affiliates for the purpose of paragraphs 3(1)(b) and (c) if they meet the conditions stated in subsection 3(0.2). An entity, including an entity such as a credit card securitization vehicle or an entity created to guarantee interest and principal payments under a covered bond program, that meets the conditions in subsection 3(0.2) would not be an affiliated entity. All obligations of such entities are required to be exclusively secured by their own assets to meet the condition in paragraph 3(0.2)(b). Also, a vehicle created to invest in real estate or an infrastructure that meets the conditions in subparagraph 3(0.2)(a)(iii) would not be an affiliated entity of another entity even if its financial statements are consolidated with the other entity.

Subsection 3(1) – Duty to submit for clearing

The duty to submit a mandatory clearable derivative for clearing to a regulated clearing agency only applies at the time the transaction is executed. If a derivative or class of derivatives is determined to be a mandatory clearable derivative after the date of execution of a transaction in that derivative or class of derivatives, we would not expect a local counterparty to submit the mandatory clearable derivative for clearing. Therefore, we would not expect a local counterparty to clear a mandatory clearable derivative entered into as a result of a counterparty exercising a swaption that was entered into before the date on which the requirement to submit a mandatory clearable derivative for clearing is applicable to that counterparty or the date on which the derivative became a mandatory clearable derivative. Similarly, we would not expect a local counterparty to clear an extendible swap that was entered into before the date on which the requirement to submit a mandatory clearable derivative for clearing is applicable to that counterparty or the date on which the derivative became a mandatory clearable derivative and extended in accordance with the terms of the contract after such date.

However, if after a derivative or class of derivatives is determined to be a mandatory clearable derivative, there is another transaction in that same derivative, including a material amendment to a previous transaction (as discussed in subsection 1(1) above), that derivative will be subject to the mandatory central counterparty clearing requirement.

Where a derivative is not subject to the mandatory central counterparty clearing requirement but the derivative is clearable through a regulated clearing agency, the counterparties have the option to submit the derivative for clearing at any time. For a complex swap with non-standard terms that regulated clearing agencies cannot accept for clearing, adherence to the Instrument would not require market participants to structure such derivative in a particular manner or disentangle the derivative in order to clear the component which is a mandatory clearable derivative if it serves legitimate business purposes. However, considering that it would not require disentangling, we would expect the component of a packaged transaction that is a mandatory clearable derivative to be cleared.

For a local counterparty that is not a participant of a regulated clearing agency, we have used the phrase “cause to be submitted” to refer to the local counterparty’s obligation. In order to comply with subsection (1), a local counterparty would need to have arrangements in place with a participant for clearing services in advance of entering into a mandatory clearable derivative.

A transaction in a mandatory clearable derivative is required to be cleared when at least one of the counterparties is a local counterparty and one or more of paragraphs (a), (b) or (c) apply to both counterparties. For example, a local counterparty under any of paragraphs (a), (b) or (c) must clear a mandatory clearable derivative entered into with another local counterparty under any of paragraphs (a), (b) or (c). As a further example, a local counterparty under any of paragraphs (a), (b) or (c) must also clear a mandatory clearable derivative with a foreign counterparty under paragraphs (a) or (b). For instance, a local counterparty that is an affiliated entity of a foreign participant would be subject to mandatory central counterparty clearing for a mandatory clearable derivative with a foreign counterparty that is an affiliated entity of another foreign participant considering that there is one local counterparty to the transaction and both counterparties meet the criteria under paragraph (b).

Pursuant to paragraph (c) a local counterparty that had a month-end gross notional amount of outstanding derivatives exceeding the $500 000 000 000 threshold in subparagraph (c)(ii) must clear a mandatory clearable derivative entered into with another counterparty that meets the criteria under paragraph (a), (b) or (c). In order to determine whether the $500 000 000 000 threshold in subparagraph (c)(ii) is exceeded, a local counterparty must add the gross notional amount of all outstanding derivatives of its affiliated entities that are also local counterparties, to its own. However, investments funds and consolidated structured entities that meet the criteria under subsections 3(0.1) and (0.2) are not included in the calculation.

Where a local counterparty is a member of a group of affiliated entities that exceeds the $500 000 000 000 threshold but is not itself a counterparty to derivatives that have an average month-end gross notional amount exceeding the $1 000 000 000 threshold, calculated in accordance with subparagraph (c)(iii), it is not required to clear a mandatory clearable derivative.

A person or company that exceeds the $1 000 000 000 notional exposure, calculated according to paragraphs (b) and (c), is required to fulfill the mandatory clearing requirement from September 1 of a given year until August 31 of the next year. This is referred to as the “reference period” in the Instrument.

For example, local counterparty XYZ has had an average month-end gross notional amount under all outstanding derivatives of $75 000 000 000 for the months of March, April and May of 2021. Counterparty XYZ has also had, combined with each of its affiliated entities that are local counterparties, a month-end gross notional amount for all derivatives of $525 000 000 000 at the end of November 2020. Considering that the aggregated month-end gross notional amount outstanding of $525 000 000 000 exceeds the $500 000 000 000 threshold and that it occurred during the previous 12 months, and that the average month-end gross notional amount of the $75 000 000 000 for March, April and May exceeds the $1 000 000 000 threshold, counterparty XYZ will need to comply with the Instrument. As such, a local counterparty that does not exceed, on its own, the $1 000 000 000 threshold is not required to clear even if the aggregated month-end gross notional amount outstanding with all of its affiliated entities exceeds the $500 000 000 000 threshold.

Furthermore, in the example, a local counterparty that was subject to mandatory clearing from September 1, 2022 until August 31, 2023, and that no longer exceeds the $1 000 000 000 threshold for the months of March, April and May of 2023, will no longer be required to comply with section 3 for the next reference period starting September 1, 2023. However, the local counterparty will have to evaluate its application every year. Consequently, if a local counterparty exceeds the $1 000 000 000 threshold again in a future year, it will become subject to the requirements of the Instrument until the following year.

The calculation of the gross notional amount outstanding under paragraphs (b) and (c) excludes derivatives with affiliated entities whose financial statements are prepared on a consolidated basis, which would be exempted under section 7 if they were mandatory clearable derivatives.

In addition, a local counterparty determines whether it exceeds the threshold in subparagraph (c)(ii) by adding the gross notional amount of all outstanding derivatives of its affiliated entities that are also local counterparties, to its own.

A local counterparty that is a participant at a regulated clearing agency, but does not subscribe to clearing services for the class of derivatives to which the mandatory clearable derivative belongs would still be required to clear if it is subject to paragraph (c).

A local counterparty subject to mandatory central counterparty clearing that engages in a mandatory clearable derivative is responsible for determining whether the other counterparty is also subject to mandatory central counterparty clearing. To do so, the local counterparty may rely on the factual statements made by the other counterparty, provided that it does not have reasonable grounds to believe that such statements are false.

We would not expect that all the counterparties of a local counterparty provide their status as most counterparties would not be subject to the Instrument. However, a local counterparty cannot rely on the absence of a declaration from a counterparty to avoid the requirement to clear. Instead, when no information is provided by a counterparty, the local counterparty may use factual statements or available information to assess whether the mandatory clearable derivative is required to be cleared in accordance with the Instrument.

We would expect counterparties subject to the Instrument to exercise reasonable judgement in determining whether a person or company may be near or above the thresholds set out in paragraphs (b) and (c). We would expect a counterparty subject to the Instrument to solicit confirmation from its counterparty where there is reasonable basis to believe that the counterparty may be near or above any of the thresholds.

The status of a counterparty under this subsection should be determined before entering into a mandatory clearable derivative. We would not expect a local counterparty to clear a mandatory clearable derivative entered into after the date on which the requirement to submit a mandatory clearable derivative for clearing is applicable to that counterparty, but before one of the counterparties was captured under one of paragraphs (a), (b) or (c) unless there is a material amendment to the derivative.

Subsection 3(2) – 90-day transition

This subsection provides that only transactions in mandatory clearable derivatives executed on or after the 90th day after the end of the month in which the local counterparty first exceeded the threshold are subject to subsection 3(1). We do not intend that transactions executed between the 1st day on which the local counterparty became subject to subsection 3(1) and the 90th day be back-loaded after the 90th day.

Subsection 3(3) – Submission to a regulated clearing agency

We would expect that a transaction subject to mandatory central counterparty clearing be submitted to a regulated clearing agency as soon as practicable, but no later than the end of the day on which the transaction was executed or if the transaction occurs after business hours of the regulated clearing agency, the next business day.

Subsection 3(5) – Substituted compliance

Substituted compliance is only available to a local counterparty that is a foreign affiliated entity of a counterparty organized under the laws of the local jurisdiction or with a head office or principal place of business in the local jurisdiction and that is responsible for all or substantially all the liabilities of the affiliated entity. The local counterparty would still be subject to the Instrument, but its mandatory clearable derivatives, as per the definition under the Instrument, may be cleared at a clearing agency pursuant to a foreign law listed in Appendix B if the counterparty is subject to and compliant with that foreign law.

Despite the ability to clear pursuant to a foreign law listed in Appendix B, the local counterparty is still required to fulfill the other requirements in the Instrument, as applicable. This includes the retention period for the record keeping requirement.

4. The third paragraph of subsection 7(1) is deleted.

5. Subsections 7(2) and (3) are deleted.

6. PART 4 MANDATORY CLEARABLE DERIVATIVES and PART 6 TRANSITION AND EFFECTIVE DATE are replaced with the following:

APPENDIX A MANDATORY CLEARABLE DERIVATIVES

In the course of determining whether a derivative or class of derivatives will be subject to mandatory central counterparty clearing, the factors we will consider include the following:

- the derivative is available to be cleared on a regulated clearing agency;
- the level of standardization of the derivative, such as the availability of electronic processing, the existence of master agreements, product definitions and short form confirmations;
- the effect of central clearing of the derivative on the mitigation of systemic risk, taking into account the size of the market for the derivative and the available resources of the regulated clearing agency to clear the derivative;
- whether mandating the derivative or class of derivatives to be cleared would bring undue risk to regulated clearing agencies;
- the outstanding notional amount of the counterparties transacting in the derivative or class of derivatives, the current liquidity in the market for the derivative or class of derivatives, the concentration of participants active in the market for the derivative or class of derivatives, and the availability of reliable and timely pricing data;
- the existence of third-party vendors providing pricing services;

- with regards to a regulated clearing agency, the existence of an appropriate rule framework, and the existence of capacity, operational expertise and resources, and credit support infrastructure to clear the derivative on terms that are consistent with the material terms and trading conventions on which the derivative is traded;
- whether a regulated clearing agency would be able to manage the risk of the additional derivatives that might be submitted due to the mandatory central counterparty clearing requirement determination;
- the effect on competition, taking into account appropriate fees and charges applied to clearing, and whether mandating clearing of the derivative could harm competition;
- alternative derivatives or clearing services co-existing in the same market;
- the public interest.

7. Form 94-101F1 Intragroup Exemption and Form 94-101F2 Derivatives Clearing Services are deleted.

8. These changes become effective on (insert date).

ANNEX D

This Annex sets out a blackline showing the proposed changes to Companion Policy 94-101 *Mandatory Central Counterparty Clearing of Derivatives*, as set out in Annex C.

COMPANION POLICY 94-101 MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES

GENERAL COMMENTS

Introduction

This Companion Policy sets out how the Canadian Securities Administrators (the "CSA" or "we") interpret or apply the provisions of National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* ("NI 94-101" or the "Instrument") and related securities legislation.

The numbering of Parts and sections in this Companion Policy correspond to the numbering in NI 94-101. Any specific guidance on sections in NI 94-101 appears immediately after the section heading. If there is no guidance for a section, the numbering in this Companion Policy will skip to the next provision that does have guidance.

SPECIFIC COMMENTS

Unless defined in NI 94-101 or explained in this Companion Policy, terms used in NI 94-101 and in this Companion Policy have the meaning given to them in the securities legislation of the jurisdiction including National Instrument 14-101 *Definitions*.

In this Companion Policy, "Product Determination Rule" means,

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

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.

In this Companion Policy, "TR Instrument" means,

in Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan and Yukon, Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting*,

in Manitoba, Manitoba Securities Commission Rule 91-507 *Trade Repositories and Derivatives Data Reporting*,

in Ontario, Ontario Securities Commission Rule 91-507 *Trade Repositories and Derivatives Data Reporting*, and

in Québec, Regulation 91-507 respecting Trade Repositories and Derivatives Data Reporting.

PART 1
DEFINITIONS AND INTERPRETATION

Subsection 1(1) – Definition of "participant"

A "participant" of a regulated clearing agency is bound by the rules and procedures of the regulated clearing agency due to the contractual agreement with the regulated clearing agency.

Subsection 1(1) – Definition of "regulated clearing agency"

It is intended that only a "regulated clearing agency" that acts as a central counterparty for over-the-counter derivatives be subject to the Instrument. The purpose of paragraph (a) of this definition is to allow, for certain enumerated jurisdictions, a mandatory clearable derivative involving a local counterparty in one of the listed jurisdictions to be submitted to a clearing agency that is not yet recognized or exempted in the local jurisdiction, but that is recognized or exempted in another jurisdiction of Canada. Paragraph (a) does not supersede any provision of the securities legislation of a local jurisdiction with respect to any recognition requirements for a person or company that is carrying on the business of a clearing agency

in the local jurisdiction.

Subsection 1(1) – Definition of "transaction"

The Instrument uses the term "transaction" rather than the term "trade" in part to reflect that "trade" is defined in the securities legislation of some jurisdictions as including the termination of a derivative. We do not think the termination of a derivative should trigger mandatory central counterparty clearing. Similarly, the definition of transaction in NI 94-101 excludes a novation resulting from the submission of a derivative to a clearing agency or clearing house as this is already a cleared transaction. Finally, the definition of "transaction" is not the same as the definition found in the TR Instrument as the latter does not include a material amendment since the TR Instrument expressly provides that an amendment must be reported.

In the definition of "transaction", the expression "material amendment" is used to determine whether there is a new transaction, considering that only new transactions will be subject to mandatory central counterparty clearing under NI 94-101. If a derivative that existed prior to the coming into force of NI 94-101 is materially amended after NI 94-101 is effective, that amendment will trigger the mandatory central counterparty clearing requirement, if applicable, as it would be considered a new transaction. A material amendment is one that changes information that would reasonably be expected to have a significant effect on the derivative's attributes, including its notional amount, the terms and conditions of the contract evidencing the derivative, the trading methods or the risks related to its use, but excluding information that is likely to have an effect on the market price or value of its underlying interest. We will consider several factors when determining whether a modification to an existing derivative is a material amendment. Examples of a modification to an existing derivative that would be a material amendment include any modification which would result in a significant change in the value of the derivative, differing cash flows, a change to the method of settlement or the creation of upfront payments.

Subsection 1(2) – Interpretation of "affiliated entity"

To determine whether two entities are affiliates, the Instrument uses an approach based on the concept of consolidated financial statements under IFRS or U.S. Generally Accepted Accounting Principles (U.S. GAAP). Consequently, two entities whose financial statements are consolidated, or would be consolidated if any financial statements were required, would be considered affiliated entities under the Instrument. We expect corporate groups that do not prepare financial statements in accordance with IFRS or U.S. GAAP to apply the consolidation test under either IFRS or U.S. GAAP to determine whether entities within the corporate group meet the "affiliated entity" interpretation.

PART 2
MANDATORY CENTRAL COUNTERPARTY CLEARING

Subsections 3(0.1) and (0.2) – Exclusion of investment funds and certain entities

An investment fund whose financial statements are consolidated with those of another entity should not be considered an affiliated entity of the other entity for the application of paragraphs 3(1)(b) and (c). In addition, the month-end exposure should not be considered when calculating the month-end gross notional amount in accordance with those paragraphs.

However, an investment fund will be subject to the clearing requirements if it, on its own, exceeds the $500 000 000 000 month-end gross notional amount for all outstanding derivatives.

Similarly, certain consolidated structured entities (commonly known as special purpose entities) should not be considered as affiliates for the purpose of paragraphs 3(1)(b) and (c) if they meet the conditions stated in subsection 3(0.2). An entity, including an entity such as a credit card securitization vehicle or an entity created to guarantee interest and principal payments under a covered bond program, that meets the conditions in subsection 3(0.2) would not be an affiliated entity. All obligations of such entities are required to be exclusively secured by their own assets to meet the condition in paragraph 3(0.2)(b). Also, a vehicle created to invest in real estate or an infrastructure that meets the conditions in subparagraph 3(0.2)(a)(iii) would not be an affiliated entity of another entity even if its financial statements are consolidated with the other entity.

Subsection 3(1) – Duty to submit for clearing

The duty to submit a mandatory clearable derivative for clearing to a regulated clearing agency only applies at the time the transaction is executed. If a derivative or class of derivatives is determined to be a mandatory clearable derivative after the date of execution of a transaction in that derivative or class of derivatives, we would not expect a local counterparty to submit the mandatory clearable derivative for clearing. Therefore, we would not expect a local counterparty to clear a mandatory clearable derivative entered into as a result of a counterparty exercising a swaption that was entered into before the ~~effective date of the Instrument~~date on which the requirement to submit a mandatory clearable derivative for clearing is applicable to that counterparty or the date on which the derivative became a mandatory clearable derivative. Similarly, we would not expect a local counterparty to clear an extendible swap that was entered into before the ~~effective date of the Instrument~~date on which the requirement to submit a mandatory clearable derivative for clearing is applicable to that counterparty or the date on which the

derivative became a mandatory clearable derivative and extended in accordance with the terms of the contract after such date.

However, if after a derivative or class of derivatives is determined to be a mandatory clearable derivative, there is another transaction in that same derivative, including a material amendment to a previous transaction (as discussed in subsection 1(1) above), that derivative will be subject to the mandatory central counterparty clearing requirement.

Where a derivative is not subject to the mandatory central counterparty clearing requirement but the derivative is clearable through a regulated clearing agency, the counterparties have the option to submit the derivative for clearing at any time. For a complex swap with non-standard terms that regulated clearing agencies cannot accept for clearing, adherence to the Instrument would not require market participants to structure such derivative in a particular manner or disentangle the derivative in order to clear the component which is a mandatory clearable derivative if it serves legitimate business purposes. However, considering that it would not require disentangling, we would expect the component of a packaged transaction that is a mandatory clearable derivative to be cleared.

For a local counterparty that is not a participant of a regulated clearing agency, we have used the phrase "cause to be submitted" to refer to the local counterparty's obligation. In order to comply with subsection (1), a local counterparty would need to have arrangements in place with a participant for clearing services in advance of entering into a mandatory clearable derivative.

A transaction in a mandatory clearable derivative is required to be cleared when at least one of the counterparties is a local counterparty and one or more of paragraphs (a), (b) or (c) apply to both counterparties. For example, a local counterparty under any of paragraphs (a), (b) or (c) must clear a mandatory clearable derivative entered into with another local counterparty under any of paragraphs (a), (b) or (c). As a further example, a local counterparty under any of paragraphs (a), (b) or (c) must also clear a mandatory clearable derivative with a foreign counterparty under paragraphs (a) or (b). For instance, a local counterparty that is an affiliated entity of a foreign participant would be subject to mandatory central counterparty clearing for a mandatory clearable derivative with a foreign counterparty that is an affiliated entity of another foreign participant considering that there is one local counterparty to the transaction and both counterparties ~~respect~~meet the criteria under paragraph (b).

~~A local counterparty that has had a month-end gross notional amount of outstanding derivatives exceeding the threshold in paragraphs (b) or (c), for any month following the entry into force of the Instrument, must clear all its subsequent transactions in a mandatory clearable derivative with another counterparty under one or more of paragraphs (a), (b), or (c).~~

Pursuant to paragraph (c) a local counterparty that had a month-end gross notional amount of outstanding derivatives exceeding the $500 000 000 000 threshold in subparagraph (c)(ii) must clear a mandatory clearable derivative entered into with another counterparty that meets the criteria under paragraph (a), (b) or (c). In order to determine whether the $500 000 000 000 threshold in subparagraph (c)(ii) is exceeded, a local counterparty must add the gross notional amount of all outstanding derivatives of its affiliated entities that are also local counterparties, to its own. However, investments funds and consolidated structured entities that meet the criteria under subsections 3(0.1) and (0.2) are not included in the calculation.

Where a local counterparty is a member of a group of affiliated entities that exceeds the $500 000 000 000 threshold but is not itself a counterparty to derivatives that have an average month-end gross notional amount exceeding the $1 000 000 000 threshold calculated, in accordance with subparagraph (c)(iii), it is not required to clear a mandatory clearable derivative.

A person or company that exceeds the $1 000 000 000 notional exposure, calculated according to paragraphs (b) and (c), is required to fulfill the mandatory clearing requirement from September 1 of a given year until August 31 of the next year. This is referred to as the "reference period" in the Instrument.

For example, local counterparty XYZ has had an average month-end gross notional amount under all outstanding derivatives of $75 000 000 000 for the months of March, April and May of 2021. Counterparty XYZ has also had, combined with each of its affiliated entities that are local counterparties, a month-end gross notional amount for all derivatives of $525 000 000 000 at the end of November 2020. Considering that the aggregated month-end gross notional amount outstanding of $525 000 000 000 exceeds the $500 000 000 000 threshold and that it occurred during the previous 12 months, and that the average month-end gross notional amount of the $75 000 000 000 for March, April and May exceeds the $1 000 000 000 threshold, counterparty XYZ will need to comply with the Instrument. As such, a local counterparty that does not exceed, on its own, the $1 000 000 000 threshold is not required to clear even if the aggregated month-end gross notional amount outstanding with all of its affiliated entities exceeds the $500 000 000 000 threshold.

Furthermore, in the example, a local counterparty that was subject to mandatory clearing from September 1, 2022 until August 31, 2023, and that no longer exceeds the $1 000 000 000 threshold for the months of March, April and May of 2023 will no longer be required to comply with section 3 for the next reference period starting September 1, 2023. However, the local counterparty will have to evaluate its application every year. Consequently, if a local counterparty exceeds the $1 000 000 000 threshold again in a future year, it will become subject to the requirements of the Instrument until the following year.

The calculation of the gross notional amount outstanding under paragraphs (b) and (c) excludes derivatives with affiliated entities whose financial statements are prepared on a consolidated basis, which would be exempted under section 7 if they were mandatory clearable derivatives.

In addition, a local counterparty determines whether it exceeds the threshold in ~~paragraph~~subparagraph (c)(ii) by adding the gross notional amount of all outstanding derivatives of its affiliated entities that are also local counterparties, to its own.

A local counterparty that is a participant at a regulated clearing agency, but does not subscribe to clearing services for the class of derivatives to which the mandatory clearable derivative belongs would still be required to clear if it is subject to paragraph (c).

A local counterparty subject to mandatory central counterparty clearing that engages in a mandatory clearable derivative is responsible for determining whether the other counterparty is also subject to mandatory central counterparty clearing. To do so, the local counterparty may rely on the factual statements made by the other counterparty, provided that it does not have reasonable grounds to believe that such statements are false.

We would not expect that all the counterparties of a local counterparty provide their status as most counterparties would not be subject to the Instrument. However, a local counterparty cannot rely on the absence of a declaration from a counterparty to avoid the requirement to clear. Instead, when no information is provided by a counterparty, the local counterparty may use factual statements or available information to assess whether the mandatory clearable derivative is required to be cleared in accordance with the Instrument.

We would expect counterparties subject to the Instrument to exercise reasonable judgement in determining whether a person or company may be near or above the thresholds set out in paragraphs (b) and (c). We would expect a counterparty subject to the Instrument to solicit confirmation from its counterparty where there is reasonable basis to believe that the counterparty may be near or above any of the thresholds.

The status of a counterparty under this subsection should be determined before entering into a mandatory clearable derivative. We would not expect a local counterparty to clear a mandatory clearable derivative entered into after the ~~Instrument came into effect~~date on which the requirement to submit a mandatory clearable derivative for clearing is applicable to that counterparty, but before one of the counterparties was captured under one of paragraphs (a), (b) or (c) unless there is a material amendment to the derivative.

Subsection 3(2) – 90-day transition

This subsection provides that only transactions in mandatory clearable derivatives executed on or after the 90th day after the end of the month in which the local counterparty first exceeded the threshold are subject to subsection 3(1). We do not intend that transactions executed between the 1st day on which the local counterparty became subject to subsection 3(1) and the 90th day be back-loaded after the 90th day.

Subsection 3(3) – Submission to a regulated clearing agency

We would expect that a transaction subject to mandatory central counterparty clearing be submitted to a regulated clearing agency as soon as practicable, but no later than the end of the day on which the transaction was executed or if the transaction occurs after business hours of the regulated clearing agency, the next business day.

Subsection 3(5) – Substituted compliance

Substituted compliance is only available to a local counterparty that is a foreign affiliated entity of a counterparty organized under the laws of the local jurisdiction or with a head office or principal place of business in the local jurisdiction and that is responsible for all or substantially all the liabilities of the affiliated entity. The local counterparty would still be subject to the Instrument, but its mandatory clearable derivatives, as per the definition under the Instrument, may be cleared at a clearing agency pursuant to a foreign law listed in Appendix B if the counterparty is subject to and compliant with that foreign law.

Despite the ability to clear pursuant to a foreign law listed in Appendix B, the local counterparty is still required to fulfill the other requirements in the Instrument, as applicable. This~~ese~~ includes the retention period for the record keeping requirement. ~~and the submission of a completed Form 94-101F1 *Intragroup Exemption* to the regulator or securities regulatory authority in a jurisdiction of Canada when relying on an exemption regarding mandatory clearable derivatives entered into with an affiliated entity.~~

PART 3
EXEMPTIONS FROM MANDATORY CENTRAL COUNTERPARTY CLEARING

Section 6 – Non-application

A mandatory clearable derivative involving a counterparty that is an entity referred to in section 6 is not subject to the requirement under section 3 to submit a mandatory clearable derivative for clearing even if the other counterparty is otherwise subject to it.

The expression "government of a foreign jurisdiction" in paragraph (a) is interpreted as including sovereign and sub-sovereign governments.

Section 7 – Intragroup exemption

The Instrument does not require an outward-facing transaction in a mandatory clearable derivative entered into by a foreign counterparty that meets paragraph 3(1)(a) or (b) to be cleared in order for the foreign counterparty and its affiliated entity that is a local counterparty subject to the Instrument to rely on this exemption. However, we would expect a local counterparty to not abuse this exemption in order to evade mandatory central counterparty clearing. It would be considered evasion if the local counterparty uses a foreign affiliated entity or another member of its group to enter into a mandatory clearable derivative with a foreign counterparty that meets paragraph 3(1)(a) or (b) and then do a back-to-back transaction or enter into the same derivative relying on the intragroup exemption where the local counterparty would otherwise have been required to clear the mandatory clearable derivative if it had entered into it directly with the non-affiliated counterparty.

Subsection 7(1) – Requisite conditions for intragroup exemption

The intragroup exemption is based on the premise that the risk created by mandatory clearable derivatives entered into between counterparties in the same group is expected to be managed in a centralized manner to allow for the risk to be identified and managed appropriately.

This subsection sets out the conditions that must be met for the counterparties to use the intragroup exemption for a mandatory clearable derivative.

~~The expression "consolidated financial statements" in paragraph (a) is interpreted as financial statements in which the assets, liabilities, equity, income, expenses and cash flows of each of the counterparty and the affiliated entity are consolidated as part of a single economic entity.~~

Affiliated entities may rely on paragraph (a) for a mandatory clearable derivative as soon as they meet the criteria to consolidate their financial statements together. Indeed, we would not expect affiliated entities to wait until their next financial statements are produced to benefit from this exemption if they will be consolidated.

If the consolidated financial statements referred to in paragraph 7(1)(a) are not prepared in accordance with IFRS, Canadian GAAP or U.S. GAAP, we would expect that the consolidated financial statements be prepared in accordance with the generally accepted accounting principles of a foreign jurisdiction where one or more of the affiliated entities has a significant connection, such as where the head office or principal place of business of one or both of the affiliated entities, or their parent, is located.

Paragraph (c) refers to a system of risk management policies and procedures designed to monitor and manage the risks associated with a mandatory clearable derivative. We expect that such procedures would be regularly reviewed. We are of the view that counterparties relying on this exemption may structure their centralized risk management according to their unique needs, provided that the program reasonably monitors and manages risks associated with non-centrally cleared derivatives. We would expect that, for a risk management program to be considered centralized, the evaluation, measurement and control procedures would be applied by a counterparty to the mandatory clearable derivative or an affiliated entity of both counterparties to the derivative.

Paragraph (d) refers to the terms governing the trading relationship between the affiliated entities for the mandatory clearable derivative that is not cleared as a result of the intragroup exemption. We would expect that the written agreement be dated and signed by the affiliated entities. An ISDA master agreement, for instance, would be acceptable.

~~**Subsection 7(2) – Submission of Form 94-101F1**~~

~~Within 30 days after two affiliated entities first rely on the intragroup exemption in respect of a mandatory clearable derivative, a local counterparty must deliver, or cause to be delivered, to the regulator or securities regulatory authority a completed Form 94-101F1 *Intragroup Exemption* ("Form 94-101F1") to notify the regulator or securities regulatory authority that the exemption is being relied upon. The information provided in the Form 94-101F1 will aid the regulator or securities regulatory authority in better~~

~~understanding the legal and operational structure allowing counterparties to benefit from the intragroup exemption. The parent or the entity responsible to perform the centralized risk management for the affiliated entities using the intragroup exemption may deliver the completed Form 94-101F1 on behalf of the affiliated entities. For greater clarity, a completed Form 94-101F1 could be delivered for the group by including each pairing of counterparties that seek to rely on the intragroup exemption. One completed Form 94-101F1 is valid for every mandatory clearable derivative between any pair of counterparties listed on the completed Form 94-101F1 provided that the requirements set out in subsection (1) are complied with.~~

~~Subsection 7(3) – Amendments to Form 94-101F1~~

~~Examples of changes to the information provided that would require an amended Form 94-101F1 include: (i) a change in the control structure of one or more of the counterparties listed in Form 94-101F1, and (ii) the addition of a new local jurisdiction for a counterparty. This form may also be delivered by an agent.~~

Section 8 – Multilateral portfolio compression exemption

A multilateral portfolio compression exercise involves more than two counterparties who wholly change or terminate some or all of their existing derivatives submitted for inclusion in the exercise and replace those derivatives with, depending on the methodology employed, other derivatives whose combined notional amount, or some other measure of risk, is less than the combined notional amount, or some other measure of risk, of the derivatives replaced by the exercise.

The purpose of a multilateral portfolio compression exercise is to reduce operational or counterparty credit risk by reducing the number or notional amounts of outstanding derivatives between counterparties and the aggregate gross number or notional amounts of outstanding derivatives.

Under paragraph (c), the existing derivatives submitted for inclusion in the exercise were not cleared either because they did not include a mandatory clearable derivative or because they were entered into before the class of derivatives became a mandatory clearable derivative or because the counterparty was not subject to the Instrument.

We would expect a local counterparty involved in a multilateral portfolio compression exercise to comply with its credit risk tolerance levels. To do so, we expect a participant to the exercise to set its own counterparty, market and cash payment risk tolerance levels so that the exercise does not alter the risk profiles of each participant beyond a level acceptable to the participant. Consequently, we would expect existing derivatives that would be reasonably likely to significantly increase the risk exposure of the participant to not be included in the multilateral portfolio compression exercise in order for this exemption to be available.
We would generally expect that a mandatory clearable derivative resulting from the multilateral portfolio compression exercise would have the same material terms as the derivatives that were replaced with the exception of reducing the number or notional amount of outstanding derivatives.

Section 9 – Recordkeeping

We would generally expect that reasonable supporting documentation kept in accordance with section 9 would include complete records of any analysis undertaken by the local counterparty to demonstrate it satisfies the conditions necessary to rely on the intragroup exemption under section 7 or the multilateral portfolio compression exemption under section 8, as applicable.

A local counterparty subject to the mandatory central counterparty clearing requirement is responsible for determining whether, given the facts available, an exemption is available. Generally, we would expect a local counterparty relying on an exemption to retain all documents that show it properly relied on the exemption. It is not appropriate for a local counterparty to assume an exemption is available.

Counterparties using the intragroup exemption under section 7 should have appropriate legal documentation between them and detailed operational material outlining the risk management techniques used by the overall parent entity and its affiliated entities with respect to the mandatory clearable derivatives benefiting from the exemption.

~~PART 4~~

APPENDIX A MANDATORY CLEARABLE DERIVATIVES

~~and~~

~~PART 6~~
~~TRANSITION AND EFFECTIVE DATE~~

~~Section 10 – Submission of Form 94-101F2 & Section 12 – Transition for the submission of Form 94-101F2~~

~~A regulated clearing agency must deliver a Form 94-101F2 *Derivatives Clearing Services* ("Form 94-101F2") to identify all derivatives for which it provides clearing services within 30 days of the coming into force of the Instrument pursuant to section 12. A new derivative or class of derivatives added to the offering of clearing services after the Instrument is in force is declared through a Form 94-101F2 within 10 days of the launch of such service pursuant to section 10.~~

~~Each regulator or securities regulatory authority has the power to determine by rule or otherwise which derivative or class of derivatives will be subject to mandatory central counterparty clearing. Furthermore, the CSA may consider the information required by Form 94-101F2 to determine whether a derivative or class of derivatives will be subject to mandatory central counterparty clearing.~~

In the course of determining whether a derivative or class of derivatives will be subject to mandatory central counterparty clearing, the factors we will consider include the following:

- the derivative is available to be cleared on a regulated clearing agency;
- the level of standardization of the derivative, such as the availability of electronic processing, the existence of master agreements, product definitions and short form confirmations;
- the effect of central clearing of the derivative on the mitigation of systemic risk, taking into account the size of the market for the derivative and the available resources of the regulated clearing agency to clear the derivative;
- whether mandating the derivative or class of derivatives to be cleared would bring undue risk to regulated clearing agencies;
- the outstanding notional amount of the counterparties transacting in the derivative or class of derivatives, the current liquidity in the market for the derivative or class of derivatives, the concentration of participants active in the market for the derivative or class of derivatives, and the availability of reliable and timely pricing data;
- the existence of third-party vendors providing pricing services;
- with regards to a regulated clearing agency, the existence of an appropriate rule framework, and the existence of capacity, operational expertise and resources, and credit support infrastructure to clear the derivative on terms that are consistent with the material terms and trading conventions on which the derivative is traded;
- whether a regulated clearing agency would be able to manage the risk of the additional derivatives that might be submitted due to the mandatory central counterparty clearing requirement determination;
- the effect on competition, taking into account appropriate fees and charges applied to clearing, and whether mandating clearing of the derivative could harm competition;
- alternative derivatives or clearing services co-existing in the same market;
- the public interest.

~~FORM 94-101F1~~
~~*INTRAGROUP EXEMPTION*~~

~~**Submission of information on intragroup transactions by a local counterparty**~~

~~In paragraph (a) of item 1 in section 2, we refer to information required under section 28 of the TR Instrument.~~

~~We intend to keep the forms delivered by or on behalf of a local counterparty under the Instrument confidential in accordance with the provisions of the applicable legislation. We are of the view that the forms generally contain proprietary information, and that the cost and potential risks of disclosure for the counterparties to an intragroup transaction outweigh the benefit of the principle requiring that forms be made available for public inspection.~~

~~While we intend for Form 94-101F1 and any amendments to it to be kept generally confidential, if the regulator or securities regulatory authority considers that it is in the public interest to do so, it may require the public disclosure of a summary of the information contained in such form, or amendments to it.~~

~~FORM 94-101F2~~
~~*DERIVATIVES CLEARING SERVICES*~~

Submission of information on clearing services of derivatives by the regulated clearing agency

Paragraphs (a), (b) and (c) of item 2 in section 2 address the potential for a derivative or class of derivatives to be a mandatory clearable derivative given its level of standardization in terms of market conventions, including legal documentation, processes and procedures, and whether pre- to post- transaction operations are carried out predominantly by electronic means. The standardization of economic terms is a key input in the determination process.

In paragraph (a) of item 2 in section 2, "life-cycle events" has the same meaning as in section 1 of the TR Instrument.

Paragraphs (d) and (e) of item 2 in section 2 provide details to assist in assessing the market characteristics such as the activity (volume and notional amount) of a particular derivative or class of derivatives, the nature and landscape of the market for that derivative or class of derivatives and the potential impact its determination as a mandatory clearable derivative could have on market participants, including the regulated clearing agency. Assessing whether a derivative or class of derivatives should be a mandatory clearable derivative may involve, in terms of liquidity and price availability, considerations that are different from, or in addition to, the considerations used by the regulator or securities regulatory authority in permitting a regulated clearing agency to offer clearing services for a derivative or class of derivatives. Stability in the availability of pricing information will also be an important factor considered in the determination process. Metrics, such as the total number of transactions and aggregate notional amounts and outstanding positions, can be used to justify the confidence and frequency with which the pricing of a derivative or class of derivatives is calculated. We expect that the data presented cover a reasonable period of time of no less than 6 months. Suggested information to be provided on the market includes:

- statistics regarding the percentage of activity of participants on their own behalf and for customers,
- average net and gross positions including the direction of positions (long or short), by type of market participant submitting mandatory clearable derivatives directly or indirectly, and
- average trading activity and concentration of trading activity among participants by type of market participant submitting mandatory clearable derivatives directly or indirectly to the regulated clearing agency.

ANNEX E

SUMMARY OF COMMENTS AND CSA RESPONSES

Section Reference	Issue/Comment	Response
S. 1 – Definitions: Affiliated entity	Two commenters pointed out that there is a potential for confusion around the interpretation of the term “affiliate” due to the lack of harmonization throughout the rules.	No change. Given the specific scopes and objectives of each rule published by the CSA, having a harmonized interpretation of “affiliated entity” is currently difficult. The CSA will however continue exploring further options to harmonize definitions and interpretations as much as possible throughout its rules.
S. 3 – Duty to clear	Two commenters suggested that the exclusion of trusts and investments funds in former paragraphs 3(1)(b) and 3(1)(c) should be done under Section 1 to avoid amendments to the existing ISDA Canadian Clearing Classification Letter.	Change made. These exemptions were moved to new subsections 3(0.1) and 3(0.2).
S. 3 – Duty to clear	A commenter asked if the proposed additional exemption in subparagraph 3(1)(c)(iv) was intentional.	No change. The CSA’s intent is to consistently exempt from the clearing requirement any local counterparty that does not exceed the $1 000 000 000 threshold.
S. 3 – Duty to clear	Two commenters suggested annual testing of the thresholds on a predetermined date in order to facilitate operational monitoring.	Change made for the $1 000 000 000 threshold, no change for the $500 000 000 000 threshold. An annual three-month monitoring window has been introduced for testing of the $1 000 000 000 threshold.
S. 3 – Duty to clear	A commenter pointed out that a derivative market participant may be above the $500 000 000 000 threshold when the mandatory clearing requirement comes into force but this same participant could be under the threshold the following months causing this participant to be subject to our National Instrument even if they no longer meet the threshold.	Change made. The CSA is proposing that a person or entity that has been required to clear under paragraph 3(1)(c) would benefit from an exemption from the clearing obligation if it has not exceeded the $500 000 000 000 threshold for 12 consecutive months.

List of Commenters

1. The Canadian Advocacy Council for Canadian CFA Institute Societies
2. Canadian Market Infrastructure Committee
3. International Swaps and Derivatives Association

ANNEX F

LOCAL MATTERS – ONTARIO

As set out in the main body of this Notice, the CSA are proposing the following amendments and changes:

- proposed amendments to the National Instrument, and
- proposed changes to the CP.

Please refer to the main body of this CSA Notice.

The Proposed Amendments are two of the burden reduction initiatives identified in the OSC Report entitled Reducing Regulatory Burden in Ontario's Capital Markets and published on November 19, 2019 (the **OSC Burden Reduction Report**). Specifically, this matter relates to the following Decisions and Recommendations discussed in the OSC Burden Reduction Report:

- D-7 Publish for consultation proposed amendments to the interpretation of affiliated entity status to narrow the scope of entities subject to the mandatory clearing requirement, and
- D-8 Publish for consultation proposed amendments that eliminate forms filing requirements where we have alternative sources for obtaining the information that the filings would provide.

Regulatory Impact Assessment

1. Overview

The proposed amendments to the National Instrument have been informed by comments received in response to the 2017 Proposed Amendments. They are aimed at reducing the regulatory burden that may be currently imposed by the National Instrument in certain instances, without compromising investor protection or financial stability.

The proposed changes to the CP are intended to update the CP to reflect the proposed amendments to the National Instrument.

The Proposed Amendments narrow the scope of the mandatory clearing obligation to address the concern that the population of entities subject to the mandatory clearing obligation may currently go beyond what was originally intended. In addition, the Proposed Amendments remove the requirement to submit forms where we have found alternative sources for obtaining the information included in these forms.

2. Affected stakeholders

Amendments proposed to narrow the scope of market participants subject to the Clearing Requirement will benefit:

- investment funds and certain special purpose entities,
- affiliated entities of regulated clearing agency participants or that are part of large derivatives participant groups, which affiliated entities have an average month-end gross notional amount under all outstanding derivatives of less than $1 billion, and
- in turn, regulated clearing agency participants and large derivatives participant groups.

Amendments proposed to eliminate Form 94-101F1 *Intragroup Exemption* and Form 94-101F2 *Derivatives Clearing Services* will benefit:

- affiliated entities when engaging in inter-affiliate trading, and
- regulated clearing agencies.

3. Qualitative and quantitative analysis of the anticipated costs and benefits of the Proposed Amendments

3.1 Qualitative Analysis

Market participants whose derivatives exposure does not represent a potential systemic risk or who do not have access to clearing agencies that offer clearing services for the mandated derivatives will not be subject to the Clearing Requirement once

the Proposed Amendments are implemented. This will reduce regulatory burden for these derivatives market participants as they will not have to incur costs associated with complying with the Clearing Requirement[1].

In addition, regulatory burdens associated with compliance monitoring and internal auditing will be reduced for derivatives market participants through the following:

- an express carve out of investment funds and special purpose entities from being treated as affiliated entities, and
- the replacement of monthly testing for the $1 billion *de minimis* exclusion for affiliated entities with an annual testing during a three-month monitoring window (March, April and May).

Additional time and costs savings will be materialized by derivatives market participants with the elimination of Form 94-101F1 *Intragroup Exemption* and Form 94-101F2 *Derivatives Clearing Services*. Regulatory burden associated with form submission will be eliminated for affiliated entities when relying on the intragroup exemption and for regulated clearing agencies when offering clearing services for a new derivative or class of derivatives.

3.2 Quantitative Analysis

Benefits to firms

In order to estimate the costs savings or costs avoided as a result of the proposed amendments, we considered the incremental compliance costs that would otherwise have been borne by market participants.

- Proposal to narrow the scope of market participants subject to the Clearing Requirement

Based on our review of derivatives trade data and consultations with stakeholders, we believe there are at this time approximately 10 derivatives market participant groups[2] that will benefit from the proposed amendments. Absent the current proposal, we estimate that each of the 10 impacted derivatives market participant groups would have spent approximately 220 hours complying with the Clearing Requirement on an annual basis. We assume that these entities would have used in-house legal and compliance staff, business analysts and database analysts to perform the necessary compliance activities. For the purposes of this analysis, we use weighted average hourly costs to account for the fact that staff of different levels of seniority and skill may be involved in each activity.[3] We estimate that each impacted market participant group will avoid incurring approximately $13,900 in ongoing compliance costs per year as a result of the proposal to narrow the scope of market participants subject to the Clearing Requirement.[4] In aggregate, the impacted market participant groups will avoid incurring approximately $139,000 per year in ongoing compliance costs.

In addition, we assume that 3 of the derivatives market participant groups would have been subject to a compliance review by OSC staff each year. We estimate that each of these participant groups will avoid incurring approximately $3,400 in costs associated with compliance reviews of the Clearing Requirement.[5] In aggregate, the impacted market participant groups will avoid incurring approximately $10,200 in compliance review costs per year.

In total, impacted derivatives market participants will avoid incurring approximately $149,200 in compliance costs per year as a result of the proposal to narrow the scope of market participants subject to the Clearing Requirement.

- Proposal to eliminate Form 94-101F1 and Form 94-101F2

Based on our review of derivatives trade data and consultations with stakeholders, we believe that the following stakeholders will benefit from the proposal to eliminate Form 94-101F1 and Form 94-101F2:

  - 5 clearing agencies, and
  - 10 derivatives market participant groups with approximately 80 affiliated entities.

We assume that all of the impacted entities currently use in-house legal and compliance staff, business analysts and database analysts to perform the necessary compliance activities. For the purposes of this analysis, we use weighted average hourly

1 Costs of clearing include clearing membership fees, capital requirements and margining.

2 Each of (i) a regulated clearing agency participant and its affiliated entities, and (ii) a large derivative participant group comprised of affiliated large local counterparties and their local affiliated entities is considered a derivatives market participant group.

3 Estimated hourly rates are based on the Robert Half 2018 Salary Guide for Accounting and Finance Professionals, the Counsel Network's In-House Counsel Compensation & Career Survey Report 2018 and the Canadian Lawyer 2018 Legal Fees Survey.

4 This estimate is based on the following calculation: compliance staff costs (75 hours per year x $68/hour = $5,100) + business/ database analyst costs (144 hours per year x $61/hour = $8,784).

5 This estimate is based on the following calculation: compliance staff costs (30 hours per year x$65/hour = $1,950) + legal staff costs (10 hours per year x $96/hour = $960) + business/database analyst costs (8 hours per year x $61/hour = $488).

costs to account for the fact that staff of different levels of seniority and skill may be involved in each activity. The approximate cost savings for impacted entities includes:

- $1,100/year for each clearing agency[6]
- $2,100/year for each participant group[7], and
- $10,400/year total for all affiliates[8].

In aggregate, we estimate that impacted stakeholders will save approximately $36,900 in compliance costs per year as a result of the proposal to eliminate Form 94-101F1 and Form 94-101F2.

In addition, we assume that 3 of the impacted derivatives market participant groups would have been subject to a compliance review by OSC staff each year. We estimate that each of these participant groups will save approximately $1,000 in costs associated with the compliance reviews.[9] In aggregate, the impacted market participants will avoid incurring approximately $3,000 in compliance review costs per year.

In total, impacted stakeholders will save approximately $40,000 in compliance costs per year as a result of the proposal to eliminate Form 94-101F1 and Form 94-101F2.

Costs to firms

We assume that each of the 10 market participant groups will incur nominal costs associated with updating existing policies and procedures to comply with the new requirements. We estimate that each impacted market participant group will incur one-time implementation costs of approximately $7,900[10].

Legislative Authority for Rule Making

The proposed amendments will come into force under the rulemaking authority provided under subparagraph 35(iii) of subsection 143(1) of the *Securities Act* (Ontario). Subparagraph 35(iii) authorizes the Ontario Securities Commission to make rules prescribing requirements in respect of persons or companies trading in derivatives, including requirements in respect of margin, collateral, capital, clearing and settlement.

Alternatives Considered

No alternatives to rule-amendment were considered.

Reliance on Unpublished Studies

In developing the Proposed Amendments, we are not relying on any significant unpublished study, report or other written material.

We welcome comments on all aspects of the Proposed Amendments, including the estimated costs associated with complying with the requirements of the National Instrument.

6 This estimate is based on the following calculation: compliance staff costs (2 hours per year x $83/hour = $166) + legal staff costs (5.25 hours per year x $103/hour = $540) + business/database analyst costs (8 hours per year x $55/hour = $440).

7 This estimate is based on the following calculation: compliance staff costs (9.25 hours per year x $82/hour = $759) + legal staff costs (2 hours per year x $104/hour = $208) + business/database analyst costs (19 hours per year x $60/hour = $1,140).

8 We estimate that each affiliate will save approximately $130/year.

9 This estimate is based on the following calculation: compliance staff costs (8.25 hours per year x$65/hour = $536) + legal staff costs (3.25 hours per year x $96/hour = $312) + business/database analyst costs (2 hours per year x $60/hour = $120).

10 This estimate is based on the following calculation: compliance staff (32 hours x $83/hour = $2,656) + legal staff costs (32 hours x $104/hour = $3,328) + business/database analyst costs (2 hours x $61/hour = $122). We assume that each participant group will also engage external legal counsel (4 hours x $445 = $1,780).