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Comments on the Proposed Instrument *Derivatives: Registration*
issued by the Canadian Securities Administrators

Dear Madams:

We, the Japanese Bankers Association, would like to express our gratitude for this opportunity to comment on the Proposed National Instrument 93-102 *Derivatives: Registration* and the Proposed Companion Policy 93-102 *Derivatives: Registration* (collectively, "Proposed Instrument") issued on April 19, 2018 by the Canadian Securities Administrators ("CSA"). We respectfully expect that the following comments will contribute to your further discussion.

We would highly appreciate it if you read this comment letter and our comment letter concurrently submitted to the CSA in respect of Proposed National Instrument 93-101 and its companion policy issued in June together, given many issues are related to each other.

[General Comments]

1. Exemption based on equivalence assessment

Foreign derivatives dealers established in jurisdictions whose corresponding requirements are deemed to be equivalent to the requirements in the Proposed Instrument should be exempted from such requirements unconditionally, instead of applying certain conditions in Section 52. We request the CSA to assess equivalence of Japan's Financial Instruments and Exchange Act (the "Act") in cooperation with the

Japan Financial Services Agency (JFSA) and grant an exemption to Japanese financial institutions based on the assessment that the Act is equivalent to the Proposed Instrument, instead of listing Japan in Appendix B and imposing certain conditions to qualify for the exemption from registration.

(Rationale)

Japan has already implemented the OTC derivatives regulations following the G20 agreement by incorporating them into the Act, whose equivalence to U.S. regulations has been recognized by the CFTC. Imposing Canadian registration requirements on Japanese financial institutions that are already subject to and in comply with such a strict national regulation would force them to address inefficient duplicated regulations, which result in excessive regulatory burdens for them.

If financial institutions that have been subject to national regulations on OTC derivatives are required to register as a derivatives dealer, some financial institutions may cease from transacting with Canadian firms in order to avoid regulatory burdens, causing adverse consequences on the liquidity of Canadian derivatives markets. That is as is the case with the U.S. when the OTC derivatives regulations under the Dodd-Frank Act took effect.

The following comments are provided in case that the Japanese financial institutions are not granted an exemption from the requirements in the Proposed Instrument.

2. Clarification of cross-border transactions

We request the CSA to consider and clarify how the Proposed Instrument will be applied to cross-border transactions.

(Rationale)

According to the Proposed Instrument, the requirements of trade reporting to Canadian authorities and portfolio reconciliation, etc. may be applied even to those transactions executed and booked by foreign derivatives dealers outside Canada or those transactions that do not involve Canadian counterparties.

For example, the Ontario Securities Commission Rule 91-507 requires trade reporting to Canadian authorities if at least one of the counterparties to a transaction is a "registered derivatives dealer". Therefore, if a non-Canadian person registers as a foreign derivatives dealer, all transactions executed by that foreign derivatives dealer would be subject to trade reporting and portfolio reconciliation requirements, which could result in excessive regulatory burdens.

Given the above, we request the CSA to consider and clarify how the regulations required

by Canadian authorities will apply to cross-border transactions of foreign derivatives dealers in consideration of regulations in foreign jurisdictions where their head office and branches are located. Specifically, the scope of transactions should be limited to "transactions executed and booked within Canada" or "transactions with a Canadian counterparty located within Canada."

3. Derivatives dealer registration

The CSA should allow non-Canadian firms to register as a derivatives dealer on a branch-by-branch basis.

(Rationale)

The Proposed Instrument does not distinguish firms within Canada from firms outside Canada in terms of the derivatives dealer registration. However, given the fact that non-Canadian firms engage in a significant volume of derivatives transactions in foreign jurisdictions and that they are permitted to register as a Canadian financial institution on a branch-by-branch basis, the Proposed Instrument should also allow the derivatives dealers registration on a branch-by-branch basis, instead of on a firm-by-firm basis.

If non-Canadian firms uniformly become subject to the registration requirement according to the same criteria applied to Canadian firms and are only allowed to register on a firm-by-firm basis, they will need to register as a derivative dealer even though they only transact with Canadian firms to a very limited extent because the requirements in the Proposed Instrument will apply uniformly on a global basis. As is the case with the U.S. markets when the OTC derivatives regulations under the Dodd-Frank Act were implemented, some financial institutions may cease from transacting with Canadian firms in order to avoid regulatory burdens, which may ultimately cause harm to liquidity in Canadian derivatives markets.

[Specific Comments]

1. Conditions to qualify for the exemption of foreign derivatives dealers from registration requirement (Section 52)

As we express in the general comments, foreign derivatives dealers established in jurisdictions whose regulations are deemed to be equivalent to the Proposed Instrument should not be required to satisfy the certain conditions to qualify for the exemption from requirements to register set forth in Section 52. If this request is not accepted, paragraph (1)(a) "the person or company does not solicit or transact in a derivative with, for or on behalf of a non-eligible derivatives party" should be removed from the conditions. Furthermore, the CSA should provide the clarification to paragraph (2)(b)(ii)(B) (i.e. "all or substantially all of the assets of the person or company may be situated outside of the local jurisdiction"), one of the items required to be delivered to the derivatives party in writing. Also, the derivatives party to whom such disclosure in writing is required should

be limited to those who are located within Canada.

(Rationale)

In the case of derivatives dealers operating in a jurisdiction where the CFTC recognize that it has an equivalent regulation to the Dodd-Frank Act, the condition that the derivatives dealer "does not solicit or transact in a derivative with, for or on behalf of a non-eligible derivatives party" would not be necessary for supervisory purposes because derivatives dealers are already subject to strict national regulations and have in place a robust customer protection framework.

With respect to paragraph (2)(b)(ii)(B) pertaining to one of the required items to be disclosed to the derivatives party, the CSA should expressly define the words "all or substantially all of the assets" as its meaning is not necessarily clear. In addition, please confirm that at least those firms located outside Canada and having a Canadian branch meets the condition in this paragraph.

Furthermore, paragraph (2)(b)(ii) of the Proposed Instrument can be interpreted that a foreign derivatives dealer should apply this disclosure requirement to all of its derivatives parties. Therefore, the term "the derivatives party," to which a written disclosure should be delivered, should be limited to the derivatives parties located within Canada and revise the stipulation.

2. Covered instruments (Section 3)

FX forwards, FX swaps and deposits or loans embedding derivatives, should be excluded from the scope of the Proposed Instrument.

(Rationale)

FX forwards and FX swaps are traded in those markets with relatively high liquidity and transparency. Also, there is a mechanism in place to mitigate their settlement risk. In light of these situations, similar regulations that have already been implemented in the U.S. exclude these products from the scope of application.

Regulations applied to define the scope of the Proposed Instruments (e.g. Ontario Securities Commission Rule 91-506) exclude ordinary deposits and some loans embedding derivatives from the scope but do not set forth specific covered contracts/instruments and instead only provide significantly limited examples. In the first place, those deposits and loans embedding derivatives only entail a limited risk as a derivative. Therefore, these types of deposits and loans embedding derivatives should be excluded from the scope of the Proposed Instrument.

3. Clarification of the registration requirement as a derivatives dealer (Annex IV Part 3/Section 6)

The CSA should limit the registration requirements as a derivatives dealer as much as practical and is also requested to clarify the requirements by confirming our understanding specified below is correct.

i) The term "non-eligible derivatives party ('non-EDP')" is limited to a non-EDP that is "organized under the laws of Canada or a jurisdiction of Canada or that has its head office or principal place of business in Canada."

ii) If our understanding written above i) is correct, a firm is not required to register as a derivatives dealer, solely on the basis that it engages in a derivatives transaction with a counterparty outside Canada that is equivalent to the non-EDP.

iii) The registration requirement under Section 6(a) will apply if a firm enters into a transaction with a non-EDP after the finalized Instrument takes effect. That means, the requirement will not apply to all pre-effective date transactions (regardless of their remaining term) with a non-EDP even if that transactions' maturity arrive after the effective date.

iv) The registration requirement under Section 6(b) will not be applied if soliciting or initiating contact with a non-EDP is conducted or booked outside Canada.

v) Section 6(c) requires registration only if a firm facilitates the clearing for a "Canadian counterparty."

(Rationale)

The Proposed Instrument stipulates that "in the business of trading derivatives" or "required to register under section 6" is the "registration triggers" and does not refer to whether it is established within or outside Canada. Consequently, it can be interpreted that almost all financial institutions, including non-Canadian firms, are required to register if they satisfy the former condition, which seems to be an unnatural interpretation. From this viewpoint, the CSA should clarify the registration requirements.

Furthermore, the registration requirements should be limited as much as practical because, as mentioned previously, excessive regulatory burdens on non-Canadian firms will have negative effects on the Canadian markets. The CSA can, for example, apply the registration requirements to register only when a firm is required to register as a derivatives dealer pursuant to Canada's securities legislation or is required to register under section 6 and has its principal place of business or head office in Canada.

4. Individual registration (Section 16)

Individuals should not be required to register. If it is nevertheless determined to require individuals to register, the CSA should limit the scope of individual registration

to those individuals who genuinely need registration and specify why such registration is necessary.

(Rationale)

The Proposed Instrument requires to extensively conduct individual registration, and therefore significant operational burdens are expected to be generated, while the necessity of such registration is unclear.

5. Risk management (Section 39)

With respect to the establishment of risk tolerance limits, the CSA should allow firms to manage risks associated with derivatives together with those with other products, instead of focusing on the risks associated with derivatives.

(Rationale)

Global firms generally perform risk management by taking into account interrelation between various types of products, rather than by focusing on specific products. For example, interest rate risk associated with derivatives is managed in an integrated manner together with bonds and other products. Under such practice, it is inefficient to separate products that are subject to a specific regulation (i.e., derivatives) and establish risk tolerance limits individually for them. Given this, the CSA should allow management of risks associated with derivatives together with those with other products.

6. Coverage of the threshold calculation (Sections 50 and 51)

From the perspective of reducing systemic risk in Canada, it would be reasonable to differentiate firms outside Canada from those within Canada for the coverage of the threshold calculation. However, with respect to the threshold to qualify for the exemption from the derivatives dealer registration, the CSA should consider the possibility of raising the threshold from C$250 million by analyzing relevant laws and risk coverage ratios applied in other jurisdictions, and should also review the coverage of the threshold calculation and observation period.

(Rationale)

If the proposed threshold is applied, an increasing number of financial institutions may exit from the Canadian markets to avoid regulatory burdens, reducing the liquidity and ultimately disrupting sound market activities. In order to maximize regulatory effects and at the same time maintain the soundness of the markets, the CSA should raise the proposed threshold and ensure that those financial institutions entailing significant risks and thus should be genuinely regulated will be subject to the derivatives dealer registration.

In addition, the Proposed Instrument does not provide a sufficient analysis that explains

the threshold for the exemption from the derivatives dealer registration (i.e. C$250 million in aggregate gross notional amount outstanding in the previous 24 calendar months). While the calculation methods used cannot be simply compared with other jurisdictions, the U.S. has indicated in the consultative document on the SD regulation its direction to permanently apply the threshold of US$8 billion in the previous 12 months. Such an approach could be referenced and, for example, this threshold could be used as a criterion.

Furthermore, firms registered as a derivatives dealer should be excluded from the group-level threshold calculation because they are appropriately managing risks under the supervision of the Canadian authorities. In addition, a Canadian firm's branch located outside Canada should be excluded from the definition of "Canadian counterparty" and thus to exclude the branch from the threshold calculation, because transactions entered into by such a branch will pose limited risks associated with Canada[1].

If the Proposed Instrument sets a 24-month observation period to calculate the threshold, it would require lead time of more than two years when planning changes to a business model or booking scheme for transactions relating to Canada, which would make it difficult for firms to take agile actions. We therefore request the CSA to consider shortening the observation period to 12 months.

7. Clarification of interpretation, etc.

In finalizing the Proposed Instrument, please clarify the following point.

If a firm is exempted from the requirements to register by relying on, for example, "limited notional amount" (Section 50) or "foreign derivatives dealers" (Section 52), etc., we understand that the firm is exempted not only from the registration as an entity (Section 7) but also from the individual registration for its representative or employees (Section 16). Please inform whether our understanding is correct.

Sincerely,

H. Iwamoto

Hideharu Iwamoto
Vice Chairman and Senior Executive Director

[1] In the U.S. where similar regulations have already been implemented, a non-U.S. branch of a U.S. financial institution is excluded from the threshold calculation under certain conditions.