

ANNEX B

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

PART 1 DEFINITIONS AND INTERPRETATION

Definitions

1. In this Instrument,

“financial entity” means any of the following:

- (a) an association governed by the *Cooperative Credit Associations Act* (Canada) or a central cooperative credit society for which an order has been made under subsection 473(1) of that Act;
- (b) a bank, loan corporation, loan company, trust company, trust corporation, insurance company, treasury branch, credit union, caisse populaire, financial services cooperative, or league that, in each case, is authorized by an enactment of Canada or a jurisdiction of Canada to carry on business in Canada or a jurisdiction of Canada;
- (c) a pension fund that is regulated by either the Office of the Superintendent of Financial Institutions (Canada) or a pension commission or similar regulatory authority of a jurisdiction of Canada;
- (d) an investment fund;
- (e) a person or company, other than an individual, that under the securities legislation of a jurisdiction of Canada is any of the following:
 - (i) subject to the registration requirement;
 - (ii) registered;
 - (iii) exempted from the registration requirement;
- (f) a person or company organized under the laws of a foreign jurisdiction that is similar to an entity referred to in any of paragraphs (a) to (e);

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

- (a) the counterparty is a person or company to which one or more of the following apply:

- (i) it is organized under the laws of the local jurisdiction;
 - (ii) its head office is in the local jurisdiction;
 - (iii) its principal place of business 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 responsible for the liabilities of the counterparty;

“mandatory clearable derivative” means,

- (a) except in Québec, a derivative or a class of derivatives listed in Appendix A, and
- (b) in Québec, a derivative or a class of derivatives that is determined by the Autorité des marchés financiers to be subject to the clearing requirement;

“transaction” means either of the following:

- (a) entering into, materially amending, assigning, acquiring or disposing of a derivative;
- (b) the novation of a derivative, other than a novation resulting from submitting the derivative to a regulated clearing agency;

“regulated clearing agency” means,

- (a) except in Québec, a person or company recognized or exempted from recognition as a clearing agency in the local jurisdiction, and
- (b) in Québec, a person recognized or exempted from recognition as a clearing house.

Application – Québec

2. In Québec, this Instrument applies to derivatives that are not traded on an exchange and to derivatives that are traded on a derivatives trading facility.

Interpretation of the term affiliated entity

3. (1) In this Instrument, a company will be deemed to be an affiliated entity of another company if one of them is the subsidiary of the other or if both are

subsidiaries of the same company or if each of them is controlled by the same person or company.

- (2) In this section, a company will be deemed to be controlled by another person or company or by two or more companies if
 - (a) voting securities of the first-mentioned company carrying more than 50 per cent of the votes for the election of directors are held, otherwise than by way of security only, by or for the benefit of the other person or company or by or for the benefit of the other companies, and
 - (b) the votes carried by such securities are entitled, if exercised, to elect a majority of the board of directors of the first-mentioned company.
- (3) In this section, a company will be deemed to be a subsidiary of another company if one of the following applies:
 - (a) it is controlled by,
 - (i) that other,
 - (ii) that other and one or more companies each of which is controlled by that other, or
 - (iii) two or more companies each of which is controlled by that other;
 - (b) it is a subsidiary of a company that is that other's subsidiary.

Interpretation of hedging or mitigating commercial risk

4. (1) In this Instrument, a counterparty's transaction is considered to be for the purpose of hedging or mitigating commercial risk if, at the time of the transaction, the transaction establishes a position which is intended to reduce risk relating to the commercial activity or treasury financing activity of the counterparty or of an affiliated entity of the counterparty and either of the following apply:
 - (a) that derivative covers risk arising from the change in the value, price, rate or level of assets, services, inputs, products, commodities or liabilities that the counterparty or an affiliated entity of the counterparty owns, produces, manufactures, processes, provides, purchases, merchandises, leases, sells or incurs or reasonably anticipates owning, producing, manufacturing, processing, providing, purchasing, merchandising, leasing, selling or incurring in the normal course of its business;

- (b) that derivative covers the risk arising from the indirect impact on the value, price, rate or level of assets, services, inputs, products, commodities or liabilities referred to in paragraph (a), resulting from fluctuation of one or more interest rates, inflation rates, foreign exchange rates or credit risk;
- (2) Despite subsection (1), a counterparty's transaction is not considered to be for the purpose of hedging or mitigating commercial risk if the position referred to in subsection (1) is held for either of the following purposes:
- (a) to speculate;
 - (b) to offset or reduce the risk of another transaction, unless such position is itself held for the purpose of hedging or mitigating commercial risk.

PART 2

MANDATORY CENTRAL COUNTERPARTY CLEARING

Duty to submit for clearing

5. (1) A local counterparty to a transaction in a mandatory clearable derivative must submit, or cause to be submitted, that transaction for clearing to a regulated clearing agency that provides clearing services for that mandatory clearable derivative.
- (2) A local counterparty submitting a transaction for clearing under subsection (1) must submit the transaction in accordance with the rules of the regulated clearing agency, as amended from time to time.
- (3) A local counterparty must submit a transaction for clearing under subsection (1) not later than
- (a) if the transaction is executed during the business hours of the regulated clearing agency, the end of the day of execution, or
 - (b) if the transaction is executed after the business hours of the regulated clearing agency, the end of the next business day.
- (4) In Newfoundland and Labrador, the Northwest Territories, Nunavut, Prince Edward Island and Yukon, a local counterparty satisfies subsection (1) if the transaction in a mandatory clearable derivative is submitted for clearing, or caused to be submitted, to a clearing agency or clearing house that is recognized or exempted from recognition pursuant to the securities legislation of another jurisdiction of Canada.

- (5) A local counterparty that is a local counterparty solely under paragraph (b) of the definition of local counterparty satisfies subsection (1) with respect to a transaction if the transaction is submitted for clearing in accordance with the laws of a foreign jurisdiction that
- (a) except in Québec, is listed in Appendix B, and
 - (b) in Québec, appears on a list determined by the Autorité des marchés financiers.

Non-application

6. Section 5 does not apply to a transaction if any of the counterparties is one of the following:
- (a) the government of Canada, the government of a jurisdiction of Canada or the government of a foreign jurisdiction;
 - (b) a crown corporation whose obligations are guaranteed by the government of the jurisdiction in which the crown corporation was constituted;
 - (c) an entity wholly owned by a government referred to in paragraph (a) whose obligations are guaranteed by that government;
 - (d) the Bank of Canada or a central bank of a foreign jurisdiction;
 - (e) the Bank for International Settlements.

Notice of rejection

7. If a regulated clearing agency rejects a transaction submitted to it for clearing, the regulated clearing agency must immediately notify each local counterparty to the transaction.

Public disclosure of clearable and mandatory clearable derivatives

8. A regulated clearing agency must publicly disclose on its website, and must allow access to that website at no cost to the public, a list of all derivatives or classes of derivatives for which it will provide clearing services and, for each derivative or class of derivatives listed, identify whether it is a mandatory clearable derivative.

PART 3 EXEMPTIONS AND APPLICATION

End-user exemption

- 9. (1)** Section 5 does not apply to a transaction if both of the following apply:
- (a) at least one of the counterparties to the transaction is not a financial entity;
 - (b) a counterparty that is not a financial entity is entering into the transaction for the purpose of hedging or mitigating commercial risk.
- (2)** Section 5 does not apply to a transaction entered into by an affiliated entity of a counterparty that is not a financial entity if all of the following apply:
- (a) the affiliated entity is acting on behalf of the counterparty that is not a financial entity;
 - (b) the transaction is entered into for the purpose of hedging or mitigating commercial risk;
 - (c) the affiliated entity is not subject to, registered under or exempted from the registration requirement under the securities legislation of a jurisdiction of Canada.

Intragroup exemption

- 10. (1)** In this section, “intragroup transaction” means a transaction between either of the following:
- (a) two counterparties that are prudentially supervised on a consolidated basis;
 - (b) a counterparty and its affiliated entity if the financial statements for the counterparty and its affiliated entity are prepared on a consolidated basis in accordance with accounting principles as defined by the National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards*.
- (2)** Section 5 does not apply to an intragroup transaction if all of the following conditions apply:
- (a) both counterparties agree to rely on this exemption;

- (b) the transaction is subject to centralized risk evaluation, measurement and control procedures reasonably designed to identify and manage risks;
 - (c) there is a written agreement setting out the terms of the transaction between the counterparties.
- (3) No later than the 30th day after a local counterparty to an intragroup transaction relies on the exemption in subsection (2), the local counterparty must submit to the regulator, in an electronic format, a completed Form 94-101F1 *Intragroup Exemption*.
- (4) No later than the 10th day after a local counterparty becomes aware that the information in a previously submitted Form 94-101F1 *Intragroup Exemption* is no longer accurate, the local counterparty must submit to the regulator, in an electronic format, an amended Form 94-101F1 *Intragroup Exemption*.

Record keeping

11. (1) A local counterparty to a transaction that relies on section 9 or section 10 must maintain, for a period of 7 years following the date on which the transaction expires or terminates, 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
- (a) kept in a safe location and in a durable form, and
 - (b) provided to the regulator within a reasonable time following request.

PART 4 MANDATORY CLEARABLE DERIVATIVES

Submission of information on clearing services for derivatives by a regulated clearing agency

12. No later than the 10th day after a regulated clearing agency first provides or offers clearing services for a derivative or class of derivatives, the regulated clearing agency must submit to the regulator, in an electronic format, a completed Form 94-101F2 *Derivatives Clearing Services*, identifying the derivative or class of derivatives.

PART 5 EXEMPTION

Exemption

13. (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

14. No later than the 30th day after the coming into force of this Instrument, a regulated clearing agency must submit to the regulator, in an electronic format, a completed Form 94-101F2 *Derivatives Clearing Services*, identifying all derivatives or classes of derivatives for which it provided clearing services as of the date of the coming into force of this Instrument.

Effective date

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

APPENDIX A

MANDATORY CLEARABLE DERIVATIVES

[Derivative or] Class of derivatives	Date on which section 5 applies to a transaction involving a local counterparty
<i>[description of derivative]</i>	<p><i>[Insert date •]</i> - for a local counterparty that is a member of a regulated clearing agency that offers clearing services for the derivative or class of derivatives and subscribes to such service,</p> <p><i>[Insert the date which is 6 months after •]</i> - for a local counterparty that is a financial entity which <i>[insert specific threshold]</i></p> <p><i>[Insert the date which is 12 months after •]</i> - for a local counterparty that is a financial entity, other than a financial entity which <i>[insert specific threshold]</i>,</p> <p><i>[Insert the date which is 18 months after •]</i> - for a local counterparty that is not one of the following: a member of a regulated clearing agency that offers clearing services for the derivative or class of derivatives and subscribes to such service, or a financial entity.</p>

APPENDIX B

**EQUIVALENT CLEARING LAWS OF FOREIGN JURISDICTIONS
PURSUANT TO PARAGRAPH 5(5)(a)**

The laws and regulations of each of the following jurisdictions outside of Canada are considered equivalent for the purposes of paragraph 5(5)(a).

Jurisdiction	Law, Regulation and/or Instrument

FORM 94-101F1
INTRAGROUP EXEMPTION

Type of Filing:

INITIAL

AMENDMENT

Section 1 – Notifying counterparty information

1. State the full legal name of the notifying counterparty that relied on the exemption for an intragroup transaction.
2. Disclose the name under which it conducts business, if different from item 1:
3. If this Form is used to report a name change on behalf of the counterparty referred to in item 1 or item 2, enter the previous name and the new name:

Previous name:

New name:

Head office:

Address:

Mailing address (if different):

Telephone:

Website:

Contact employee:

Name and title:

Telephone:

E-mail:

Other offices:

Address:

Telephone:

Email:

Canadian counsel (if applicable)

Firm name:

Contact name:

Telephone:

E-mail:

Section 2 – Combined notification on behalf of other counterparties within the group to which the notifying counterparty belongs

1. Provide a statement confirming that both counterparties to each transaction to which this report relates chose to rely on the intragroup exemption and describe the basis on which the exemption is available to them.
2. Provide a statement confirming that each transaction to which this report relates is subject to appropriate centralized risk evaluation, measurement and control procedures. Describe those procedures.
3. State the legal entity identifier of both counterparties to each transaction to which this report relates in the manner required under the securities legislation.
4. For each transaction to which this report relates, describe the ownership and control structure of the counterparties that are affiliated entities.
5. For each transaction to which this report relates, state whether there is a written agreement setting out the terms of the transaction and, if so, state the date of the agreement and the signatories to the agreement and describe the agreement.

Section 3 – Certification

I certify that I am authorised to submit this Form on behalf of the notifying counterparty and, where applicable, on behalf of the other affiliated entities listed above in Section 2 and that the information in this Form is true and correct.

DATED at _____ this _____ day of _____, 20____

(Print name of authorized person)

(Print title of authorized person)

(Signature of authorized person)

(Email)

(Phone number)

Instructions: Submit this form to the regulator in the local jurisdiction as follows:

[Insert names of each jurisdiction and email or other address by which submission is to be made.]

FORM 94-101F2
DERIVATIVES CLEARING SERVICES

Type of Filing: **INITIAL** **AMENDMENT**

Section 1 – Regulated Clearing Agency Information

1. Full name of regulated clearing agency:
2. Contact information of person authorized to submit this form:

Name and title:
Telephone:
E-mail:

Section 2 – Description of Derivatives

1. Identify each derivative or class of derivatives for which the regulated clearing agency provides clearing services, for which a Form 94-101F2 has not previously been filed.
2. For each derivative or class of derivatives referred to in item 1, describe all material attributes of the derivative including:
 - (a) standard practices for managing any life cycle events, as defined in the securities legislation, associated with the derivative,
 - (b) the extent to which it is electronically confirmable,
 - (c) the degree of standardization of the contractual terms and operational processes,
 - (d) the market for the derivative or class of derivatives, including its participants, and
 - (e) data on the volume and liquidity of the derivative or class of derivatives within Canada and internationally.
3. Describe the impact of providing clearing services for the derivative or class of derivatives on the regulated clearing agency's risk management framework and financial resources, including the default waterfall and the effect on the clearing members.
4. Describe the extent to which the regulated clearing agency can maintain compliance with its regulatory obligations should the regulator or securities regulatory authority mandate the clearing of the derivative or class of derivatives.

5. Describe the clearing services to be provided.
6. If applicable, attach a copy of the notice the regulated clearing agency provided to its members and a summary of any concerns received in response to that notice.

Section 3 – Certification

CERTIFICATE OF REGULATED CLEARING AGENCY

I certify that I am authorized to submit this form on behalf of the regulated clearing agency named below and that the information in this form is true and correct.

DATED at _____ this _____ day of _____, 20____

(Print name of regulated clearing agency)

(Print name of authorized person)

(Print title of authorized person)

(Signature of authorized person)

Instructions: Submit this form to the regulator in the local jurisdiction as follows:

[Insert names of each jurisdiction and email or other address by which submission is to be made.]