Summary of Comments and Responses on
Multilateral Instrument 93-101 *Derivatives: Business Conduct* and
Companion Policy 93-101CP *Derivatives: Business Conduct*

Annex A
List of Commenters

Commenter
Alternative Investment Management Association
Bloomberg Tradebook Canada Company
The Canadian Advocacy Council of CFA Societies Canada
The Canadian Commercial Energy Working Group
Canadian Bankers Association
Canadian Market Infrastructure Committee
Convera Canada ULC
International Swaps and Derivatives Association, Inc.
Pension Investment Association of Canada
Portfolio Management Association of Canada

Annex B
Summary of Comments and Responses

This summarizes the written public comments we received on the January 20, 2022 publication for comment of National Instrument 93-101 *Derivatives: Business Conduct*, now Multilateral Instrument 93-101 *Derivatives: Business Conduct* (the **Business Conduct Rule** or **MI 93-101**) and Companion Policy 93-101CP *Derivatives: Business Conduct* (the **CP**), and our responses to those comments.

In this summary of comments, the following terms have the following meanings:

"CFTC" means the U.S. Commodity Futures Trading Commission;

"CIRO" means the Canadian Investment Regulatory Organization;

"CSA" means the Canadian Securities Administrators;

"EDP" means "eligible derivatives party" as defined in MI 93-101;

"IOSCO" means the International Organization of Securities Commissions;

"NI 31-103" means National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*;

"NI 93-102" or the "Proposed Registration Rule" means National Instrument 93-102 *Derivatives: Registration*;

"OSFI" means the federal Office of the Superintendent of Financial Institutions;

"permitted client" has the meaning ascribed to that term in section 1.1[*definitions*] of NI 31-103;

"regulator" means the regulator or securities regulatory authority in a jurisdiction;

"SEC" means the U.S. Securities and Exchange Commission;

"specified foreign jurisdiction" means any of Australia, Brazil, Hong Kong, Japan, South Korea, New Zealand, Singapore, Switzerland, United Kingdom of Great Britain and Northern Ireland, any member country of the European Union, the United States of America, Norway and Iceland;

"U.K." means the United Kingdom of Great Britain and Northern Ireland; and

"U.S." means the United States of America.

Other capitalized terms not otherwise defined in this Summary of Comments have the meanings set out to them in the Business Conduct Rule.

A. Overview of Comments

1. Overview of support for the initiative

Summary of General Support

Overall, commenters were very supportive of the changes reflected in the January 2022 publication of the Business Conduct Rule and indicated that the significant changes to the Business Conduct Rule following the last publication are both improvements over the prior proposals and responsive to comments and concerns raised by market participants**.**

Commenters were supportive of the CSA's efforts to introduce business conduct regulations on derivatives dealers and advisers. As well, commenters were supportive of the principles behind the business conduct proposals and efforts to protect market participants, including reducing systemic risk and meeting IOSCO's statement of related principles and objectives. One commenter indicated that the January 2022 publication has struck the appropriate balance between putting in place a robust investor protection framework and responding to the overall comments of stakeholders impacted by the Business Conduct Rule. Commenters also indicated the importance of harmonizing rules across Canada, as well as harmonization with regimes outside of Canada.

One commenter specifically highlighted their belief that it is important the final Business Conduct Rule is implemented and operationalized as soon as possible, even without the inclusion some of some of the concepts from the Client Focused Reforms[1] at this time.

i) Support for the inclusion of short-term FX in the institutional FX market

Several commenters were very supportive of applying a subset of provisions in the Business Conduct Rule to cover short-term FX in the institutional FX market and expressed the view that applicable dealers should be required to abide by these provisions, such as fair dealing and conflicts of interest when transacting with a derivatives party.

One commenter indicated that they believe there is value to provide Canadian regulators with the necessary tools in the event that there is a misconduct issue involving short-term FX. The commenter also emphasized that the FX Global Code of Conduct is very clear that it does not impose legal or regulatory obligations on market participants and therefore, integrating code of conduct into regulations is helpful. Similarly, another commenter commented that such inclusion is unlikely to cause a significant burden, but instead will enhance the integrity of the short-term FX market in Canada.

ii) Support for the liquidity provider exemption

Several commenters were supportive of including the liquidity provider exemption.

One commenter supported the new exemption and indicated that without such an exemption, liquidity in the Canadian OTC derivatives market would be materially impaired. The commenter believes adding regulatory burden would dissuade foreign banks from maintaining existing Canadian operations or existing Canadian coverage and that foreign liquidity is essential for Canadian businesses to be able to hedge the risks associated with their operations. Accordingly, this exemption is appropriate and necessary to maintain a robust Canadian OTC derivatives market.

iii) Support for including de minimis exemptions in the senior manager's requirements

[1] See recent amendments to NI 31-103 and its Companion Policy (the **Client Focused Reforms**) in 2019

Several commenters indicated their support for including de minimis exemptions (these exemptions are now referred to in the CP as "**notional amount exemptions**") in senior derivatives manager requirements.

iv) Support for eliminating the financial threshold to qualify as a commercial hedger

Several commenters were supportive of eliminating the $10 million financial threshold to qualify as a commercial hedger.

In many commenters' views, the removal of the threshold will have a positive effect on the ability of clients to access liquidity from dealers and on a dealer's willingness to trade with a broader range of clients. In particular, this change will ensure that mid-market entities are not excluded from access to OTC derivatives transactions and are therefore able to access important hedging products and continue to result in healthy competition.

One commenter who indicated strong support for eliminating the threshold stated that this decision is also consistent with the long-standing treatment of commercial hedgers of all sizes in other Canadian jurisdictions.

v) Support for streamlining the requirements that apply to registered derivatives advisers under NI 31-103

Many comments were supportive of the ability of registered advisers to leverage their existing compliance infrastructure by complying with corresponding requirements in NI 31-103 with respect to their derivatives activity for many of the conduct provisions set out in the Business Conduct Rule. One commenter indicated that this helps in reducing regulatory burden, while maintaining investor protection and lauded the approach.

vi) Support for a flexible 5-year timeframe for re-papering the status of existing clients that had previously provided status representations

Several comments indicated support for the extended time that will allow derivatives firms for a period of 5 years to treat existing status representations (e.g., permitted clients, qualified parties, accredited counterparties and eligible contract participants) as EDPs.

CSA Response

We thank the commenters for their comments supporting the changes reflected in the January 2022 publication of the Business Conduct Rule. Specifically, we thank the commenters for their comments supporting:

- the inclusion of the short-term FX in the Business Conduct Rule;
- the inclusion of the liquidity provider exemption in the Business Conduct Rule;
- the inclusion of the exemption from senior derivatives manager requirements in the Business Conduct Rule;
- the elimination of the $10 million financial threshold to qualify as a commercial hedger in the Business Conduct Rule;
- the CSA's efforts to streamline the requirements in the Business Conduct Rule that apply to registered derivatives advisers under NI 31-103; and
- the 5-year period to re-paper the status of representations given by certain clients.

2. Overview of Comments and Concerns with the Initiative

Although the majority of commenters were very supportive of the Business Conduct Rule, a few commenters raised additional comments regarding the impact of the Business Conduct Rule in the January 2022 publication. The principal concerns we received on the Business Conduct Rule were as follows:

- there are still elements of the EDP definition that pose challenges to firms transitioning to the use of the new definition, given that the proposed structure of the EDP definition retained the knowledge and experience requirement does not use a bright-line test, and therefore, is not harmonized with the approach taken under the framework for regulating securities market participants or comparable foreign regulators. The CSA should reconsider the impact on liquidity and allow more flexibility;

- the transition representations derivatives firms can rely on during the transition period should be further expanded to account for certain additional types of sophisticated parties;

- to promote continued liquidity in the Canadian market, it is important to harmonize Canadian OTC derivatives rules with the derivatives rules in larger markets outside Canada to the greatest extent possible, as well as align certain elements to the existing securities regime in Canada, where appropriate. Any onerous or bespoke reporting requirements imposed on foreign market participants will impact liquidity and dissuade foreign dealers from operating in the Canadian market; and

- although registered advisers are appreciative of the changes made to include an exemption in the Business Conduct Rule for registered advisers complying with the requirements under NI 31-103 in respect of their derivatives activity, additional guidance would be helpful to assist firms with implementing the new regime.

CSA Response

We thank the commenters for their comments on the Business Conduct Rule. In response to the comments we received, changes we have made to the Business Conduct Rule include:

- removing the knowledge and experience requirement in the EDP definition, which will significantly ease the re-papering burden and align with the approach taken to obtaining status representatives more generally under securities legislation for securities and exchange-traded derivatives products, as well as align with foreign regulators, which rely on bright-line tests;

- expanding the "commercial hedger" concept under the EDP definition such that it is available for use by individuals operating sole proprietorships;

- expanding the status representations that derivatives firms can rely on for the purposes of the transition representations;

- clarifying that the inclusion of short-term FX contracts in the institutional FX market for the purposes of a limited sub-set of provisions does not require any of the Canadian financial institutions that are subject to this provision to obtain any additional certifications or status representations from clients; rather the provision will simply overlay, on a principles basis, the

existing policies and procedures that have already been adopted by these derivatives firms through their adherence to the FX Global Code of Conduct;

- harmonizing the foreign dealer exemption to align with the approach taken in the international dealer exemption under NI 31-103, as well as the approach taken in the foreign advisers and foreign liquidity providers exemption and removing the requirement to provide additional regulatory reports;

- including detailed guidance for registered advisers relying on the section 48 [*Registered advisers under securities or commodity futures legislation*] exemption on the interaction of the exemption with the comparable requirements applicable to a registered adviser's derivatives activity under NI 31-103;

- expanding the list of specified jurisdictions found in Appendix A, Appendix D and Appendix E of the Business Conduct Rule, which are identified to have comparable derivatives regulation on an outcomes-basis;

- aligning the recordkeeping requirements with the approach to conduct regulation under securities legislation, which significantly reduces the timeframe for retaining applicable records (from 7 years after the expiration of the transaction, to 7 years from the record creation date); and

- increasing the financial threshold from $3 billion to $10 billion under the notional amount exemption available to commodity derivatives dealers whose derivatives activity with eligible derivatives parties falls below the stipulated financial threshold, to align the approach more closely with the exemptions contemplated in the U.S. and E.U. regulatory framework.

B. Summary of Specific Comments

1. Overview of comments on the exemptions impacting foreign dealers, foreign advisers and foreign sub-advisers

As noted above, a number of commenters emphasized the importance of harmonizing Canadian OTC derivatives rules with regimes in larger markets outside Canada and expressed concerns over the potential negative impact the Business Conduct Rule would have on liquidity in the market, and in particular the liquidity provided by foreign dealers to the Canadian derivatives market.

Accordingly, several commenters supported the significant changes proposed in the third publication of the Business Conduct Rule to minimize the potential impact of the Business Conduct Rule on foreign derivatives dealers and advisers in order to protect market liquidity by:

- introducing a new foreign liquidity provider exemption for foreign dealers that trade with derivatives dealers in Canada;

- streamlining the foreign dealer and foreign adviser exemptions so that they more closely conform to the international dealer and international adviser exemptions in NI 31-103;

- adding a new exemption for foreign sub-advisers similar to the international sub-adviser

exemption in NI 31-103; and

- including additional guidance on the application of the business trigger test as it relates to dealers that conduct activities in Canada and in foreign jurisdictions, as well as on the availability of exemptions from business conduct requirements.

Several commenters noted that ensuring that Canadian regulation of the OTC derivatives market does not significantly reduce liquidity is critical to the functioning of the market. They noted that regulation that imposes unique requirements will deter market makers from continuing to participate in the Canadian OTC derivatives market. Accordingly, commenters expressed that these changes to the Business Conduct Rule would help to ensure that liquidity is maintained in the Canadian market.

a) New foreign liquidity provider exemption (section 37)

Several commenters expressed their strong support for the changes made by the CSA to preserve liquidity in the inter-dealer market by introducing a new foreign liquidity provider exemption for foreign dealers that trade with derivatives dealers in Canada. These commenters reiterated that Canadian based derivatives dealers do not desire or need the protection set out in the Business Conduct Rule when facing a foreign liquidity provider. And further, they indicated that this new exemption appropriately addressed their comments on previous publications of the Business Conduct Rule where they stressed that Canadian participants form only a very small part of the global derivatives market and that maintaining liquidity in the Canadian market and ongoing and uninterrupted access to foreign dealers (namely, foreign banks) is critical to the operation of Canadian financial markets.

Additionally, commenters noted that if or when the CSA proposed the next iteration of a derivatives registration rule, that this foreign liquidity provider exemption should also be incorporated into that rule as well.

CSA Response

Thank you from providing your comments in support of the new foreign liquidity provider exemption.

b) Foreign derivatives dealer exemption (section 39)

Several commenters were very supportive of the changes the CSA made to the foreign derivatives dealer exemption to streamline the requirements and provide limits on the reporting obligations imposed on foreign dealers, such as limiting the reporting to activities that involve parties located in Canada and introducing a materiality threshold to the conditions under which a foreign dealer relying on this exemption would be required to report non-compliance to the regulator.

Several commenters noted that the changes made were necessary to maintain liquid Canadian OTC derivatives markets and supported the changes that clarify that reports of material non-compliance extend only to the foreign dealers interaction with Canadian counterparties and the Canadian market; however, they noted that given the multiple global rules multinational dealers are subject to, that the timing for fulfilling such reporting obligation under the CSAs rules should not precede any report to the foreign dealers regulator in its home jurisdiction.

One commenter, however, noted that the approach taken in the Business Conduct Rule exceeds all current reporting requirements for registered and exempt securities firms in Canada and expressed concerns with taking a different approach as it relates to OTC derivatives, including that departing from

existing standards on the securities side means that certain foreign dealers may simply exit the Canadian market entirely.

CSA Response

Thank you for providing support and recommendations on the foreign derivatives dealer exemption in the Business Conduct Rule. We have removed the requirement for foreign derivatives dealers to provide reports to Canadian regulators under this exemption. The rationale is to align the approach taken in the Business Conduct Rule with the foreign liquidity provider exemption and the foreign adviser exemption, which do not have requirements to provide this type of reporting, as well as aligning with the overall approach taken for all regulated product lines (i.e., securities and futures). Removing this reporting requirement from the Business Conduct Rule entirely for foreign dealers relying on this exemption ensures there is a common approach across product lines, as well as within the Business Conduct Rule itself. CSA Staff remain of the view that even with this change, the main benefits of modernizing the foreign dealer exemption remain intact since the availability of this exemption is limited to jurisdictions that CSA Staff has determined has comparable derivatives regulation.

c) Foreign derivatives adviser exemption (section 46) and sub-adviser exemption (section 47)

Several commenters expressed their overall support for streamlining the foreign adviser and sub-adviser exemptions so that they more closely conform to the international adviser exemptions in NI 31-103.

Two commenters expressed that they were in favour of these exemptions as contemplated, so long as there is a level playing field. Specifically, one commenter noted that to the extent foreign advisers are not subject to any requirements to follow derivatives business conduct rules with respect to FX forwards in their home jurisdiction, that Canadian advisers should similarly not be required to follow such rules.

CSA Response

Thank you for providing support and recommendations on the foreign derivatives adviser and sub-adviser exemptions. The exemption model for foreign dealers and foreign advisers from the requirements in the Business Conduct Rule are intended to preserve market access and maintain general liquidity. Regulators both domestically and globally have observed market abuse as it relates to FX derivatives and do not support a change to the rule that minimizes the obligations of derivatives firms for conducting themselves responsibly and owing basic business conduct obligations to a derivatives party.

2. Comments on the definition of "eligible derivatives party"

A few commenters made recommendations on the definition of EDP in the Business Conduct Rule.
One commenter recommended that the definition of EDP under paragraphs (m), (n), (o) and (p) of the Business Conduct Rule be revised to allow a derivatives firm flexibility in determining whether a derivatives party has the requisite knowledge and experience, instead of being required to only rely on written representations. The commenter noted that in their experience, written representations are not always provided by clients in all cases despite multiple follow-up requests. Another commenter specifically stated that the requirement is unnecessary. The commenter believes that financial thresholds are appropriate and sufficient to identify derivatives parties who are not in need of extra protections. The commenter believes that the definition as drafted will be a burden on derivatives firms without any meaningful benefit.

The commenter also expressed concerns that the definition of EDP is cumbersome and mostly duplicates other established Canadian client definitions. The commenter believes that the definition of EDP should include all the persons that qualify as "permitted clients" under NI 31-103. The commenter also strongly encouraged the CSA to consider that there is a need to align the EDP definition with the "eligible contract participant" definition under the U.S. *Commodity Exchange Act*.

CSA Response

We thank the commenters for their comments on the definition of EDP. In response to commenters, we have removed the requirement to provide a knowledge and experience self-certification from each relevant prong of the EDP definition. After careful consideration, the CSA has removed this requirement to more clearly harmonize the approach with the approach taken in the existing securities and commodities futures regulatory framework, which use bright-line tests to ascertain the status of a client. Furthermore, this generally aligns the CSA's approach with foreign approaches taken to client classification as well, which we recognize is important given the cross-border nature of derivatives markets and overlapping regulatory regimes.

We have also more closely aligned with the concept of "eligible contract participant" under the U.S. *Commodity Exchange Act*, which includes the concept of sole proprietorships, by expanding the "commercial hedger" concept under the EDP definition such that it is available for use by individuals operating sole proprietorships. We understand that there are specific scenarios where sole proprietorships (which are legally treated as individuals) also enter into derivatives to hedge risks associated with their commercial activities. As such, individual sole proprietors operating a commercial business are able to qualify as commercial hedgers if they satisfy the conditions for qualifying as a commercial hedger and are entering into a transaction solely for the purposes of managing risks inherent to the commercial enterprise. To ensure this prong of the EDP definition is used for its intended purpose, CSA Staff intend to carefully monitor and review the use of this prong of the definition by clients of derivatives firms to qualify as an EDP. We will also continue to monitor the impact of differences between the Business Conduct Rule and foreign approaches to derivatives regulation.

We have not revised the EDP definition to include the concept of "permitted client" under NI 31-103. As there are differences between securities and derivatives markets, the Business Conduct Rule is intended to be a tailored regime for derivatives.

3. Comments on the potential impact of the Business Conduct Rule on registered advisers

We received a comment stating that the CSA should set out a clear roadmap at the start of MI 93-101 illustrating its application to advisers regulated by NI 31-103. The commenter believes that there can be increased clarity regarding the application of the Business Conduct Rule to advisers by setting out the parts of the Business Conduct Rule that advisers already complying with NI 31-103 are subject to.

Additional comments of the potential impact of the Business Conduct Rule on registered advisers are summarized in #7 of the Summary of Responses to Specific Request for Comments below.

CSA Response

We thank the commenter for their comments on the impact of the Business Conduct Rule on registered advisers and accordingly, have:

- explained through CP guidance how compliance with certain requirements of NI 31-103 could reasonably be viewed as also satisfying similar requirements for derivatives in the Business Conduct Rule; and

- included a chart in Appendix B of the CP to assist registered advisers with understanding their obligations. Appendix B of the CP sets out an overview of the parts, divisions and sections in MI 93-101 that still apply to registered advisers relying on the section 48 exemption in the Business Conduct Rule, as well as a summary of the parts, divisions and sections in the Business Conduct Rule that do not apply to registered advisers that comply with the corresponding requirements in NI 31-103 in respect of their derivatives activity. Appendix B of the CP also lists the provisions under NI 31-103 that are generally applicable in respect of a registered adviser's derivatives activity if such registered adviser is relying on the section 48 exemption in the Business Conduct Rule.

So long as the registered adviser complies with the relevant principles under NI 31-103 and MI 93-101 in connection with their activities in relation to derivatives, then the intention is for these firms to leverage off of these existing regimes when ensuring that market conduct principles extend to their derivatives activity with their clients.

4. Comments on Proposed Registration Requirements for Derivatives Market Participants

We received a few comments relating to proposed registration requirements for derivatives market participants and the interaction of such requirements with the Business Conduct Rule.

In relation to the Proposed Registration Rule, we received the following comments:

- Two commenters urged the CSA to implement the Business Conduct Rule and the Proposed Registration Rule at the same time.

- One commenter recommended that the exemptions provided in the Business Conduct Rule be harmonized with the Proposed Registration Rule. For example, the commenter noted that unlike the Proposed Registration Rule, there is no notional amount exemption from the derivatives dealer business conduct requirements other than with respect to the senior manager derivatives regime, nor is there an exemption for crown corporations.

- One commenter also noted that it is difficult to provide fulsome comments on the Business Conduct Rule without understanding the status of the Proposed Registration Rule regarding when a firm is required to be a derivatives adviser.

CSA Response

We thank the commenters for their comments on the proposed registration requirements for derivatives market participants and the interaction of such requirements with the Business Conduct Rule. The Business Conduct Rule is intended to create a uniform approach to derivatives markets conduct regulation in Canada and promote consistent protections for market participants, regardless of the derivatives firm they deal with, and accordingly is the next step towards creating a uniform approach to derivatives markets conduct regulation in Canada.

While the CSA did not publish the next iteration of the Proposed Registration Rule, and the Business Conduct Rule will be implemented in advance of the Proposed Registration Rule, we will consider comments received in relation to the Proposed Registration Rule and Companion Policy for any future publications, including in relation to the notional amount thresholds and related tests to determine such thresholds, since we intend these thresholds to be harmonized between these two rules.

Regarding the comment about how to determine when a firm will be considered to be a derivatives adviser, please note that the CP to the Business Conduct Rule provides guidance on the factors used to determine when a person or company is engaged in the business of advising with respect to derivatives. Specifically, refer to [*Factors in determining a business purpose – derivatives adviser*] in the CP to the Business Conduct Rule, which sets out the factors in determining a "business purpose" for derivatives advisers.

5. Comments on the timing of implementation and transition representations

We received a number of comments relating to the timing of implementation of the Business Conduct Rule and the representations set out under section 50 to facilitate the transition to the Business Conduct Rule (the **Transition Representations**). Commenters provided the following recommendations:

- Several commenters noted their appreciation for the proposed transition period of 5 years. However, one commenter recommended that the CSA provide at a two-year implementation period while another commenter recommended at least a three-year implementation period.

- Two commenters asked for additional clarity confirming that the transition period effectively ends in 6 years and asked that the CP be amended to expressly provide guidance on this point.

- Another commenter, while generally supportive, noted two concerns with respect to the transition provisions of the Business Conduct Rule that the commenter views significantly reduce the effectiveness of those provisions:

    - Firstly, the commenter is concerned that there are certain derivatives parties that would otherwise qualify as EDPs, where a derivatives firm would not have obtained any of the Transition Representations. Therefore, the commenter recommends the inclusion of the "accredited investor" representation in Ontario as well as the EMIR "financial counterparty" and "NFC+" representations as Transition Representations since parties that provide these representations are considered to be sophisticated counterparties.

    - Secondly, the commenter noted that if the derivatives party is an eligible commercial hedger, in order to meet its obligations under section 8(2) of the Business Conduct Rule, the commenter believes that derivatives firms will need to conduct an outreach in order to obtain the waiver required under that section. In the commenter's experience, this group has the lowest rate of response to information requests. As a result, this would place a significant burden on Canadian banks and increase the risk of market disruption. The commenter recommends that as long as one of the Transition Representations has been made prior to the effective date, eligible commercial hedgers would be deemed to have given the waiver.

- The commenter also recommends the following amendments to the transition provisions:

- Provide that even where special purpose vehicles have not made one of the Transition Representations prior to the effective date, derivatives firms facing such special purpose vehicles would not need to conduct a special outreach to those parties and would not require a waiver from those parties to treat them as EDPs during the transition period; and

- To reduce the significant burden placed on Canadian financial institutions trading short-term FX transactions, the Business Conduct Rule should expressly provide that such counterparties will be deemed to be EDPs during the transition period.

- Application to pre-existing transactions - lastly, the commenter noted that it is unclear to what extent the Business Conduct Rule would apply to transactions that were entered into before the effective date. Since there are certain derivatives parties from whom a derivatives firm would not have received any such representations but would otherwise be EDPs, this implies all obligations under the Business Conduct Rule would apply to all legacy transactions of such derivatives parties. The commenter noted that this is confusing as there are certain obligations under the Business Conduct Rule that apply only prior to trading, and this is also contrary to legislative conventions to have legislation apply retroactively.

CSA Response

We thank the commenters for their comments on the timing of implementation and Transition Representations. In response to the comments received, we have made the following changes to the Business Conduct Rule:

- We have added clarification language in the CP that the transition period to re-paper clients under the EDP definition ends 5 years following the date the Business Conduct Rule takes effect. Therefore, firms that have already papered clients under existing status representations effectively have 6 years to obtain new representations from their existing clients, since there is a delayed effective date of one year from the date of the final publication until the Business Conduct Rule takes effect.

- We have included a "non-individual accredited investor" representation in Ontario. We have included this "non-individual accredited investor" representation because we understand that banks relying on the registration exemption in section 35 of the *Securities Act* (Ontario) had obtained accredited investor representations from their Ontario clients in respect of certain OTC derivatives contracts. This accommodation is only intended to be available for use in the transition period to facilitate transition for banks that had obtained the accredited investor representation for their OTC contracts.

- We have included the EMIR "financial counterparty" and "NFC+" representations as Transition Representations.

- With respect to the comment about retroactively applying the rule, please note that the Business Conduct Rule applies only once the Business Conduct Rule takes effect.

- Accordingly, when the Business Conduct Rule takes effect, to the extent there is a pre-existing transaction and the transaction (as well as the account and relationship between the parties) continues, provided the derivatives firm has obtained an applicable Transition Representation, only the fair dealing obligation will apply.

- Derivatives are not point-in-time specific transactions. There are ongoing relationships and obligations between the parties in respect of a transaction once the Business Conduct Rule takes effect. Therefore, in CSA Staff's view, it would not be an appropriate outcome (especially given the length of certain OTC derivatives transactions) to remove the application of even the basic fair dealing obligation to such transactions going forward. Furthermore, stakeholders have expressed concerns to CSA Staff in the past with respect to the broad public interest powers in the provinces respective securities legislation and how that applies to their derivatives activity – in CSA Staff's view, firms will benefit from the additional certainty of knowing that a specific obligation applies.

- With respect to transactions with non-eligible derivatives parties (i.e., retail clients), following the effective date, all applicable provisions in the Business Conduct Rule apply to the extent practicable. We note that for the population of firms that are members of CIRO and are offering over-the-counter derivatives to retail customers, that they are already subject to business conduct obligations. The Business Conduct Rule will now overlay those obligations and we expect those firms will be relying on the exemption available to firms who are members of CIRO for complying with the relevant CIRO provisions. We also note that in previous comments letters received as part of consultations on the Business Conduct Rule, both the foreign banks and local Canadian banks have re-iterated that they do not intend to offer the products subject to this rule to clients that do not otherwise qualify as eligible derivatives parties. For the population of firms that are otherwise impacted and have any questions, we encourage them to contact their local securities regulator for any additional guidance they may need.

- With respect to the comment that was raised about having to re-paper all clients transacting in short-term FX in the wholesale FX market as eligible derivatives parties:

  - The inclusion of short-term FX contracts in the institutional FX market for the purposes of a limited sub-set of provisions **does not** require any of the Canadian financial institutions that are subject to this provision to obtain any additional certifications or status representations from clients; rather the provision will simply overlay, on a principles basis, the existing policies and procedures that have already been adopted by these derivatives firms through their adherence to the FX Global Code of Conduct when they transact with a client in a short-term FX contract in the "institutional foreign exchange market", which is a defined term in the Business Conduct Rule (and referred to in the FX Global Code of Conduct as the "wholesale foreign exchange market"). The CP reiterates that this excludes retail clients and is intended to only cover transactions with the types of counterparties covered in the FX Global Code of Conduct.

  - We have made changes to the Business Conduct Rule to further clarify that it was not the CSA's policy intention or expectation that firms would need to obtain status representations from any of their clients they transact with in the wholesale FX market by removing the reference to paragraphs of clients covered by the eligible derivatives

party definition; the CSA's intention is to overlay a small sub-set of conduct provisions over certain Canadian financial institutions' existing policies and procedures that already incorporate the same principles (e.g., fair dealing, conflicts of interest, complaints handling) into their internal compliance regimes as a result of adhering to the FX Global Code of Conduct. The CP already explains that we would expect that it would cover the types of institutional FX counterparties referenced in certain paragraphs of the eligible derivatives party definition, which aligns with the types of counterparties that are considered to be wholesale FX clients that transact in the institutional foreign exchange market under the FX Global Code of Conduct. We refer you to the relevant section of the CP for additional explanation.

- The waiver required under section 8(2)(a)(iii) of MI 93-101 means that the additional protections in MI 93-101 are presumed to apply to eligible derivatives parties that are individuals or eligible commercial hedgers, unless they waive some or all of the additional protections in MI 93-101. For the purposes of transitioning to the new regulatory framework, CSA Staff expect that it may take some time for a derivatives firm to obtain the necessary waivers from the population of clients that this provision may otherwise apply to. Accordingly, we have included an additional one-year period following the effective date of MI 93-101 for derivatives firms to obtain the waiver. During this period, the core obligations in the Business Conduct Rule still apply. This specific grace period is to assist derivatives firms in circumstances where their client is an eligible derivatives party and is an individual (and the waiver is still required to be obtained by virtue of the application of section 8(2)(a)(iii)), or in circumstances where a client can only qualify as an eligible derivatives party on the basis of the new eligible commercial hedger prong of the eligible derivatives party definition.

6. Comments on the end-user exemption

We have received a few comments with recommendations relating to the end-user exemption:

- One commenter noted that while the end-user exemption is helpful, the commenter recommends the CP be amended to add an additional example where a person or company may qualify for this exemption even if it is not entering into derivatives trades for hedging purposes but solely for purposes of gaining market returns, provided such person or company trades with a derivatives dealer.

- Another commenter recommended that paragraphs (d) and (e) of subsection 38(1) be removed or at least modified to exclude transactions arranged by a person for its affiliates. The commenter is concerned that phrases such as "facilitate" and "or otherwise intermediate" are broad and could inadvertently subject end users to the rule.

CSA Response

Thank you for comments on the end-user exemption. The CSA is aware that derivatives are not exclusively used for hedging purposes and in response to the comment received asking that we include an additional example in the CP, we have amended the CP to add an example of where a person or company may qualify for the end-user exemption for speculative purposes such as for the purpose of gaining market returns. We note that a similar exemption is not available for securities participants and this exemption was tailored for derivatives markets to provide some additional measures of certainty in circumstances for

end users transacting with derivatives firms about their regulatory status in relation to their derivatives activity.

However, in response to the recommendation that paragraphs (d) and (e) of subsection 38(1) be removed or modified to exclude transactions arranged by a person for its affiliates, the CSA does not support this removal or modification. The CSA refers the commenter to section 5 of the Business Conduct Rule [*Non-application – affiliated entities*]. The Business Conduct Rule does not apply to a person or company in respect of dealing with or advising an affiliated entity of the person or company, unless the affiliated entity is an investment fund.

7. Miscellaneous other comments (by Part and Section)

Factors in determining a Business Purpose for a Derivatives Dealer and a Derivatives Adviser in the CP

One commenter expressed concern with the inclusion within the CP of "Directly or indirectly carrying on the activity with repetition, regularity or continuity" and "Transacting with the intention of being compensated" as factors to be considered in determining whether a person or company meets the definition of "derivatives dealer" or "derivatives adviser."

The commenter noted that these two factors are overly broad and may inadvertently capture pension plans or their sponsors. The commenter stated that due to their size and mandate, they might engage in various types of OTC derivatives transactions with repetition, regularity or continuity, however, such plans and their sponsors do not act as a dealer or adviser in any traditional sense. Additionally, the commenter noted that pension plans, due to their size and mandate, might engage in various types of OTC derivatives transactions resulting in their earning various forms of compensation such as receiving premium payments.

The commenter proposes that the CP include additional clarification such that:

- certain pension plan investment trading activities with repetition on their own will not be considered to be in the business of trading derivatives if the only applicable factor is that they are carrying out the derivatives trading activity with repetition, regularity or continuity and where they are facing a dealer in those trades; and

- receiving option or derivative premiums will not be viewed as "transacting with the intention of being compensated."

Separately, another commenter commented on a deleted sentence in the CP under the "Facilitating or intermediating transactions" factor in determining a derivatives dealer. The deleted sentence is "This typically takes the form of the business commonly referred to as a broker." The commenter is concerned that with the deletion, the guidance for derivatives dealer registration can be interpreted broadly enough to capture electronic communication tools that allow third-party counterparties to communicate with their customers. The commenter is concerned that the broader language signals a potential expansion of the CSA's jurisdiction over software service providers that facilitate communications between derivatives counterparties.

CSA Response

In Canada, the registration requirement for securities and derivatives market participants is set out in Canadian securities legislation. Under this legislation, unless an exemption from registration is available,

a person or company is generally required to register in one or more categories of registration if they are, *inter alia*,

- in the business[2] of trading securities or derivatives,
- in the business of advising others in relation to securities or derivatives, or
- hold themselves out as being in the business of trading or advising others in relation to securities or derivatives.

The test for determining whether a person or company is considered "in the business" of trading or advising others in relation to securities or derivatives is commonly referred to as the "business trigger".

The CSA have provided guidance on the interpretation of the business trigger as it relates to securities market participants in Section 1.3 [*Fundamental concepts*] of the companion policy to NI 31-103. This guidance reflects prior case law and regulatory decisions that have interpreted the business trigger test for securities matters.

The criteria set out in the CP are based on the similar criteria set out in the companion policy to NI 31-103 but have been modified to reflect the different nature of derivatives markets and derivatives market participants. In particular, the criteria have been modified to place greater emphasis on the factor of "acting as a market maker" while retaining the flexibility to consider the other criteria as appropriate.

As explained in the CP, in determining whether a person or company should be considered in the business of trading derivatives, the person or company should consider its activities holistically. We do not consider that all of the factors discussed above necessarily carry the same weight or that any one factor will be determinative.

In determining whether a person or company is subject to business conduct requirements under the Business Conduct Rule, a person should also consider the availability of exemptions in the Business Conduct Rule, such as the end-user exemption in section 38 of the Business Conduct Rule, for entities that may transact in derivatives with regularity but that do not otherwise engage in specified "dealer-like" activities. The CSA have included this exemption to provide market participants with regulatory certainty as to whether the requirements of the rules apply to their activities. The CSA recognize that many businesses may transact in derivatives as part of their regular business and may not deal with non-EDPs or otherwise engage in specified "dealer-like" activities. It is not necessary for end-users that satisfy the criteria described in the end-user exemption to comply with the requirements of the Business Conduct Rule because they may not be considered "in the business of trading" or because they can rely on the exemption for end-users that do not engage in specified dealer activities.

Comparison with swap-dealer criteria in the U.S.

We also note that the criteria for determining whether a person or company is a derivatives dealer are generally similar to the criteria used by the U.S. CFTC and SEC in determining whether a person or

[2] In British Columbia, Manitoba and New Brunswick, the statutory trigger for registration is based on a trade trigger, but NI 31-103 provides an exemption for entities not in the business of trading securities.

company is a "swap dealer" or a "security-based swap dealer". The CFTC and SEC have issued the following guidance in determining whether an entity is a swap dealer or security-based swap dealer:[3]

> The Dodd-Frank Act definitions of the terms "swap dealer" and "security-based swap dealer" focus on whether a person engages in particular types of activities involving swaps or security-based swaps. Persons that meet either of those definitions are subject to statutory requirements related to, among other things, registration, margin, capital and business conduct.
>
> The CEA and Exchange Act definitions in general encompass persons that engage in any of the following types of activity:
>
> (i) Holding oneself out as a dealer in swaps or security-based swaps,
> (ii) making a market in swaps or security-based swaps,
> (iii) regularly entering into swaps or security-based swaps with counterparties as an ordinary course of business for one's own account, or
> (iv) engaging in any activity causing oneself to be commonly known in the trade as a dealer or market maker in swaps or security-based swaps.
>
> These dealer activities are enumerated in the CEA and Exchange Act in the disjunctive, in that a person that engages in any one of these activities is a swap dealer under the CEA or security-based swap dealer under the Exchange Act, even if such person does not engage in one or more of the other identified activities. … [Footnotes omitted]

In the case of derivatives market participants that engage in derivatives activities in both Canada and the U.S., the CSA will consider the regulatory status of the participant in the U.S. in determining whether the participant should be subject to business conduct and registration obligations under the Business Conduct Rules.

Regarding the comment asking for clarification that a party that provides electronic communication tools that allow third-party counterparties to communicate with their customers to conduct derivatives transactions not be considered to be in the business of trading in derivatives, depending on the facts, to the extent that a market participant is recognized or exempt from recognition as an exchange (including swap execution facilities, multilateral trading facilities and similar trading facilities) by the CSA, and is the type of exchange that does not enter into derivatives transactions as a counterparty for its own account (including as riskless-principal), then we would not typically view this type of exchange as a derivatives dealer or derivatives adviser. We note that the Business Conduct Rule is principles-based and is intended to be flexible enough to accommodate its application, where appropriate, to business models or activities to address evolving market practices and technological developments.

Definition of "Derivatives Party Assets" in the Business Conduct Rule

One commenter reiterated their comments made on the second draft of the Business Conduct Rule that the definition of "Derivatives Party Assets" should be more precisely defined. The commenter noted that

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[3] See Commodity Futures Trading Commission and Securities and Exchange Commission Joint Final Rule, Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant", available at http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2012-10562a.pdf

a broad definition increases the possibility of confusion and the potential for conflict with the proposed safeguarding requirements under the federal *Retail Payment Activities Act* to be administered by the Bank of Canada.

The commenter suggested that the definition be revised to reflect only client assets held by a derivatives firm as collateral in respect of derivatives transactions or, if applicable, held by a derivatives firm for investment purposes on the part of the derivatives party. At the very least, the commenter noted that the definition should be explicitly limited to assets which are held or received by a derivatives firm in relation to derivatives transactions such that it is clear that funds held or received for unrelated purposes are not in scope.

CSA Response

We thank the commenter for their comment. The Business Conduct Rule applies to a derivatives firm's conduct with respect to its derivatives activity with a derivatives party, including assets held or received by a derivatives firm in connection with this activity. As we described in the previous summary of comments, clarification was provided in the third publication of the CP to MI 93-101 that the CSA's expectations with respect to derivatives party assets is that a dealer is at minimum expected to maintain records that allow the positions and the value of collateral delivered by each customer in connection with a derivatives transaction to be identified in the books and records of the derivatives firm.

Definition of "Affiliated Entity" in the Business Conduct Rule

One commenter noted that until such time that the CSA addresses the definition of "affiliate" more broadly, the commenter believes it is important that the Business Conduct Rule not create additional uncertainty as to how the term affiliate is to be applied. The commenter expressed that it would be problematic if a different definition of affiliate were applied in different derivatives rules, such as registration, trade reporting or mandatory clearing rules, and similar securities rules without a comprehensive consultation. Therefore, the commenter expressed that the CSA should avoid a material change to the definition of "affiliate" specifically for the Business Conduct Rule.

CSA Response

We thank the commenter for their comment, we agree and acknowledge that a consistent definition of "affiliated entity" across all OTC derivatives rules may be desirable. We note that certain rules that apply to derivatives markets that are primarily aimed at addressing systemic risk are based on accounting concepts of consolidation (which is consistent with similar rules domestically and globally that are aimed at addressing systemic risk). Yet, we are also concerned about creating inconsistencies with other rules that may apply to the derivatives firms, such as NI 31-103 and NI 52-107 *Acceptable Accounting Principles and Auditing Standards*, as well as corporate legislation. Accordingly, we have retained the control-based test for the purposes of the publication of the Business Conduct Rule.

Section 9 – Fair Dealing

One commenter expressed explicit support for the fair dealing requirements under section 9.

Another commenter asked that the CSA provide greater clarity around what constitutes "unreasonable pressure" in the context of a breach of section 9, and in particular, to confirm that derivatives firms have the right to refuse to provide services to derivatives parties that are eligible commercial hedgers and that are unwilling to provide waivers required by the derivatives firm's operating model. The commenter

believes that a requirement that asking clients to sign waivers as a condition of doing business not be considered "unreasonable pressure" placed on a derivatives party so long as the relevant waivers are presented at the time that the account is opened or before a derivatives transaction is booked.

Another commenter noted that the reference to "counterparty risk" in the CP commentary on fair dealing could be interpreted as meaning only credit risk and not capital risk. The commenter recommends that the wording of the relevant sentence in the CP be clarified to add "capital risk" after the words "level of counterparty risk."

CSA Response

We thank the commenters for their comments. What constitutes unreasonable pressure will be case-by-case and fact dependent. Derivatives firms will conduct their businesses in accordance with their own business objectives. In circumstances where a derivatives firm decides to only conduct its business with eligible derivatives parties, as part of potential future review of its practices by the CSA, they can expect that CSA Staff will review a firm's process for obtaining Eligible Derivatives Party representations, as well as its process for obtaining waivers.

We expect that derivatives firms clearly disclose their business practices, including that in providing a waiver, clients waive the additional protections in the Business Conduct Rule and that if the protections are something they are seeking, that they could seek to transact with another derivatives firm. If the derivatives firm is selling another product or service to a customer, we remind the derivatives firm of their obligations under section 13 [*Tied selling*].

Regarding the comment recommending that the reference to "counterparty risk" in the CP be clarified to add "capital" risk, we have made this clarification in the CP.

CP Commentary on Section 16 – Permitted Referral Arrangements

One commenter expressed that the approach noted in the CP on section 16 is too broad. The CP sets out that the definition of "Referral Arrangements" is not limited to referrals for providing derivatives, financial services or services requiring registration. It also includes receiving a referral fee for providing a derivatives party's name and contact information to an individual or a firm. As well, the CP noted that "Referral Fee" is broadly defined to include any benefits received from referring a derivatives party, including sharing or splitting any commission resulting from a transaction. The commenter noted that referrals which are specifically related to business lines which are not subject to the Business Conduct Rule should not be captured. The commenter also noted that the broad language appears to be inconsistent with later commentary in the CP which suggests that obligations should only apply to derivatives-related activities, which the commenter expressed is a more reasonable interpretation of the scope of a derivative firm's obligation.

CSA Response

We thank the commenter for their comments on permitted referral arrangements under the Business Conduct Rule. This provision only applies to derivatives firms in their activities with non-eligible derivatives parties. As such, it is our view that the scope of the permitted referral arrangements provision is appropriate given that it provides important protections to retail clients and is generally commensurate with the equivalent provision that applies to retail investors under NI 31-103.

CP Commentary on Section 19 – Relationship Disclosure Information

One commenter noted that the CP commentary on section 19 seems to expand the obligations set out in section 19(1) of the Business Conduct Rule. The CP sets out that to satisfy obligations under subsection 19(1), an individual acting on behalf of a derivatives firm must spend sufficient time with a derivatives party in a manner consistent with their operations to adequately explain the relationship disclosure information that is delivered to the derivatives party. The commenter noted that the requirement to walk each client through the relationship disclosure information is potentially burdensome and will create delays in the onboarding process, and that detailed walk throughs should not be required provided that individuals acting on behalf of the derivatives firm are available to answer questions.

CSA Response

The relationship disclosure obligations in section 19 of the Business Conduct Rule are generally similar to the corresponding relationship disclosure obligations in section 14.2 of NI 31-103 and as such should be familiar to firms that are registrants.

In the case of firms that are not registrants, this may represent a new obligation for these firms. However, as previously noted, we have made a number of significant changes to the EDP definition including eliminating the $10 million financial threshold in the commercial hedger category (from $10 million to $0), which means that the population of clients that this additional obligation applies to has been reduced.

To the extent a derivatives firm is dealing with a derivatives party that is not an EDP or is an individual EDP or a commercial hedger EDP that has not waived the right to receive this disclosure, we believe this is important disclosure for clients and should be retained.

Section 33 – Self Reporting

One commenter noted that it is not clear whether a new self-reporting requirement layer is necessary given that Canadian banks already have significant self-reporting requirements. The commenter asked that the CSA re-consider the self-reporting requirement given that section 32(3) of the Business Conduct Rule imposes a reporting requirement on the senior derivatives manager of a derivatives dealer that is substantially equivalent to paragraphs 5.2(c) and (d) of NI 31-103.

CSA Response

We remain of the view that it is necessary and appropriate to require timely disclosure of non-compliance to the regulator or securities regulatory authority in the circumstances where there is a risk of material harm to a derivatives party or to the capital markets generally, or the non-compliance represents a pattern of material non-compliance.

Section 36 – Form, accessibility and retention of records

One commenter recommended that the recordkeeping requirements be amended to be similar to NI 31-103 section 11.5(1) [*General Requirements for Records*], which the commenter noted would be consistent with the approach of keeping consistent with NI 31-103 as much as possible for consistency of regulatory regimes.

CSA Response

We thank the commenter for their comment on the recordkeeping requirements. We have amended the record retention period under the Business Conduct Rule to increase harmonization and reduce burden on market participants.

The record retention requirement under the Business Conduct Rule has been amended such that the retention period is linked to the record creation date as opposed to linked to the expiry of the transaction. Accordingly, derivatives firms are required to keep relevant records for 7 years (or 8 years in Manitoba) from the date such record is created. Linking the retention period to the record creation date harmonizes with the approach taken under NI 31-103 and also creates harmonization for investment dealers that offer OTC derivatives under the CIRO regime. In comparison to the record retention requirements in the third publication of the Business Conduct Rule, this approach significantly reduces burden on market participants, for example, in the case of a long-dated derivative, relevant communication records are no longer required to be kept for the duration of the long-dated derivative plus an additional number of years (which could have been up to 42 years). However, please note that this amended standard represents only a minimum requirement; firms can keep records for a longer period if they so choose. In addition, please note that the record retention requirements under the Business Conduct Rule are in addition to the record retention requirements found in other derivatives rules that applicable firms are subject to and are not meant to override any obligations of derivatives firms under those rules.

Extraterritoriality of the Rules

One commenter noted that there is an extraterritorial impact under the Business Conduct Rule. The commenter noted that this impact places Canadian derivatives dealers trading from foreign branches at a significant disadvantage as foreign end-users will not want to be forced to complete yet another representation letter in order to continue trading with Canadian derivatives dealers, and instead would choose to trade with non-Canadian dealers. Therefore, the commenter recommends that an exemption from the Business Conduct Rule should be available if a Canadian dealer faces a derivatives party solely from its foreign office/branch. In the alternative, the commenter recommended that paragraph (m) of the EDP definition be amended to remove the "requisite knowledge and experience" requirement when a Canadian dealer faces a foreign derivatives party. The commenter believes that the net asset financial threshold test of $25 million is a sufficient proxy for determining a derivatives party's sophistication.

CSA Response

We thank the commenter for their comment. As noted earlier in this Summary of Comments, we have removed the requirement to provide a knowledge and experience self-certification from each relevant prong of the EDP definition to more clearly harmonize the approach with the approach taken in the existing securities and commodities futures regulatory framework, which use bright-line tests to ascertain the status of a client. Furthermore, this generally aligns the CSA's approach with foreign approaches taken to client classification as well, which we recognize is important given the cross-border nature of derivatives markets and overlapping regulatory regimes.

Miscellaneous Drafting Comments

A number of commenters provided drafting comments to the Business Conduct Rule and CP. Thank you to the commenters that provided drafting comments, we will amend the Business Conduct Rule and CP where necessary.

C. Summary of Responses to Specific Request for Comments

In the Notice and Request for Comments, we asked the following questions:

1. *We have introduced a new foreign liquidity provider exemption in section 37 of the Instrument for foreign dealers that transact with derivatives dealers located in Canada. This is an outright exemption from the requirements in the Proposed Instrument intended to preserve market access and maintain general liquidity in the inter-dealer market. As a result, a Canadian derivatives dealer, regardless of its size, will benefit from this provision. This also means that the core provisions in the Instrument will not apply when a local derivatives dealer is transacting with a foreign derivatives dealer.*

   Do you support including this additional exemption in section 37 of the Proposed Instrument?

Comments on the new foreign liquidity provider exemption are summarized in "B – Summary of Specific Comments" above.

CSA Response

We thank commenters for their support of the foreign liquidity provider exemption in the Business Conduct Rule.

2. *A foreign dealer or adviser from a foreign jurisdiction that, on an outcomes-basis, has comparable requirements to those in the Instrument will receive a complete exemption from the Instrument where that foreign dealer or adviser complies with the conditions of the exemption in section 39 or the exemption in section 46. Outcomes-based assessments have been conducted for the jurisdictions listed in Appendices A and D. Please provide any comments you may have on the inclusion of any of the foreign jurisdictions listed in these Appendices.*

   Should any other foreign jurisdiction(s) with comparable requirements be added to these Appendices? Please explain your response with reference to the applicable legislation and related requirements.

A number of commenters generally agreed with the list set out in the Appendices, with certain recommended amendments. One commenter noted that both MiFID II and MiFIR are applicable in three additional European Free Trade Countries (Iceland, Liechtenstein and Norway) and accordingly should be included in the Appendices. Another commenter noted that Israel should also be added to the Appendices while a third commenter noted that the Appendices do not include all IOSCO jurisdictions and believes that there is no justification to limiting these lists to countries that are located in only certain IOSCO jurisdictions.

CSA Response

We thank commenters for their support and comments on Appendices A and D of the Business Conduct Rule which identifies foreign jurisdictions with comparable derivatives regulation on an outcomes-basis.

We have included Norway and Iceland, where both MiFID II and MiFIR are applicable, in Appendices A and D as well as Appendix E.

The fact that a foreign jurisdiction is not included in Appendices A, D or E is not necessarily intended to

suggest any policy concern with the regulatory regime of that foreign jurisdiction. It simply means CSA Staff have not had an opportunity to consider whether that foreign jurisdiction has comparable requirements in place on an outcomes-basis. We anticipate that Appendices A, D and E may be updated from time to time to include additional foreign jurisdictions once CSA Staff have had a chance to consider the regulatory regimes in these additional foreign jurisdictions.

Please note that industry associations or market participants with interest in a particular jurisdiction that is not listed may make applications for exemptive relief and make submissions to CSA Staff in support of comparability assessments for jurisdictions that are not found in Appendices A, D and E.

3. *We have clarified that if the person or company that is a derivatives dealer is not located in the local jurisdiction (i.e., a foreign derivatives dealer), the obligations in the Instrument apply only to its dealing activities with a derivatives party that is located in the local jurisdiction. We have further clarified that any reports made by a foreign derivatives dealer to the regulator or securities regulatory authority under section 39(1)(d) are limited exclusively to the derivatives activity being conducted with a derivatives party located in Canada.*

   Do you support limiting the reports to the regulator contemplated by section 39(1)(d) to only cover a foreign derivatives dealer's activities with a derivatives party that is located in Canada?

All commenters that responded to this question indicated strong support for limiting the reports to only cover foreign derivatives dealers' activities with a derivatives party that is located in Canada.

One commenter indicated that it appears to be a reasonable limit, however, noted that some consideration of whether the transaction is with a foreign subsidiary of a domestic party that has not otherwise triggered an equivalent reporting obligation under the foreign subsidiary's applicable regulatory regime could be considered to ensure the uniform reporting of transaction activity relating to ultimate domestic derivatives exposure.

Another commenter also indicated support and expressed that this change to limit the reports to the regulator is a change that is necessary to maintain liquid Canadian OTC derivatives markets. However, the commenter expressed that the timing of such reporting should be consistent with a foreign derivatives dealer's reporting obligations to its home jurisdiction regulator. And another commenter further took the view that the reports should be limited to providing notices of regulatory action, which would be consistent with the approach taken under NI 31-103.

CSA Response

Thank you to commenters for providing support and recommendations, as noted earlier in this Summary of Comments, we have removed the requirement for foreign derivatives dealers to provide reports to Canadian regulators under the foreign derivatives dealer exemption. Removing this reporting requirement from the Business Conduct Rule entirely for foreign dealers relying on this exemption ensures there is a common approach across product lines, as well as within the Business Conduct Rule itself. However, CSA Staff remains of the view that this approach should be limited to jurisdictions that CSA Staff has determined has comparable derivatives regulation.

4. *We have eliminated the $10 million financial threshold in the non-individual commercial hedger category of the definition of "eligible derivatives party" (in section 1(1) paragraph (n) of the*

Instrument). This means that more firms may qualify as eligible commercial hedgers under the Instrument. It is important to note, however, that, for a person or company to qualify as an eligible commercial hedger, they must provide a written waiver of their right to receive all or some of the additional protections in the Instrument (these are the additional protections that apply to all transactions with persons or companies that do not qualify as EDPs). Additionally, for a person or company to qualify as an eligible commercial hedger, they must still provide specific representations that they have the requisite knowledge and experience to evaluate certain derivatives information, as well as the suitability and characteristics of the derivative that is being transacted.

Do you support eliminating the $10 million financial threshold for qualifying as a commercial hedger? Will this new approach have any effect, positive or negative, on the ability of non-EDP clients to access liquidity from dealers or on a dealer's willingness to trade with non-EDP clients?

A number of commenters provided responses to this question, all of which were in favour of eliminating the $10 million financial threshold for qualifying as a commercial hedger. Comments of support are summarized in (iv) of the Summary of General Support found in the beginning of this Summary of Comments.

CSA Response

We thank commenters for their support for eliminating the $10 million financial threshold for qualifying as a commercial hedger.

5. *We have added exemptions in section 31.1 of the [third publication of the] Instrument from the senior derivatives manager requirements for persons and companies to rely on (i) a general notional activity exemption available to all derivatives dealers whose aggregate gross notional amount of outstanding derivatives does not exceed $250 million or (ii) a notional activity exemption available to derivatives dealers that exclusively deal in commodities derivatives and whose aggregate gross notional amount of outstanding commodity derivatives does not exceed $3 billion.*

   Do you support the additional exemptions in section 31.1 from the senior derivatives manager requirements?

The majority of commenters that commented on this question indicated support, however, certain commenters raised concerns with the additional exemptions in section 31.1 of the third publication of the Business Conduct Rule.

Of the commenters that support the additional exemptions, one commenter noted that derivatives dealers that can rely on the notional amount exemption should not bear the burden of implementing the senior derivatives manager regime under the Business Conduct Rules as the costs of complying with those obligations would far outweigh the benefits to market participants.

Another commenter that supported the additional exemptions suggested its expansion to cover all obligations with respect to transactions with EDPs. However, they also suggested that the notional amount exemption be amended in two ways. Firstly, the commenter stated that the exemption is over-inclusive, and the total amount of derivatives activity, including hedging, an entity engages in, should not be used as a metric to determine whether an entity receives dealer-related relief. Instead, Canada should

follow the approach taken by the U.S. and EU and base the exemption on the entity's level of dealing activity. Secondly, the commenter stated that the exemption applies disproportionately to Canadian entities when compared to non-Canadian entities. Instead, the commenter believes that the exemption should be amended to require the inclusion of all relevant derivatives entered into by corporate Canadian entities and corporate non-Canadian entities with Canadian counterparts.

One commenter indicated that they do not support the additional exemptions in section 31.1. The commenter believes that the presentation of additional information on the reason for this change and related research is required to confirm whether the proposed notional amount exemptions are appropriate. The commenter is concerned that removing the requirement could have attendant gatekeeper risks and attract further risk of oversight failures and/or misconduct particular to this smaller dealer segment. The commenter noted that broad exemption provides an opportunity for significant counterparty damage, particularly for lesser sophisticated parties that transact without close supervision from experienced personnel.

One commenter provided concerns on the proposed senior manager regime overall. The commenter noted that if the CSA is unwilling to remove the proposed senior manager regime, the commenter recommends that the limits on the proposed notional amount for the exemption be removed.

CSA Response

CSA Staff are aware that there are different approaches taken to derivatives regulation in the European Union and the United States, and that our regime is structured somewhat differently in its application and scope. However, given the cross-border nature of OTC derivatives markets, and the interconnectedness between regulation as it applies to various market participants on a cross-border basis, we do accept that in the commodities derivatives market, there is derivatives activity that is closely linked to a physical commodities business and accordingly, the policy basis for regulating that activity warrants somewhat different considerations because the derivatives activity (including derivatives activity that takes place within the corporate group and certain levels of trading activity in relation to the business) functions primarily in support of, and otherwise ancillary to, a firm's main business. Accordingly, as a matter of principle, certain commodity derivatives dealers, despite their derivatives activity, are not directly akin to the traditional purely financial derivatives dealers that operate in derivatives markets.

CSA Staff have carefully considered the operation of the exemptions that are available to commodities firms in the U.S. and in the E.U., considered the market participants that operate under such exemptions, and have raised the notional amount threshold from $3 Billion to $10 billion (the **Commodity Derivatives Dealer Notional Amount Exemption**) in a new section 44 [*Exemptions from certain requirements in this Instrument for certain notional amounts of certain commodity derivatives and other derivatives activity*] to align it more closely with the exemptions contemplated in the U.S. and E.U. regulatory framework. The Commodity Derivatives Dealer Notional Amount Exemption is only available when a derivatives dealer is trading with an eligible derivatives party and is only available if the conditions for relying on the exemption are fully satisfied. This change will significantly and meaningfully reduce the burden on commodities derivatives dealers. However, given the different structure of the Canadian business conduct rule when compared to the regime contemplated in the U.S. and E.U. (it applies regardless of whether a derivatives firm is registered or not), even if firms intend to rely on the notional amount exemption, the basic fair dealing and conflicts of interest principles will continue to apply to their derivatives activity, as well as the requirement to deliver a trade confirmation. We expect that firms can readily comply with these basic principles given their own internal best practices, corporate governance standards and market convention. We will continue to monitor derivatives data reports, as well as developments in commodity

derivatives markets that may affect the appropriateness of the dollar value of the notional amount exemption threshold.

6. *Short-Term FX Contracts in the Institutional FX Market*

   We have applied a limited subset of provisions in section 1.1 of the Instrument to any Canadian financial institution that is a derivatives dealer with respect to its short-term FX transactions in the institutional FX market (commonly referred to as 'FX spot' in the 'wholesale FX' market) if its gross notional amount of derivatives outstanding exceeds $500 billion. This provision is only intended to capture those transactions between such derivatives dealers and their counterparties that are also considered wholesale FX market participants for the purposes of the FX Global Code of Conduct.

   Do you support applying the specified provisions to this subset of derivatives dealers?

A number of commenters supported the inclusion of short-term FX, as outlined in the [*Support for the inclusion of short-term FX in the institutional FX market*] section of this Summary of Comments above. One of the commenters that supported the inclusion did provide certain recommendations with respect to providing flexibility as firms transition to this new regime by not requiring representations with respect to a party's EDP status and deeming a counterparty to a short-term FX transaction an EDP, unless a derivatives firm has or is aware of information that would make it unreasonable to deem that counterparty an EDP.

CSA Response

We thank the commenters for their comments supporting the inclusion of the short-term FX in the Business Conduct Rule. Please note the following:

- The inclusion of short-term FX contracts in the institutional FX market for the purposes of a limited sub-set of provisions **does not** require any of the Canadian financial institutions that are subject to this provision to obtain any additional certifications or status representations from clients; rather the provision will simply overlay, on a principles basis, the existing policies and procedures that have already been adopted by these derivatives firms through their adherence to the FX Global Code of Conduct when they transact with transacting with a client in a short-term FX contract only in the "institutional foreign exchange market", which is a defined term in the Business Conduct Rule. The CP reiterates that this excludes retail clients.

- We have made changes to the Business Conduct Rule to further clarify that it was not the CSA's policy intention or expectation that firms would need to obtain status representations from any of their clients they transact with in the wholesale FX market by removing the reference to paragraphs of clients covered by the eligible derivatives party definition. Again, the CSA's intention is to overlay a small sub-set of conduct provisions over certain Canadian financial institutions existing policies and procedures that already incorporate the same principles (e.g., fair dealing, conflicts of interest, complaints handling) into their internal compliance regimes as a result of adhering to the FX Global Code of Conduct. The CP already explains that we would expect that it would cover the types of institutional FX counterparties referenced in certain paragraphs of the eligible derivatives party definition, which aligns with the types of counterparties that are

considered to be wholesale FX clients that transact in the institutional foreign exchange market under the FX Global Code of Conduct. We refer you to the relevant section of the CP for additional explanation.

7. *We have added an exemption in section 48 for registered advisers under securities or commodity futures legislation from certain requirements of the Proposed Instrument listed in Appendix E if the registered adviser complies with corresponding requirements in NI 31-103 relating to a transaction with a derivatives party. In such cases, we anticipate that the existing compliance systems of the registered adviser can easily be extended to address any of the residual obligations of the Instrument, which residual obligations ensure that NI 31-103 requirements are extended to the registered adviser's derivatives activities.*

   Please provide any comments you may have on this approach and the requirements listed in Appendix E.

   We understand that some derivatives parties rely on the expertise of a derivatives adviser to develop or implement derivatives trading strategies to help them achieve their organizational objectives. Section 8 of the Instrument exempts derivatives advisers from many of the requirements of the Instrument when they are advising an EDP.

   Are there any scenarios where derivatives advisers that are advising EDPs should be required to comply with any of the requirements that section 8 provides an exemption from?

A number of commenters provided strong support for this approach. One commenter indicates that they believe this approach strikes the correct balance of market and investor protection and imposition of regulatory burden.

One commenter noted that new requirements should only be imposed on registered advisers where a significant regulatory gap has been identified that is specific to derivatives, new conduct considerations, or new types of clients or counterparties. The commenter indicated that registrant outreach and guidance in staff notices to help meet these obligations are important so that registrants can develop the necessary remedial compliance policies and systems proactively as necessary, rather than in response to findings of a costly compliance review and remediation process.

One commenter provided overwhelming support for this approach, but also expressed certain preferences. The commenter set out the following recommendations and questions:

- To improve clarity, provide a statement setting out a list of the divisions and sections of MI 93-101 that do apply to registered portfolio managers, instead of listing only the exemptions for registered advisers under section 48 of Appendix F.

- Provide additional clarity on the timeline for obtaining an EDP representation from a derivatives party that is a permitted client, as currently, this transition period set out in the Business Conduct Rule and as discussed in the CP is confusing.

- Whether section 5 [*Non-application – affiliated entities*] could be interpreted as being available to a foreign derivatives sub-adviser, foreign derivatives sub-sub-adviser or

foreign derivatives dealer that is affiliated with a derivatives adviser. The commenter asks that the CSA provide clarification in the CP, using examples.

Another commenter provided support while also recommending that the CSA add an exemption from Division 1 of Part 3 to section 48 because there are clear analogues under NI 31-103 that already apply to registered advisers, including the following core conduct obligations: fair dealing, conflicts of interest and know-your client provisions.

Commenters were either silent on scenarios where derivatives advisers that are advising EDPs should be required to comply with any of the requirements that section 8 provides an exemption from or indicated that there were not any scenarios they can think of.

CSA Response

Although we generally agree with many of these comments, we do not support a complete exemption for registered advisers as we are concerned that this will:

- create regulatory gaps and uncertainty (e.g., the fair dealing obligation for registered advisers is not found in NI 31-103),[4]
- result in inconsistent treatment between different categories of registered firms (such as derivatives dealers and portfolio managers) that perform similar activities,[5] and
- result in an increased regulatory burden for registered advisers.[6]

However, we agree with the principle that registered advisers are already subject to a comprehensive registration and business conduct regime through NI 31-103, and the derivatives rules should, as much as possible, allow these firms to leverage off these existing regimes. We acknowledge that certain core conduct obligations are principles-based and as such we expect that registered advisers will leverage their existing compliance frameworks to ensure they are meeting these corresponding principles-based obligations under MI 93-101.

With respect to the drafting comments,

- we have made changes to the Business Conduct Rule and CP to improve clarity, by listing the divisions and sections of MI 93-101 that do apply to registered portfolio managers in a new

[4] This is because certain requirements in NI 31-103, such as the know-your-client (KYC) and suitability requirements in Part 13 of NI 31-103 and the client disclosure requirements in Part 14 of NI 31-103, are framed in terms of "purchases" and "sales" of "securities" rather than "transactions" in "derivatives". We also believe it would create significant regulatory uncertainty to regulate certain types of OTC derivatives as securities for registered advisers but as derivatives for investment dealers and other derivatives dealers.

[5] For example, both registered advisers and investment dealers/CIRO members advise funds and manage accounts that may contain OTC derivatives. We believe it would create significant regulatory uncertainty to regulate derivatives advisers as securities advisers and investment dealers/CIRO members as derivatives dealers for the same managed account activities.

[6] This is because, in many respects, the proposed derivatives rules represent a "lighter regulatory touch" than NI 31-103. For example, the EDP definition in the derivatives rules includes a "commercial hedger" category that is not included in the "permitted client" definition in NI 31-103.

Appendix B to the CP, in addition to listing the exemptions for registered advisers under section 48 of Appendix F;

- we have provided additional clarification in the CP on the availability and use of the transition period for a derivatives firm that has previously confirmed a derivatives party's status as a permitted client or eligible contract participant prior to the effective date of MI 93-101 (for example, in documentation such as an ISDA master agreement, account opening documentation or an investment management agreement), such that the derivatives firm is able to treat that representation as if the derivatives party had represented to the derivatives firm that it qualifies as an "eligible derivatives party" for the purposes of MI 93-101;

- regarding the availability of the affiliated entity exemption section 5 [*Non-application – affiliated entities*], the affiliated entity exemption is intended to generally be available to the extent the derivatives firm meets the affiliated entity definition set out in subsection 1(4). The exemption is not intended for use as a safe-harbour to avoid basic business conduct obligations from being imposed on that relationship either between a derivatives dealer and an affiliated derivatives adviser to the extent the derivatives adviser is advising a derivatives party that is unrelated to the adviser or the dealer, or if the dealer is counterparty to a trade with a derivative party that the adviser is not related to but is providing advice in respect of.

8. *Section 10 of the Instrument was developed with the intention that it would be generally consistent with the conflicts of interest provisions of NI 31-103. The Client Focused Reforms amended the conflicts of interest provisions of NI 31-103 (through amendments to section 13.4 and the addition of section 13.4.1) and adopted related companion policy changes. We are considering further changes to conform the conflicts of interest requirements so that they are consistent with those in NI 31-103, along with other changes to conform the requirements to be consistent with the requirements found in Client Focused Reforms.*

   Please provide any comments relating to the inclusion of such corresponding changes to the Proposed Instrument.

The commenters were very supportive of the changes to MI 93-101 to be generally consistent with conflicts of interest provisions in NI 31-103.

One commenter indicated that while they agree with the changes made, the top priority is that the Business Conduct Rule is first implemented expeditiously. The commenter believes that it is important that these Client Focused Reform initiatives be considered in the future but that the implementation of MI 93-101 not be held up as a result.

Another supportive commenter stated that any changes made to the Business Conduct Rule and CP recognize that there are differences between the derivatives and securities markets and that market participants should be given an opportunity to comment on these proposed changes if they are materially different from what is currently provided. The commenter also noted their belief that the conflicts of interest section should be interpreted flexibly and be sensitive to the context and to derivatives market participants' reasonable expectations. In particular, given the differences between the derivatives and securities markets, the commenter believes that it may not be necessarily appropriate to apply the

conflicts of interest provisions to OTC derivatives market participants in the same manner as the relevant provisions would apply to securities market participants.

Two commenters believe that the Business Conduct Rule should be amended prior to implementation to conform with the conflicts of interest requirements in NI 31-103.

Conversely, one commenter indicated their view that changes to conform the conflicts of interest requirements so that they are consistent with those in NI 31-103 and with the Client Focused Reforms are not necessary or appropriate at this time, as such changes will increase compliance costs for derivatives dealers and advisers and there are differences between the nature of derivatives markets and securities markets that need to be carefully considered by the CSA when contemplating making any similar changes. Instead, the commenter recommends that the CSA consider any such conforming changes at a later date after derivatives firms have had sufficient time to implement changes necessitated by the Business Conduct Rule.

CSA Response

We thank the commenters for their comments. The CSA continues to monitor the implementation of Client Focused Reforms for securities market participants. We will consider whether comparable provisions are appropriate for the OTC derivatives market in the future.