

January 10, 2018

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

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Re: Comments with respect to Proposed Amendments to National Instrument 94-101 and Companion Policy 94-101 – *Mandatory Central Counterparty Clearing of Derivatives*

The International Swaps and Derivatives Association, Inc. (*ISDA*¹) appreciates the opportunity to provide comments with respect to the proposed amendments (the

¹Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 68 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and **International Swaps and Derivatives Association, Inc.**

Proposed Rule Amendments) to National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (the **National Instrument**) and the proposed changes (the **Proposed CP Changes**) to Companion Policy 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (the **CP**). In this letter, we refer to the Proposed Rule Amendments and the Proposed CP Changes together as the **Proposed Amendments**.

The Proposed Amendments were published by the Canadian Securities Administrators (**CSA**) on October 12, 2017 and would refine the scope of counterparties to which the clearing requirement under the National Instrument applies as well as the types of derivatives mandated for clearing under the National Instrument.

ISDA has been actively engaged for a number of years with providing input on regulatory reforms impacting derivatives in major jurisdictions globally, including Canada. ISDA provided comments to the CSA during the consultation process which led up to the publication of the National Instrument and the CP in January 2016. To help facilitate compliance with the new requirements, ISDA published a Canadian Clearing Classification Letter (the **Classification Letter**) on March 30, 2017 in order to allow market participants to exchange information and determine whether their transactions are in scope for mandatory clearing. A copy of the Classification Letter is attached to this letter as Appendix A.

ISDA is pleased to provide feedback regarding the Proposed Amendments on behalf of its members.

COMMENTS:

1. Exclusion of Investment Funds and Trusts from Affiliate Definition

ISDA agrees that investment funds and trusts should not be caught by the mandatory clearing requirement solely on the basis that they are “affiliates” of a clearing participant or a large notional counterparty, or, in the case of trusts, because they have a common trustee. However, as opposed to the approach taken in the Proposed Amendments, we recommend that the exclusion of investment funds and trusts from the clearing requirement be accomplished through amendments to the definitions of “affiliated entity” and “control” in sections 1(2) and 1(3) of the National Instrument. For example, the CSA could add language to those sections (or the corresponding paragraphs of the CP) which provides that no investment fund or trust shall be considered an affiliated entity of another person or company for purposes of Sections 3(1)(b) and (c) of the National Instrument.

If the approach in the Proposed Amendment is adopted, ISDA will have to make changes to the Classification Letter which many market participants have already started incorporating into their implementation plans prior to the publication of the Proposed Amendment. The introduction of a revised Classification Letter will be

international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association’s web site: www.isda.org.

confusing for market participants, many of whom are already dealing with a large number of onboarding and classification documents from their dealer counterparties. To avoid any delays, ISDA would encourage the CSA to amend the National Instrument in a manner that allows the Classification Letter to be used in its current form.

2. Potential for Confusion Around the Definition of Affiliate

There is a lack of harmonization in how the term “affiliate” is defined for purposes of different OTC derivatives rules across Canadian jurisdictions. This inconsistency was acknowledged by the OSC at the time Ontario’s trade repository and derivatives data reporting rules were amended to exclude certain inter-affiliate transactions. In the relevant Notice of Amendment from 2015, the OSC stated as follows:

- a. “We acknowledge that the term affiliated companies used in the TR Rule and defined in the *Securities Act* (Ontario) (the **Act**), is not fully harmonized with similar defined terms used to refer to affiliates in the securities legislation of other Canadian jurisdictions. The Committee plans to address inconsistencies between the definitions in the future.”²

The definitions of “affiliated entity” and “control” in the National Instrument are almost identical to the definitions given to those terms in the trade reporting regulation in Quebec³ and in the multilateral instrument⁴ governing trade reporting in all Canadian jurisdictions other than Ontario, Manitoba and Quebec. The trade reporting rules in Manitoba rely on the affiliate definition in the *Securities Act* (Manitoba), which, similar to Ontario, only refers to affiliated companies.

Until such time as the CSA addresses the definition of affiliate more broadly, ISDA believes it is important that the Proposed Amendments not create additional uncertainty as to how the term affiliate is to be applied in the context of other derivatives rules (including derivatives trade reporting rules). For example, it would be confusing and contrary to market practice if the Proposed Amendments created an inference that derivative transactions between a derivatives dealer and an investment fund or a derivatives dealer and a trust should be reported under the derivative trade reporting rules as affiliate transactions. We request that the CSA finalize the Proposed Amendments in a way that minimizes the potential for additional uncertainty. ISDA would also support a broader effort to address inconsistencies in the definition of affiliate more generally.

3. New CAD \$1 Billion Threshold Exception

The changes in the Proposed Amendment to section 3(1)(c) of the National Instrument create a new CAD \$1 billion threshold exemption from the clearing requirement. Specifically, when a local counterparty is a member of a group whose gross notional amount of outstanding derivatives exceeds CAD \$ 500 billion

² (2016), 39 OSCB 4519

³ Autorité des marchés financiers Regulation 91-507 respecting Trade Repositories and Derivatives Data Reporting, sections 1(3) and 1(4).

⁴ Multilateral Instrument 96-101, sections 1(2) and 1(3).

(excluding inter-affiliate trades), the local counterparty will not be subject to mandatory clearing if its month-end gross notional of derivatives (excluding inter-affiliates trades) does not exceed CAD \$1 billion. This is a material departure from the original National Instrument and it is unclear why this new exemption has been included as part of the amendment. We note that this exemption would allow a local counterparty that is not a clearing member but is over the CAD \$500 billion threshold to incorporate a new entity that would not be subject to mandatory clearing if it remains below the CAD \$1 billion threshold. Given that ISDA's members are not aware of any local counterparties (other than direct clearing participants) that are currently in scope for mandatory clearing under the CAD \$500 billion category, it is unclear why this additional exemption is necessary. Among other things, the introduction of this new exemption would require amendments to the Classification Letter. For the reasons articulated above under Comment 1, ISDA believes it would be disruptive to have to republish the Classification Letter, including resulting in the delay of client outreach efforts until after the Proposed Amendment has been finalized. If the exemption is retained in the final amendment, we would ask the CSA to draft the Proposed Amendment in a manner which does not require changes to be made to the Classification Letter.

4. Timing of Calculation Threshold

Sections 3(1)(b)(iii) and 3(1)(c)(iii) require the calculation of month-end gross notional amount be performed "at any time after the date on which [the] Instrument comes into force". A counterparty under Section 3(1)(b) or 3(1)(c) which exceeds the applicable threshold only in respect of one month after the National Instrument coming into force would be required to clear OTC derivatives under the National Instrument.

ISDA believes that counterparties which subsequently fall below the applicable threshold would not be systemically important and, therefore, should not be required to clear OTC derivatives under the National Instrument. For operational purposes, ISDA suggests annual testing on a predetermined date for the mandatory clearing thresholds (similar to the annual testing of the \$12 billion threshold under OSFI Guideline E-22 Margin Requirements for Non-Centrally Cleared Derivatives and CSA Consultation Paper 95-401 Margin and Collateral Requirements for Non-centrally Cleared Derivatives). If, on the annual testing date, a counterparty is above the application threshold, then that counterparty will be required to mandatorily clear in-scope products until the next annual testing date. If, on the subsequent testing date, the counterparty falls below the clearing threshold, it will not be required to clear in-scope products until the next annual testing date.

* * * * *

ISDA and its members would like to reiterate our appreciation to the CSA for the opportunity to provide feedback on the Proposed Amendments. We are happy to discuss our comments and to provide any additional information that may be helpful.

Please contact the undersigned if you have any questions or concerns.

Sincerely,



Katherine Darras
General Counsel
International Swaps and Derivatives Association, Inc.

Appendix A



International Swaps and Derivatives Association, Inc.

**CANADIAN CLEARING CLASSIFICATION
LETTER**

Published on March 30, 2017

by the International Swaps and Derivatives Association, Inc.

On January 19, 2017, the Canadian Securities Administrators published National Instrument 94-101, *Mandatory Central Counterparty Clearing of Derivatives* and a related companion policy (the “*Canadian Mandatory Clearing Rule*”). This classification letter (this “letter”) allows market participants to provide their counterparties with status information in order to determine if they are in scope for purposes of the Canadian Mandatory Clearing Rule. The representations in this letter are solely for the purposes of making that determination.

Capitalized terms used in this letter are defined in Appendix I.

CLASSIFICATION STATEMENTS

Question 1: Clearing Agency Participant

Instructions: Please check the applicable boxes below to indicate each OTC RCA (if any) with which you are a Clearing Agency Participant.

Chicago Mercantile Exchange Inc. (OTC IRS)

CME Clearing Europe Limited (Cleared OTC IRS)

Eurex Clearing AG (EurexOTC Clear IRS)

LCH.Clearnet Limited (SwapClear Rates)

None of the above

]

⁵ The relevant OTC RCAs will depend on the jurisdiction(s) in which the party using this letter to request information is a Local Counterparty. Parties using this letter should list the potential in-scope OTC RCAs to assist the recipient in completing this letter. As of the date of publication of this letter, the potential in scope OTC RCAs are Chicago Mercantile Exchange Inc., CME Clearing Europe Limited, Eurex Clearing AG and LCH.Clearnet Limited. Other clearing agencies or clearing houses may be added over time if additional OTC RCAs are recognized or exempt from recognition in the future.

Question 2: Clearing Participant Affiliate⁶

Instructions: Please make one of the two representations below by checking the relevant box.

We are a Clearing Participant Affiliate

We are not a Clearing Participant Affiliate

Question 3: Large Notional Counterparty

Instructions: Please make one of the two representations below by checking the relevant box (regardless of your response to Question 1).

We are a Large Notional Counterparty

We are not a Large Notional Counterparty

Question 4: Notional Threshold Information

Instructions: If you are a Clearing Participant Affiliate or Large Notional Counterparty, please indicate whether you intend to take advantage of the 90-day transition period under paragraph 3(2) of the Canadian Mandatory Clearing Rule (this transition period is not available if you have indicated that you are a Clearing Agency Participant in Question 1).

We will use the 90-day transition period

We will not use the 90-day transition period

If you have indicated above that you intend to use the 90-day transition period, please specify the first month and year⁷ in which you exceeded the month-end gross notional amount in accordance with either paragraph 3(1)(b)(ii) or 3(1)(c)(ii), as applicable, of the Canadian Mandatory Clearing Rule:

Month/Year: _____

Question 5: Clearing Agency Participants that have Clearing Participant Affiliates

⁶ For purposes of determining whether you are a Clearing Participant Affiliate, you should only have regard to the OTC RCAs listed in Question 1.

⁷ The earliest month specified should be April 2017.

Instructions: Only answer this question if you indicated in response to Question 1 above that you are a Clearing Agency Participant of one or more OTC RCAs identified in Question 1. Please make one of the representations below to indicate whether you have any Clearing Participant Affiliates.

We do have Clearing Participant Affiliates

We do not have any Clearing Participant Affiliates

If you do have Clearing Participant Affiliates, please list all such Clearing Participant Affiliates in the table below.⁸

<i>Full legal name of Clearing Participant Affiliate(s)</i>	<i>LEI/CICI/[Alternative Identifier] of Clearing Participant Affiliate(s)</i>

Question 6: Non-Canadian Local Counterparty

Instructions: If you are a Non-Canadian Local Counterparty, please indicate below whether you intend to rely on substituted compliance in accordance with paragraph 3.(5) of the Canadian Mandatory Clearing Rule.

Non-Canadian Local Counterparty that will rely on substituted compliance

Non-Canadian Local Counterparty that will not rely on substituted compliance

⁸ Please use a separate sheet if additional space is needed to list all Clearing Participant Affiliates.

The undersigned agrees to notify the recipient of this letter in writing before or as soon as reasonably practicable following any of the statements made in this letter ceasing to be true. The recipient may rely on the statements made in this letter, unless and until the recipient receives written notification to the contrary from the undersigned.

Executed and delivered with effect from:

Date: _____

[Full name of Entity Completing Letter]: _____

LEI/CICI/[Alternative Identifier⁹]: _____

Signature: _____

Name of signatory: _____

Title of signatory: _____

⁹ If you would like to include an alternative identifier, please describe the type of identifier provided.

**APPENDIX I
TO CANADIAN CLEARING CLASSIFICATION LETTER**

DEFINED TERMS

As used in the letter (including in this Appendix I), the words “affiliate” and “affiliated” shall be construed as provided in paragraphs 1.(2) and 1.(3) of the Canadian Mandatory Clearing Rule.

“*Canadian Mandatory Clearing Rule*” has the meaning given to it above on page 1 of this letter.

“*Clearing Agency Participant*” means any Participant of an OTC RCA, other than an Exempt Entity, that subscribes to clearing services for Mandatory Clearable Derivative(s).

“*Clearing Participant Affiliate*” means an affiliate, other than an Exempt Entity, of a Participant of an OTC RCA listed in Question 1 of this letter that subscribes to clearing services for Mandatory Clearable Derivative(s), where such affiliate has had, at any time following the date on which the Canadian Mandatory Clearing Rule comes into force¹⁰, a month-end gross notional amount under all outstanding over-the-counter derivatives (as defined in the Canadian Mandatory Clearing Rule) exceeding CAD \$1,000,000,000 (or such other amount specified in the future pursuant to an amendment, supplement or other revision to the Canadian Mandatory Clearing Rule), excluding derivatives eligible for the Intragroup Exemption.

“*Exempt Entity*” means (i) the government of Canada, the government of a jurisdiction of Canada or the government of a foreign jurisdiction; (ii) a crown corporation for which the government of the jurisdiction where the crown corporation was constituted is liable for all or substantially all the liabilities; (iii) a person or company wholly owned by one or more governments referred to in paragraph (i) of this definition of Exempt Entity if the government or governments are liable for all or substantially all the liabilities of the person or company; (iv) the Bank of Canada or a central bank of a foreign jurisdiction; (v) the Bank for International Settlements; and (vi) the International Monetary Fund.

“*Intragroup Exemption*” means the intragroup exemption from mandatory clearing provided for in section 7 of the Canadian Mandatory Clearing Rule.

“*Large Notional Counterparty*” means a Local Counterparty in any jurisdiction of Canada, other than a Clearing Participant Affiliate or an Exempt Entity, that has had, at any time following the date on which the Canadian Mandatory Clearing Rule comes into force¹¹, a month-end gross notional amount under all outstanding over-the-counter derivatives (as defined in the Canadian Mandatory Clearing Rule), combined with each affiliated entity that is a Local Counterparty in any jurisdiction of Canada, exceeding CAD \$500,000,000,000 (or such other amount specified in the

¹⁰ Assuming necessary approvals are obtained, the Canadian Mandatory Clearing Rule will come into force on April 4, 2017. This means April 30, 2017 will be the earliest date on which parties will be able to confirm their status as a Clearing Participant Affiliate.

¹¹ Assuming necessary approvals are obtained, the Canadian Mandatory Clearing Rule will come into force on April 4, 2017. This means April 30, 2017 will be the earliest date on which parties will be able to confirm their status as a Large Notional Counterparty.

future pursuant to an amendment, supplement or other revision to the Canadian Mandatory Clearing Rule), excluding derivatives eligible for the Intragroup Exemption.

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

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

- (a) the person or company is organized under the laws of the local jurisdiction;
- (b) the head office of the person or company is in the local jurisdiction;
- (c) the principal place of business of the person or company is in the local jurisdiction;

or

(ii) the counterparty is an affiliated entity of a person or company referred to in paragraph (i) of this definition of Local Counterparty and the person or company is liable for all or substantially all the liabilities of the counterparty.

“Mandatory Clearable Derivative” means a derivative within a class of derivatives listed in Appendix A to the Canadian Mandatory Clearing Rule.

“Non-Canadian Local Counterparty” means an entity to which only paragraph (ii) of the definition of Local Counterparty applies.

“OTC RCA” means a Regulated Clearing Agency that offers clearing services in respect of Mandatory Clearable Derivatives.

“Participant” means a person or company that has entered into an agreement with a Regulated Clearing Agency to access the services of the Regulated Clearing Agency and is bound by the Regulated Clearing Agency’s rules and procedures.

“Regulated Clearing Agency” means,

- a) in Alberta, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan and Yukon, a person or company recognized or exempted from recognition as a clearing agency or clearing house pursuant to the securities legislation of any jurisdiction of Canada,
- b) in British Columbia, Manitoba and Ontario, a person or company recognized or exempted from recognition as a clearing agency in the local jurisdiction, and
- c) in Québec, a person recognized or exempted from recognition as a clearing house.