ANNEX A

Summary of comments and CSA responses on Proposed National Instrument 94-102
Derivatives: Customer Clearing and Protection of Customer Collateral and Positions

1. Section Reference	2. Summary of Issues/Comments	3. Response
GENERAL COMMENTS		
General Comments	Overall, commenters supported creating a domestic regime for the protection of customer positions and collateral to ensure that Canada's derivatives market functions efficiently and continues to maintain the confidence of market participants.	The Instrument addresses the need for a harmonized regime across Canada for the protection of customer positions and collateral. The Instrument furthers the aims of OTC derivatives reform set out by the Group of Twenty and supports the safe, effective and efficient function of Canada's OTC derivatives market.
	Support was expressed for substituted compliance in the Instrument. In particular, support was expressed for the revisions that facilitate the operation of different customer clearing models and including the laws of the United States and European Union for substituted compliance. Other commenters cautioned that without an effective substituted compliance regime, the Instrument may result in overlapping, duplicative and burdensome requirements.	Exemptions based on substituted compliance are available where market participants are subject to foreign laws that are substantially the same, on an outcomes basis, as the Instrument, based on a review of the foreign laws. The Instrument permits substituted compliance in specified circumstances and subject to certain conditions where a foreign clearing intermediary or regulated clearing agency clears a derivative and is in compliance with the foreign laws listed in Appendix A to the Instrument.
	Two commenters requested that orders exempting certain actions issued by foreign regulatory agencies be included in the substituted compliance approach used in the Instrument.	No change. To include exemptions made by foreign regulatory authorities in the substituted compliance approach under the Instrument would be an impermissible sub-delegation of a securities regulatory authority's legislative powers, as a foreign regulatory authority granting exemptions would be able to bypass the effect of the Instrument without the approval of the securities regulatory authority.

	One commenter requested that customer disclosure rules under the U.S. Commodity Futures Trading Commission (**CFTC**) regulations be deemed equivalent to the disclosure rules in the Instrument. Additionally, the commenter suggested that the Instrument be aligned with the customer disclosure rules and market practice evidenced by CFTC Rule 1.55(k) Disclosure and Default Disclosure, in particular with respect to sections 21, 22, 23, 26 and 27.	Change made. An exemption based on substituted compliance is available to clearing intermediaries that provide disclosure in accordance with CFTC and European Market Infrastructure Regulation (**EMIR**) disclosure requirements. Additionally, the examples of information to be included in the disclosure provided as guidance in the CP have been clarified.
	Two commenters requested clarification regarding whether equity options would be within the scope of the Instrument. It was noted that equity options have a specific margining process where initial margin is collected on a gross basis and there is no netting of opposite positions or resulting margin. The commenters suggest that the level of segregation required under the Proposed Instrument would adversely limit the margin efficiency investors are looking for when using OTC options in parallel with exchange-traded options and will impose a significant burden on equity options market participants that is not imposed in other foreign jurisdictions.	Change made. OTC options on securities are excluded from the scope of application of the Instrument.
	One commenter noted that requirements in the Instrument should be applied consistently across all jurisdictions of Canada and harmonized with international regulations.	No change. The Instrument will be consistently applied across Canadian jurisdictions and is largely harmonized with international regulations.
	One commenter noted that implementation of the Instrument will require significant technological, operational and rule changes for regulated clearing agencies and requested that appropriate timelines for compliance be provided in the Instrument.	Change made. The Instrument includes an implementation period to provide time for market participants to comply with the Instrument.
	Two commenters requested that reporting obligations in the Instrument be revised to minimize duplicative reporting requirements for foreign clearing agencies, such as by accepting the same reports provided to the CFTC or National Futures Association (with information regarding non-Canadian customers removed). One commenter requested that the reporting obligations of clearing agencies be limited to information related to collateral held by Canadian intermediaries.	Change made. An exemption based on substituted compliance is available to regulated clearing agencies that act in accordance with CFTC and EMIR recordkeeping and reporting requirements.

PART 1: DEFINITIONS, INTERPRETATION AND APPLICATION		
s. 1 – Definitions and interpretation		
General comments	One commenter requested that the definition of "cleared derivative" be modified to clarify the exclusion of exchange-traded derivatives from the scope of the definition of "cleared derivative" and from the scope of the Instrument as it applies to clearing agencies.	No change. Subsection 1(4) together with the application provisions in subsection 2(2) of the Instrument provide that the Instrument is limited only to the scope of derivatives set out in each local jurisdiction's derivatives product determination rule or regulation (the **Product Determination Rules**),[1] which exclude exchange-traded derivatives. Subsection 1(4) and Subsection 2(2) apply to the entirety of the Instrument, including the definitions of direct intermediary and indirect intermediary and the other application provisions in section 2. To provide a specific reference to the Product Determination Rules in the definition of "cleared derivative" would be redundant.
"clearing services"	One commenter suggested that the definition may be overly broad and capture activities which should not be regulated as clearing services, such as services provided by introducing brokers that do not hold customer collateral.	No change. The term "clearing services" is not defined in the Instrument. However, guidance applicable to that term is provided in the CP. With respect to intermediaries that provide clearing services, the Instrument applies only to clearing intermediaries that, according to the definitions in the Instrument, require, receive or hold customer collateral.
"customer"	One commenter noted that a clearing agency may have difficulty porting a customer's position and associated collateral where there are several intermediaries between the clearing agency and the customer that is the beneficial owner of the position. The commenter suggested that the definition of customer should be limited in scope to include only direct customers of a direct intermediary (i.e., a customer of a participant of the clearing agency).	No change. Customers that clear indirectly should benefit from the same protections as those that clear directly through a direct intermediary.

[1] Manitoba Securities Commission Rule 91-506 *Derivatives: Product Determination*; Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination*; Québec *Regulation 91-506 respecting Derivatives Determination*; and Multilateral Instrument 91-101 *Derivatives: Product Determination*.

"customer collateral"	One commenter requested that the definition of customer collateral distinguish between collateral that is deposited to satisfy margin requirements (i.e., initial margin) and cash or other assets that are paid or deposited to settle the change in price of an open transaction over its settlement cycle (i.e., variation margin). The commenter requested clarification on whether customer initial margin and variation margin must be segregated from the initial margin and variation margin belonging to other customers as well as from house owned initial margin and variation margin.	No change. Initial margin and variation margin must be segregated from a clearing intermediary's house account. Customer collateral is permitted to be held in an omnibus account, provided that the customer collateral for each customer is accounted for separately.
PART 2: TREATMENT OF CUSTOMER COLLATERAL BY A CLEARING INTERMEDIARY		
s. 3 – Segregation of customer collateral – clearing intermediary		
General Comments	One commenter expressed concern regarding the risk associated with perfecting a secured interest in cash collateral posted by a customer to a clearing intermediary. While the commenter supported the changes made to the Instrument, which no longer requires customer collateral to be held in a segregated account linked to the customer's name, the commenter noted the importance of amending the personal property security legislation in Canada to permit perfection by control of a security interest in cash collateral held outside a securities account.	Amendments to the personal property securities legislation are outside the jurisdiction of the CSA. However, amendments were made to the Quebec Civil Code to address this issue and the Committee supports the amendments suggested by the commenter and harmonization of personal property securities legislation across Canada.
s. 5 – Excess margin – clearing intermediary		
General Comments	One commenter requested that the requirement for clearing service providers to identify and record each business day the value of excess margin under section 5 and section 31 be harmonized with the CFTC's regulations which only require Futures Commission Merchants (FCMs) to calculate excess margin across all customers rather than at the individual customer level.	No change. However, an exemption based on substituted compliance with CFTC and EMIR provisions is available for sections 5 and 31 of the Instrument.

s. 7 – Investment of customer collateral – clearing intermediary		
General Comments	One commenter noted that United States laws do not require that a repurchase or reverse repurchase agreement in respect of customer collateral invested by a clearing intermediary or regulated clearing agency be confirmed in writing to the customer, contrary to section 7 or section 33, and that such a requirement may be onerous, considering that a customer bears no risk of loss on such agreement.	Change made. To harmonize with similar CFTC requirements, delivery of a written confirmation to the clearing intermediary, rather than to the customer, of the terms of a repurchase or resale transaction involving customer collateral is required in the Instrument. Additionally, the clearing intermediary must disclose to the customer in writing that its customer collateral may be invested or used by the clearing intermediary in accordance with section 7, including disclosure that any losses on the investment or use of the customer collateral will not be allocated to the customer.
PART 3: RECORDKEEPING BY A CLEARING INTERMEDIARY		
s. 12 – Retention of records – clearing intermediary		
General Comments	Commenters requested that the record time for record retention under section 12 and section 36 be reduced to five years.	No change. A seven-year retention period is common practice in Canada and is in line with timing requirements under the *Limitations Act, 2002* (Ontario).
	Commenters requested that record retention be measured in relation to each individual transaction to harmonize with similar requirements under United States laws. Alternatively, the commenters suggested that recordkeeping requirements be considered for substituted compliance. Clarification of what was meant by keeping records in a readily accessible location was also requested.	Change made. Record retention has been revised to operate on an individual transaction basis. However, general account information must be maintained for at least seven years after the last date upon which a customer's last derivative that is cleared by the clearing intermediary expires or terminates.

s. 13 – Books and records – clearing intermediary		
General Comments	Commenters suggested that the information required to be recorded about customer collateral held by clearing intermediaries and regulated clearing agencies under section 13 and section 37 is too detailed for the customer segregation regime permitted by the Instrument. A concern was raised that requiring clearing intermediaries and regulated clearing agencies to identify specific items of collateral attributable to each customer may lead customers to believe specific items of collateral are individually segregated for their benefit. Commenters requested that the guidance be revised to only require recording of collateral value.	Change made. The Instrument requires a clearing intermediary or regulated clearing agency to record the value of the customer collateral received from or attributable to a customer.
PART 4: REPORTING AND DISCLOSURE BY A CLEARING INTERMEDIARY		
s. 25 – Customer collateral report – regulatory		
General Comments	Two commenters suggested that the requirement for clearing intermediaries to report posted customer collateral on Forms 94-102F1 and 94-102F2 on an individual customer basis was more burdensome than similar requirements under the CFTC's rules, where reporting on posted customer collateral is only required on an aggregate basis. One commenter expressed its support for section 25 to be one of the sections listed in Appendix A for which substituted compliance is available for clearing intermediaries that are in compliance with analogous rules and regulations under the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (United States).	Change made. Forms 94-102F1 and 94-102F2 have been revised. A clearing intermediary is now required to report customer collateral on an aggregate basis for all customers, rather than on an individual customer basis. Additionally, a clearing intermediary is now required to report which permitted depositories hold customer collateral on its behalf but is not required to report on the value of customer collateral held at each permitted depository location. The reporting required under this section is of importance to Canadian securities regulatory authorities. Consequently, this section remains a residual requirement that is applicable even when substituted compliance is available.
s. 26 – Customer collateral report – customer		
s.26(1)(b)	Two commenters requested that paragraph 26(1)(b) and paragraph 44(b) be modified to remove references to asset type and quantity of customer collateral to address the concern raised about the level of detail required to be recorded about customer collateral held by clearing intermediaries and regulated clearing agencies under section 13 and section 37.	Change made. Consistent with the changes to sections 13 and 37, the Instrument requires a clearing intermediary or regulated clearing agency to record the value of the customer collateral received from or attributable to a customer.

PART 5: TREATMENT OF CUSTOMER COLLATERAL BY A REGULATED CLEARING AGENCY		
General Comments	Commenters suggested that portfolio margining and cross-margining of OTC derivatives with other products such as futures should be permitted under the Instrument because these practices confer commercial benefits for market participants without meaningfully increasing the risk of customer shortfalls in the event of a clearing intermediary's default.	No change. The Instrument prohibits the cross-margining of a customer's OTC cleared derivatives and futures positions. However, in some jurisdictions, customer protection requirements applicable to futures are equivalent to those applicable to OTC cleared derivatives; under such regimes, cross-margining may not represent a material risk to porting a customer's OTC cleared derivatives positions. Therefore, these factors will be taken into account when considering an application for discretionary relief from the prohibition on cross-margining or when making an equivalence determination of a foreign jurisdiction's regulatory requirements for the purpose of substituted compliance.
s. 28 – Collection of initial margin		
General Comments	One commenter noted that a clearing agency's rules do not prescribe the level of margin that its participants must request from its customers. Accordingly, it will not be possible for the clearing agency to monitor whether or not direct intermediaries are offsetting initial margin positions of its customers against one another.	No change. A regulated clearing agency is responsible for ensuring it receives initial margin on a gross basis from each customer.
s. 30 – Holding of customer collateral – regulated clearing agency		
General Comments	One commenter requested the Instrument explicitly permit commingling and the use of omnibus accounts directly in section 30.	No change. We refer to the guidance in section 30 of the CP, which states that the customer collateral of multiple customers held by a regulated clearing agency may be commingled in an omnibus customer account if the customer collateral is segregated by each customer on a recordkeeping basis. Additionally, the recordkeeping obligations in the Instrument require the regulated clearing agency to identify the value of customer collateral held for each customer within an omnibus account.

s.30(2)	One commenter requested clarification on whether separate accounts are required for each type of customer collateral (e.g., initial margin, variation margin) as well as for any property of the customer held by the regulated clearing agency related to transactions outside of the scope of the Instrument (e.g., exchange-traded derivatives).	Change made. All types of customer collateral can be commingled in an omnibus account with the customer collateral of other customers. Additionally, guidance has been added to the CP clarifying that a regulated clearing agency is required to hold customer collateral relating to cleared derivatives separately from any other type of property that is not customer collateral, including any other property posted by a customer as collateral relating to another investment or financial instrument that is not a cleared derivative. For example, the customer collateral of a customer may be commingled in an omnibus account with the customer collateral of other customers but may not be commingled with collateral relating to a futures contract that belongs to the customer or another customer.
s. 32 – Use of customer collateral – regulated clearing agency		
General Comments	Commenters noted that section 32 prevents cross-margining of futures and OTC swaps and requested that cross-margining be permitted where a Canadian counterparty is interacting with a clearing agency in foreign jurisdictions where cross-margining is permitted. It was requested the Committee consider that clearing agencies would need to implement manual controls to prevent Canadian counterparties from accessing cross-margined offerings and that Canadian counterparties would be subject to significantly higher margin requirements if their futures and OTC swaps could not be commingled and cross-margined.	No change. The Instrument prohibits the cross-margining of a customer's OTC cleared derivatives and futures positions. However, in some jurisdictions, customer protection requirements applicable to futures are equivalent to those applicable to OTC cleared derivatives; under such regimes, cross-margining may not represent a material risk to porting a customer's OTC cleared derivatives positions. Therefore, these factors will be taken into account when considering an application for discretionary relief from the prohibition on cross-margining or when making an equivalence determination of a foreign jurisdiction's regulatory requirements for the purpose of substituted compliance.
s. 33 – Investment of customer collateral – regulated clearing agency		
General Comments	One commenter requested that investment losses be borne solely by the clearing agency. The commenter noted that equivalent provisions in the CFTC regulations do not permit mutualisation of investment losses among clearing agency members and requested clarification on the risk management and policy reasons for permitting mutualisation of investment losses among clearing members.	No change. There is no requirement in section 7 or section 33 that losses be shared among clearing intermediaries.

PART 6: RECORDKEEPING BY A REGULATED CLEARING AGENCY		
s. 36 – Retention of records – regulated clearing agency		
General Comments	Clarification of the scope of records required to be retained by regulated clearing agencies was requested. The commenter suggested that the customer information collected by a clearing intermediary and shared with a regulated clearing agency under section 24 should be retained only by the clearing intermediary in accordance with section 12.	Change made. The Instrument does not require a regulated clearing agency to retain records related to a cleared derivative after the cleared derivative is terminated. Clearing intermediaries are required to maintain records related to customers and individual cleared derivatives for at least 7 years after termination; thus, it would be redundant for both clearing intermediaries and regulated clearing agencies to keep these records for an extended period after termination.
s. 37 – Books and records – regulated clearing agency		
General Comments	A concern was raised that requiring clearing intermediaries and regulated clearing agencies to identify specific items of collateral attributable to each customer may cause customers to believe specific items of collateral are individually segregated for their benefit.	Change made. The Instrument requires a regulated clearing agency to record the value of the customer collateral received from or attributable to a customer.
s. 38 – Separate records – regulated clearing agency		
s. 38(b)	One commenter noted that under United States laws, a derivatives clearing organization (**DCO**) must only record the value of customer collateral held by the DCO in satisfaction of its margin requirements and is not required to record the value of excess margin. The commenter requested that paragraph 38(b) not apply to non-Canadian clearing agencies subject to different regulatory requirements and which have built operation systems accordingly.	Change made. Section 31 of the Instrument has been revised and requires a regulated clearing agency to record the value of excess margin it holds for a clearing intermediary on behalf of its customers. Additionally, an exemption based on substituted compliance is available to regulated clearing agencies that act in accordance with CFTC or EMIR requirements.
s. 38(b)	One commenter requested that paragraph 38(b) be revised to clarify that clearing agencies are not required to distinguish the value of customer collateral on an individually segregated basis (i.e., it can be recorded within an omnibus customer account).	No change. Customer collateral can be held within an omnibus account but the value of customer collateral attributable to each customer must be recorded.

s. 38(b) and (c)	One commenter requested that to align with the CFTC's approach to the treatment of non-US indirect intermediary's accounts, the Instrument should provide for substituted compliance for paragraphs 38(b) and (c) and clarify that paragraphs 38(b) and (c) apply only to a clearing intermediary in respect of local counterparties (not all of their customers).	Change made. An exemption based on substituted compliance is available to regulated clearing agencies that act in accordance with CFTC or EMIR requirements. Otherwise, section 2 of the Instrument provides that the requirements under the Instrument are applicable to a regulated clearing agency that has its head office or principal place of business in a foreign jurisdiction only in respect of clearing services provided for local customers (i.e., customers located or organized in Canada). Section 2 also provides that the requirements under the Instrument applicable to clearing intermediaries apply only in respect of clearing services provided to local customers.
PART 7: REPORTING AND DISCLOSURE BY A REGULATED CLEARING AGENCY		
s. 41 – Disclosure to direct intermediaries by regulated clearing agency		
General Comments	One commenter requested that for clearing agencies subject to United States laws, substituted compliance be available to permit reliance on the existing disclosures by clearing agencies under Part 39.37 of the CFTC's rules. Additionally, where a clearing agency has already made the disclosures required under the Instrument to a customer, the clearing agency should not be required to make the disclosures again after the Instrument comes into force.	Change made. Substituted compliance applies to clearing intermediaries that provide disclosure in accordance with CFTC and EMIR disclosure requirements. Additionally, the guidance in the CP providing examples of information to be included in the disclosure has been clarified. As stated in the Notice and in the CP, where a regulated clearing agency or clearing intermediary has previously delivered disclosure to its customers that meets the requirements of the Instrument prior to the entry into force of the Instrument, new disclosure will not need to be provided to those customers.

S. 43 – Customer collateral report – regulatory		
General Comments	One commenter suggested that the reporting requirements regarding customer collateral for regulated clearing agencies on Form 94-102F3 was more burdensome than similar requirements under the CFTC's rules.	Change made. Form 94-102F3 has been revised and a regulated clearing agency is now required to report customer collateral on an aggregate basis for all customers, rather than on an individual customer basis. Additionally, a regulated clearing agency is now required to report which permitted depositories hold customer collateral on its behalf but is not required to report on the value of customer collateral held at each permitted depository location. The reporting required under this section is of importance to Canadian securities regulatory authorities. Consequently, this section remains a residual requirement that is applicable even when substituted compliance is available.
PART 8: TRANSFER OF POSITIONS		
s. 46 – Transfer of customer collateral and positions		
General Comments	One commenter noted that the contractual obligation between a clearing agency and its direct participant to comply with the rules of the clearing agency does not extend to a customer of the direct participant. Consequently, the clearing agency is not in a position to assess if the direct participant's customer has defaulted on its obligation.	Change made. The CP has been revised at section 24 to explain that the clearing intermediary would be responsible for providing information on customer default.
s. 46(1)	Two commenters requested that subsection 46(1) be modified to include "to the extent practicable" to address explicitly the challenges associated with discharging the obligations created by this provision.	Change made. Section 46 has been revised in the Instrument to address the challenges associated with the obligations created by the provision. These changes include specifying different requirements for transfers of a customer's positions and customer collateral in a default scenario or by request of the customer in a business-as-usual scenario.
s. 46(3)(a)	Two commenters suggested that paragraph 46(3)(a) be revised to reflect the fact that customer consent to transfer collateral and positions will not always be obtained in certain default scenarios which rely on negative consent.	Change made. Regulated clearing agencies are obligated to make reasonable efforts to ensure the transfer of a customer's collateral and positions is facilitated in accordance with the customer's instructions. Guidance on this point has been added to the CP.

PART 9: SUBSTITUTED COMPLIANCE		
General Comments	In making its conclusions regarding which provisions in the Instrument will benefit from substituted compliance, one commenter encouraged assessing foreign customer protection rules using an outcomes-based approach, such that foreign rules would qualify for substituted compliance where the same level of overall protection is achieved even if the foreign rules are not exactly the same as the requirements under the Instrument.	Change made. An outcomes-based approach was used to make the substituted compliance determinations included in the Instrument.
	Commenters requested that the Instrument permit substituted compliance on a holistic basis whereby the OTC derivatives customer clearing regimes of foreign jurisdictions would be recognized in their entirety. Where certain parts of a foreign jurisdiction's customer clearing regime are insufficient, it was suggested that additional conditions be imposed such that compliance with the Instrument is required for those particular provisions.	Change made. An outcomes-based approach was used to make the substituted compliance determinations included in the Instrument. On an outcomes basis, it was determined that certain provisions in the Instrument did not have equivalent provisions in the customer clearing regimes used in the foreign jurisdictions that we have reviewed. Accordingly, such "residual" provisions must be complied with by foreign clearing intermediaries and regulated clearing agencies providing clearing services for local customers even when benefitting from the exemption based on substituted compliance.

List of Commenters:

1. BMO Nesbitt Burns Inc.
2. The Canadian Advocacy Council for Canadian CFA Institute Societies
3. Canadian Market Infrastructure Committee
4. Chicago Mercantile Exchange Inc.
5. Futures Industry Association, Inc.
6. TMX Group Limited