

# Proposed National Instruments

NI 93-101 *Derivatives: Business Conduct*

...

NI 93-102 *Derivatives: Registration*

June 27, 2018

# Introduction

- Consultation Paper 91-407 – 2013
- NI 93-101 *Derivatives: Business Conduct*
  - Published for comment April 4, 2017 – 21 comment letters received
  - Published for second comment June 14, 2018 –  
**comment period closes September 17, 2018**
  - There will be additional publication(s) for comment for the appendices
- NI 93-102 *Derivatives: Registration*
  - Published for comment April 19, 2018 –  
**comment period closes September 17, 2018**

# NI 93-101 *Derivatives: Business Conduct*

# Proposed NI 93-101 Business Conduct

## Background

- Objectives
  - Business conduct regime that parallels securities regime in NI 31-103 but that is tailored for OTC derivatives
  - Establish requirements for persons in the business of trading or advising on derivatives
  - Two-tiered approach with increased protections where person receiving services is less sophisticated or has limited financial resources
- Key concepts
  - Derivatives adviser
  - Derivatives dealer
  - Derivatives party
  - Eligible derivatives party
    - Commercial hedger
  - Affiliated entity

# Proposed NI 93-101 Business Conduct

## Application

- Instrument applies to all persons that are derivatives advisers and dealers in a jurisdiction
  - Trade derivatives with or for a person or advise a person on derivatives in a jurisdiction
- Does not apply where
  - Only trade with or for a person or advise a person that is an affiliated entity
  - The derivatives dealer or adviser is a government, central bank or the BIS or IMF
- Exemption from requirements when dealing with an eligible derivatives party - Exempt from all requirements in the Instrument except
  - Part 3, Division 1
  - Sections 23 and 24
  - Subsection 27(1)
  - Part 5

# Proposed NI 93-101 Business Conduct

## Requirements that apply to everyone

- General obligations toward all (Part 3, Division 1)
  - Fair dealing
  - Conflict of interest management
  - Derivatives-party identification
- Derivatives party accounts (Part 4, only 2 sections)
  - Basic asset segregation requirement (s. 24)
  - Basic trade confirmation requirement (s. 27(1))
- Compliance and recordkeeping (Part 5)
  - Compliance and risk-management systems
  - Senior manager duties
  - Client/counterparties agreements
  - Recordkeeping

# Proposed NI 93-101 Business Conduct

## Requirements when dealing with non-EDPs

- Additional obligations/restrictions (Part 3, Div 2–3)
  - Derivatives-party-specific know-your-derivatives party
  - Product suitability
  - Permitted referral arrangements
  - Complaint handling
  - Prohibition on tied selling
- Derivatives party accounts (Part 4)
  - Relationship disclosure
  - Pre-trade disclosures
  - Report daily valuations
  - Notice by non-resident registrants
  - Holding, use and investment of assets
  - Transaction confirmations
  - Statements

# Proposed NI 93-101 Business Conduct

## Requirements that apply to everyone

- Fair dealing (s. 8)
- Conflict of interest management (s. 9)
- Know your derivatives party (s. 10)
- Asset segregation (s. 24)
- Transaction confirmations (s. 27(1))



# Proposed NI 93-101 Business Conduct

## Requirements that apply to everyone

- Compliance and risk-management systems (s. 30)
- Senior derivatives manager (s. 29)
  - Someone above the level of the trading desk but close enough to the day-to-day activity to know what's going on
- Senior derivatives manager duties (s. 31)
  - Supervision to ensure compliance
  - Respond to non-compliance
  - Prepare compliance report
  - Submit report to the board (may be submitted through CCO)
- Firm self-reporting (s. 32)
  - Firm must report material non-compliance to regulator

# Proposed NI 93-101 Business Conduct

## Requirements that apply to everyone

- Derivatives party agreement (s. 33)
  - Enter into agreements before transacting
- Recordkeeping (s. 34–35)
  - General records, including of compliance
  - Transaction records

# Proposed NI 93-101 Business Conduct

## Requirements when dealing with non-EDPs

- Derivatives-party-specific needs and objectives (s.11)
- Suitability (s. 12)
- Referral arrangements (s. 13–15)
- Complaint handling (s. 16)
- Tied selling prohibition and disclosure (s. 17)

# Proposed NI 93-101 Business Conduct

## Requirements when dealing with non-EDPs

- Relationship disclosure (account opening) (s. 18)
- Pre-trade disclosure (s. 19)
- Daily/monthly valuations – make available (s. 20)
- Notice by non-resident dealers/advisers (s. 21)

# Proposed NI 93-101 Business Conduct

## Requirements when dealing with non-EDPs

- Derivatives Party Assets (s. 22-26)
  - Basic segregation (s. 24)
  - Initial margin (s. 22, 25-26)
- Transaction confirmations (s. 27)
- Quarterly statements (s. 28)

# Proposed NI 93-101 Business Conduct

## Exemptions from the Instrument

- End Users (s. 37)
  - A person or company is exempt if it does not
    - Solicit/transact with non-EDP
    - Advise non-EDP (other than general advice)
    - Regularly make or offer to make a market
    - Regularly facilitate or intermediate transactions
    - Facilitate clearing through a qualifying clearing agency
  - Exclude activities with affiliates (except investment funds)
  - Not available if person or company is registered

# Proposed NI 93-101 Business Conduct

## Exemptions from Specific Requirements (Dealers)

- Foreign Derivatives Dealer (s. 38)
  - A foreign derivatives dealer from a jurisdiction listed in Appendix A is exempt if it
    - Does not solicit/transact with a non-EDP in the local jurisdiction
    - Is registered/licensed/authorized in the foreign jurisdiction
    - Is subject to and complies with foreign laws in Appendix A
    - Reports to the regulator material non-compliance with foreign laws
  - Additional conditions
- Investment Dealer (s. 39)
  - Exempt from requirements in Appendix B if it complies with corresponding IIROC requirement and notifies regulator of material non-compliance
- Canadian Financial Institution (s. 40)
  - Exempt from requirements in Appendix C if it complies with corresponding prudential regulator requirement and notifies regulator of material non-compliance

# Proposed NI 93-101 Business Conduct

## Exemptions from Specific Requirements (Dealers)

- Derivatives Trading Facility (s. 41)
  - A derivatives firm is exempt from s. 10 (*Know your derivatives party*) and s. 27 (*Content and delivery of transaction information*) if
    - The transaction is on/subject to rules of the DTF
    - The transaction is submitted for clearing/accepted for clearing by a qualifying clearing agency
    - The firm does not know the identity of the derivatives party prior to execution
    - At the time of the transaction, the derivatives party is an EDP



## Exemptions for Derivatives Advisers

- Advising Generally (s. 42)
  - Exemption for general advice that is not tailored
  - Disclose financial or other interest in recommended derivatives
- Foreign Derivatives Adviser (s. 43)
  - A foreign derivatives adviser from a jurisdiction listed in Appendix D is exempt if it
    - Does not provide advice to a non-EDP (other than general advice)
    - Is registered/licensed/authorized in the foreign jurisdiction
    - Is subject to and complies with foreign laws in Appendix D
    - Reports to the regulator material non-compliance with foreign laws
  - Additional conditions

# Proposed NI 93-101 Business Conduct

## Transitional

- Effective Date (s. 45)
  - Except for sections 8 (*Fair dealing*), 20 (*Daily reporting*) and 28 (*Derivatives party statements*), the requirements in the Instrument will not apply to pre-existing derivatives if the derivatives firm has taken reasonable steps to determine that a derivatives party is a “permitted client”, “accredited counterparty” or “qualified party”.

# NI 93-102 *Derivatives: Registration*

# Proposed NI 93-102 Registration

## Background

- Objectives
  - Establish requirements for the registration of key participants in derivatives markets, that will
    - mitigate risks to market participants by weeding out individuals that are bad apples
    - ensure they have the necessary training and experience
  - Require firms to have adequate financial resources
  - Ensure firms have systems to ensure compliance and manage risk

# Proposed NI 93-102 Registration

## Application

- Key concepts – largely the same as NI 93-101
  - Principal regulator – reduce burden by having a principal point of contact in Canada
  - Ultimate designed person, chief compliance officer, chief risk officer
  - Managed account
- Instrument does not apply to the governments, crown corporations whose accounts are consolidated with those of a government for accounting purposes, central banks, the BIS or IMF

# Proposed NI 93-102 Registration

## Application

- Basic requirement for a dealer or adviser to be registered comes from the various provincial Acts
- Additional registration triggers (s. 6)
  - Transacting with or soliciting transactions with a person that is not an EDP
  - Providing clearing services to another person
- Registration categories for firms (s. 7–8)
  - Restricted derivatives dealer and restricted derivatives adviser
- Requirement to be an IIROC dealer member (s. 9)
  - If trade with or for an individual that is not an EDP

# Proposed NI 93-102 Registration

## Application

- Registration categories for individuals
  - Derivatives dealing representative
  - Derivatives advising representative
  - Derivatives ultimate designated person
  - Derivatives chief compliance officer
  - Derivatives chief risk officer
- Exemption from registration as a representative
  - If the individual only deals with or advises EDPs
  - If the individual is not a derivatives advising representative for a managed account

# Proposed NI 93-102 Registration

## Requirements at a glance

- Maintain registration in a category appropriate to your activities (s. 6–8, 10–16, 19–25); join IIROC if transacting with individual non-EDPs (s. 9)
- Be proficient (s. 17–18)
- Designate a derivatives ultimate designated person, a derivatives chief compliance officer and a derivatives chief risk officer (s. 26–30)
  - Each of which has specified duties
  - Must have access to the board
- Maintain prescribed capital (TBD) (s. 31)
- Submit to audits as required (s. 32–33)



# Proposed NI 93-102 Registration

## Requirements at a glance

- Deliver financial statements (s. 34–37)
- Implement compliance and risk management systems (s. 38–39)
- Confirmations with DPs (s. 40)
- Valuations (s. 41)
- Dispute resolution (s. 42)
- Business continuity and disaster recovery (s. 43)
- Portfolio reconciliation (s. 44)
- Portfolio compression (s. 45)
- Recordkeeping (s. 46–47)

# Proposed NI 93-102 Registration

## Proficiency requirements (s. 17–18)

- Firm must ensure individuals have education, training and experience that a reasonable person would consider necessary
- Additionally: prescribed CCO, CRO, UDP, and dealing and advising representative qualifications
  - In each case, we have proposed a baseline for comment

# Proposed NI 93-102 Registration

## Ultimate Designated Person (s. 27)

- Firm must designate a person who meets the requirements in (1)
- Supervise and promote compliance
- Report material non-compliance to the board
- Report material non-compliance to the regulator
- Access to board (s. 30)

# Proposed NI 93-102 Registration

## Chief Compliance Officer (s. 28)

- Firm must designate a person who meets the requirements in (1)
- Policies and procedures designed to assess compliance
- Monitor and assess compliance
- Report material non-compliance to the UDP
- Annual compliance report to the board
- Access to board (s. 30)

# Proposed NI 93-102 Registration

## Chief Risk Officer (s. 29)

- Firm must designate a person who meets the requirements in (1)
- Policies and procedures to assess and manage derivatives risks
- Monitor and assess compliance with risk management policies and procedures
- Report material non-compliance to the UDP
- Annual compliance report to the board
- Access to board (s. 30)

# Proposed NI 93-102 Registration

## Financial, compliance, and risk management (s. 31–39)

- Capital requirements (s. 31)
- Audits (s. 32–33)
- Financial statements (s. 34–37)
- Compliance policies and procedures (s. 38)
- Risk management policies and procedures (s. 39)
  - Approved by board
  - Identify risks
  - Establish risk tolerance limits and risk management requirements
  - Periodic review of risks and limits
  - Monitor compliance with risk policies & procedures
  - Periodic reporting to UDP and board
  - Reporting of material changes in risk exposure
  - Independent review of RM systems

# Proposed NI 93-102 Registration

## Interaction with clients and counterparties (s. 40–45)

- Confirmation of material terms after each transaction (s. 40)
- Written agreement for valuation process (s. 41)
- Disputes (s. 42)
- Portfolio reconciliation (s. 44)
- Portfolio compression (s. 45)

# Proposed NI 93-102 Registration

## BCP/DR and Recordkeeping (s. 43, 46–47)

- Business continuity and disaster recovery (s. 43)
- Recordkeeping (s. 46–47)



## Exemptions from Registration (Dealers)

- Not in the Business of Trading (s. 48)
  - In BC, MB and NB, a person or company is exempt if it does not
    - Engage in business of trading, as principal or agent
    - Solicit/transact with non-EDP
    - Regularly quote prices or otherwise make or offer to make a market
    - Regularly facilitate or intermediate transactions
    - Facilitate clearing through a qualifying clearing agency
- End-User (s. 49)
  - A person or company is exempt if it does not
    - Solicit/transact with non-EDP
    - Advise non-EDP (other than general advice)
    - Regularly make or offer to make a market
    - Regularly facilitate or intermediate transactions
    - Facilitate clearing through a qualifying clearing agency
  - Not available if person or company is registered

# Proposed NI 93-102 Registration

## Exemptions from Registration (Dealers)

- Limited Notional Amount under Derivatives (s. 50)
  - Person or company does not solicit/transact with non-EDP
  - Person or company does not advise non-EDP (other than general advice)
  - \$250 million threshold
- Limited Notional Amount under Commodity Derivatives for Commodity Derivatives Dealer (s. 51)
  - Person or company does not solicit/transact with non-EDP
  - Person or company does not advise non-EDP (other than general advice)
  - Person or company is only a derivatives dealer for commodity derivatives
  - \$1 billion threshold
- Exemptions are not available if person or company is registered

# Proposed NI 93-102 Registration

## Proposed Methodologies for Notional Amount

- Notional amount as a proxy for activity
- Thresholds based on (monetary) notional amount outstanding
- Converting a notional quantity to a monetary notional amount
- Request for comment:
  - Static, measured at outset, or Current, measured at each calculation
  - Proposed approaches for “price” & “quantity”

# Proposed NI 93-102 Registration

## Exemptions from Registration (Dealers)

- Foreign Derivatives Dealer (s. 52)
  - A foreign derivatives dealer from a jurisdiction listed in Appendix B is exempt if it
    - Does not solicit/transact with a non-EDP
    - Is registered/licensed/authorized in the foreign jurisdiction
    - Is subject to and complies with foreign laws in Appendix B
    - Notifies the regulator of material non-compliance with foreign laws
  - Additional conditions

# Proposed NI 93-102 Registration

## Exemptions from Registration (Advisers)

- Advising Generally (s. 57)
  - Exemption for general advice that is not tailored
  - Disclose financial or other interest in recommended derivatives
- Dealer without Discretionary Authority (s. 58)
- Foreign Derivatives Adviser (s. 59)
  - A foreign derivatives adviser from a jurisdiction listed in Appendix G is exempt if it
    - Does not provide advice to a non-EDP (other than general advice)
    - Is registered/licensed/authorized in the foreign jurisdiction
    - Is subject to and complies with foreign laws in Appendix G
    - Notifies the regulator of material non-compliance with foreign laws
  - Additional conditions

# Proposed NI 93-102 Registration

## Exemptions from Registration (both)

- Affiliated Entities (s. 53 & s. 60)
  - A person or company is exempt from the dealer registration requirement and the adviser registration requirement if it is only required to register because of activities with an affiliated entity
  - Exemption is not available if the affiliated entity is an investment fund.

# Proposed NI 93-102 Registration

## Exemptions from Specific Requirements (Dealers)

- Foreign Derivatives Dealer (s. 54)
  - A foreign derivatives dealer from a jurisdiction listed in Appendix D is exempt from a requirement specified in Appendix D if it
    - Is registered/licensed/authorized in the foreign jurisdiction
    - Is subject to and complies with foreign laws in Appendix D
    - Notifies the regulator of material non-compliance with foreign laws
  - Additional Conditions
- Investment Dealer (s. 55)
  - Exempt from requirements in Appendix E if it complies with the corresponding IIROC requirement.
- Canadian Financial Institution (s. 56)
  - Exempt from requirements in Appendix F if it complies with the corresponding prudential regulator requirement and notifies the regulator of material non-compliance

# Proposed NI 93-102 Registration

## Exemptions from Specific Requirements (Advisers)

- Foreign Derivatives Adviser (s. 61)
  - A foreign derivatives adviser from a jurisdiction listed in Appendix H is exempt from a requirement specified in Appendix H if it
    - Is registered/licensed/authorized in the foreign jurisdiction
    - Is subject to and complies with foreign laws in Appendix H
    - Notifies the regulator of material non-compliance with foreign laws
  - Additional Conditions



# Contact details

## **Michael Brady**

*Manager, Derivatives*

*British Columbia Securities Commission*

[mbrady@bcsc.bc.ca](mailto:mbrady@bcsc.bc.ca)

## **Chad Conrad**

*Legal Counsel*

*Alberta Securities Commission*

[chad.conrad@asc.ca](mailto:chad.conrad@asc.ca)

## **Wendy Morgan**

*Senior Legal Counsel*

*Financial and Consumer  
Services Commission (NB)*

[wendy.morgan@fcnb.ca](mailto:wendy.morgan@fcnb.ca)