

## Legal update

### Proposed National Instrument 93-101 *Derivatives: Business Conduct*

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June 2018

#### Corporate finance and securities

On June 14, 2018, the Canadian Securities Administrators (“CSA”) published Proposed National Instrument 93-101 *Derivatives: Business Conduct* and Proposed Companion Policy 93-101 *Derivatives: Business Conduct* (collectively, the “Proposed Instrument”) for a 95-day comment period, expiring on September 17, 2018. This is the second comment period for the Proposed Instrument. The Proposed Instrument has been revised and republished to reflect the comments received in the first comment period between April 4, 2017 and September 1, 2017 and so that it can be considered together with the recently published Proposed National Instrument 93-102 *Derivatives: Registration* and Proposed Companion Policy 93-102 *Derivatives: Registration* (collectively, the “Proposed Registration Instrument”). The comment period for the Proposed Registration Instrument will also close on September 17, 2018.

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#### Purpose

The Proposed Instrument, together with the Proposed Registration Instrument, are intended to implement a comprehensive regime for the regulation of persons or companies that are in the business of trading or advising on derivatives. They will help protect participants in the over-the-counter (“OTC”) derivatives markets from unfair, improper or fraudulent practices and foster confidence in the Canadian derivatives markets.

The Proposed Instrument in particular is intended to help protect investors, reduce risk, improve transparency, increase accountability and promote responsible business conduct in the OTC derivatives markets.

#### Who does it apply to?

The Proposed Instrument applies to persons or companies that meet the definition of “derivatives adviser” or “derivatives dealer” regardless of whether they are registered or exempted from the requirement to be registered in a jurisdiction. Generally, this includes persons or companies who are engaging in or holding themselves out as engaging in the business of advising others in respect of derivatives or trading in derivatives as principal or agent. A “business trigger” test is used to determine if the persons or companies are in the business of trading or advising in OTC derivatives in a relevant Canadian jurisdiction.

Exemptions from requirements in the Proposed Instrument may be available for certain derivatives end-users (e.g., entities that trade derivatives for their own account for commercial purposes), investment dealers regulated by the Investment Industry Regulatory Organization of Canada (“IIROC”), Canadian financial institutions, and persons who provide general advice in relation to derivatives.

## Requirements

The Proposed Instrument includes requirements relating to the following:

- Fair dealing
- Conflicts of interest
- Know your client (KYC)
- Suitability
- Pre-trade disclosure
- Reporting
- Compliance
- Senior management rules
- Recordkeeping
- Treatment of derivatives party assets

Many of these requirements are similar to existing market conduct requirements applicable to registered securities dealers and advisers under National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (“NI 31-103”).

The Proposed Instrument takes a two-tiered approach as follows:

- 1) certain obligations apply in all cases when a derivatives firm is dealing with or advising a derivatives party, regardless of the level of sophistication or financial resources of the derivatives party; and
- 2) certain obligations do not apply to a derivatives firm if it is dealing with or advising an “eligible derivatives party” (i.e. a sophisticated derivatives party with sufficient knowledge and experience or financial resources) that:
  - is neither an individual nor a specified commercial hedger; or
  - is an individual or specified commercial hedger that has waived in writing the protections provided by the requirements.

The requirements will not apply to unexpired derivatives that were entered into before the effective date of the Proposed Instrument other than certain requirements relating to fair dealing, daily reporting, and derivatives party statements. In this regard, transition provisions will be included.

## Comment Period

The CSA states that it is seeking comments in writing by **September 17, 2018** on all aspects of the Proposed Instrument including, in particular, the following aspects:

- Definition of “affiliated entity”<sup>1</sup>
- Definition of “eligible derivatives party”
- Anonymous transactions executed on a derivatives trading facility
- Handling complaints
- Derivatives party assets<sup>2</sup>
- Policies, procedures and controls

Michael Bunn  
Elana M. Hahn  
Matthew Lau

## Footnotes

- <sup>1</sup> The Proposed Instrument provides an exemption for dealing with or advising an affiliated entity, other than an affiliated entity that is an investment fund.
- <sup>2</sup> Derivatives party assets are assets received or held by a derivatives firm from, for, or on behalf of a derivatives party, and may be subject to certain segregation requirements.

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For further information, please contact one of the following lawyers:

> <b>Michael Bunn</b>	Toronto	+1 416.216.4095	<a href="mailto:michael.bunn@nortonrosefulbright.com">michael.bunn@nortonrosefulbright.com</a>
> <b>Elana M. Hahn</b>	Toronto	+1 416.203.4468	<a href="mailto:elana.hahn@nortonrosefulbright.com">elana.hahn@nortonrosefulbright.com</a>
> <b>Matthew Lau</b>	Toronto	+1 416.216.2469	<a href="mailto:matthew.lau@nortonrosefulbright.com">matthew.lau@nortonrosefulbright.com</a>

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