

# Chapter 5

## Rules and Policies

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### 5.1.1 Amendment to National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives

#### ONTARIO SECURITIES COMMISSION

#### NOTICE OF AMENDMENT TO NATIONAL INSTRUMENT 94-101 *MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES*

#### 1. Introduction

The Ontario Securities Commission (the **OSC**, the **Commission** or **we**) has made an amendment to National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (the **Clearing Rule**).

Ministerial approval is required for the Clearing Rule amendment to come into force. This amendment will be delivered to the Minister of Finance on July 21, 2017. The Minister may approve or reject this amendment or return it for further consideration. If the Minister approves the Clearing Rule amendment or does not take any further action by September 19, 2017, the Clearing Rule amendment will come into force on October 4, 2017.

#### 2. Background

On January 19, 2017 the OSC published National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives*. The Clearing Rule became effective on April 4, 2017. Based on consultations with and feedback from various market participants, and in order to more effectively and efficiently promote the underlying policy aims, the Commission has amended the Clearing Rule. Details of the amendment are discussed further below.

#### 3. Substance and Purpose of the Amendment

The key objective of the Clearing Rule amendment is to delay the effective date of certain counterparties' mandatory clearing obligations under the Clearing Rule to allow for subsequent amendments to clarify the scope of the parties subject to these obligations.

The Commission believes that the Clearing Rule amendment is not required to be published for comment on the basis that:

- it grants an exemption or removes a restriction and is not likely to have a substantial effect on the interests of persons or companies other than those who benefit under it, and/or
- it does not materially change an existing rule.

#### 4. Summary of the Clearing Rule Amendment

(a) *Section 13: delay of certain counterparties' obligation to submit for clearing*

The Commission has amended the effective date of mandatory clearing for certain counterparties specified in paragraphs 3(1)(b) and (c) of the Clearing Rule to which paragraph 3(1)(a) does not apply. The effective date of mandatory clearing has been changed from October 4, 2017 to August 20, 2018. Minor housekeeping changes have also been made.

The Commission understands that the scope of the parties subject to mandatory clearing obligations under paragraph 3(1)(c) of the Clearing Rule may be beyond what was originally intended. Specifically, based on the Clearing Rule's current definition of "affiliated entity" and the meaning of "control," investment funds and special purpose vehicles organized as trusts or partnerships and managed by unrelated managers could be subject to mandatory clearing. As a result, the Commission is amending the Clearing Rule to delay clearing obligations. This will provide additional time for the Commission to publish additional proposed amendments to the Clearing Rule that will address the scope of the mandatory clearing obligations before the effective date of these mandatory clearing obligations.

Other Canadian Securities Administrators (**CSA**) members are concurrently publishing blanket orders to change the effective date of the counterparty clearing obligations under the Clearing Rule from October 4, 2017 to August 20, 2018. The Clearing Rule amendment has the same effect as the blanket orders.

**5. Legislative Authority for Rule Making**

The Clearing Rule amendment will come into force under the rulemaking authority provided under subparagraph 35(iii) of subsection 143(1) of the *Securities Act* (Ontario). Subparagraph 35(iii) authorizes the Commission to make rules prescribing requirements in respect of persons or companies trading in derivatives, including requirements in respect of margin, collateral, capital, clearing and settlement.

**6. Annexes**

Appended as part this Notice are the following Annexes:

- Annex A, which sets out the Clearing Rule amendment; and
- Annex B, which is the blackline corresponding to Annex A.

**July 6, 2017**

ANNEX A

AMENDMENTS TO  
NATIONAL INSTRUMENT 94-101 MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES

1. *National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives is amended by this Instrument.*
2. **Section 13 is** replaced by the following:  
  
**Transition – certain counterparties' submission for clearing**  
  
13. A counterparty specified in paragraph 3(1)(b) or (c) to which paragraph 3(1)(a) does not apply is not required to submit a mandatory clearable derivative for clearing to a regulated clearing agency until August 20, 2018.
3. This Instrument comes into force on October 4, 2017.

**ANNEX B**

**NATIONAL INSTRUMENT 94-101  
MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES**

**PART 1  
DEFINITIONS AND INTERPRETATION**

**Definitions and interpretation**

**1. (1)** In this Instrument

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

- (a) the counterparty is a person or company, other than an individual, to which one or more of the following apply:
  - (i) the person or company is organized under the laws of the local jurisdiction;
  - (ii) the head office of the person or company is in the local jurisdiction;
  - (iii) the principal place of business of the person or company is in the local jurisdiction;
- (b) the counterparty is an affiliated entity of a person or company referred to in paragraph (a) 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;

“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;

“transaction” means any of the following:

- (a) entering into a derivative or making a material amendment to, assigning, selling or otherwise acquiring or disposing of a derivative;
  - (b) the novation of a derivative, other than a novation with a clearing agency or clearing house.
- (2)** In this Instrument, a person or company is an affiliated entity of another person or company if one of them controls the other or each of them is controlled by the same person or company.
- (3)** In this Instrument, a person or company (the first party) is considered to control another person or company (the second party) if any of the following apply:
- (a) the first party beneficially owns or directly or indirectly exercises control or direction over securities of the second party carrying votes which, if exercised, would entitle the first party to elect a majority of the directors of the second party unless the first party holds the voting securities only to secure an obligation;
  - (b) the second party is a partnership, other than a limited partnership, and the first party holds more than 50% of the interests of the partnership;

- (c) the second party is a limited partnership and the general partner of the limited partnership is the first party;
  - (d) the second party is a trust and a trustee of the trust is the first party.
- (4) In this Instrument, in Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan and Yukon, “derivative” means a “specified derivative” as defined in Multilateral Instrument 91-101 *Derivatives: Product Determination*.

**Application**

2. This Instrument applies to,
- (a) in Manitoba,
    - (i) a derivative other than a contract or instrument that, for any purpose, is prescribed by any of sections 2, 4 and 5 of Manitoba Securities Commission Rule 91-506 *Derivatives: Product Determination* not to be a derivative, and
    - (ii) a derivative that is otherwise a security and that, for any purpose, is prescribed by section 3 of Manitoba Securities Commission Rule 91-506 *Derivatives: Product Determination* not to be a security,
  - (b) in Ontario,
    - (i) a derivative other than a contract or instrument that, for any purpose, is prescribed by any of sections 2, 4 and 5 of Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination* not to be a derivative, and
    - (ii) a derivative that is otherwise a security and that, for any purpose, is prescribed by section 3 of Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination* not to be a security, and
  - (c) in Québec, a derivative specified in section 1.2 of Regulation 91-506 respecting derivatives determination, other than a contract or instrument specified in section 2 of that regulation.

*In each other local jurisdiction, this Instrument applies to a derivative as defined in subsection 1(4) of this Instrument. This text box does not form part of this Instrument and has no official status.*

**PART 2  
MANDATORY CENTRAL COUNTERPARTY CLEARING**

**Duty to submit for clearing**

3. (1) A local counterparty to a transaction in a mandatory clearable derivative must submit, or cause to be submitted, the mandatory clearable derivative for clearing to a regulated clearing agency that offers clearing services in respect of the mandatory clearable derivative, if one or more of the following applies to each counterparty:
- (a) the counterparty
    - (i) is a participant of a regulated clearing agency that offers clearing services in respect of the mandatory clearable derivative, and
    - (ii) subscribes to clearing services for the class of derivatives to which the mandatory clearable derivative belongs;
  - (b) the counterparty
    - (i) is an affiliated entity of a participant referred to in paragraph (a), and
    - (ii) has had, at any time after the date on which this Instrument comes into force, a month-end gross notional amount under all outstanding derivatives exceeding \$1 000 000 000 excluding derivatives to which paragraph 7(1)(a) applies;

- (c) the counterparty
  - (i) is a local counterparty in any jurisdiction of Canada, other than a counterparty to which paragraph (b) applies, and
  - (ii) has had, at any time after the date on which this Instrument comes into force, a month-end gross notional amount under all outstanding derivatives, combined with each affiliated entity that is a local counterparty in any jurisdiction of Canada, exceeding \$500 000 000 000 excluding derivatives to which paragraph 7(1)(a) applies.
- (2) Unless paragraph (1)(a) applies, a local counterparty to which paragraph (1)(b) or (1)(c) applies is not required to submit a mandatory clearable derivative for clearing to a regulated clearing agency if the transaction in the mandatory clearable derivative was executed before the 90th day after the end of the month in which the month-end gross notional amount first exceeded the amount specified in subparagraph (1)(b)(ii) or (1)(c)(ii), as applicable.
- (3) Unless subsection (2) applies, a local counterparty to which subsection (1) applies must submit a mandatory clearable derivative for clearing no later than
  - (a) the end of the day of execution if the transaction is executed during the business hours of the regulated clearing agency, or
  - (b) the end of the next business day if the transaction is executed after the business hours of the regulated clearing agency.
- (4) A local counterparty to which subsection (1) applies must submit the mandatory clearable derivative for clearing in accordance with the rules of the regulated clearing agency, as amended from time to time.
- (5) A counterparty that is a local counterparty solely pursuant to paragraph (b) of the definition of “local counterparty” in section 1 is exempt from this section if the mandatory clearable derivative is submitted for clearing in accordance with the law of a foreign jurisdiction to which the counterparty is subject, set out in Appendix B.

#### Notice of rejection

- 4. If a regulated clearing agency rejects a mandatory clearable derivative submitted for clearing, the regulated clearing agency must immediately notify each local counterparty to the mandatory clearable derivative.

#### Public disclosure of clearable and mandatory clearable derivatives

- 5. A regulated clearing agency must do all of the following:
  - (a) publish a list of each derivative or class of derivatives for which the regulated clearing agency offers clearing services and state whether each derivative or class of derivatives is a mandatory clearable derivative;
  - (b) make the list accessible to the public at no cost on its website.

### PART 3 EXEMPTIONS FROM MANDATORY CENTRAL COUNTERPARTY CLEARING

#### Non-application

- 6. **This Instrument does not apply to the following counterparties:**
  - (a) the government of Canada, the government of a jurisdiction of Canada or the government of a foreign jurisdiction;
  - (b) 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;
  - (c) a person or company wholly owned by one or more governments referred to in paragraph (a) if the government or governments are liable for all or substantially all the liabilities of the person or company;
  - (d) the Bank of Canada or a central bank of a foreign jurisdiction;

- (e) the Bank for International Settlements;
- (f) the International Monetary Fund.

#### **Intragroup exemption**

7. (1) A local counterparty is exempt from the application of section 3, with respect to a mandatory clearable derivative, if all of the following apply:
- (a) the mandatory clearable derivative is between a counterparty and an affiliated entity of the counterparty if each of the counterparty and the affiliated entity are consolidated as part of the same audited consolidated financial statements prepared in accordance with “accounting principles” as defined in National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards*;
  - (b) both counterparties to the mandatory clearable derivative agree to rely on this exemption;
  - (c) the mandatory clearable derivative is subject to a centralized risk management program reasonably designed to assist in monitoring and managing the risks associated with the derivative between the counterparties through evaluation, measurement and control procedures;
  - (d) there is a written agreement between the counterparties setting out the terms of the mandatory clearable derivative between the counterparties.
- (2) No later than the 30th day after a local counterparty first relies on subsection (1) in respect of a mandatory clearable derivative with a counterparty, the local counterparty must deliver electronically to the regulator or securities regulatory authority a completed Form 94-101F1 *Intragroup Exemption*.
- (3) No later than the 10th day after a local counterparty becomes aware that the information in a previously delivered Form 94-101F1 *Intragroup Exemption* is no longer accurate, the local counterparty must deliver or cause to be delivered electronically to the regulator or securities regulatory authority an amended Form 94-101F1 *Intragroup Exemption*.

#### **Multilateral portfolio compression exemption**

8. A local counterparty is exempt from the application of section 3, with respect to a mandatory clearable derivative resulting from a multilateral portfolio compression exercise, if all of the following apply:
- (a) the mandatory clearable derivative is entered into as a result of more than 2 counterparties changing or terminating and replacing existing derivatives;
  - (b) the existing derivatives do not include a mandatory clearable derivative entered into after the effective date on which the class of derivatives became a mandatory clearable derivative;
  - (c) the existing derivatives were not cleared by a clearing agency or clearing house;
  - (d) the mandatory clearable derivative is entered into by the same counterparties as the existing derivatives;
  - (e) the multilateral portfolio compression exercise is conducted by an independent third-party.

#### **Recordkeeping**

9. (1) A local counterparty to a mandatory clearable derivative that relied on section 7 or 8 with respect to a mandatory clearable derivative must keep records demonstrating that the conditions referred to in those sections, as applicable, were satisfied.
- (2) The records required to be maintained under subsection (1) must be kept in a safe location and in a durable form for a period of
- (a) except in Manitoba, 7 years following the date on which the mandatory clearable derivative expires or is terminated, and
  - (b) in Manitoba, 8 years following the date on which the mandatory clearable derivative expires or is terminated.

**PART 4  
MANDATORY CLEARABLE DERIVATIVES**

**Submission of information on derivatives clearing services provided by a regulated clearing agency**

10. No later than the 10th day after a regulated clearing agency first offers clearing services for a derivative or class of derivatives, the regulated clearing agency must deliver electronically to the regulator or securities regulatory authority a completed Form 94-101F2 *Derivatives Clearing Services*, identifying the derivative or class of derivatives.

**PART 5  
EXEMPTION**

**Exemption**

11. (1) The regulator or the securities regulatory authority may grant an exemption to this Instrument, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.
- (2) Despite subsection (1), in Ontario, only the regulator may grant an exemption.
- (3) Except in Alberta and Ontario, an exemption referred to in subsection (1) is granted under the statute referred to in Appendix B of National Instrument 14-101 *Definitions* opposite the name of the local jurisdiction.

**PART 6  
TRANSITION AND EFFECTIVE DATE**

**Transition – regulated clearing agency filing requirement**

12. No later than May 4, 2017, a regulated clearing agency must deliver electronically to the regulator or securities regulatory authority a completed Form 94-101F2 *Derivatives Clearing Services*, identifying all derivatives or classes of derivatives for which it offers clearing services on April 4, 2017.

**Transition – certain counterparties' submission for clearing**

13. A counterparty specified in paragraphs 3(1)(b) or (c) to which paragraph ~~(3)(1)(a)~~ 3(1)(a) does not apply is not required to submit a mandatory clearable derivative for clearing to a regulated clearing agency until ~~October 4, 2017~~ August 20, 2018.

**Effective date**

14. (1) This Instrument comes into force on April 4, 2017.
- (2) In Saskatchewan, despite subsection (1), if these regulations are filed with the Registrar of Regulations after April 4, 2017, these regulations come into force on the day on which they are filed with the Registrar of Regulations.

**APPENDIX A  
TO  
NATIONAL INSTRUMENT 94-101  
MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES  
MANDATORY CLEARABLE DERIVATIVES  
(Section 1(1))**

**Interest Rate Swaps**

Type	Floating index	Settlement currency	Maturity	Settlement currency type	Optionality	Notional type
Fixed-to-float	CDOR	CAD	28 days to 30 years	Single currency	No	Constant or variable
Fixed-to-float	LIBOR	USD	28 days to 50 years	Single currency	No	Constant or variable
Fixed-to-float	EURIBOR	EUR	28 days to 50 years	Single currency	No	Constant or variable
Fixed-to-float	LIBOR	GBP	28 days to 50 years	Single currency	No	Constant or variable
Basis	LIBOR	USD	28 days to 50 years	Single currency	No	Constant or variable
Basis	EURIBOR	EUR	28 days to 50 years	Single currency	No	Constant or variable
Basis	LIBOR	GBP	28 days to 50 years	Single currency	No	Constant or variable
Overnight index swap	CORRA	CAD	7 days to 2 years	Single currency	No	Constant or variable
Overnight index swap	FedFunds	USD	7 days to 3 years	Single currency	No	Constant or variable
Overnight index swap	EONIA	EUR	7 days to 3 years	Single currency	No	Constant or variable
Overnight index swap	SONIA	GBP	7 days to 3 years	Single currency	No	Constant or variable

**Forward Rate Agreements**

Type	Floating index	Settlement currency	Maturity	Settlement currency type	Optionality	Notional type
Forward rate agreement	LIBOR	USD	3 days to 3 years	Single currency	No	Constant or variable
Forward rate agreement	EURIBOR	EUR	3 days to 3 years	Single currency	No	Constant or variable
Forward rate agreement	LIBOR	GBP	3 days to 3 years	Single currency	No	Constant or variable

**APPENDIX B  
TO  
NATIONAL INSTRUMENT 94-101  
MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES  
LAWS, REGULATIONS OR INSTRUMENTS OF FOREIGN JURISDICTIONS  
APPLICABLE FOR SUBSTITUTED COMPLIANCE  
(Subsection 3(5))**

<b>Foreign jurisdiction</b>	<b>Laws, regulations or instruments</b>
European Union	Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories
United States of America	Clearing Requirement and Related Rules, 17 C.F.R. pt. 50



**Rules and Policies**

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<b>Pairs</b>	<b>LEI of counterparty 1</b>	<b>Jurisdiction(s) of Canada in which counterparty 1 is a local counterparty</b>	<b>LEI of counterparty 2</b>	<b>Jurisdiction(s) of Canada in which counterparty 2 is a local counterparty</b>
1				

2. Describe the ownership and control structure of the counterparties identified in item 1.

**Section 3 – Certification**

I certify that I am authorized to deliver this Form on behalf of the entity delivering this Form and on behalf of the counterparties identified in Section 2 of this Form and that the information in this Form is true and correct.

DATED at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
(Print name of authorized person)

\_\_\_\_\_  
(Print title of authorized person)

\_\_\_\_\_  
(Signature of authorized person)

\_\_\_\_\_  
(Email)

\_\_\_\_\_  
(Phone number)



**Section 3 – Certification**

**CERTIFICATE OF REGULATED CLEARING AGENCY**

I certify that I am authorized to deliver this form on behalf of the regulated clearing agency named below and that the information in this form is true and correct.

DATED at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
(Print name of regulated clearing agency)

\_\_\_\_\_  
(Print name of authorized person)

\_\_\_\_\_  
(Print title of authorized person)

\_\_\_\_\_  
(Signature of authorized person)