

# Insights and Commentary from Dentons

On March 31, 2013, three pre-eminent law firms—Salans, Fraser Milner Casgrain, and SNR Denton—combined to form Dentons, a Top 10 global law firm with more than 2,500 lawyers and professionals worldwide.

This document was authored by representatives of one of the founding firms prior to our combination launch, and it continues to be offered to provide our clients with the information they need to do business in an increasingly complex, interconnected and competitive marketplace.



**ALBERTA SECURITIES  
COMMISSION PUBLISHES  
NOTICE OF REPUBLICATION  
AND REQUEST FOR  
COMMENT REGARDING  
REGULATION OF OVER-THE-  
COUNTER DERIVATIVES  
TRANSACTIONS**

**BY: PRISCILLA BUNKE AND  
COURTNEY BURTON**

**Alberta Securities Commission publishes a Notice of Republication and Request for Comment regarding proposed amendments to Alberta’s regulation of Over-the-Counter Derivatives Transactions**

## **I. INTRODUCTION**

On October 15, 2012, the Alberta Securities Commission (the “**Commission**”) issued a *Notice of Republication and Request for Comment regarding proposed amendments to Alberta’s regulation of Over-the-Counter Derivatives Transactions*<sup>1</sup> (the “**Notice of Republication and Request for Comment**”) regarding proposed amendments to legislation under the *Securities Act*, R.S.A. 2000, and c S-4 (the “**Act**”) required to:

...enable the Commission to comply with the G20 Commitments in the interim while the Commission and the other CSA jurisdictions continue work to modernize the regulatory framework governing derivatives trades in Canada.

In September 2009 the G20 leaders on behalf of their nations, including Canada, met in Pittsburgh to examine the status of the financial market infrastructures that had failed or undergone significant stress in the years prior. Following this meeting, the G20 nations issued a communiqué and committed, in part, to the following:<sup>2</sup>

All standardized OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest. OTC derivative contracts should be reported to trade repositories. Non-centrally cleared contracts should be subject to higher capital requirements.

Therefore, because of the commitments made by the G20 nations in 2009 (the “**G20 Commitments**”) Canada now has obligations to establish a new regulatory regime related to the trading of over-the-counter (“**OTC**”) derivatives in Canada. Since December 2009, the Bank of Canada, the Canadian Securities Administrators (“**CSA**”), the Office of the Superintendent of Financial Institutions and the Canadian Department of Finance have coordinated efforts to implement reform of Canada’s OTC derivatives markets in line with the G20 Commitments, including the commitment to clear standardized OTC derivatives. As the ten (10) provinces and three (3) territories in Canada are all separately responsible for securities regulation in their respective jurisdictions, in order to assist Canada in meeting its G20 Commitments, all the provinces and territories must each participate in creating and monitoring a new regulatory regime for OTC derivatives. Thus far, participation has taken the form of collaboration under the CSA umbrella. However, as end-2012 quickly approaches, many provinces and territories are beginning to take concrete steps which they propose will allow them to assist Canada in meeting its G20 Commitments related to the regulation of OTC derivatives markets.

---

<sup>1</sup> A copy of which is available [here](#).

<sup>2</sup> See *The G-20 Toronto Summit Declaration*, sections 25 and 19, June 27, 2010, available [here](#).

## II. BACKGROUND

### A. Authority To Make Regulations and Rules

By way of background, the Lieutenant Governor in Council in Alberta has the authority to make regulations under the Act pursuant to section 223<sup>3</sup> and the Commission has the authority under section 224<sup>4</sup> of the Act to make rules;<sup>5</sup> for example, the Commission Rules. The Commission uses rules to administer the requirements of Alberta securities laws.<sup>6</sup>

While any amendment to the Act requires a legislative amendment, the Commission has the authority under section 224 to make and amend rules without a legislative amendment.

### B. Authority To Issue Blanket Orders

The Commission has the authority under section 213<sup>7</sup> of the Act to exempt certain persons from Alberta securities laws. It is section 213 of the Act that the Commission relies upon when issuing blanket orders. Of note, despite the fact that the Commission articulates, in its Notice of Republication and Request for Comment, that it proposes to “enact” Blanket Order 91-505, there is no legislative enactment necessary to bring a blanket order of this nature into force. The Commission is given this authority under section 213 of the Act and therefore it would be more accurate to say that the Commission proposes to “issue” Blanket Order 91-505.

---

<sup>3</sup> Due to its length, section 223 is not reproduced herein. However, this particular section of the Act may be viewed [here](#).

<sup>4</sup>Section 224 prescribes that the Commission may, subject to this section and the regulations referred to in section 223(ii), make rules in respect of any of the matters in respect of which the Lieutenant Governor in Council may make regulations under section 223. (2) Notwithstanding subsection (1), the Commission shall not do the following: (a) make rules in respect of matters referred to in section 223(ee); (b) make rules in respect of matters referred to in section 223(hh.1) (i) except with the approval of the Minister, or (ii) unless no change is being made to the minimum requirements under existing rules made in respect of section 223(hh.1); (c) make rules in respect of matters referred to in section 223(ii). (3) Notwithstanding that the Commission may make rules, (a) where the provisions of a regulation made under section 223 and a rule made under this section conflict, the regulation prevails, and (b) the Lieutenant Governor in Council may amend or repeal any rule made by the Commission under this section. (4) A rule made by the Commission under this section has the same force and effect as a regulation made by the Lieutenant Governor in Council under section 223. (5) The Regulations Act does not apply to a rule made by the Commission under subsection (1).

<sup>5</sup> “Rules” means the rules made by the Commission under section 224 or under section 211.6(2).

<sup>6</sup> “Alberta securities laws” means the Act, the regulations and any decisions made by the Commission or the Executive Director and any extra-provincial securities laws adopted or incorporated by reference under section 211.4.

<sup>7</sup> Section 213 of the Act provides that the Commission may by order exempt (a) any person, company, trade or distribution, or (b) any class or classes of persons, companies, trades or distributions from all or any provision of Alberta securities laws.

### C. Definition Of OTC Derivative

The only existing definition of OTC derivative, in Alberta securities laws, is currently contained in Blanket Order 91-503, which provides that an OTC derivative:

...means an agreement in respect of an option, forward contract, contract for differences or other instrument of a type commonly considered to be a derivative, or any combination of any of them, if:

- (i) the material economic terms of the agreement have been customized to the purposes of the parties to the agreement and the agreement is not part of a fungible class of agreements that are standardized as to their material economic terms;
- (ii) the creditworthiness of a party to the agreement would be a material consideration in entering into or determining the terms of the agreement, (iii) the agreement is not entered into or traded on or through an organized market, stock exchange or futures exchange; and
- (iv) the agreement, if cleared, is cleared through an acceptable clearing corporation.

In addition to the defined term of OTC derivative in Blanket Order 91-503, the definition of "security"<sup>8</sup> in the Act includes futures contracts<sup>9</sup> and options<sup>10</sup> that are not exchange contracts<sup>11</sup>. As a result, certain parties and their clients who contract with one another for such futures contracts and options (including certain OTC derivatives) are subject to registration and prospectus requirements, unless exempted.

Should the Commission revoke Blanket Order 91-503, thus revoking the definition of OTC derivative, there will no longer be a definition of OTC derivative in force in Alberta.

Although Blanket Order 91-505 includes a definition of "over-the-counter trade", this definition only captures trades which are traded pursuant to the by-laws, rules or regulations of an exchange, and is fully defined as follows:

---

<sup>8</sup> Due to its length, the complete definition of "security" is not reproduced herein. However, this definition may be viewed within the Act itself, a copy of which is available [here](#).

<sup>9</sup> "Futures contract" means any obligation to make or take future delivery of (i) a commodity, (ii) a security, or (iii) cash if the amount of cash is derived from, or by reference to, a variable, including (A) a price or quote for a commodity or security, (B) an interest rate, (C) a currency exchange rate, or (D) an index or benchmark, but does not include an obligation or a class of obligations that is designated not to be a futures contract pursuant to an order made under section 10."

<sup>10</sup> Note: the Act does not contain a specific definition of "option". It is, however, captured in the following definitions: "exchange contract" and "security".

<sup>11</sup> "Exchange contract" means a futures contract or an option where (i) its performance is guaranteed by a clearing agency, and (ii) it is traded on an exchange pursuant to standardized terms and conditions set out in the bylaws, rules or regulations of that exchange at a price agreed on when the futures contract or option is entered into on the exchange, and includes any instrument or class of instruments that (iii) meets the requirements referred to in subclauses (i) and (ii), and (iv) is designated as an exchange contract by an order of the Commission;

‘over-the-counter trade’ includes any trade in futures contracts other than trades in exchange contracts which are traded pursuant to the by-laws, rule, or regulations of an exchange;

A trade of derivatives made pursuant to the by-laws, rules or regulations of an exchange is a trade made “on-exchange,” otherwise known as exchange trading. Derivatives can be bought and sold “on-exchange” and “off-exchange” (i.e. OTC). On-exchange refers to the futures markets (i.e. central exchange where market participants can trade standardized futures contracts). In the trade of energy derivatives, examples of two large exchanges are the New York Mercantile Exchange (part of the CME Group) and the Intercontinental Exchange, Inc. The OTC market is specific to customized swaps and OTC options. These customized trades are traded bilaterally between two counterparties.

It is unclear from the definition of “over-the-counter trade” contained in Blanket Order 91-505 whether the Commission is referring to OTC derivatives trades, on-exchange trading, or is potentially referring to OTC derivatives trades which are subsequently cleared by a clearing agency.

### III. PROPOSED AMENDMENTS

The Commission has indicated that “[t]he Proposed Amendments will codify the Commission’s legal authority under the Act to comply with the G20 Commitments on regulating [OTC] derivatives.” To that end, the Commission is proposing to regulate OTC derivatives transactions under the Act by implementing the following proposed amendments:

- A. revisions to section 8(2) of the *Alberta Securities Commission Rules (General)* (the “**Commission Rules**);
  - B. revocation of Blanket Order 91-503 *Over-the-Counter Derivatives and Commodities Contracts* (“**Blanket Order 91-503**”) and replacement of Blanket Order 91-503 with Blanket Order 91-505 *Over-the-Counter Derivatives Transactions* (“**Blanket Order 91-505**”);
- (collectively, the “**Proposed Amendments**”).

#### A. Section 8(2) of the *Alberta Securities Commission Rules (General)*

The Commission, in its Notice of Republication and Request for Comment, indicates that:

[t]he proposed amendments to section 8(2) of the [Commission Rules] will provide the Executive Director with power to require registrants to comply with the G20 Commitments respecting trading and clearing of OTC derivatives trades.

There are two portions of this quotation which warrant further analysis: (1) the portion of the quotation which requires “registrants” to comply with the G20 Commitments respecting trading and clearing of OTC derivative trades; and (2) the term “registrant” itself.

First, the Commission indicates that, through the Proposed Amendments, the Executive Director is being given the power to require registrants to comply with the G20 Commitments. It should again be noted that the G20 Commitments have not been made by the market participants. It was the national authorities and international bodies, with the Financial Stability Board as a central locus of coordination, which have further advanced a reform program of OTC derivatives markets. The onus is on Canada to work with other national authorities and international bodies to meet its G20 Commitments. Therefore, the quotation should instead indicate that the Commission, in assisting Canada in meeting its G20 Commitments, proposes to regulate certain market participants who engage in OTC derivative trades.

Second, the Act defines the term “registrant” as a person or company registered or required to be registered under the Act or the regulations.<sup>12</sup> Arguably, there is no existing language under the Act or the regulations which provides that OTC market participants must register (i.e. become registrants) because they are engaged in trades of OTC derivatives. Should the Commission wish to mandate registration of market participants engaged in OTC derivatives trading, a specific requirement to do so should be clearly articulated.

Section 8(2) of the Commission Rules currently provides the Executive Director with the power to require any class of registrants, as a condition of registration, to report all trades in the OTC market to an agency.

Specifically, the section 8(2) indicates:

The Executive Director may require any class of registrants, as a condition of registration:

(a) to report all trades in the over-the-counter market to an agency in accordance with the requirements of the agency<sup>13</sup>, and

(b) to pay the agency fees of the agency that are approved by the Commission.

The Commission Rules do not indicate that market participants involved in OTC derivatives trades must be registered.

The Commission, in the Notice of Republication and Request for Comment, suggests that section 8(2) (as it is currently drafted) “already provides the Executive Director with power to require trade reporting of OTC derivatives transactions.” This statement is not exactly accurate. Although section 8(2) of the Commission Rules gives the Executive Director the right to impose conditions on registration, upon a strict reading, it does currently mandate registration of market participants engaged in the trading of OTC derivatives.

The proposed amendments to section 8(2) (a) of the Rules are shown below in **bold/underlined** text, as follows:

---

<sup>12</sup>“Regulations” means the regulations made under this Act and, unless the context otherwise indicates, includes the rules.

<sup>13</sup> “Agency” is not a defined term in the Act or regulations.

The Executive Director may require any class of registrants, as a condition of registration:

(a) to report all trades in the over-the-counter market to an agency in accordance with the requirements of the agency recognized by the Commission, ~~and~~

(b) to pay the agency fees of the agency that are approved by the Commission,

(c) to trade futures contracts, or classes of futures contracts, on or through the facilities of an exchange recognized by the Commission or exempted by the Commission from the requirement to be recognized as an exchange,

(d) to clear trades in futures contracts, or classes of futures contracts, on or through the facilities of a clearing agency recognized by the Commission, and

(e) to maintain at least a prescribed minimum excess working capital in respect of trades in futures contracts, or classes of futures contracts, not cleared on or through the facilities of a clearing agency recognized by the Commission.

The Notice of Republication and Request for Comment suggests that these amendments “will provide the Executive Director with power to require registrants to comply with the G20 Commitments respecting trading and clearing of OTC derivatives trades.” As noted above, the G20 Commitments are not commitments of market participants; they are commitments of national authorities and international bodies, including Canada. Further, these amendments do not mandate registration of market participants who engage in OTC derivative trades. Again, based on a strict interpretation of section 8(2), as amended by the Proposed Amendments, it could be concluded that the section simply implies that power to place conditions on registration.

It appears that the Commission’s intent in proposing these amendments is to give the Commission additional powers which it sees as necessary in order to assist Canada in meeting its various G20 Commitments. Again, the section only contemplates the imposition of conditions related to registration, but does not mandate registration itself. The Proposed Amendments seem to suggest the Executive Director will have the authority to impose additional conditions on registration if mandated, as follows:

- the authority to require that market participants report all trades in OTC derivatives to trade repositories<sup>14</sup> which must be recognized by the Commission;
- the authority to require market participants to trade their OTC derivatives on-exchange unless they are specifically exempted from such requirement;
- the authority to recognize clearing agencies; and
- the authority to prescribe margin thresholds for those OTC derivatives that are not cleared by a recognized clearing agency.

---

<sup>14</sup> It is assumed the term “agency” as it is used in section 8(2) refers to trade repositories.



## A. Proposed revocation of Blanket Order 91-503 *Over-the-Counter Derivatives and Commodities Contracts* and issuance of Blanket Order 91-505 *Over-the-Counter Derivatives Transactions*

The Commission's regulatory model respecting derivatives, prior to 1999, was patterned after the typical regulation of securities in most Canadian jurisdictions. Securities regulators oversee exchange markets that have self-regulatory responsibilities in some cases. Exchanges are required to set out and enforce rules to protect customers, prevent fraud and manipulation, maintain orderly and fair markets, and so on. The regulators have the power to modify the exchanges' rules, as well as issue rules and regulations of their own. Common to securities laws as found in the Act, is a presumption that certain forms of trading, including where public investors are involved, should take place on a regulated exchange.

It is assumed that it is this presumption that led to the inclusion of OTC derivatives transactions within the scope of the Commission's regulation on June 1, 1999. This was done by amending the Act as follows: (i) the amendment of the definition of a futures contract and (ii) the expansion of the definition of "trade"<sup>15</sup> to include entering into a futures contract or an option that is an exchange contract.

As a result, the Act regulated trading and advising in both securities and exchange contracts. The definition of a security under the Act specifically excludes an exchange contract. However, a futures contract or option that is not traded on an exchange under standardized terms is not an exchange contract and is therefore included in the definition of "security". As a result of this amendment to the Act, OTC derivatives (which are customized and do not include standardized terms) became, and are still subject to, all of the provisions in the Act applicable to securities, but are not subject to the provisions that only apply to exchange contracts.

Following these amendments, many market participants at that time questioned their ability to carry out OTC derivatives transactions in the derivatives market. Therefore, in response to these concerns, the Commission conducted consultations with participants and their advisers for a week, and thereafter issued a Blanket Order 91-502 *Over-the-Counter Derivatives Transactions & Commodity Contracts* ("**Blanket Order 91-502**"). Blanket Order 91-502, retroactive to June 1,

---

<sup>15</sup> The definition of "trade" following the amendments: includes (i) any sale or disposition of a security for valuable consideration, whether the terms of payment are on margin, instalment or otherwise, but does not include (A) a purchase of a security, or (B) except as provided in subclause (v), a transfer, pledge or encumbrance of securities for the purpose of giving collateral for a bona fide debt; (ii) any entering into a futures contract or an option that is an exchange contract; (iii) any participation as a trader in any transaction in a security or an exchange contract through the facilities of an exchange or a quotation and trade reporting system; (iv) any receipt by a registrant of an order to buy or sell a security or an exchange contract; (v) any transfer, pledge or encumbrance of securities of an issuer from the holdings of a control person for the purpose of giving collateral for a bona fide debt; (vi) any act, advertisement, solicitation, conduct or negotiation made directly or indirectly in furtherance of anything referred to in subclauses (i) to (v);

1999, essentially exempted all OTC derivatives and commodity transactions between entities considered to be a “qualified party”<sup>16</sup> (“**Qualified Party**”).

Blanket Order 91-502 has since been revoked and replaced with Blanket Order 91-503. The revocation and replacement occurred as a result of complaints by market participants that Blanket Order 91-502 was obsolete, as it did not permit transactions which involved clearing agencies acting as central counterparties. The involvement of clearing agencies was becoming increasingly common in such transactions, and resulted from attempts to mitigate the risks undertaken by the counterparties to an OTC transaction by transferring the risks to a central counterparty (i.e. the clearing agency). Blanket Order 91-503, which is currently in effect and which the Commission is proposing to revoke, recognized this development respecting the clearing of OTC derivatives transactions.

Blanket Order 91-503 provides that OTC derivatives transaction and commodity contracts are not to be deemed to be futures contracts pursuant to Section 10 of the Act. Blanket Order 91-503 reads, in part, as follows:

...the following OTC derivatives transactions and commodity contracts are not futures contracts as defined in subsection 1(x) of the Act:

- (i) an OTC derivatives transaction of which the underlying interest consists of an interest rate, Canadian or foreign currency, a foreign exchange rate, a commodity, a security, an index, a benchmark, or other variable, or another OTC derivative, or some relationship between, or combination of, one or more of any of them;
- (ii) a commodity contract; or
- (iii) a contract for the sale or exchange of a commodity that provides for the physical delivery only of the subject matter of the contract;

provided, in the case of the OTC derivatives transactions and commodity contracts referred to in paragraphs (i) and (ii) are made between Qualified Parties who each act as principal except in respect of Qualified Parties described in paragraphs (BB) and (CC) of the Appendix to this Order;

The end result of Blanket Order 91-503 was that a Qualified Party that traded in OTC derivatives received a blanket exemption from the registration and prospectus requirements that would otherwise be applicable to such transactions. In light of the current Canadian initiative to reform the regulation of OTC derivatives markets, Blanket Order 91-503 may be seen as being too broad. In addition, Blanket Order 91-503 does not address the fundamental question of a

---

<sup>16</sup> “Qualified Party” is defined in Blanket Order 91-503 and means any of the entities listed in the Appendix to this Order, where each is acting as principal, or alternatively as an agent or trustee for accounts that are fully managed by it. For the purposes of this order, a party is a Qualified Party for the purpose of any OTC derivative transaction or commodity contract if that party is a Qualified Party at the time the party enters into the transaction or contract.

permanent regulatory solution for the regulation of the diverse spectrum of derivatives traded in Alberta both on-exchange and off-exchange (i.e. OTC).

As a result, the Commission had published a proposed Alberta Securities Commission Rule 91-505 *Over the Counter Derivatives* (“**Proposed Rule 91-505**”) together with the proposed revocation of Blanket Order 91-503 for public comment in February 2011. The Commission states that it received six (6) comment letters on the Proposed Rule 91-505. The Commission indicates in analyzing these comments, together with participating in the ongoing work being done by the CSA to modernize the regulatory framework governing OTC derivatives trades in Canada that it has decided to re-publish Proposed Rule 91-505 in a new form, along with the above noted Proposed Amendments in order to better facilitate compliance with the G20 Commitments. The Commission now proposes to re-issue Blanket Order 91-505 - *Over the Counter Derivatives Transactions* (“**Blanket Order 91-505**”) as a replacement to Blanket Order 91-503.

Blanket Order 91-505 relies on the authority given to the Commission in section 213 of the Act, which allows the Commission to ability to exempt any person from all or any of the provisions of Alberta securities laws. Generally, the Commission is proposing that it would not be prejudicial to the public interest to allow a Qualified Party to be exempt for the prospectus requirement related to the distribution of futures contracts. Further, Blanket Order 91-505 proposes to waive the “dealer registration requirement” related to OTC derivatives trades in futures contracts where each party to the trade is a Qualified Party and to OTC derivatives trades in physical commodity contracts.

It is not clear why the Commission refers to the “dealer registration requirement” in Blanket Order 91-505. The background to the prospectus and registration exemption, contained in Blanket Order 91-503, contemplated a broader application to “...certain parties and their clients who contract directly with one another for such OTC derivatives and commodity contracts are subject to registration and prospectus requirements, unless exempted.”

Pursuant to Blanket Order 91-505, any Qualified Party relying on the “dealer registration exemption” may be subject to prescribed requirements which may be imposed by the Executive Director of the Commission and may include the requirement to:

- report the trade to recognized agency;
- effect the trade on or through recognized exchange facilities, or those facilities that are exempt from the recognition requirement);
- clear the trade on or through a recognized clearing agency; or
- maintain a prescribed minimum of working capital for those trades no cleared on or through a recognized clearing agency.

The term Qualified Party refers to a listing of those entities which the Commission considers to be a Qualified Party and is attached as an Appendix to Blanket Order 91-505. For reference, the complete Appendix to Blanket Order 91-505 is attached hereto as a Schedule.

## B. Notes

The Commission invites interested market participants to submit comments regarding the Proposed Amendments to the Commission on or before November 16, 2012. A copy of the Proposed Amendments is available [here](#).

We invite market participants and other stakeholders to discuss any comments and questions with us. If you require any assistance in commenting on the Proposed Amendments we are available to assist you.

For more information regarding the Commission's derivatives regulation initiatives and the proposed Canadian OTC derivative regulatory regime being conducted by the CSA and other Canadian federal government agencies and how it could impact your derivatives and commodity trading operations, please contact:

**Priscilla Bunke**

403 268 6370

[priscila.bunke@fmc-law.com](mailto:priscila.bunke@fmc-law.com)

**Courtney Burton**

403 268 6370

[courtney.burton@fmc-law.com](mailto:courtney.burton@fmc-law.com)

*This summary provides only an outline and does not constitute legal advice. Specific legal advice should be obtained before making any decisions regarding the Proposed Amendments.*

**SCHEDULE**  
**REPRODUCTION OF APPENDIX**  
**TO BLANKET ODER 91-505**

APPENDIX  
QUALIFIED PARTIES

Banks

- (A) a bank to which the Bank Act (Canada) applies;
- (B) Business Development Bank of Canada continued under the Business Development Bank of Canada Act (Canada);
- (C) a bank subject to the regulatory regime of a country that is a member of the Basle Accord (the "Accord") or a country that is not an initial signatory to the Accord but has adopted the regulatory and supervisory rules set out in the Accord if the bank has a minimum paid up capital and surplus, as shown on the last audited balance sheet, in excess of \$100 million (or its equivalent in another currency);

Commercial User

- (D) a person or company that sells, buys, trades, produces, markets, brokers or otherwise uses in its business a commodity and as a consequence enters into an over-the-counter trade in a futures contract;

Credit Unions and Caisses Populaires

- (E) a credit union central or a federation of caisses populaires or any credit union or regional caisse populaire located, in each case, in Canada;

Loans and Trust Companies

- (F) a loan or trust corporation registered under the loan and trust corporations legislation of a province or territory of Canada or under the Trust and Loan Companies Act (Canada);
- (G) a loan or trust company subject to the regulatory regime of a country that is a member of the Basle Accord or a country that is not an initial signatory to the Accord but has adopted the regulatory and supervisory rules set out in the Accord if the loan company or trust company has a minimum paid up capital and surplus, as shown on the last audited balance sheet, in excess of \$100 million (or its equivalent in another currency);

Insurance Companies

- (H) an insurance company licensed to do business in Canada or a province or territory of Canada if the insurance company has a minimum paid up capital and surplus, as shown on the last audited balance sheet, in excess of \$100 million (or its equivalent in another currency);
- (I) an insurance company subject to the regulatory regime of a country that is a member of the Basle Accord or a country that is not an initial signatory to the Accord but has adopted the regulatory and supervisory rules set out in the Accord if the insurance company has a minimum

paid up capital and surplus, as shown on the last audited balance sheet, in excess of \$100 million (or its equivalent in another currency);

#### Sophisticated Entities

(J) a person or company that

(i) together with its affiliates has entered into one or more over-the-counter trades involving futures contracts with counterparties that are not its affiliates, if

(a) the trades had a total gross dollar value of or equivalent to at least \$1 billion in notional principal amount; and

(b) any of the contracts relating to one of these trades were outstanding on any day during the previous 15 month period, or

(ii) together with its affiliates had total gross marked-to-market positions of or equivalent to at least \$100 million aggregated across counterparties, with counterparties that are not its affiliates in one or more over-the-counter trades involving futures contracts on any day during the previous 15 month period;

#### Individuals

(K) an individual who has a net worth of at least \$5 million (or its equivalent in another currency) excluding the value of his or her principal residence, and any holding company of which such individual owns all of the shares;

#### Governments/Agencies

(L) Her Majesty in Right of Canada or any province or territory of Canada and all Crown corporations, instrumentalities and agencies of the Canadian federal or provincial or territorial governments or the Alberta Treasury Branch;

(M) a national government of a country that is a member of the Basle Accord or a country that is not an initial signatory to the Basle Accord but has adopted the regulatory and supervisory rules set out in the Basle Accord and any instrumentality or agency of that government or corporation wholly-owned by that government;

(N) a Canadian municipality with a population in excess of 50,000 and any Canadian provincial or territorial capital city;

#### Corporations and other Entities

(O) a company, partnership, unincorporated association, organization or trust, other than an entity referred to in (A), (B), (C), (D) (E), (F), (G), (H), (I) and (J) with total assets, as shown on the last audited balance sheet, in excess of \$25 million (or its equivalent in another currency);

#### Pension Plan or Fund

(P) a pension fund that is regulated by either the Office of the Superintendent of Financial Institutions (Canada) or a provincial or territorial pension commission, if the pension fund has

total net assets, as shown on the last audited balance sheet, in excess of \$50 million, provided that, in determining net assets, the liability of a fund for future pension payments shall not be included;

#### Mutual Funds and Investment Funds

(Q) a mutual fund or non-redeemable investment fund if each investor in the fund is a Qualified Party;

(R) a mutual fund if the investments of the fund are managed by a company that is registered under the Act or securities legislation of another province or territory in Canada as a portfolio manager;

(S) a non-redeemable investment fund if the person responsible for providing investment advice to the fund is registered under the Act or securities legislation of another province or territory in Canada as an adviser, other than a securities adviser;

#### Brokers/Investment Dealers

(T) a person or company registered under the Act or securities legislation of another province or territory in Canada as a broker or an investment dealer or both;

(U) a person or company registered under the Securities Act (Ontario) as an international dealer if the person or company has total assets, as shown on its last audited balance sheet, in excess of \$100 million or its equivalent in another currency;

(V) a person or company whose account is fully managed by a registered portfolio manager or broker or investment dealer acting as a trustee or agent for such person or company;

(W) a direct or indirect wholly-owned subsidiary of any of the entities described in paragraphs (A), (B), (C), (D), (E), (F), (G), (H), (I), (J), (L), (M), (N), (O), (P), (T) and (U);

(X) a holding body corporate of which any of the entities described in paragraphs (A), (B), (C), (D), (E), (F), (G), (H), (I), (J), (L), (M), (N), (O), (T) and (U) is a direct or indirect wholly-owned (Y) a direct or indirect wholly owned subsidiary of a holding body corporate described in paragraph (X);

(Z) a firm, partnership or joint venture or other form of unincorporated association in which one or more of the entities described in paragraphs (W), (X) or (Y) have a direct or indirect controlling interest;

(AA) a party whose obligations in respect of the over-the-counter trade in a futures contract for which the determination is made are fully guaranteed by another qualified party;

(BB) a portfolio manager or a financial intermediary referred to in paragraphs (A), (E), (F), (H), (L), (T) or (U) above, while acting as manager of accounts of a person, company, pension fund or pooled fund trust, which accounts are fully managed by such portfolio manager or financial intermediary; and

(CC) a broker or investment dealer acting as a trustee or agent for the person, company, pension fund or pooled fund trust under section 65 of Commission rules.