

PROPOSED MULTILATERAL INSTRUMENT 91-101
DERIVATIVES: PRODUCT DETERMINATION

Definitions and interpretation

1. (1) In this instrument, “specified instrument” means Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting*.
- (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 if 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) if the second party is a trust and a trustee of the trust is the first party.
- (4) In British Columbia, “derivative” in this instrument means a contract or instrument that is an option, swap, future, forward, or other financial or commodity contract or instrument whose market price, value, or delivery, payment or settlement obligations are derived from, referenced to or based on an underlying interest including a value, price, index, event, probability or thing.

Excluded derivatives

2. (1) The specified instrument does not apply to a contract or instrument that is a derivative, if the contract or instrument is one or more of the following:
 - (a) regulated by
 - (i) gaming control legislation of Canada or a jurisdiction of Canada, or

- (ii) gaming control legislation of a foreign jurisdiction, if the contract or instrument
 - (A) is entered into outside of Canada,
 - (B) is not in violation of legislation of Canada or the local jurisdiction, and
 - (C) would be regulated under gaming control legislation of Canada or the local jurisdiction if it had been entered into in the local jurisdiction;
- (b) an insurance contract or an income or annuity contract or instrument entered into
 - (i) with an insurer holding a licence under insurance legislation of Canada or a jurisdiction of Canada and regulated as insurance under that legislation, or
 - (ii) outside of Canada with an insurer holding a licence under insurance legislation of a foreign jurisdiction, if it would be regulated as insurance under insurance legislation of Canada or of the local jurisdiction if it had been entered into in the local jurisdiction;
- (c) for the purchase and sale of currency that
 - (i) except where all or part of the delivery of the currency referenced in the contract or instrument is rendered impossible or commercially unreasonable by an intervening event or occurrence not reasonably within the control of the parties, their affiliated entities or their agents, requires settlement by the delivery of the currency referenced in the contract or instrument,
 - (A) on or before the 2nd business day after the date of execution of the transaction, or
 - (B) if the contract or instrument was entered into contemporaneously with a related trade in a security, on or before the settlement date for the related trade in a security,
 - (ii) is intended by the counterparties, at the time of the execution of the transaction, to be settled by the delivery of the currency referenced in the contract within the time periods set out in subparagraph (i), and
 - (iii) does not allow for the contract or instrument to be rolled over;

- (d) for delivery of a commodity other than cash or currency that
 - (i) is intended by the counterparties, at the time of execution of the transaction, to be settled by delivery of the commodity, and
 - (ii) does not allow for cash settlement in place of delivery except where all or part of the delivery is rendered impossible or commercially unreasonable by an intervening event or occurrence not reasonably within the control of the counterparties, their affiliated entities, or their agents;
 - (e) evidence of a deposit issued by a bank listed in Schedule I, II or III to the *Bank Act* (Canada), by an association to which the *Cooperative Credit Associations Act* (Canada) applies or by a company to which the *Trust and Loan Companies Act* (Canada) applies;
 - (f) evidence of a deposit issued by a credit union, league, caisse populaire, loan corporation, treasury branch or trust company operated under legislation in any jurisdiction of Canada;
 - (g) traded on an exchange that is
 - (i) recognized by a securities regulatory authority,
 - (ii) exempt from recognition by a securities regulatory authority, or
 - (iii) regulated in a foreign jurisdiction by a signatory to the International Organization of Securities Commissions' Multilateral Memorandum of Understanding.
- (2) For the purposes of paragraph (1)(g), an exchange does not include the following:
- (a) a swap execution facility as that term is defined in the *Commodity Exchange Act*, 7 U.S.C. §1a(50) (United States);
 - (b) a security-based swap execution facility as that term is defined in the 1934 Act;
 - (c) a multilateral trading facility as that term is defined in Directive 2014/65/EU Article 4(1)(22) of the European Parliament;
 - (d) an organized trading facility as that term is defined in Directive 2014/65/EU Article 4(1)(23) of the European Parliament;
 - (e) an entity organized in a foreign jurisdiction that is similar to an entity described in any of paragraphs (a) to (d).

Investment contracts and options

3. (1) In Alberta, a contract or instrument, other than a contract or instrument to which section 2 applies, that is a contract or instrument referred to under subparagraph (i) of the definition of “derivative” and that is a security solely by reason of being an investment contract or option is designated to be a derivative to which the specified instrument applies.
- (2) Subsection (1) does not apply to a contract or instrument to which all of the following apply:
- (a) the contract or instrument is issued by any of the following:
 - (i) an issuer;
 - (ii) a control person of an issuer;
 - (iii) an insider of an issuer;
 - (b) the underlying interest of the contract or instrument is a security of the issuer or an affiliated entity of the issuer;
 - (c) the contract or instrument is used for either or both of the following:
 - (i) to compensate or incent the performance of a director, employee or service provider of the issuer or an affiliated entity of the issuer;
 - (ii) as a financing instrument in connection with the raising of capital for the issuer or an affiliated entity of the issuer or the acquisition of a business or property by the issuer or an affiliated entity of the issuer.

Under the securities legislation of Alberta, a contract or instrument is not both a “derivative” and a “security” for the same purpose at the same time.

- (3) In British Columbia, the specified instrument applies to a contract or instrument, other than a contract or instrument to which section 2 applies, that is a derivative, and that is otherwise a security solely by reason of being one or more of the following:
- (a) a document evidencing an option, subscription or other interest in a security;
 - (b) a futures contract;
 - (c) an investment contract;
 - (d) an option.

- (4) In British Columbia, despite subsection (3), the specified instrument does not apply to a contract or instrument that is a security and would otherwise be a derivative to which all of the following apply:
- (a) the contract or instrument is issued by any of the following:
 - (i) an issuer;
 - (ii) a control person of an issuer;
 - (iii) an insider of an issuer;
 - (b) the underlying interest of the contract or instrument is a security of the issuer or an affiliated entity of the issuer;
 - (c) the contract or instrument is used for either or both of the following:
 - (i) to compensate or incent the performance of a director, employee or service provider of the issuer or an affiliated entity of the issuer;
 - (ii) as a financing instrument in connection with the raising of capital for the issuer or an affiliated entity of the issuer or the acquisition of a business or property by the issuer or an affiliated entity of the issuer.
- (5) In New Brunswick, Nova Scotia and Saskatchewan, the specified instrument does not apply to a contract or instrument, other than a contract or instrument to which section 2 applies, that is a derivative and that, but for the exclusion of derivatives from the definition of security, would be a security unless the contract or instrument would be a security solely by reason of being an investment contract.
- (6) In New Brunswick, Nova Scotia and Saskatchewan, the specified instrument does not apply to a contract or instrument to which all of the following apply:
- (a) the contract or instrument is issued by any of the following:
 - (i) an issuer;
 - (ii) a control person of an issuer;
 - (iii) an insider of an issuer;
 - (b) the underlying interest of the contract or instrument is a security of the issuer or an affiliated entity of the issuer;
 - (c) the contract or instrument is used for either or both of the following:

- (i) to compensate or incent the performance of a director, employee or service provider of the issuer or an affiliated entity of the issuer;
- (ii) as a financing instrument in connection with the raising of capital for the issuer or an affiliated entity of the issuer or the acquisition of a business or property by the issuer or an affiliated entity of the issuer.

Under the securities legislation of New Brunswick, Nova Scotia and Saskatchewan, a contract or instrument is not both a “derivative” and a “security” for the same purpose at the same time.

Derivatives that are securities

4. In British Columbia, the specified instrument does not apply to a contract or instrument, other than a contract or instrument to which section 3 applies, that is a security and would otherwise be a derivative.

The definitions of “derivative” and “security” under the securities legislation of Alberta, and the definition of “security” under the securities legislation of New Brunswick, Nova Scotia and Saskatchewan, provide the same effect.

Effective date

5. This instrument comes into force on **[date to be determined]**.